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Surrogacy (Regulation) Act, 2021: A constitutionally passed social boon or bane to the process of constitutionality itself?

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Though surrogacy itself isn't a new practice in society, the evolution of new surrogacy regulation legislation seems pleasing but at the same time poses new challenges that themselves seem in conflict with the constitutional values. Before the legislation, the lack of rules and laws in this area made it an open field for the exploitation of labour as well as the customers. Therefore, the legislation can be seen as a welcomed step to regulate a grey area. However, the provisions that this legislation contains, in themselves seem to infringe fundamental rights. The complete ban on commercial surrogacy raises questions about infringement of article 19 of the clinics which have been in this business for a long. Not just that, it can even be seen as a violation of the rights of the surrogates who'd otherwise want to indulge in this practice professionally. Industrial aspect aside, the legislation in other ways can be seen to limit the scope of the right to life under article 21 by limiting their choice to start a family. This blanket ban on commercial surrogacy strikes out the option of a child for intending parents who'd want to start a family by that means. Also, particularly allowing altruistic surrogacy only to a certain class creates unreasonable classification and even to an extent is arbitrary in nature due to which the legislation can be seen to be violative of article 14 of the constitution too. Keeping all these clashes in mind, nevertheless, it can't be denied that there is an urgent need for legislation in this area to regulate and curb the rampant exploitation which is right now prevalent in this industry. What needs to be discussed remains how we make this act more accommodating of the rights of the citizens while serving its purpose.

Keywords: *surrogacy, arbitrary, surrogacy.*

INTRODUCTION

Etymologically coming from the Latin word “surrogatus” the word “surrogacy” literally means “substitute”. True to its meaning, the process of surrogacy involves another woman, who lends her womb and acts as a substitute mother to the child being born through the process of surrogacy. There might be multiple types of surrogacies but mainly there are two types:

- Traditional
- Gestational

However, in monetary and economic terms surrogacy can further be classified as:

- Commercial
- Altruistic

The process of traditional surrogacy involves a male partner giving their semen for embryo formation. In this process, however, the child born is well related to the surrogate mother. Whereas coming to gestational surrogacy, the embryo is artificially produced and fertilised in a laboratory by taking the gametes of the intending couple or from an unknown donor and is placed in the womb of the surrogate mother. As a result, the child so born is biologically unrelated to the surrogate mother.

With the evolution of modern society and the rise in living standards, the process of surrogacy can be seen as being resorted to even more, by the people who wish to experience parenthood and are unable to do so naturally due to various reasons. This has given birth to the Assisted Reproductive Technology industry, which includes various means like IVF, surrogacy, etc. the industry, therefore, has become a way to commercialise the process of surrogacy wherein females from different backgrounds are recruited as surrogates and a link is formed between the surrogates and the couples wanting to avail these services, through the hospitals and institutions, who charge for them. On other hand comes the option of altruistic surrogacy, which doesn't involve monetary exchange except for the insurance coverage and medical expenses, and can be seen more as 'social work. With the rise in demand in the ART industry, what has

also occurred is the demand and need for legislation to regulate the grey area that this industry was, in until the introduction of the Surrogacy (Regulation) Act, 2021.¹

BACKGROUND

The concept of surrogacy, if seen intrinsically, isn't new to India. Incidents from Indian mythology and scriptures provide evidence wherein surrogacy could be seen not to be a new concept. One of the most famous examples is Kunti bearing the Pandavas without sexual intercourse and also, the transfer of Devaki's seventh son, Balaram, to Rohini's womb. What has sparked the debate on this topic is not whether it's a modern or pre-modern concept. The debate on surrogacy is far more legal than moral. For a long, India proved to be a favourable place for conducting cheap surrogacy and finding cheap surrogates. The dark side of this industry, however, first came into bright light through the case of *Baby Manji Yamada v Union of India*², when the intending Japanese couple separated and the child wasn't allowed to Japan due to their legal framework.³ The child's custody was finally given to her grandmother. In 2008, this case brought out the dark side of commercialisation that prevailed in this industry. Since then, multiple suggestions were given and guidelines were laid, to regulate this industry.

