



SURROGACY (REGULATION) ACT, 2021: A CRITICAL ANALYSIS

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INTRODUCTION

Little Souls find their way to you, whether they are from your womb or someone else's

- Sheryl Crow

Motherhood is a gift which is bestowed by the nature on every woman. But due to physiological conditions, a woman cannot give birth to their own offspring. It is an arrangement for the infertile parents to have a child. The term "Surrogacy" is originated from the Latin term "Surrogatus" which means a substitute. The Black Law dictionary defines surrogacy as "A process of carrying and delivering the child for another"¹. It is a process in which the surrogate mother agrees to conceive and carry the child for the intending parents and after the child is born, she will hand over the child to the parents without retaining any parentage rights over the child.

The Black Law dictionary classifies Surrogacy into 2 classes i.e. Gestational Surrogacy and Traditional Surrogacy. In gestational surrogacy, the child is not related to the surrogate mother biologically. The embryo is created through the process of In Vitro Fertilization (IVF) by using the egg and sperm of the intended parents and is then implanted into the surrogate mother. It is also referred as the Full Surrogacy. On the other hand, Traditional Surrogacy takes places through the process of artificial insemination. The child is related to the surrogate mother genetically. It is a process in which a woman provides her own egg which is fertilized by artificial insemination and carries the foetus and gives birth to the child for another person.²

Surrogacy can be classified as commercial or altruistic surrogacy. In commercial surrogacy, the surrogate mother is given monetary compensation by the couple for carrying the child in her womb and the child is given to them either privately or through the adoption whereas in altruistic surrogacy, the intended parents undertake to bear the medical expenses for the surrogate mother.

¹Sharma, R S. "Social, ethical, medical & legal aspects of surrogacy: an Indian scenario." *The Indian journal of medical research* vol. 140 Suppl,Suppl 1 (2014): S13-6.

² Surrogacy: A hope to childless couple along with challenge in law, Available at <http://ijlljs.in/wp-content/uploads/2014/10/Surrogacy-A-Hope-to-Childless-Couple-Along-With-a-Challenge-to-Law.pdf>(Last Accessed on 23rd April, 2024)

LEGISLATIVE FRAMEWORK CONCERNING SURROGACY IN INDIA

In India, the surrogacy is regulated by the Surrogacy Regulation Act, 2021. This act prohibits the commercial surrogacy. The object of this Act is to prevent the exploitation of the women who may be lured into the arrangements of the commercial surrogacy. Under the provisions of the Act altruistic surrogacy is permitted whereby the surrogate mother is required to carry the child to help another individual or couple without receiving the monetary benefit other than medical and insurance expenses. The purpose is to ensure that the procedure of surrogacy remains ethical and transparent and promotes the welfare of all the parties involved.

Surrogacy has been defined under Section 2(zd) of the Surrogacy Regulation Act, 2021. It refers to the “Practice where a woman bears and gives birth to the child for the intended couple with the intention of handing over such child to the couple after the birth of the child.”³ The Act also has further defined the altruistic surrogacy and commercial surrogacy. Section 2(b) of the Act defines the Altruistic Surrogacy. It refers to that surrogacy practice where no monetary incentives or expenses of whatever nature are paid to the surrogate mother. Only the medical expenses and insurance coverage are being given to the surrogate mother or her dependants.⁴ This Act only permits altruistic surrogacy to ensure the welfare of the surrogate mother and the intended couple.

The Act explicitly prohibits the commercial surrogacy. The object behind the prohibition is to save the mother from the exploitation. Commercial Surrogacy involves those procedures where buying or selling of the human embryo takes place or the services of the surrogate mother are traded for the monetary benefit or reward in cash or kind. These monetary incentives are given to the surrogate mother or her dependants. Such monetary reward does not include the medical expenses and insurance coverage incurred on the surrogate mother.⁵

Chapter II of the Act deals with the Regulation of the Surrogacy Clinics. Section 4 of the Surrogacy Regulation Act, 2021 provides for the prohibition and regulation of surrogacy clinics. It states that “No Surrogacy Clinic shall conduct or associate with or assist in the performance of the activities relating to the surrogacy and surrogacy procedures unless such clinic has been registered under this Act”.⁶ In addition to this, the Act explicitly prohibits any person or entity including the surrogacy clinic, paediatrician, gynaecologist, embryologist or even the registered medical practitioner to engage in any form of the commercial surrogacy practices.⁷ Such persons are also prohibited from promoting, publishing, propagating or advertising anything which is likely to encourage a woman to act as a surrogate mother or is aimed at promoting commercial surrogacy in general.⁸

Section 3(vi) of the Act further prohibits the abortion during the period of the surrogacy without the written consent of the surrogate mother and the registered medical practitioner including the gynaecologist,

³ The Surrogacy Regulation Act, Section 2(zd).

