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Analysis of Reproductive Rights in the Light of Art Act & Surrogacy Act

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ABSTRACT

The article discusses the legal and ethical challenges surrounding The Surrogacy Act of 2021 and Assisted reproductive technology (regulation) Act 2021. focusing on eligibility criteria, health implications, surrogate rights, financial burden, and compensation. It's high lights the impact on marginalized segments of society and the proposes global alternatives to construct the act neutral and more satisfying for all participating beneficiaries.

The Assisted Reproductive Technology (Regulation) Act, 2021, was passed by Parliament to regulate the functioning of assisted reproductive technology clinics and all the banks in the country. It aims to supervise, regulate, and protect the rights of women go through fertility treatment, including the controversial treatment of surrogacy, and ensure legal and ethical success.

Keywords: *Surrogacy Act 2021, Assisted reproductive technology (regulation) Act 2021, ethical challenges and surrogate rights, ART banks and ART clinics, surrogacy, surrogate mother, infertility.*

I. INTRODUCTION

Every living being have the capacity to give birth, and family is aspired to improve it. In Indian mythology there as a assumption that a person is incomplete without a son, as their son gives water to their departed soul. Although, adoption is a well-established procedure for those people who cannot have children due to psychological reasons or physiological disorders, and religious laws provide legitimacy and procedures.

Advancements of technological have opened fresh opportunities for child expectant, enabling Assisted reproductive technology to authorise individuals with many disabilities to have their own children.

Surrogacy-The term "surrogate" originates from the Latin word "surrogatus," which translates to "appointed in place of another." This concept reflects the role of a surrogate in the process of childbearing, where they carry a pregnancy for someone who is unable to do so themselves,

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According to the definition of "Black's Law Dictionary"³ surrogacy is the birth and delivery of a child on behalf of another person.

Surrogacy is defined by both domestic and international law as a situation in which a woman agrees to conceive using assisted reproductive technologies (ART) with the intention of carrying the child in her womb and handing it over to the intended couple. In India, it is defined as where a woman volunteers to carry a pregnancy for an intending couple who are unable to conceive or carry a pregnancy themselves. After the baby is born, the surrogate transfers legal parenthood to the intended parents. In Israel, it is defined as a surrogacy agreement providing for the implantation of fertilized ova for conception.

Based on the key terms used in these definitions, it can be deduced that there are notable differences in the meaning of surrogacy. Surrogacy as "ART (assisted reproductive technology) treatment" for infertility: either as a medical procedure that helps the child to be born by contributing their genetic materials,

Second, surrogacy as a "social arrangement" that requires the concerned couples, third parties acting in the capacity of the gamete donors, surrogate moms, fertility clinics, physicians, and another more relevant parties, Thirdly Surrogacy as "agreement" among all the parties involved on important aspects such as the medical procedure, genetic material contribution, child custody and transfer, payment, costs, and other aspects that are agreed upon in writing by all parties who are involved. Therefore, the legal definition of surrogacy is not consistent.

II. HISTORICAL BACKGROUND

Surrogacy is in form of assisted reproduction in India, where the third person bears a child for another couple, agree to creating a legal contract. Since 1978, surrogacy has been practiced in the country, known for its high rate of "reproductive tourism" and grow rapidly fertility industry. However, there is still a lot of work to be done.

Surrogacy in India has been a subject matter of interest since the 1978 when the successful delivery of the first IVF child in Kolkata on October 3rd. The adoption is an alternative of surrogacy as an assisted reproductive technique (ART) in India has been given hope to the population. Despite legalization, there was no clear legislation, leading to uncontrolled surrogacy by cost-effective clinics and underprivileged women. In 2015, the Indian government prohibit commercial surrogacy for foreign people, and in 2016, the Surrogacy (Regulation) Bill was approved and providing a new definition and regulations for surrogacy. The bill needed

³ Black's law dictionary

proof of a couple's infertility before adopting a surrogate child, defining infertility as the lack of ability to become pregnant after five years after unprotected coitus or other health issues, which doesn't cover all cases.⁴

The Surrogacy (Regulation) Bill, 2019 was presented in the Lok Sabha on July 15, 2019, allowing altruistic surrogacy but prohibit commercial surrogacy. It approve medical bills and insurance coverage, while commercial surrogacy is for financial incentives. President Ramnath Kovind approved the bill on 25 December 2021.