The 228th report of the Law Commission of India first suggested a complete ban on commercial surrogacy and allowed the ethical practice of surrogacy only in altruistic form.⁴ Furthermore, the National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India⁵ laid down some measures to set standards for conducting surrogacy procedures in India. However, due to a lack of lawfully enforceable legislation, these reports and guidelines remained nothing but superficial only until now,⁶ when the controversial Surrogacy

¹ Surrogacy (Regulation) Act 2021

² *Baby Manji Yamada v Union of India* [2008] 13 SCC 518

³ *Ibid*

⁴ *Ibid*

⁵ Government of India, 'National guidelines for accreditation, supervision and regulation of ART clinics in India' (Ministry of Home Affairs, 2005) <https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf> accessed 15 August 2022

⁶ *Ibid*

(Regulation) Act, 2021⁷ was passed by Rajya Sabha, which aimed to impose a complete ban on commercial surrogacy and strictly regulate altruistic surrogacy.

SURROGACY (REGULATION) ACT, 2021: A SOCIAL BOON OR CONSTITUTIONAL BANE

The first blow to incite debates about surrogacy, which till now remained a dormant topic, came with the introduction of the Surrogacy (Regulation) Bill, 2019.⁸ The legislation so put forward was said to be with aim of protecting the surrogates and curbing their exploitation. By 2008, there was a steep rise in the cases of exploitation of females involved in this profession. India, being a poor country, provided a good ground for visiting couples to find surrogates at comparatively cheaper rates than in their own countries. However, this all-goodie picture had flaws that came to realize later than the benefits showed. Females, ailing from poverty and hardships, chose to become surrogates at low prices.

Due to a lack of regulations, there was no check on how a surrogate was treated and the medical conditions she was subjected to the last of the concerns of the institutions who hired them as they focused merely on profit maximisation. The cases of abandoning a child born through surrogacy, in case of any physical or medical disability became common. The fate of the surrogate child remained uncertain in conditions where the couple separated in the future. Additionally, many countries didn't have citizenship policies for children born through surrogates of foreign counties. All these problems were something which needed to be looked after. Therefore, the introduction of the Surrogacy (Regulation) Bill, 2019⁹ came as a ray of hope as it was the first credible step to address this problem. However, after a critical reading of the bill, there were many apprehensions that the social activists, as well as the people involved in this industry, had. Going back a bit in history, this wasn't the first time this bill was introduced in parliament. In 2016, this bill was first introduced but wasn't passed. In 2019, the same bill was introduced which after being passed by the upper house, became an act and was enacted in

⁷ Surrogacy (Regulation) Act 2021

⁸ Surrogacy (regulation) Bill 2019

⁹ *Ibid*

2021. Since the first time the bill came to the knowledge of people, there were debates and vocal apprehensions of people about the said legislation being arbitrary in nature and being violative of various fundamental rights.

Certain sections of the act faced more criticism than others. The biggest concern however remained two. First, a complete ban on commercial surrogacy would adversely affect not only the clinics and institutions involved in conducting this business but also the surrogates involved and the intending couples. Second, the act was extremely exclusive as it left out of its ambit homosexual couples and people who fell out of the age bracket as specified in the act. Upon reading the act true to its words, it could be very clearly seen that such contentions do hold valid grounds. Many sections of the act¹⁰ conflict with fundamental rights, enshrined in part III of the constitution¹¹. § 3(ii)¹² of the act puts a blanket ban on practising surrogacy in any commercial form. Now, what is a question of concern is that such a ban clearly renders all the clinics and institutions unable to indulge in practice involving commercial surrogacy as their chosen profession. This in itself becomes ironic to the spirit of the constitution wherein article 19(1)(g)¹³ provides the right practice or choose one's profession. A complete ban on commercial surrogacy can be seen not only to take away this right from the surrogacy clinics involved in such practice, but also from the surrogates, who even if just for the sake of escaping poverty, chose surrogacy as a medium of income.¹⁴ The argument that such legislation is in favour of the public and to regulate the evil of exploitation which this industry is a great cause of, cannot be used to justify the blanket ban, which leaves no place for deliberation or regulation per se. The solution, therefore, which the act proposes seems like a shortcut to deal with the problem in short term, without keeping in mind its constitutional fallouts and effects in farther future.

