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The Surrogacy (Regulation) Act, 2021: Jurisprudential and Critical Analysis

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ABSTRACT

This paper analyses the Surrogacy (Regulation) Act, 2021, the first codified law on surrogacy practice in India. It examines the state of surrogacy practice prevailing in India before the arrival of the Act, when the country was among the most favoured destinations for foreign nationals visiting India to avail themselves of surrogacy services and was emerging as a hub of the surrogacy market worldwide. The exploitation of surrogate mothers, and the absence of any law securing the rights of the stakeholders involved in the process, led first to the withdrawal of commercial surrogacy from foreign nationals in 2015 and then to its prohibition under the 2021 Act. The paper examines the growth of commercial surrogacy in India and the effects of that prohibition. It also examines the evolution of the Surrogacy (Regulation) Act, 2021 by focusing on the needs and the legislative developments which led to the passing of the new law, and the changes the Act has brought about in surrogacy practice together with the challenges associated with its effective implementation. It further assesses the lacunae and loopholes in the new law and offers suggestions to rectify them.

Keywords: *Surrogacy, Intending Couple, Surrogate Mother, Altruistic Surrogacy, Commercial Surrogacy*

I. INTRODUCTION

Surrogacy is employed when a couple unable to conceive seeks the assistance of a surrogate mother who gestates the child on their behalf. The arrangement, though it appears advantageous to all parties, raises intricate social, ethical, moral and legal questions. The term "surrogate" derives from the Latin *subrogare*, meaning "appointed to act in the place of".[1] BLACK'S LAW DICTIONARY defines surrogacy as "the process of carrying and delivering a child for another person".[2]

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[1] *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518, para. 5 (India).

[2] BLACK'S LAW DICTIONARY 1582 (9th ed. 2009), *quoted in* LAW COMM'N OF INDIA, REPORT NO. 228, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY para. 1.2, at 5 (Aug. 2009).

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The practice of surrogacy may be divided into two kinds, commercial and altruistic. In commercial surrogacy the surrogate mother receives monetary compensation for carrying the child; in altruistic surrogacy nothing is paid to her beyond medical expenses. Commercial surrogacy was practised in India from 2002 onwards and remained lawful for Indian citizens until section 38 of the Surrogacy (Regulation) Act, 2021 took effect on 25 January 2022, the measures taken in 2015 having been executive directions which stopped foreign nationals from commissioning surrogacy in India.[3] Regrettably, the practice was manipulated by intermediaries who placed themselves between the hospital system and surrogate women, and this led to the exploitation of the latter.

To address the questions arising from surrogate motherhood and surrogacy agreements, the Government of India adopted certain measures, among them the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, drawn up by the Indian Council of Medical Research (hereinafter ICMR) and approved by the Ministry of Health and Family Welfare in 2005.[4] The primary limitation of these guidelines was their non-binding character: they were recommendations carrying minimal or no legal force. They supplied a template for surrogacy agreements, but the legal status of a surrogacy contract remained ambiguous. Intending parents might choose to reject a child born with a disability, in which case the surrogate mother may unjustly bear the consequences although she has no responsibility for them, the genetic material not being her own. If she too withdraws, the position of the child is uncertain. The guidelines were silent on these questions, as they were on what is to happen if the intending parents separate during the pregnancy, or if both parties refuse to accept the child.

The Parliamentary Standing Committee, in its 102nd Report on the Surrogacy (Regulation) Bill, 2016, described India as the "world capital of surrogacy", generating two billion dollars annually.[5] The annual turnover of the surrogacy market in 2012 has separately been estimated in the surrogacy literature at approximately 2.5 billion United States dollars, a figure that does not appear in the Committee Report itself. The Law Commission of India recorded in its 228th Report that the assisted reproductive technology (hereinafter ART) industry had grown into a sector worth 25,000 crore rupees, with intending parents paying surrogate mothers between

[3] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 38 (India), brought into force w.e.f. Jan. 25, 2022 by S.O. 271(E) (Jan. 20, 2022).