The bill passed has several potential problems, including –

Article 14 of the Constitution prohibits the woman from becoming a surrogate mother, as the Act only allows family or close friends to be surrogate mother.

Under the influence of employment in rural India forces women to bear household financial responsibilities, leading to compensate to the surrogate mother for births or surrogacy. Legalizing altruistic surrogacy could lead to exploitation of surrogate mothers.

The restriction on surrogacy eligibility for married couples violates the personal rights of the LGBTQ community, as same-sex couples cannot have children through surrogacy.

The law requires an indenting couple to be infertile for qualified, excluding some circumstances like diabetes and hypertension, which may lead to miscarriages, and excluding those who are not able to get pregnant after five years.

According to the bill, the intended couple who are regarded as the child's biological parents must be close relatives of the surrogate mother. The appropriate authority's consent and the surrogate mother's signed consent are needed for an abortion. The intended parents have no right to say in the decision and no legal right to inquire about the child's risk.

In India, surrogacy is still seen as a unethical and as a unnatural, limiting the rights of the surrogate mothers and the couples. The lack of privacy and dignity rights in the law causes a risk to these rights, and emotional risks can lead to disputes post-delivery, which has not been resolved under the Bill.

The measure recognition surrogacy as a "Need" rather than a "Want," which contradicts Article 21's guarantee of reproductive decision-making rights.

Drafting a bill, such as the Surrogacy Bill, 2021, is crucial for raising awareness and regulating the practice. However, to make surrogacy accessible and remove stigmas, several amendments

⁴ Animesh Nagvanshi, " Surrogacy in India-A long Journey for the Nation", The Times of India, March 4,2023.

are needed.

III. SOME INTERNATIONAL CONVENTION

1. United Nations Convention on The Rights Of The Child, 1989:

The United Nations Conventions on the Rights of the Child, 1989, guarantee several rights, encompassing the rights to participation, growth, safety, and survival. These rights consist of basic necessities like nourishment, housing, and medical services. They also protect children from exploitation, neglect, abuse, and exploitation, and allow them to express their opinions and participate in societal activities. The four articles, also known as "General Principles," have received significant attention.⁵

2. Maternity Protection Convention, 2000:

The International Labour Organization established the Convention on March 30, 2000, defining a woman as any undiscriminated female, aiming to safeguard maternity leave and benefits at work, ensuring equal treatment and establishing criteria for implementing these benefits.⁶

3. The Hague Convention on Contract Pregnancy (On Surrogacy), 2010:

A "Hague Convention" on Surrogacy aims to govern the global surrogacy sector, particularly for children born from contract pregnancies. The primary goal is to prevent similar situations from occurring and take appropriate actions for those experiencing a contract pregnancy. The Convention on Adoption, which recognizes the receiving state, has achieved this goal and remains impartial regarding intercountry adoption practices. The Convention on Pregnancy must remain neutral on surrogacy.⁷

IV. ART ACT (THE ASSISTED REPRODUCTIVE TECHNOLOGY REGULATION ACT,2021)

Infertility affects 10%-15% of couples worldwide. Ever Since the birth of Louis Brown in 1978, assisted reproductive technology (ART) has increased, with the UK enacting the Human Fertilization and Embryology Act of 1990. The UK government amended the act in 2009, and Many European countries have strict laws against surrogacy and gamete donation. The American Society for Reproductive Medicine adheres to regulations, while the FDA regulates

⁵ United Nations Convention on the Rights of the Child, 1989, art. 6., available at: <https://www.unicef.org/child-rights-convention/convention-text> (visited on Aug 21, 2020)

⁶ Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 (Visited on April 15, 2024).

