

Surrogacy (Regulation) Act 2021 And The Right To Procreation In India

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Abstract

Though motherhood completes a woman but it is not possible for every woman to embrace motherhood naturally. **Infertility** is a health problem faced by people across the world since time immemorial. With advancement of science and technology came the solutions for infertility and specially with development of **In Vitro Fertilization (IVF)** technology came the solution to have one's own child. With IVF came in the concept of **surrogacy**, which finds a mention even in Bible and in Hindu Puranas. Due to low cost, less legislative control and easy availability of surrogates, India became a hub for international surrogacy. As each side has two coins the boom in surrogacy came in with its own negative consequences and apprehensions of exploitation of the poor surrogates and moral arguments against renting of womb. The Indian Legislature passed the new **Surrogacy (Regulation) Act 2021**, whereby India recently banned commercial surrogacy. Through the present research paper, the researcher aims to throw light on the legislative measures for surrogacy at the national and international level and aims to examine the scope of **Right to reproduction in India**. Through this research paper the researcher aims to critically analyze the constitutional validity of Surrogacy (Regulation) Act 2021, in light of Article 21 of the Indian Constitution. The researcher has also discussed the responses generated through field research carried out by the researcher by interviewing surrogates personally in Anand, Gujarat in the present research paper to evaluate the informed consent on the parts of the surrogates while entering into surrogacy agreement.

INTRODUCTION

It is said that Motherhood completes a woman and showers her with the most joyous gift of the nature that is a child. However, from time immemorial couples have faced the issue relating to infertility. According to World Health Organization infertility is a global health issue affecting millions of people of reproductive age worldwide. Around 48 million couples and 186 million individuals have infertility globally according to the available data. Primary infertility is inability to have any pregnancy whereas secondary infertility is the inability to have a pregnancy after previously successful conception. Infertility may occur due to male factor, female factor or a combination of both male and female factor or may be unexplained at times.

Society has found various ways to overcome the issue of childlessness and infertility by employing various means like, permitting multiple marriages, acceptance of physical relationship out of the wedlock for procreation of children, adoption etc. However, some of these ways were regarded as barbaric in nature and were discontinued but the problem of infertility continued and man started finding out other ways to resolve the same. Being childless was neither acceptable in the society nor by the couple. The childless couple went through social castration and experienced emotional pain and suffering for not having children. In fact, infertility became a stigma in many societies like India, wherein a barren woman lost her social status and became the object of blame and shame for the family. With further advancement of science there was little paradigm shift in the society whereby it was not only the woman who was blamed for being childless but the anguish of being childless continued to hover over the couple. The agony and trauma of infertility could be best felt and described only by the infertile couples themselves. Though the society has advanced but still the burden of delivering an offspring for the family is highest on the woman. It is also known that in general, society in India has got a steady family structure, strong desire for children, specially, for son to carry forth the heritage or *Vansh*. Before the advancement of science Adoption was the only option available to such couples. However, every couple will not be ready to accept adoption as a solution to their childlessness as a lot of importance is given to have a pure blood lineage in patriarchal society like India and thus stress of having one's own offspring with genetic connection to the parents.

With the development of science and with technologies like IVF, came the solution to have natural children of one's own and with same came the concept of surrogacy. Advancement of science, increasing rates of infertility, easy availability of surrogates due to economic needs, highly qualified doctors, cheap labour, development of infra structure by the government to boost medical tourism and no legislative control for the same, surrogacy became a booming business in India.

RESEARCH METHODOLOGY

The researcher has used available primary and secondary data to write this article. The researcher has used scheduled questionnaire method and through purposive sampling the researcher carried out qualitative research by visiting Akansha clinic in Anand, Gujarat from 25th to 29th December 2021 and interviewed 26 surrogates and Dr. Nayana Patel, who is regarded as a pioneer in the field of surrogacy in India. The researcher has discussed at length the results of the said interview in the present research paper.