[4] INDIAN COUNCIL OF MED. RESEARCH & NAT'L ACAD. OF MED. SCIS., NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA (Ministry of Health & Family Welfare, Gov't of India, 2005).

[5] DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HEALTH & FAMILY WELFARE, RAJYA SABHA, ONE HUNDRED SECOND REPORT ON THE SURROGACY (REGULATION) BILL, 2016, para. 1.1, at 1 (Aug. 10, 2017).

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USD 25,000 and USD 30,000, figures later reproduced in the 2018 study of the Council for Social Development submitted to the National Human Rights Commission.[6] In the same Report the Law Commission stated that "the need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones".[7]

II. Commercialization of Surrogacy in India: Growth and Development

Envisioning a child as a commodity is difficult. Infants are ultimately the result of love and not of financial transactions, a conception that occurs independently of any commercial endeavour. Historically, impoverished parents have perceived their offspring as prospective economic assets, weighing their future financial contribution, whether in agriculture, industry or the family estate, against the expense of bringing them up. Surrogacy has similarly evolved into a commercial enterprise in countries such as India, and this has prompted enquiries which have sparked political debate.

The market for surrogacy is large and growing, and many people around the world wish to engage another woman to bear their children. Those who do not approve of commercial surrogacy call it "wombs for rent", "baby farming", "the baby booming business", "womb on hire" and "parenthood by proxy". A natural reproductive function of the woman's body has been turned into a commercial business: people are encouraged to use surrogacy services, women are asked to become surrogates, and the organisations which run these arrangements make a great deal of money. Concerns arise over the commodification of surrogacy, including the emergence of a black market in newborns, the creation of breeding farms, the exploitation of marginalised women as reproductive instruments and the possibility of selective breeding according to financial capacity. Surrogacy became a large business in India because surrogate mothers were readily available and the cost was far lower than in other countries, and because those involved had no effective legal recourse. As at 2008, surrogacy in India was reported to be a business worth more than USD 445 million.[8]

Indian surrogate mothers were generally paid in instalments over the nine months of the pregnancy, and received nothing if they failed to conceive or if a miscarriage occurred. Viewed dispassionately, the remuneration paid to a surrogate may seem small, yet it could constitute the

[6] Law Comm'n of India, Report No. 228, *supra* note 2, at 11, *quoted in* P.M. Arathi, Council for Social Dev., A Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi (Final Report submitted to the Nat'l Human Rights Comm'n, Dec. 24, 2018).

[7] Law Comm'n of India, Report No. 228, *supra* note 2, para. 4.1, at 26.

[8] *Surrogacy a $445 mn Business in India*, Econ. Times (Aug. 25, 2008); S.S. Das & Priyanka Maut, *Commercialization of Surrogacy in India: A Critical Analysis*, 5 JCC L. Rev. (Jan. 2014).

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economic lifeline of a family, meeting essential needs such as housing, the education of children and medical care.

As at 2008, intending parents were required to remit between USD 10,000 and USD 28,000 to clinics for a comprehensive package covering fertilisation, the surrogate's compensation and delivery of the child in hospital.[9] The whole expense, including airfare, medical procedures and accommodation, was about one third of the cost of the same treatment in the United Kingdom. The business grew in Anand in Gujarat, in Pune and Mumbai in Maharashtra, and in Delhi, Kolkata and Thiruvananthapuram, where surrogate mothers were easy to find.[10] The clinics ordinarily acted as intermediaries between the surrogate mother and the commissioning couple. India became a hub of the surrogacy business, and intending parents from the United States, Russia and Britain came to India because Indian surrogates were cheaper than surrogates elsewhere. Many registered with clinics such as the Akanksha clinic in Anand district of Gujarat and the test tube baby centre at Bhopal.[11] The surrogacy agreements executed at these clinics were largely inequitable, concluded in haste, and inadequate to safeguard the rights of the surrogate mothers and of the children born of such arrangements.