⁷ HCCH, available at: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>, (Visited on April 10 2024)

ART clinics. In some Catholic-dominant countries, IVF is strictly prohibited, but was lifted in 2015.⁸

Durga, the first IVF child born in India, in 1981 but she was not recognized by the government. Harsha, born in 1986, was approved by the Indian Council of Medical Research. ART clinics and banks have proliferated since then, but public health services are underfunded and hard to come by.

The Assisted Reproductive Technology (Regulation) Act, 2021, for to protect infertile couples and surrogate mothers' rights. It provides monetary stability for oocyte donors and offers insurance coverage for twelve months. The Act addresses the ban on surrogacy in European countries, which often turn to India for the treatment.

To ensure the safe and ethical practice of assisted reproduction, the Indian Parliament enacted the Assisted Reproductive Technology (Regulation) Act in December 2021. This law regulates ART clinics and banks across the country. It aims to supervise, regulate, and protect women's right who was receiving infertility treatment, including the controversial treatment of surrogacy, and improves the oversight, control, authorization, and operation of the banks and ART clinics, addresses surrogacy, protects surrogate mothers' rights, and ensures legal and ethical success in treatment.

In ART treatment, gametes, embryos, and gonadal tissues are extracted, altered, stored, and applied; in certain cases, cryopreservation is used. Due to sensitive treatments and infertile couples' hardships, legislation is needed in this emerging field.

The Act, spanning six chapters, provides technical terms for assisted reproduction, regulates ART clinics and banks, and covers research using Gonadal tissues, embryos, and human gametes.

The Act aims to implement assisted reproduction at the grassroots level through the powers of state and federal surrogacy and ART boards. It includes a 60-day registration process, generating big data for research and policy guidance. The Act also includes Sex selection and pre-implantation genetic diagnosis for moral application. Subsidies and benefits are delivered directly and specifically as guaranteed. Children born through assisted reproduction have their rights upheld, and strict adherence is guaranteed by penalties. The Act is amendable in the future by allowing the central government to remove obstacles that arise during implementation or in

⁸ Jamwal VDS, Yadav AK, " The Assisted Reproductive Technology (Regulation) Act, 2021: A Step in the Right Direction", 48 *IJCM* 5 (2023)

unanticipated circumstances.⁹

(A) Loophole

The Act lacks clarity on qualifications, experience as well as the needed abilities for specialists in banks and ART clinics, despite mentioning infrastructure and manpower. More detailed rules and regulations could address this crucial aspect of manpower management.

Adoption is a common solution for failed fertility treatment, but it's unregulated in India. Regulation of adoption, along with ART and surrogacy, is crucial, especially for international couples seeking surrogacy services in developing countries.

(B) Implementation issue

The implementation of the Act will face challenges in registering numerous ART clinics and banks, supervising compliance, and enforcing fines. State-specific rules and legal issues may arise from surrogacy contracts. Implementing human gametes and embryos at Airports and seaports will present real difficulties. Maintaining confidentiality and regulating data usage from the national ART registry will be challenging, requiring collaboration and coordination among stakeholders.

V. SURROGACY REGULATION ACT, 2021

The article discusses the moral and legal challenges surrounding the Surrogacy Act of 2021, focusing on eligibility criteria, health implications, surrogate rights, financial burden, and compensation. It highlights the impact on marginalized segments of society and proposes global alternatives to increase the benefits for each and every beneficiary involved and make the act non-discriminatory.