DEFINING SURROGACY

Surrogacy is a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the place of”. Thus, surrogacy is a procedure where a female carries a pregnancy and gives birth to a child for another female. The term “Surrogate motherhood” means a woman who assents to have an embryo produced from the sperm of a man who (may or) may not be her husband and oocytes of another of another woman (or even herself, as the case may be e.g. in straight surrogacy), intended in her in order to bear the pregnancy to her capability and deliver the child to the intended couple or an individual that had asked for surrogacy. The Supreme Court of India has defined surrogacy as “Well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party”.

There are two types of surrogacies: the first, called **traditional surrogacy**, involves the surrogate being artificially inseminated with the intended father’s sperm. The second, termed **gestational surrogacy**, is done through in vitro fertilization, in which the egg of the intended mother or of an anonymous donor is fertilized in a petri dish with the sperm of the intended father or of a donor and the embryo is transferred to the surrogate’s uterus.

On the basis of the motive behind surrogacy, it can be classified further in to two types: **commercial surrogacy and Altruistic Surrogacy**. In commercial surrogacy the surrogate mother enters into an agreement mainly for economic reasons. Thus, in such cases the mother is remunerated by the couple to carry a pregnancy to the term. Whereas in altruistic surrogacy the surrogate mother gets no remuneration for her pregnancy and the relinquishment of the baby. With no financial inducement involved, such arrangement often carry moralistic implications and the surrogate mother’s contribution is seen as a noble deed for the greater good or giving the greatest gift of a child to a sterile couple.

Surrogacy is not a new practice as it has mentions both in bible wherein Abraham’s wife Sarah commissioned her maid Hagar to be a surrogate and bear the children of Abraham by sleeping with him and even in Indian mythology wherein birth of Lord Balram, Lord Kartikeya, Kauravas and guru Drona is mentioned through use of Artificial Reproductive Technology including surrogacy.

LEGISLATIVE RESPONSE TO SURROGACY AT INTERNATIONAL LEVEL

Surrogacy is a global practice and every country in the world has different Laws governing Surrogacy agreement and practice. Certain countries allow surrogacy including commercial surrogacy whereas in other countries surrogacy is totally barred. Certain countries allow only altruistic surrogacy and certain countries do not have any laws governing surrogacy. Though inter country adoption has been regulated since 1993 and has been disdained by international community but there has been no such regulation relating to surrogacy. In fact, there has been sharp rise in use of surrogacy as a method to procure child and has substituted adoption. In case of inter country adoption, there are safeguards to protect the adopted child through international instrument, however there exists no such safeguard for children born out of surrogacy arrangement. Since intermediaries play a major role in surrogacy arrangements, there exists high chance that the intended parents and surrogate mother may be exploited. Many countries in the world ban surrogacy even altruistic surrogacy which drives such intended couples travel to other countries for seeking surrogacy arrangements. Generally, the intended couples travel to developing or under developed countries wherein either commercial surrogacy is permitted or there is no Law at all governing surrogacy. This leads to highest chances of poor surrogate from the developing and under developed Nation being exploited. Further the international Courts like The European Court of Human Rights have given decisions of enforcing the State to give citizenship to the children born out of such surrogacy arrangement though the State under its legal system does not permit surrogacy. These decisions are pronounced keeping in mind the best interest of the Children born out of surrogacy but encourages the practice wherein the States are not allowing their own woman to be exploited through surrogacy but there is no bar in exploiting the surrogate form developing or under developed country. Thus, the states will protect domestic womb at the cost of foreign wombs. Since the surrogates are paid high which is sometimes equivalent to their ten years salary, protecting their interest becomes all the more important as in desire to safeguard their future they might end up sacrificing their present and it is not necessary that in safeguarding the rights of the children the surrogate’s rights are sacrificed and hat the international community has to choose between protecting either of them. Further most states under their Municipal Law provide criteria for surrogate mothers but the criteria to be fulfilled by the intended parents are vague. There exists proper mechanism whereby the surrogate has to handover the child to the intended parents but there exist no proper rules to ensure that the intended parents are not abandoning the child born out of surrogacy. Though there is no direct international regulation governing surrogacy but attempts have been made to govern allied matters at international level. For example, UNESCO has passed three declarations namely Universal Declaration on Human Genome and Human Rights (Passed on 11th November 1997, in the 29th General conference of UNESCO) International Declaration on Human Genetic Data (Passed on 16th October 2003, in the 32nd General conference of UNESCO) and Universal Declaration on Bio Ethics and Human Rights (Passed on 19th October 2005, in the 33rd General conference of UNESCO) to govern genetic technology and its usage.