Another apprehension that ails the experts is the fact that the definition of 'couple' as specified in § 2(h)¹⁵ is very exclusive and completely disregards from its ambit homosexual couples. Even

¹⁰ Surrogacy (regulation) Act 2021

¹¹ Constitution of India, part III

¹² Surrogacy (regulation) Act 2021, s 3(ii)

¹³ Constitution of India, art 19(1)(g)

¹⁴ *Ibid*

¹⁵ Surrogacy (regulation) Act 2021, s 2(h)

after the decriminalisation of homosexuality, the fight for legally recognisable marriage continues for the LGBTQI+ communities, adding to which the exclusive definition that this act puts forward makes it impossible for them to seek parenthood through surrogacy.¹⁶ This in itself brings out a big fallout and legal flaw in the act. As the act fails to protect the right to be treated equally, under article 14¹⁷, of such homosexual couples. it isn't just homosexual couples who seem to be excluded from retreating to surrogacy,¹⁸ § 4(iii)(c)(I)¹⁹ by setting a rigid age criterion, which makes many people ineligible to seek surrogacy as a method to experience parenthood.²⁰ While it isn't just couples who face such problems, even surrogates have to fulfill certain criteria as per § 4(iii)(b)(I)²¹ which not only seem arbitrary in nature but also makes it difficult for both the couple as well as the surrogate to be eligible to be an intending couple and have a child through surrogacy as well as a woman, to be eligible for being a surrogate.²²

The idea and aim of this legislation however can't be questioned upon its nobility, but the language and provisions of the act certainly create a ground for critical arguments and debates. The biggest apprehension that most people critiquing this act share is the fear that it greatly violates the golden triangle of the constitution, i.e., articles 14,²³ 19²⁴, and 21²⁵. The act violated article 14 with a provision where it excluded homosexual couples and people except the age bracket as specified in the act, to opt for surrogacy. This not only undermined the spirit of the constitution but also created a threat of overstepping the basic rights which can't be taken away from the citizens using legislation or act. The next blow came with the provision of the complete ban which prevented people from practising their right to choose and practice any profession, given by article 19 of the constitution. Both of these rights can be seen to be violated by the very

¹⁶ *Ibid*

¹⁷ Constitution of India, art 14

¹⁸ *Ibid*

¹⁹ Surrogacy (regulation) Act 2021, s 4(iii)(c)(I)

²⁰ *Ibid*

²¹ Surrogacy (regulation) Act 2021, s 4(iii)(b)(I)

²² *Ibid*

²³ Constitution of India, art 14

²⁴ Constitution of India, art 19

²⁵ Constitution of India, art 21

essence of the act which was supposedly brought to prevent and strengthen article 23²⁶ and 24²⁷, which grants every citizen the right against exploitation. Now the conflict stands between enforcement and prevention of fundamental rights themselves, which ends up making this act stand at a place of dilemma.

Furthermore, coming to another crucial angle, Article 21²⁸ provides the right to lead a dignified life, to every citizen. The right to reproduce is also an integral part of the right to have a dignified life²⁹. Moreover, many Supreme Court precedents have upheld this view. Denying citizens or creating situations or provisions which make them unable to practice this right, can be seen to violate Article 21 of the citizens.³⁰ When we look a little deeper into the provisions of the act, it can be seen that there are many sections that not only conflict with these inalienable rights but also somehow try to override them in some cases. Though fundamental rights aren't absolute rights, these rights need to be protected in supremacy. The rights need not be moulded according to the rules and legislations, rather, rules and legislations have to be formed in a way where they not only protect but also enhance the ambit of these fundamental rights. In the present case, the act seems to limit the scope of these rights to a great extent. The act though can be seen as a welcomed step to regulate this industry, which till now stayed an open grey area for malpractices and exploitation. However, there is a lot that needs to be amended in this act to bring it in harmony with the rights of people.³¹

Another concern that the provisions of this act pose are the need to acquire a certificate of proven infertility or medical inefficiency to be eligible for availing of altruistic surrogacy. This regulation seems to violate the right to privacy of an individual as it will need publication of this information by acquiring a medical certificate from a hospital and then an eligibility certificate from the district magistrate, only after which a couple may be granted eligibility for opting surrogacy as mean of experiencing parenthood. The very need for this certificate is a very

²⁶ Constitution of India, art 23

²⁷ Constitution of India, art 24

²⁸ Constitution of India, art 21

²⁹ *Suchita Srivastava v Chandigarh Administration* [2009] 9 SCC 1

³⁰ *Ibid*

³¹ *Ibid*

personal aspect. Every individual seeks to keep his/her medical inefficiencies or conditions to themselves. For obtaining the certificate, such delicate personal information will have to be compromised, which not everyone might be comfortable doing. In such situations, individuals are left with no choice except for giving up the option of surrogacy or revealing their medical information. This is something that undermines the privacy of people and should be seen through a much more serious lens.