The Boom and Bust of Babymaking: India's Surrogacy Saga Infertility, fueled by factors like age and environment, is a growing challenge. Thankfully, advancements in ART have offered a beacon of hope. Surrogacy, where a woman carries a pregnancy for someone else, has emerged as a viable path to parenthood for many, including those beyond traditional gender roles. Surrogacy can be undertaken altruistically or commercially. **A Billion-Dollar Business, Ethical Unease** India once boasted a thriving commercial surrogacy market, valued at a colossal \$2.5 billion in 2012. However, this lucrative industry harbored a dark side. Middlemen exploited the system, fostering an unhealthy dynamic between the healthcare system and the

⁹ Ibid

women acting as surrogates. This commercialization raised serious ethical concerns, prompting questions about exploitation and the very nature of the practice.

This revision uses a more engaging title and emphasizes the financial aspect of commercial surrogacy. It also rephrases "unhealthy dynamic" for a more general audience. Around 50% of the roughly 25,000 children born in India each year through surrogacy were for Western couples. India has seen a surge in procreative medical tourism due to the availability of affordable assisted reproductive technologies.¹⁰

Surrogacy has gained global popularity, leading to diverse legal regulations in different countries. Countries like There are surrogacy-friendly laws in the USA, Georgia, Ukraine, and Colombia. legislation, while others have restrictive regimes. This has led to legal difficulties and worries regarding evasive travel. The influx of cases into India, despite absence of worldwide coordination and regulation, has led to unethical practices and exploitation.

The government of India has been working to address the issue of commercial surrogacy, which has been linked to exploitation and harassment of surrogate mothers. In response, the government proposed the Surrogacy Regulation Bill of 2015, that was passed in 2018 and later amended in 2021. The new Act, which went into effect in January 2022, only permits charitable surrogacy and prohibits commercial surrogacy and the trade of human being gametes and embryos. This move aims to safeguard the commissioning parent's rights and prevent abuse of the surrogacy option.

(A) Review on surrogacy Act

An Indian married couple who are infertile and between the ages of 23 and 50 without any living children is referred to as a "intending couple" under the 2021 Act. With the exception of a child who poses a serious risk of death or has a disability, the couple is not allowed to have any living children. The Act also makes it possible for married Indian-origin couples residing overseas to become parents through selfless surrogacy for widows and divorcees from India.

The new law defines surrogate mothers as willing, ever-married women aged 25-35 with their own child. They can only register once in their lifetime, but a maximum of three tries can be made if there is an embryo transfer isn't successful. They must be in good physical and mental health, not provide their own gametes, and receive only insurance and medical costs.

The Medical Termination of Pregnancy Act, 2019 permits the surrogate mother to stop the

¹⁰ National Institute of Health, *available at* : <https://pubmed.ncbi.nlm.nih.gov/37213977/> (Visited on April 3,2024)

pregnancy or withdraw her participation before the embryo is inserted into her womb.¹¹

The current Act aims to prevent women's exploitation by preventing predatory middlemen and upholding motherhood and parental rights. However, it outlaws commercial surrogacy, shifting focus from right to need-based decisions. The Act additionally forbids certain teams from using surrogacy services, including widowers, foreign nationals, single men and women, couples who identify as gay or lesbian, and couples with only one child. This criminalises surrogacy in socially oppressed communities.

The 2021 amendment of the Medical Termination of Pregnancy Act, 1971 allows unmarried pregnant women to undergo abortions, but prevents them from using surrogacy services. While commercial surrogacy can provide dignified lives and financial independence, it hinders reproductive autonomy and restricts benefits to certain sections of society. Limiting the age at which women can become intended mothers or surrogate mothers also deprives them of their fundamental right to procreate.

The 2021 Act prohibits altruistic surrogacy for homosexual couples, perpetuating stereotypes and excluding the LGBTQIA+ community from the process. This discriminatory approach, despite Indian law and societal norms, allows ART services to be utilized by widowed and divorced women, excluding them from surrogacy.