Similarly, international concerns about use of Assisted Reproductive Technology and its social and ethical consequences were questioned in the 52nd Health Assembly in 1999 in which the World Health Organization was asked to analyse the contemporary developments in the field of ART technology and was also requested to view its ethical and social implications. In its response the WHO department of reproductive Health and Research convened a meeting on the medical, ethical and social aspects of assisted reproduction from 17th to 21st September in the year 2001. A similar meeting was also convened by WHO in the year 1990 but at that time the stress was on the technical aspects involving usage of assisted reproductive technology. In the 2001 meeting which was conducted at Geneva and more than 40 participants from 22 countries which included scientists, medical professionals, clinicians, embryologists, social scientists, ethicists and consumer representatives.

Hague conference on Private International Law adopted parentage and surrogacy project and lot of research work is done in the said area from 2011 till date. The permanent bureau carried out extensive work by carrying out research on practical needs of the said area, consulting legal, Health and other professionals.

Till now United Nations has not passed any conventions governing Surrogacy but Through its Special Rapporteur on Sale and sexual exploitation of children including child prostitution, child pornography and other child sexual abuse material, presented a thematic report to General assembly in October 2019 on Safeguard for the protection of the Rights of children born from surrogacy arrangements. The rapporteur had sent questionnaires member states, civil societies and stakeholders for collecting the data and the same was presented in the form of a report to the General Assembly in the 37th session of Human Rights Council.

According to the report there exist dupable practices involving children born through surrogacy through out the world. The report stated that these practices are present both in countries where surrogacy is regulated and also in countries where surrogacy is unregulated. The report examined and gave its suggestions for prohibiting sale of children born through surrogacy. The Special Rapporteur encouraged the States to safeguard the rights of the children born through surrogacy as well as that of the surrogates. The report further stated that the States need to protect these rights disregard to the legal status of surrogacy agreement at the national and international level. The right of the child should be protected keeping in mind, the best interest of the child. The States should safeguard the identity of the child and his origin and also to see to it that the provisions regulating surrogacy are not leading to statelessness for the child. The report became instrumental in encouraging further research in surrogacy by other human rights agencies and United Nation's instrumentalities relating to rights of the woman. Several Human Rights agencies organized an expert group meeting on surrogacy in Bangkok in 2018, wherein it was stressed that legislative and policy approaches relating to surrogacy should be formulated while keeping in mind the human rights perspective and the States should ensure that the rights of all the stakeholders are protected and exploitative practices are done away with.