CONSEQUENTIAL APPREHENSIONS

Besides the biggest concern that the act seems to supersede the fundamental rights of the citizens, activists and citizens are concerned about the consequences of such an arbitrary act. Their apprehensions can be seen to hold valid ground as there can be seen the very possibility of such apprehensions coming to life. They are only practical. The concern that such a complete ban might give rise to an illegal market for practising surrogacy, can't be ruled out. If seen and tried to be understood with arguments, it is very much possible and, in such conditions, there might be even more exploitation of the disadvantaged surrogates and to some extent, also the intending parents. The bigger irony will be, that there wouldn't be any regulation to safeguard their interest, only penal punishment as specified in § 38(2)³² and § 40³³. This apprehension in its essence very much conveys the flaws that the act which has been enacted contains. Another valid concern might be that enacting such legislation which allows complete bans, it may encourage the government and legislature to not look for regulatory solutions but go for the easiest way possible, i.e., completely banning the practice or activity which might be causing the problem. One of the other concerns also remains that only availability of altruistic surrogacy and ban on any monetary payment except for insurance and medical coverage again can be seen to put females' service in the domestic domain and not allow economic value for their service. Such regulation might discourage women then, from even indulging in altruistic surrogacy and therefore making it difficult for intending couples to resort to it.

³² Surrogacy (regulation) Act 2021, s 38(2)

³³ Surrogacy (regulation) Act 2021, s 40

Indeed, it is important to safeguard the interests of people and maintain the balance in society, but it's equally important that the legislature does it without subverting fundamental rights. "Role of the government is that of facilitator, not controller,"³⁴ imposing such legislation which can be seen in the light of unreasonable restrictions and arbitrariness changes the role of government to the controller, which might be in contravention of its very responsibility of it.³⁵ Such concerns seem valid when heard with arguments that back them up. What remains to be addressed is the idea that to what extent such apprehensions and their related solutions shall be incorporated to not lose the aim of this act as well as incorporate the demands and safeguard the rights of people at the same time.

WAY FORWARD

As justified as the aim behind this act is, it is now important that government listen to the concerns of people and make it accommodative in nature to maximize its benefits and protection provided by it, to the citizens. A regulatory policy on commercial surrogacy rather than a blanket ban might be a welcomed first step in this direction. Another step, to strengthen the provisions of this act, can be, having more inclusive and flexible age criteria for the eligibility of being both, the surrogate and intending parents. Such accommodative measures will not only make this act more legally sound but shall also enhance its acceptability as it shall be more inclusive thereafter.

Another provision that also might be looked at and deliberated upon is including homosexual couples being eligible for opting for surrogacy as a method of experiencing parenthood. This will not only address the problem of exclusiveness but will also promote and set an example of applicability and availability of the right to equality under article 14³⁶, to all citizens.

³⁴ *Excel Wear v Union of India* [1979] 1 SCR 1009

³⁵ *Ibid*

³⁶ Constitution of India, art 14

CONCLUSION

Surrogacy (regulation) Act, 2021 is a welcomed first step in direction of regulating an industry, which for so long has remained an unregulated open ground for service and exploitation. However, the concerns regarding acts being arbitrary in nature remain, the fact that some regulations were indeed needed, and those too strict ones, can't be overlooked. For this very reason, it is evident that the act though not perfect contains important and much-needed measures. As far as the question of it being constitutionally sound stands, there are provisions that might have to be amended to synchronise the aim as well as the rights of the people.

It's a long road to perfection, enactment of this act is the first step. As long as there remains room for debate and deliberation, there might be insightful suggestions that'll help the legislature to make sounder laws that will accommodate the social as well as legal needs of people. What remains to be seen is how the makers take these suggestions from the very people who'll be subjected to these laws and respond to them. After all, it's the people who need to live with the implications of that law, therefore, it needs to be kept in mind that such laws shall not compromise with the very essence of the constitution itself.

As always, there must be two sides to a coin, this act might on one side be seen to be violative of rights, and on the other side at the same time, to be protective of another set of rights and against exploitation. It now depends on both, legislators as makers, to keep in mind the best interest of those being subjected to it. And citizens as subjects, as to how they respond to it. Debates can be ever-lasting, but they sure do bring out multiple facets of anything which helps in improving. Such is the debate on this act and with such continuing efforts, shall come better understanding and acceptance for such complex acts and l