Commercial surrogacy in India took advantage of poor and vulnerable surrogate mothers and exposed them to unnecessary and unjustified risk. They had neither legal representation nor rights under any statute. There was no period of grace after the birth in which to change their minds, and they were not paid if no child was born. Women from lower middle class backgrounds turned to surrogacy in order to make ends meet. Figures attributed to the National ART Registry of India show that the number of surrogacy arrangements rose from about 50 in 2004 to 158 in 2005, an increase of roughly 216 per cent.[12] Of these, 75 were in Gujarat, 16 in Chennai and 15 in Hyderabad, the remainder being spread across other large Indian cities.[13] By way of analogy, the Transplantation of Human Organs Act, 1994 has long made it an offence to sell or otherwise deal commercially in human organs,[14] although that Act does not extend to gametes, embryos or gestational services; the engagement of surrogates nevertheless remained common in India. The sector grew because of the desire of couples to have a child of their own flesh and blood, coupled with advances in technology and access to money.

[9] Das & Maut, *supra* note 8; *Surrogacy a $445 mn Business in India*, *supra* note 8.
[10] Das & Maut, *supra* note 8.
[11] *Id.*
[12] Das & Maut, *supra* note 8 (reporting figures attributed to the National ART Registry of India).
[13] *Id.*
[14] The Transplantation of Human Organs Act, 1994, No. 42 of 1994, § 19 (India) (renamed the Transplantation of Human Organs and Tissues Act, 1994 by Act No. 16 of 2011).

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The national daily HINDUSTAN TIMES, which circulates in many major Indian cities, carried an article titled *Moms on the Market* on 13 March 2011. The rates and particulars it reported for surrogacy arrangements were as follows.[15]

- Surrogate fee: INR 100,000 to 350,000. The fee varied from city to city, from one in vitro fertilisation (hereinafter IVF) clinic to another, and from one third party recruitment agent to another. A surrogate was expected to be married and healthy, to have a child of her own and to be able to cope with the process. The report recorded that intending parents sometimes stipulated the religion or the personal habits of the surrogate, and that some clinics were themselves selective about the couples they would assist, not all of them being willing to help same sex couples.
- Cost of the IVF procedure: INR 66,000. Some IVF packages permitted no more than four embryo transfer attempts, and the transfer of three or four embryos was said to improve the prospect of pregnancy.[16]
- Indian egg donor: INR 1,80,000. The report further recorded that egg donors who were highly qualified, held a master's degree, were fertile and had fair skin could receive up to INR 50,000.[17]
- An egg donor with blonde hair or blue eyes, generally from the United States, the United Kingdom or Russia: a further sum of up to INR 1,80,000.[18]
- Twins: a further INR 1,35,000 towards complications, caesarean section and the like. Engaging a second surrogate cost a further INR 4,00,000, with additional cost if both surrogates conceived and foetal reduction became necessary.[19]
- Food allowance for surrogates: INR 20,000 to 30,000, varying between cities, although some surrogates reported receiving only INR 2,000. Some intending parents also gave gifts, clothes for the surrogate's children, religious books, music and other forms of financial assistance.[20]
- Further options included spa packages, tours of Agra, and airport pick up and drop services.[21]

[15] *Moms on the Market*, HINDUSTAN TIMES (Mar. 13, 2011), *reproduced in* Das & Maut, *supra* note 8.
[16] *Moms on the Market*, *supra* note 15.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

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The sources quoted in the article stated that the treatment costs given by these clinics were estimates only.

The Chairman of the Law Commission, Dr. Justice A.R. Lakshmanan, said in the 228th Report that the appropriate course was to legalise altruistic surrogacy arrangements and to make commercial ones unlawful.[22] The Report added that it would be irrational to prohibit surrogacy on vague moral grounds without first assessing the social ends and purposes that surrogacy can serve.