VI. JUDICIAL APPROACH

The court allowed commercial surrogacy in the case of *Baby Manjhi Yamada v. Union of India*. In 2008, India's Supreme Court allowed commercial surrogacy, boosting international confidence. However, a recent announcement has shifted the situation, placing India in the category of countries not supporting commercial surrogacy and closing its doors to foreign nationals and homosexual couples.¹²

*Justice K.S. Puttaswamy and Anr v. Union of India*¹³ - A court ruling found that requiring couples to obtain and present a certificate of infertility to pursue surrogacy violates their right to privacy. The court also argued that mandating such a certificate goes against societal morals and ethics. They emphasized the importance of protecting this fundamental right (privacy).

*Jan Balaz v. Anand Municipality*¹⁴ - In 2009, in the landmark decision, Gujarat High Court prioritized the well-being of twin babies born through compensated surrogacy to a German

¹¹ The Surrogacy (Regulation) Act 2021, (Act 47 of 2021)

¹² *Baby Manjhi Yamada v. Union of India* ANR, (2008) INSC 1656 (29 September 2008)

¹³ AIR (2017) 10 SCC 1

¹⁴ AIR 2009

father in Anand. The court awarded the babies Indian citizenship, placing their rights above those of the biological parents, surrogate mother, and egg donor.

India's dual citizenship system means children with non-Indian citizenship must convert to Indian Overseas Citizenship. Balaz plans to submit his passports to Berlin's Indian Consulate and awaits a response from a German NGO. India will attempt to send children to Germany.

In 2010, the twins of Balaz were granted documents necessary for leaving India and entering Germany, and their parents concented to adopt them in accordance with German regulations.

The right to abortion held that in case of - *Suchita srivastva v. Chandigarh administration*¹⁵ - An orphaned woman in Chandigarh sexually assaulted and while residing in a welfare institution, become pregnant. The Chandigarh Administration submitted a criminal case and constituted a medical board to evaluate her mental status. The board found the woman had an intellectual disability and mild mental retardation. The High Court of Punjab and Haryana granted the respondent permission to terminate the pregnancy. An independent expert body found that the victim's Her mental retardation did not indicate abnormal risks, nor did her condition warrant termination. The appellat challenged the decision. The appellat, 19 weeks pregnant, appealed under the MTP Act's section 3, which allows abortion up to 20 weeks of pregnancy under certain conditions, including consent, pregnancy stage, and fetus health.¹⁶

The Court ruled that forcible termination of a woman's pregnancy would violate her right to liberty and reproductive choice as a woman's human rights include her reproductive rights as a fundamental component. The Court further stated that while mentally retarded people's autonomy is respected by the MTP Act, a guardian is not permitted to make decisions on their behalf. As a result, the Court decided that the pregnant woman's consent is necessary for the procedure of termination.

The Court ruled that women have a "qualified right to abortion" because of a "compelling state interest" in protecting the child's life. The MTP Act and the UN Declaration on the Rights of Mentally Retarded Persons support this right. India, as a party to the People with Disabilities Convention on the Rights of Persons, 2007, has an obligation to respect these rights. The Court disagreed with the High Court's decision, stating that forced termination would be high risk and emotional stress.¹⁷

¹⁵ AIR (2009) 14 SCR 989, (2009) 9 SCC 1

¹⁶ Ibid

¹⁷ Ibid

VII. CONCLUSIONS

Ultimately, The Assisted Reproductive Technology (Regulation) Act of 2021 aims to protect infertile couples, surrogate mothers' rights, and ensure proper supervision, accreditation, licensing, and regulation of banks and ART clinics inside the bounds of the law and ethics.

While the Surrogacy (Regulation) Act of 2021 in India fails to protect fundamental rights, including LGBTQIA+ individuals, and imposes hurdles to protect women from commercial surrogacy and artificial reproduction, potentially leading to unintended consequences.

The Act needs to be amended to promote inclusivity and equality, addressing shortcomings and balancing stakeholder interests. New regulations must consider societal changes and protect individual rights while addressing surrogacy concerns.