LEGISLATIVE RESPONSE TO SURROGACY AT NATIONAL LEVEL

Till 2015 India permitted all sorts of Artificial Reproductive Technology, including surrogacy for everyone including foreign couples. However, after two famous cases changed the view points of the government. Firstly, famous Baby Manji Yamada Case wherein the couple got separated after employing an Indian Surrogate to beget a child for them. After the birth of the child a legal battle followed and ultimately the Supreme Court in India gave custody to the grandmother of the child. Secondly the Jan Balaz case wherein a German Couple had to face legal battle to get citizenship for their children born in India through surrogacy. The Indian government there after took a decision and prohibited foreign couples from utilizing surrogacy services in India. The Law Commission of India in its 228th Report showed concern over commercial surrogacy as a growing industry in India whereby poor woman entered into surrogacy contracts due to economic pressure and were lured into becoming surrogate without having any safety measures in their favor. The report also recommended that the Government of India should come out with an explicit legislation and prohibit commercial surrogacy in India. Till then Indian fertility clinic were being governed by the Indian Council of Medical Research National Guidelines for Accreditation, Supervision and Regulation of Art Clinics In India 2005, which were only regulatory in nature and lacked legal backing. The Government of India there after tired and introduced various Bill for legally regulating use of Artificial Reproductive Technology in India but none of the Bills turned in to a legislation. Finally in 2019 the Surrogacy (Regulation) Bill 2019 was introduced in Loksabha. The Bill was passed there and was circulated in Rajyasabha which referred the Bill to Select Committee. The select committee has forwarded its report and the Bill was reintroduced as Surrogacy (Regulation) Bill 2021. The Bill received the assent of the president on 25th December 2021 and has been passed as a Law. Following are the key features of the said Surrogacy (Regulation) Act 2021:

The objective of the Act is to constitute National Assisted Reproductive Technology and surrogacy Board, State Assisted Reproductive Technology and surrogacy Board and appointment of appropriate authorities for the regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto.

The Act defines Altruistic surrogacy as surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage on the surrogate mother, are given to the surrogate mother or her dependents or her representatives.

Commercial surrogacy has been defined as commercialization of surrogacy services or procedure or its component services or component procedures including selling, or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind to the surrogate mother or her dependents or her representatives except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.

The Act defines intending Couple means a couple who has medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.

The Act defines intending woman as a woman who is a widow or a divorcee between the age of 35 to 45 years and who intends to avail the surrogacy.

The Act defines surrogacy as a practice whereby one woman bears and gives birth to a child for an intending couple with an intention of handing over such child to the intending couple after the birth.

According to the Act Surrogate mother means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of the embryo in her womb and fulfils the conditions as provided in section 4(b)(iii).

The Act requires that in order to carry out surrogacy a clinic first has to register itself according to the provisions provided under the Act. And that no such clinic shall carry out surrogacy in a commercial manner.

The intending couple or intending woman who aim to opt for surrogacy have to apply to the Board and obtain a certificate of recommendation from the Board. Further such couples can only opt for altruistic gestational surrogacy. A surrogacy clinic shall not carry on any procedure pertaining to surrogacy unless the director in charge of the clinic is satisfied that the intending couple or intending woman as the case may be have obtained the certificate of essentiality issued by appropriate authority. Such certificate of essentiality is to be issued by the District Medical Board certifying a medical indication necessitating gestational surrogacy and an order from magistrate first class concerning the parentage and the custody of the child to be born through such surrogacy. The intending couple also has to obtain a certificate of eligibility from appropriate authority by satisfying following conditions.

- The couple should be married and between 23 to 50 years of age in case of female and between 26 to 55 years of age in case of male.
- The intending couple should not have a surviving biological or adopted child or a child through surrogacy. (Unless such a child is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure. Such application should include a certificate from a registered medical practitioner certifying such medical condition of the child)

The Act also provides essential conditions which a woman has to fulfil before opting to be a surrogate.

- Such woman should be ever married having a child of her own.
- She should be between the age group of 25 to 35 years.
- She should not have provided her own gametes.
- A woman can act as a surrogate only once in her lifetime.
- She should obtain a certificate of medical and psychological fitness from a registered medical practitioner.

In case of rejection of application either that of the intended couple or that of the surrogate, the aggrieved person can apply to State Government or central government as the case may be within 30 days of receipt of rejection of application.

The Act inflicts punishment which may extend to 10 years and fine which may extend to 10 lakh rupees for following offences:

- Publishing, issuing, advertising, communicating about commercial surrogacy
- Abandoning, disowning or exploiting a child born out of commercial surrogacy
- Exploiting or cause to be exploiting a surrogate or a child born out of surrogacy
- Selling human embryo or gametes for the purpose of surrogacy or running an organization or racket for such purpose
- Importing or helping in importing a human gamete or embryo for the purpose of surrogacy.