A. Effects of the Ban on Commercial Surrogacy in India

India has had to bear the consequences of the restrictions placed on commercial surrogacy. Until 2015 it was one of the most popular destinations for medical tourists seeking surrogacy services at low cost from Indian surrogate mothers. Just as globalisation has affected business and trade in India, so it became easy for foreign nationals to travel to India and obtain reproductive services across borders. The social inequality produced by the globalisation of these services is noticeable: the affluent obtain easy access to them, while poor women become the means by which those services are supplied, providing their bodies for the purpose. As at 2008 there were reported to be some 3,000 largely unregulated fertility clinics in the country.[23]

The sums which commercial surrogates received from non-resident Indians and foreign nationals were life altering, and could secure better living conditions, education and health care for their families. Women who had depended on that income lost it when commercial surrogacy was prohibited with effect from 25 January 2022. Commercial surrogates were for the most part poor women who earned their livelihood by providing surrogacy services, and the new Act is a setback to their right to earn. Nonetheless, the exploitation of women serving as commercial surrogates, most of them from impoverished and often illiterate backgrounds, was widespread. Intermediaries such as surrogacy clinics typically exploited their vulnerable circumstances, paying them inadequately while making substantial profits through their contracts with the surrogates. The running of illegal clinics, the trafficking of women for this purpose at low prices and disregard for the health of the surrogate were among the reasons for that exploitation. The rights of surrogate mothers and children were not secured when surrogacy arrangements were made. It was against this background that the Government first barred foreign nationals in 2015 and then prohibited commercial surrogacy altogether under the 2021 Act.

[22] LAW COMM'N OF INDIA, REPORT NO. 228, *supra* note 2, para. 4.1, at 26.
[23] *Surrogacy a $445 mn Business in India*, *supra* note 8; *see generally* Neha Tiwari, *Commercial Surrogacy in India: An Overview*, 8 ASIAN REV. SOC. SCI., no. 2, 2019, at 35.

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The prohibition of commercial surrogacy has resulted in a regression of the personal liberty guaranteed by Article 21 of the Constitution. A woman who is medically fit but who has decided of her own free will not to bear a child naturally loses the opportunity of having a child through surrogacy. A woman who has had a difficult pregnancy may choose not to bear another child herself, yet she cannot avail herself of these services, since a woman who already has a biological child is not eligible. Her personal liberty to make that choice is therefore limited by the legislation. Objections have been raised from other quarters as well, since persons belonging to LGBTQI+ communities are not recognised by the Act at all and are treated unequally with those who may claim its benefit. They too have the right to found a family, and the law curtails their reproductive autonomy. Single unmarried men and women are likewise barred from claiming the benefit of the Act. This is a direct denial of their right to procreate or to found a family, without any reasonable justification, and the law therefore appears unequal in its application.

The debate turns on the conflicting interests of different stakeholders, and the duty to safeguard the interests of the surrogate woman and of the child is among the primary responsibilities of the State. How to balance and harmonise interests as varied as reproductive autonomy, the risk of exploitation of women, and the inequality suffered by those excluded from the benefit of the Act, remains an open and much debated question.

III. Historical Evolution of the Surrogacy (Regulation) Act, 2021

Commercial surrogacy was common in India from 2002 onwards. Before 2002 there were no norms governing surrogacy at all. In 2002 the ICMR framed the first national criteria for the accreditation, monitoring and licensing of ART institutions in India, and these were sanctioned by the Ministry of Health and Family Welfare in 2005.[24] It is essential to underscore that these principles did not prohibit financial transactions. The Assisted Reproductive Technology (Regulation) Bill, 2008 sought to clarify the rights, obligations and liabilities of all those participating in surrogacy arrangements, including patients, doctors, donors and surrogates.