⁴ The Surrogacy Regulation Act, Section 2(b).

⁵ The Surrogacy Regulation Act, Section 2(g)

⁶ The Surrogacy Regulation Act, Section 3(i)

⁷ The Surrogacy Regulation Act, Section 3(ii)

⁸ The Surrogacy Regulation Act, Section 3(v).

paediatrician, and embryologist. Such authority shall authorise the procedure of abortion during the process of surrogacy according to the provisions of the Medical Termination Pregnancy Act. In addition to this, such authorities shall not conduct the sex selection for the purpose of surrogacy.⁹

Section 4 of the said Act deals with the regulation of the surrogacy procedures. It mentions that the surrogacy procedures in the surrogacy procedures shall be conducted for the altruistic purposes and not for the commercial purposes. It is also stated that these procedures shall not be carried for the purpose of sale, prostitution or any other form of exploitation.¹⁰ Surrogacy Procedures shall not be performed or initiated unless the certificate of essentiality is obtained by the intended couple. The certificate is to be obtained from the appropriate authority and is verified by the in-charge of the surrogacy clinic. In addition to this, the intended couple is required to provide the certificate of infertility from the District Medical Board which will authenticate as to which or both the intended parents are suffering from infertility. The Act requires the surrogate mother to obtain postpartum delivery complications insurance for a period of sixteen months. It is required to be provided through an insurance company or agent who is duly recognized by the Insurance Regulatory and Development Authority.¹¹

Section 4 of the Act further talks about the eligibility criteria for a surrogate mother. It provides that a surrogate must be a woman who has been married and has at least one child of her own. She must be between the age of 25 -35 years on the date of implantation. The surrogate mother should refrain from providing her own gametes and from acting as a surrogate mother more than once. Furthermore, the surrogate mother is required to obtain the certificate of physical and psychological fitness for surrogacy treatments from a registered medical practitioner before starting with the treatments and procedures.¹²

This Act also talks about the eligibility criteria for the intended couple who wishes to obtain the child through the surrogacy procedure. Eligibility certificate for the intended couple is issued separately by the appropriate authority on the fulfilment of certain conditions. It states that the intended couple must be married. The women must be between the age of 23-50 years and man must be between the age of 26-55 years on the date of the certification. Intended partners must have been married for the period of 5 years and must be nationals of India. Further it states that the intended couple should not have any surviving children whether biologically or through adoption or from any earlier surrogacy procedures. This shall not affect the right of the intended couple who already have a child who is physically or mentally challenged or is suffering from life threatening disorder or fatal illness with no permanent treatment. They can also undergo the surrogacy procedure after getting approval from the appropriate authorities and after obtaining the medical certificate from the District Medical Board.¹³

Section 6 of the said Act provides that “Person shall not conduct the surrogacy procedures unless he has explained all the side-effects and after effects of such procedures to the surrogate mother. Before undergoing

⁹ The Surrogacy Regulation Act, Section 3(viii).

¹⁰ The Surrogacy Regulation Act, Section 4.

¹¹ The Surrogacy Regulation Act, Section 4(iii)

¹² The Surrogacy Regulation Act, Section 4(b).

¹³ The Surrogacy Regulation Act, Section 4(c).

such procedures, the person has to obtain the written informed consent of the surrogate mother. She can withdraw her consent for surrogacy before the implementation of human embryo in her womb.¹⁴

This Act protects the right of the child born out of the surrogacy procedures. It prohibits the abandonment of the child born through surrogacy procedure whether within or outside India for any reason. Section 8 of the said Act provides that “A child born out of the surrogacy procedure shall be deemed to be the biological child of the intended couple and shall be entitled to all the rights and privileges which are available to the natural child”. In addition to this, Section 10 of the Act provides for the prohibition of the abortion of the child at any stage of the surrogacy except in such conditions as may be prescribed.

Chapter IV of the Surrogacy Regulation Act, 2021 deals with the Registration of the Surrogacy Clinics. This Act makes it mandatory for the surrogacy clinic to get it registered so as to conduct the surrogacy procedures. Section 11 provides that “Person shall not establish any surrogacy clinic for undertaking the surrogacy in any form unless such clinic is registered under the Act”. The surrogacy clinic has to apply for the registration within the period of 60 days from the date of the appointment of the appropriate authority.¹⁵ Section 12 of the Act provides for the certificate of the registration. The appropriate authority after holding the enquiry and being satisfied that all the requirements have been complied with shall grant a certificate of registration to the surrogacy clinic within the time period of 90 days from the date of the application. The authority shall reject the application if it is satisfied that the requirement of this Act have not been complied with. The certificate of the registration shall be valid for a period of three years and shall be renewed as may be prescribed. Moreover, the certificate of the registration shall be displayed at a conspicuous place.¹⁶