RIGHT TO REPRODUCTION MEANING AND SCOPE

Women's right to reproduction encompasses a number of rights which includes but is not limited to right to life, right to health, including sexual and reproductive health, right to decide the number and spacing of children, right to privacy, right to access sexual and reproduction health education, right to family planning and right to benefit out of scientific advancement.

One of the most important aspects of right to reproduction is the ability and the freedom to make decision as regards one's reproductive life and bodily autonomy. It is mainly related with whom and the number of children that a woman wants to have. It includes right to make full and informed choices about their sexuality and reproduction which is free from any type of pressure or coercion or violence.

RIGHT TO REPRODUCTION IN INDIA - CONSTITUTIONAL AND JUDICIAL RESPONSE

In any Country with a written constitution, the Grund Norm is the Constitution itself and the powers of the Government are limited to the extent provided by the Constitution. Under Article 13 of the Indian Constitution power of Judicial review has been bestowed on the judiciary and the government's legislative power is limited to not to pass any Law which abridges or takes away any right that are granted through Part III of the Indian Constitution. In case the Government passes any such law the highest courts in the Country have the power to declare such laws as ultra vires and struck it down. The Supreme Court and the High Courts in each State have also been empowered through Article 32 and 226 respectively to issue suitable writs or any other order or direction to safeguard the fundamental rights of the people granted through part III of the Indian Constitution. The High Courts and the Apex Courts in India have played an active role not only in implementation of fundamental rights but also in broadening the interpretation of each fundamental rights so as to make it

more meaningful and alive to the needs of the people. Many rights which are not expressly provided under the Constitution have been declared as fundamental rights by the Courts in India by employing eloquent interpretation of the same. Some such rights which became a part of Article 21 is Right to bodily autonomy, right to privacy and right to procreation and reproductive choices.

The Andhra Pradesh High Court in *B. K. Parthasarthi V. Government of Andhra Pradesh*, declared that Right to reproductive autonomy is a part of Right to Privacy and is integral part of right to life under Article 21 of the Indian Constitution. Similarly, in *Javed V. State of Haryana*, the Supreme Court while upholding that a person cannot contest Panchayati Election if two child policy is not followed by such person but at the same time the Apex Court did not deny that there is no right to procreation in India. In another Landmark judgement of *Suchitra Shrivatsava* and another *V. Chandigarh Administration*, while striking down the decision of High Court for terminating the pregnancy of a mentally challenged female against her will the Court also reiterated that right to bodily autonomy is a part of Right to privacy and integral in right to life. The Court further held that a woman's right to privacy, dignity and bodily integrity should be respected. The court further held that reproductive autonomy of a woman can be exercised to procreate as well as to abstain from procreation. In *Devika Biswas V. Union of India* right to reproduction has been expressly regarded as a part of right to life. In *Raja Gopal V. State of Tamilnadu* the Apex Court held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters. In *Justice K. S. Puttaswamy (Retd.) vs. Union of India*, right to privacy was held as a fundamental right as a part of Article 21. It was held that the right to privacy can be claimed against both state and non- state agencies and instrumentalities as the threat to privacy can originate in the age of technological advancement can not only from the state but from the non-state instrumentalities and agencies as well. The Court in its land mark judgement recognised that right to bodily autonomy is significant part of right to privacy. The Apex Court also recognised constitutional right of a woman to make reproductive choices as a part of right to personal liberty. In *Laxmi Mandal V. Deen Dayal Harinagar Hospital and others* the Delhi High Court held that right to health is interpreted to include women's right to survive pregnancy, child birth and to access reproductive health care as a part of state's obligation and thus is a part of right to life.

RIGHT TO REPRODUCTION AND SURROGACY - EXERCISING REPRODUCTIVE AUTONOMY, FIELD RESEARCH

Indian government has banned commercial surrogacy in India considering a number of factors like, it leads to commercialization of the womb or amounts to renting of womb or leads to exploitation of the surrogates or due to economic pressure poor woman are lured to enter into surrogacy agreement wherein there is lack of informed consent both medical and legal and thus amounts to human rights violation of the surrogates.