The initial focus of the ART Bill was to regulate commercial surrogacy arrangements in India, since it provided for financial compensation to surrogate mothers. The study by Dr. Ranjana Kumari submitted to the Ministry of Women and Child Development emphasised the need for specific legislation on surrogacy.[25] The absence of research on surrogacy hampers the authorities in framing legal rules and in taking effective action against offenders. A precisely drafted

[24] Indian Council of Med. Research, *supra* note 4.

[25] Ctr. for Social Research, Surrogate Motherhood: Ethical or Commercial (Final Report submitted to the Ministry of Women & Child Dev., Gov't of India, 2013) (Dr. Ranjana Kumari, Director).

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regulation must be developed without delay to set out the position of the Government of India on surrogacy, so as to prevent covert activity which may exploit surrogate mothers.

In its 228th Report the Law Commission observed:

> Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.[26]

The Union Government's opposition to commercial surrogacy was placed before the Supreme Court in October 2015, and in November 2015 assisted reproductive technology clinics were directed not to entertain foreign nationals seeking surrogacy services. The proliferation of exploitative commercial surrogacy and of other unethical practices can be traced directly to the legal and ethical ambiguity surrounding surrogacy, which surrogacy clinics turned to their own advantage.

The Surrogacy (Regulation) Bill, 2016 was drafted and introduced in the Lok Sabha in 2016, following the Government's decision of November 2015 to stop foreign nationals from participating in the surrogacy industry. The Bill was framed to protect the rights of women in the commercial surrogacy industry and to address the ethical concerns associated with it. To guard against exploitation arising from poverty and want of education, it prohibited commercial surrogacy and permitted altruistic surrogacy only among family members. Under the 2016 Bill the intending parents had to be an Indian couple married for at least five years, the wife aged 23 to 50 years and the husband 26 to 55 years, while the surrogate had to be a close relative of the intending couple, an ever married woman aged 25 to 35 years with a child of her own who had not acted as a surrogate before.[27]

The Surrogacy (Regulation) Bill, 2016 lapsed on the dissolution of the Lok Sabha and was passed afresh by that House in 2019. The Rajya Sabha constituted a Select Committee to

[26] LAW COMM'N OF INDIA, REPORT NO. 228, *supra* note 2, para. 4.1, at 26.
[27] PRS LEGISLATIVE RESEARCH, *The Surrogacy (Regulation) Bill, 2016*, https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2016 (last visited Oct. 26, 2025).

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consider the Surrogacy (Regulation) Bill, 2019 with various stakeholders, which resulted in further revisions, and the Bill received assent on 25 December 2021.[28] The Assisted Reproductive Technology (Regulation) Act, 2021 had received assent one week earlier, on 18 December 2021.[29] The Surrogacy (Regulation) Act, 2021 came into actual effect on 25 January 2022. The revised legislation authorises only altruistic surrogacy, so that those with financial resources cannot exploit the surrogacy option, and it forbids commercial surrogacy and the trade in human gametes and embryos.

IV. Salient Features of the Surrogacy (Regulation) Act, 2021

- Commercial surrogacy is expressly forbidden and only altruistic surrogacy is permitted.
- Gestational surrogacy alone is permitted.[30] The distinctive aspect of the present legislation is that only the gestational method is authorised for surrogacy. Under the traditional method the surrogate mother had a biological connection with the child, whereas under the gestational method she is solely a carrier: the sperm and the egg are sourced from the intending parents or from donors, and the child has no biological connection with her.
- Surrogacy clinics must be registered under the Act; otherwise they are prohibited from conducting any surrogacy procedure and from employing persons who lack the qualifications the Act requires. A clinic conducting surrogacy procedures must apply for registration within sixty days of the appointment of the appropriate authority, and a certificate of registration is valid for three years and must thereafter be renewed.[31]
- Only altruistic surrogacy is authorised, and no surrogacy clinic, gynaecologist, embryologist or other medical professional may conduct or promote commercial surrogacy in any capacity.
- Eligibility of the intending couple. The couple must be a legally married Indian man and woman, the man aged between 26 and 55 years and the woman between 23 and 50 years, and they must have no surviving child, whether biological, adopted or born of an earlier surrogacy.[32]