The appropriate authority either suo moto or on the complaint received shall suspend or cancel the registration if it is satisfied that the surrogacy clinic has breached the provisions of the Act or the rules made. The surrogacy clinic or the intended couple within the period of 30 days may prefer an appeal against the order of the rejection, suspension or cancellation of the registration to the State Government or the Central Government.¹⁷

Chapter VII of the Act talks about the various offences and penalties. Section 38 of the said Act prohibits the commercial surrogacy in any form and prevents the exploitation of the surrogate mother and children born through surrogacy. Any person or surrogacy clinic is not permitted to engage in the commercial surrogacy activities. Such clinics are prohibited from looking for surrogate mothers or individual brokers or intermediaries to arrange for surrogate mothers. If any person contravenes this provision, he shall be punishable with a term of 10 years and with fine which may extend to 10 lakh rupees. In addition to this, if any intended couple seeks the assistance of the surrogacy clinic or registered medical practitioner for not following the altruistic surrogacy or conducting the surrogacy procedures for commercial purposes only shall

¹⁴ The Surrogacy Regulation Act, Section 6

¹⁵ The Surrogacy Regulation Act, Section 11.

¹⁶ The Surrogacy Regulation Act, Section 12.

¹⁷ The Surrogacy Regulation Act, Section 14.

be punishable with imprisonment for a term of five years and with fine which may extend to five lakh rupees.¹⁸

Where the Act does not expressly provides for the specific punishment for the contravention of the provisions of the Act or the rules, shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees.¹⁹ Section 43 further states that the offences under the Surrogacy (Regulation) Act, 2021 are classified as cognizable, non-bailable and non-compoundable.

CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021

This Act has been enacted with the objective of regulating the practice of altruistic surrogacy and combating the exploitation of the women and surrogates. But the provisions of the Act are discriminatory against women. Women's reproductive rights are being violated. The right to reproductive choice refers to the ability of the women whether to bear or beget the child. The freedom of making the reproductive choice is a part of the fundamental right to life and personal liberty guaranteed under Article 21 of the Indian Constitution. In *Suchita Srivastava v. Chandigarh Administration*²⁰ the Supreme Court held that "Woman's freedom to make the reproductive choices is an implicit part of personal liberty enshrined under Article 21 of the Indian Constitution". In *K. S. Puttaswamy (Retd.) and Others v. Union of India*²¹, the Supreme Court held that reproductive choice of the women is an aspect of personal liberty under Article 21 of the Constitution of India. Despite all these landmark judgments, the Act excludes certain classes of women from the benefits of surrogacy which in fact is a violation of the reproductive right of women and bodily autonomy which has also been recognized by the Constitution of India.

The Act has prohibited the commercial surrogacy which resulted in affecting the right of the women to make their own reproductive choices and right to parenthood. The Act reinforces the patriarchal norms of the society that attributes no economic value to the women and directly affecting the fundamental right of the women to reproduce under Article 21 of the Indian Constitution. Moreover, Altruistic Surrogacy also limits the option for the intended couple to choose the surrogate mother as very few close relatives of the couple will agree for the surrogacy procedures. The Act also discriminates on the basis of marital status, gender as unmarried women, live-in partners and same-sex couples are excluded from availing the benefit of surrogacy.

CONCLUSION AND SUGGESTIONS

Surrogacy is a boon for the infertile couples who cannot become the parents through the natural processes. But in most cases it proved a bane for the surrogate women. Due to the prevailing socio economic inequities, underprivileged women found an option to rent their wombs and thereby make money to take care of their expenses. Intermediaries and brokers took the advantage of the situation and exploited women for producing the child for someone. Several instances began to emerge where women, in often desperate straits, started lodging police complaints after they did not receive the

¹⁸ The Surrogacy Regulation Act, Section 38.

¹⁹ The Surrogacy regulation Act, Section 41

²⁰ *Suchita Srivastva v. Chandigarh Administratio* (2009) 9 S.C.C.1

²¹ *K. S. Puttaswamy (Retd.) and Others v. Union of India* (2017) 10 S.C.C.1.

promised sum from the middle men. To overcome these instances, the government banned the practice of the commercial surrogacy and allowed the surrogacy for the altruistic purposes only. There may be legal and ethical challenges surrounding the surrogacy practices but the Surrogacy Regulation Act, 2021 paved a right direction for the surrogate mother. But it is the need of the hour to ensure that the law keeps up with the rapidly evolving technology, morality issues and societal changes.