With an objective to ascertain whether the surrogates had exercised full freedom while entering into surrogacy agreement and whether they had given informed consent or not, the researcher visited Dr. Nayana Patel's Akansha clinic in Anand, Gujarat from 25th to 29th December 2021, wherein the researcher interviewed 26 surrogates in the surrogacy house maintained by Akansha clinic. During the interview the researcher observed that the surrogates were laughing and listening to music and enjoying their stay along with their biological children which was the first indicator that there was no exploitation happening. The surrogates seemed to be very happy with the kind of facilities they were getting at the clinic during their nine months stay whether it was food, or the staff or the medical care which was provided to them. All the surrogates answered in positive that they opted to be surrogates due to economic needs and were to use the money given to them either for the education of their children or for making a home or for helping their husbands economically. However, all the 26 surrogates stated that the whole surrogacy agreement was explained to them and their husband including the medical procedure that they have to undergo and the risks involved in the same. In fact, they stated that we are given proper counselling sessions before they agreed to enter into the surrogacy agreement. This confirms that the surrogates had given free and informed consent while entering into the agreement. All the surrogates signed the surrogacy agreement before conceiving the child. This shows that they were not put into a situation wherein there is a bargain of conceiving the child first and thereafter signing the agreement which will make them vulnerable because they are already carrying the child. One of the surrogates informed the researcher that she had inquired about surrogacy facilities in Ahmedabad, Goa and Kerala and thereafter she chose to become a surrogate in Akansha clinic, which shows that surrogates are making informed choice regarding the same. The surrogates also stated that money is not the only reason to be a surrogate as they feel that by doing so, they are helping an infertile couple and it is pious thing to do. Dr. Nayana Patel mentioned in her interview that the surrogates are paid through cheque this shows that there is no invalid or illegal transaction involved while making payment. Many authors argue that since the surrogates are staying in the surrogacy house they are deprived of their right to cohabitation with their partner and are forced to do the same by the Doctors and the intended couple. However, all the surrogates who were married stated that the decision to stay in the surrogacy house was a combined decision taken by them and their husband's and no one forced to make them stay in house. They further stated that they were given a choice to either stay at surrogacy house or at their own place and it was their informed decision to stay at the surrogacy house. Out of the 26 surrogates who were interviewed by the researcher 14 had come for surrogacy to Dr. Nayana Patel's clinic for the second time. If at all there was any exploitation involved these surrogates would not have opted for the same for the second time. One of the surrogates went on further to say that if surrogacy continues to be legal and permitted, she will not mind sending her own daughter or daughter in law to be a surrogate at Nayana Patel's

Clinic to be a surrogate. This once again proves that if exploitation was present no one would agree to send their own children for being a surrogate.

CONCLUSION AND SUGGESTION

From the above discussion it becomes clear that Right to reproduction and reproductive choices has been held to be a part of Right to life by the Supreme Court of India. Even Right to bodily autonomy has been included as a part of Right to privacy by Supreme Court of India. Time and again it has been reiterated that a woman's reproductive right includes right to be benefitted out of scientific advancement. Thus, the Surrogacy (Regulation) Act 2021, is violative of Article 21 of the Indian Constitution as it abridges a woman's right to reproductive choices and right to bodily autonomy by barring her from exercising her right to be surrogate for monetary compensation. Surrogacy is many a times compared with Organ donation wherein black-marketing rackets are going on. However, in case of surrogacy the organ does not get removed from her body. Surrogacy has also been compared with prostitution and thus against public policy, but again same is not the case for surrogacy. In fact, during the interviews conducted by the researcher, one of the surrogates mentioned that in surrogacy no one touches my body, in fact I help out a needy couple and I get money for the same and there is nothing wrong in it. All the 26 surrogates stated that they don't feel guilty that they are doing anything wrong. The findings of the field research shows that the surrogacy has led to economic empowerment of these woman. All the surrogates stated that they have freely consented to be a surrogate after making an informed choice. Akansha clinic provided them with full legal assistance and the surrogacy agreement was explained to them before they signed it. Thus, there is informed consent on the part of the surrogates both medical and legal. Further while answering the questionnaire all the surrogates mentioned, they don't feel exploited at all. They mentioned that they feel safe and secure in the surrogacy house. Thus, the basis for passing the Act which was absence of informed consent and exploitation of the poor surrogates was found to be totally absent in the field research carried out by the researcher.