[28] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021 (India) (assented Dec. 25, 2021; brought into force w.e.f. Jan. 25, 2022 by S.O. 271(E) (Jan. 20, 2022)).
[29] The Assisted Reproductive Technology (Regulation) Act, 2021, No. 42 of 2021 (India) (assented Dec. 18, 2021; in force Jan. 25, 2022).
[30] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(ii)(a) Explanation (India).
[31] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, §§ 11(3), 12(3) (India).
[32] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(iii)(c)(I)-(II) (India).

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- Eligibility of the intending woman. An intending woman must be an Indian woman who is a widow or a divorcee between the ages of 35 and 45 years and who intends to avail herself of surrogacy.[33] Further, a woman may act as a surrogate mother only once in her lifetime.[34]
- A certificate of essentiality must be obtained from the appropriate authority where the intending couple has a medical indication necessitating gestational surrogacy.[35] All known side effects and after effects of the procedure must be explained to the surrogate mother, and her written informed consent must be obtained in a language which she understands.[36]
- A National Assisted Reproductive Technology and Surrogacy Registry is to be established for the registration of surrogacy clinics across the country.[37]
- Penalties. A person, clinic or agency engaged in commercial surrogacy or in the trade of human gametes or embryos is liable to imprisonment of up to ten years and a fine of up to ten lakh rupees; a registered medical practitioner or clinic conducting surrogacy for commercial purposes is separately liable, for a first offence, to imprisonment of up to five years and a fine of up to five lakh rupees.[38]

This legislation represents a significant advance in surrogacy practice in India, since before its enactment there was no governing law in the country, and a study in this field is therefore of considerable importance. The long campaign for a surrogacy law culminated in the Surrogacy (Regulation) Act, 2021. The law nonetheless remains in its early stage, and its ramifications and implementation are yet to be fully worked out. This study assesses the working of the statute and seeks a comprehensive understanding of it, so that its good outcomes may be identified and its shortcomings effectively addressed.

V. Challenges and Shortcomings of the Act

The Act is beneficial legislation, made with the intention of protecting the surrogate and the children born of the procedure. There are nonetheless gaps and loopholes in it which are serious obstacles to its implementation as a working law on surrogacy practice. The shortcomings are discussed below.

[33] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 2(1)(s) (India).
[34] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(iii)(b)(IV) (India).
[35] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(iii)(a) (India).
[36] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 6(1)(i)-(ii) (India).
[37] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, §§ 15, 16 (India).
[38] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 38(1)(a), (e), (2), § 40 (India).

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The Act deals with a child declared to be an abandoned child by the appropriate authority, but there may be cases in which a child is abandoned after the surrogacy without the knowledge of that authority. Although the new law provides for punishment, such cases may go untraced. The prohibition of commercial surrogacy has also caused a loss of livelihood to poor women who earned better under the earlier arrangements. A total prohibition on commercial surrogacy affects Article 21, the word "life" in which has been given a wider meaning that includes the right to livelihood,[39] as recognised in *Olga Tellis*.[40] Since only altruistic surrogacy is now permitted, the practical difficulty lies in finding a woman willing to act as a surrogate without compensation, the intending couple or the intending woman being required to approach the appropriate authority with such a willing woman; the surrogate may not provide her own gametes, and the child must not be genetically related to her.[41]

The Act is principally criticised for excluding those who are given no benefit under it, namely single men and women, couples in live in relationships, and gay, bisexual and transgender persons. The Act deprives them of the right to found a family. There is consequently disquiet among persons belonging to these groups, which is a serious obstacle in the path of the Act, and the exclusion has been said to violate the right to equality guaranteed by the Constitution. Further, the Act permits only divorced or widowed women between the ages of 35 and 45 years to avail themselves of the benefit of the legislation, which raises the question whether it does not control the reproductive autonomy of women who fall outside that age bracket. The High Court of Andhra Pradesh has held that "the personal decisions of an individual about the birth and babies, the right of reproductive autonomy, is a facet of the right of privacy".[42] The Supreme Court has held that "a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India",[43] and it underscored that the recognition of reproductive choice extends both to procreation and to abstention from it. A bench of nine judges of the Supreme Court has confirmed that the autonomy to make reproductive decisions falls within Article 21, which secures the right to personal liberty.[44]

[39] *Consumer Educ. & Research Ctr. v. Union of India*, (1995) 3 SCC 42 (India).
[40] *Olga Tellis v. Bombay Municipal Corp.*, (1985) 3 SCC 545 (India).
[41] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(ii)(a) Explanation, § 4(iii)(b)(II)-(III) (India).
[42] *B.K. Parthasarathi v. Government of Andhra Pradesh*, 1999 (5) ALT 715 (India) (also reported as AIR 2000 AP 156).
[43] *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 SCC 1, para. 22 (India).
[44] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

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In *Navtej Singh Johar*[45] and *Joseph Shine*[46] the Supreme Court struck down penal provisions which denied sexual autonomy, dignity and decisional privacy: the former in so far as section 377 of the Indian Penal Code criminalised consensual sexual conduct between adults of the same sex, and the latter in holding that the offence of adultery treated a wife as the property of her husband.

There is a substantial risk of an underground or illegal surrogacy market developing, since those who wish to avail themselves of the benefit of the Act are many and those who actually obtain it are few. An illegal surrogacy business is likely to grow in order to fill that gap.

The Act requires an order of parentage and custody of the surrogate child to be obtained from a Magistrate, on the basis of which the birth affidavit is prepared, but it prescribes no timeline within which that order is to be made; appeals against orders of the appropriate authority, moreover, lie to the State or the Central Government and not to a court.[47] Given the pendency already burdening the courts, the absence of a statutory timeline is likely to cause delay.

Because no compensation may be paid, and because the intending couple or the intending woman must themselves approach the appropriate authority with a willing surrogate,[48] the pool of surrogates is in practice confined to relatives and acquaintances. This may lead to the exploitation of female members of a family, who may be pressed to act as surrogates against their will in order to help other members of the family, and so to increased tension, broken families and strained family ties in the Indian family setting.

The legislation has introduced the concept of gestational surrogacy, under which the surrogate has no biological connection with the child, but it has failed to consider the implications of this for the mental health of the surrogate mother. Post partum depression, anxiety and other psychological ailments arising from the loss of connection with the child are among the matters left wholly unaddressed by the Act.

The registration of surrogacy clinics is a welcome initiative, but where enforcement capacity is uneven the possibility of evading these procedural requirements cannot be discounted.

India has a statute prohibiting dowry, a statute on domestic violence and a statute regulating pre-natal and post-natal diagnostic techniques, yet dowry, violence against women and a preference for the male child persist. It is therefore difficult to assume that the surrogacy

[45] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).
[46] *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).
[47] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(iii)(a)(II), § 14 (India).
[48] The Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(iii)(b)(II) (India).

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legislation will by itself put a complete end to commercial surrogacy or secure compliance with the Act in full.

VI. Suggestions and Conclusion

The right to reproductive autonomy is a deeply personal and basic human right grounded in personal choice, and it should not be confined to married couples but should be available irrespective of gender. The Act should be open to couples living together, to single men and women and to members of LGBTQI+ communities, since they too possess the right to found a family and should be treated equally, and there are judicial decisions which point in that direction.

Children born of surrogacy should have the right to know their identity and their origin, and the child should be made aware of the circumstances of his or her birth. In addition, the child should be breastfed for at least six months as a measure to protect his or her health, and the process of adoption of a surrogate child should not distinguish between able bodied and disabled children.