The Act also breaches right to reproductive choices and right to scientific advancement of the intending couple by limiting their right to opt for surrogacy. The Constitution of India does guarantee these rights as discussed above and even international instruments like ICCPR and CEDAW provide right to form a family, right to decide whether to have children or not, number of children and space between the children and right to take advantage of scientific advancements as Human rights. These instruments mandate the signatory states to provide these rights to their citizens through municipal legislation in their states. Thus, the Bill not only contravenes the Constitution of India but also abridges the international human rights instruments. One may argue that only commercial surrogacy is banned but altruistic surrogacy is permitted thus the couple can opt for the same but the surrogates when questioned by the researcher whether they will do surrogacy for a couple if no money was paid to them answered in negative. Thus, it will be difficult for the couple to get a surrogate who will be ready to do surrogacy without any receiving any payment. In fact, altruistic surrogacy will lead to pressurizing the daughter in laws in the family to become surrogates and may also lead to black marketing and under the table transactions to employ surrogates. The Act provides that the intended couples have to approach the appropriate authority for getting certificate of essentiality to prove their infertility. This also will lead to abridging the right to privacy of the intended couple.

The aim of adoption and surrogacy is similar that is bringing a child into a childless family. In India adoption is governed by Hindu Adoption and Maintenance Act 1956 and CARA guidelines. Both of which allow foreign parents to adopt a child from India and also allow single female and male to adopt a child. However, the Surrogacy (Regulation) Act 2021, neither allows single person to opt for surrogacy nor allows foreign couples to come for surrogacy in India. This is violative of Article 14 of the Indian Constitution that is right to equality. Further only married couple and widowed or divorced females are allowed to opt for surrogacy under the Act thus the Act makes it mandatory for a person to marry in case one wants to have children through surrogacy. this provision is again violative of Article 21 of the Indian Constitution that is right to life. India has seen a paradigm shift through Supreme Court judgement in Navtej Johar V. Union of India whereby same sex relationship has been decriminalized in India. But still for Gay and Lesbian couple the law is continuing to have orthodox view point by not allowing them to opt for surrogacy wherein that may be the only option for them to beget child which is biologically related to them. Thus, the Act also is violative of the Human rights of LGBTQ community.

To conclude compensated and not commercial surrogacy is the answer. Surrogacy in India needs to be regulated through proper legislation and not banned altogether. Following the example of Israel where commercial surrogacy is permitted but the surrogacy contract is strictly regulated by the courts and legal authorities, India should introduce similar measures to avoid exploitation of surrogates. There are chances that since commercial surrogacy is not permitted the anti-social elements from the society might start taking control and then there would be chances of more exploitation of the surrogates as they will have no one to complain to. The intended couple is already agonized for being childless further if the law is closing the door of surrogacy for them it will be a human right violation. The Law needs to have a softer approach towards the needy surrogates and the infertile couple. Regulating surrogacy by registering the surrogates and the surrogacy contract through State intervention and permitting compensated surrogacy to help the needy woman is the answer and not a blanket ban. In cases of altruistic surrogacy too the surrogate should be at least be compensated for the loss of her earnings during the pregnancy period and during post-natal period apart from medical and insurance cover that the Act seeks to provide. Even the international organization need to work towards preparing Universal guidelines and regulations to lead the States regarding practice of surrogacy.

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