Restrictions such as the upper age of 35 years for a surrogate, and the requirements that she be married and have a child of her own, should be relaxed, so that surrogacy under the Act does not become uncommon because of procedural technicalities.

The Act should specify more clearly who may be a donor and should set out in detail the qualifications for a donor, particularly with regard to biological history.

The eligibility conditions for a surrogate mother should be widened, so that willing women among the family and friends of the intending couple who are presently excluded by the conditions of age, marital status and motherhood may lawfully assist them. The Act should also make the process of certification simpler and more efficient: the more approvals and certificates that are required, such as the certificate of essentiality and the certificate of eligibility, the greater the bureaucratic involvement, which is time consuming and deters families from taking this course.

Although the Act provides for surrogacy boards at the national and State levels, the provision must be implemented in earnest. Clinics should be inspected properly and a centralised database of those availing themselves of these services should be maintained, in coordination with the enforcement agencies, so that the illegal trade in human gametes and illegal commercial surrogacy are restrained.

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Proceedings before the Magistrate should be governed by specific timelines so that there is no long pendency of litigation, since the courts are already overburdened with pending cases. The Act should make provision for a time frame for such cases.

It is also suggested that a controlled form of commercial surrogacy should be permitted in place of purely altruistic surrogacy. Non-resident Indians and foreign nationals should be permitted to commission surrogacy under strict guidelines, so that the setback to the Indian economy caused by the prohibition of commercial surrogacy may be mitigated. This would also help the poor women who lost their livelihood with the coming of this Act to regain it. It is very difficult to find a surrogate under the present Act, and there is therefore a strong possibility of pressure being exerted upon women in the family, who may be compelled against their will to act as surrogates.

Since only the gestational method is permitted under the Act, the legislature has not dealt with the cost of the procedure, which is expensive. Guidelines should therefore be issued to surrogacy clinics on this question so that they cannot act arbitrarily. It may also be suggested that traditional surrogacy be included, since it is less expensive and less complicated than gestational surrogacy. Where a relative is chosen as the surrogate, the traditional method could be adopted in place of the gestational method, which was introduced in the light of the earlier experience of commercial surrogacy, where the surrogate mother developed a bond with the child and hesitated after the delivery to hand the child over to the commissioning couple.

Surrogacy should be performed in government hospitals, and the Act should fix a particular sum so that women are not exploited and the surrogate has a sense of security.

Besides life insurance cover, the surrogate should be provided with mental health services such as counselling sessions, so that her psychological and emotional needs are met.

The prohibition of commercial surrogacy will have consequences and adequate measures should be taken to address them. One likely consequence is a parallel illegal surrogacy practice, which may lead to serious exploitation of surrogate mothers by intermediaries. The illegal sale and purchase of male and female gametes will likewise generate black money and encourage the trafficking of surrogates.

At the level of society there is a need to educate people about surrogacy, which has long been treated as a taboo subject. Information about surrogacy procedures and services should circulate freely so that those availing themselves of the benefit, and prospective beneficiaries, can make informed decisions, and so that people become willing to accept the practice where they are unable to conceive naturally.

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The Government should make an effort to provide means of livelihood to women who acted as surrogates before this legislation. Skill development programmes and financial support should be provided to such women by the State.

Although advertisement of surrogacy is prohibited by the provisions of the Act, awareness campaigns should be launched by the Government so that people are made aware of this aspect of childbirth. This would help childless couples who have waited years for a child, and couples who are undergoing other ART procedures, to avail themselves of the benefit of the Act in time, and it would prevent surrogacy from becoming a last resort.

There is thus a need to make the law consistent with the interests of all the stakeholders involved, and to balance and harmonise those interests with the larger interest of society. Efforts should be made to build an egalitarian society in which all are treated equally and without discrimination. New legislation should be made by adapting to the changing needs of society, and it should be able to protect the fundamental rights of every person.

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