



A critical analysis of The Surrogacy (Regulation) and The Assisted Reproductive Technology (Regulation) Act 2021 of India:- In special reference to women right of reproduction

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Abstract

Parliament of India in the year 2021 passed The Surrogacy (Regulation) Act 2021 and The Assisted Reproductive Technology (Regulation) Act 2021, both of which came into force on 25th January 2022. Before these enactments there was no law governing the surrogacy practise. Although several attempts were made by our parliament in the year 2008, 2010 and 2014 to draft the aforesaid laws but could not succeed. However, the guidelines issued by the Indian Council of Medical Research in the year 2005 titled “The National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India” were regulating the surrogacy industry till the new laws came into force. The law commission on its own took the initiative and submitted the 228th report in the year 2009 suggesting for a strong legislation banning the commercial surrogacy while allowing the altruistic surrogacy. This research article discusses in detail the historical development of the new laws and delve deep into the various provisions of both The Surrogacy (Regulation) Act 2021 and The Assisted Reproductive Technology (Regulation) Act 2021 and critically examine them in the light of women right of reproduction. Although the new laws have been enacted after several round of discussions but even after that, the right of women relating her choice of reproduction have been curtailed to some extent. Apart from critically examining both the laws, the researcher in the conclusion part have suggested the amendments in the present laws in order to achieve every women (irrespective of age, status etc) her right of reproduction.

Keywords: Surrogacy law, assisted reproductive technology law, women right of reproduction, commercial surrogacy, altruistic surrogacy

Introduction

Reproductive rights are considered to be the fourth-generation rights which are part of right to life enshrined in Article 21 of our Constitution ^[1]. There is no specific definition of reproductive rights but the most accepted definition is the definition given in the International Conference on Population and Development ^[2] which states that “Reproductive rights allows every couple to decide the number of pregnancies, the timing of pregnancy and when to be”. The World Health Organisation also recognises the definition given in above International conference. Reproductive rights are not individual rights but they are bundle of rights which gives every couple the right to have their children. In the last one-decade Indian judiciary has pronounced several judgments declaring the reproductive rights as part of inalienable basic human rights or we can say fundamental rights. Courts have even for the first time held that reproductive rights are essential for the quality and their survival.

With the passage of time the right of reproduction has gained a significant status in society. Now either due to medical complications or physical disabilities the couples who are enable to begot the children resort to technological procedures like Assisted Reproductive Technology or Surrogacy for help. Due to this growing demand for these technologies it was the need of hour to enact the law governing The Surrogacy and Assisted Reproductive Technology and our parliament enacted The Assisted Reproductive Technology (Regulation) Act 2021 and The Surrogacy (Regulation) Act 2021, both these acts came into

force on 25th January 2022. The aim and objective of these acts to regulate and control the multi billion unregulated surrogacy industry by banning commercial surrogacy and allowing altruistic surrogacy. Before these enactments several attempts were made by government to draft and redraft the surrogacy laws but could not succeed. However, the guidelines issued by the Indian Council of Medical Research in the year 2005 titled “The National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India” were regulating the surrogacy industry till these new laws came into force. Since these guidelines were recommendatory in nature therefore they were not effective in regulating the surrogacy industry.

With the new law in force the in which commercial surrogacy has been banned, only altruistic surrogacy is allowed, vulnerable poor women are protected from exploitation, rights of the child born out of surrogacy have been protected and National as well as State level surrogacy board has been formed, the government has made an effort to regulate the surrogacy procedure.

Critical Analysis of the Surrogacy Laws

After several years of deliberations finally the two new laws legally regulating the Surrogacy and Assisted Reproductive Technology have been enacted. While some provisions are clear improvements taking into account the various judgments and issues concerning surrogacy, few provisions are restrictive in nature inculcating the patriarchal mindset. The Surrogacy (Regulation) Act 2021 prohibits commercial

surrogacy which bans women from receiving any compensation thereby accepting the patriarchal notion that women labour is of no value hence need not to be compensated. The supreme court recently in a landmark judgment^[3] has held that the concept of tagging the women who are homemakers as non-monetary work force is antiquated and problematic. The banning of commercial surrogacy not only affects the right of livelihood of surrogates which is a fundamental right but also limit the number of women to act as surrogate. This step indirectly affects the right of parenthood to couple who are in need of children. Ban on paying compensation to the surrogates violates article 23 of the Universal Declaration of Human Rights^[4] and also article 7 of International Covenant of Cultural, Economical and Social rights^[5] which directs fair payment for human labour.

The act is an improvement over the previous versions of the bill by allowing the widow and divorced women to opt for surrogacy but it restricts the LGBT^[6] community, single father and unmarried persons from availing the services of surrogacy. This restriction is in clear violation of article 14^[7] which guarantees equal protection of laws and equality before law. In the landmark judgment of Navtej Singh Johar Versus Union of India^[8] hon'ble Supreme court has held that any legislation that discriminates against any individual upon any human trait including sexual orientation is violative of article 14. Moreover, these restrictions also violates various international covenants like article 17 of International conventionnon Economic, Social and Cultural Rights^[9] which restricts the state from arbitrary interference into individual home, privacy and family, article 16 of Universal Declaration Of Human Rights^[10] which recognises individuals right to marry and start a family.

In the new Surrogacy and Assisted Reproductive Technology law the age restriction for availing the surrogacy services have been made which is again posing as hurdle in women right of reproduction. The age criteria for man is between 26 to 55 years and for women is between 25 to 50 years, whereas The National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India^[11] issued by ICMR^[12] mandates only minimum age without any maximum age limit. By fixing the age criteria the act discriminates between those couple who marry or remarry at a later age and finds the services relating to surrogacy unavailable for them. Additionally, the age criteria manifest the patriarchal values that man should be older than women without any scientific backing, whereas we have so many married couples whose husband is younger then wife. The new laws are also silent about the procedure to be followed for those couples one of whom become eligible form age criteria but other one is falling out of age bracket. Apart from age criteria the act also requires the "certificate of necessity" and "certificate of essentiality" from necessary authorities which is an unnecessary hurdle for parents who though are medically fit to procreate but physically unfit to procreate.

The new act further mandates that the Surrogate mother should be a close relative of the intending couple. As we know that unitary family culture is prevalent in India and in this situation finding a close relative who fulfils the age criteria and is willing to act as surrogate without any consideration is rare. Hence this condition of close relative is also hurdle in women right of reproduction.

Conclusion

The Surrogacy (Regulation) Act, 2021 and The Assisted Reproductive Technology (ART) law mark significant strides in regulating surrogacy and reproductive technologies in India, responding to concerns about exploitation and safety. However, these laws also present serious concerns regarding women's rights, equality, and access to reproductive choices. The outright prohibition of commercial surrogacy undermines the value of women's reproductive labor, while the exclusion of the LGBT community, single fathers, and unmarried individuals from surrogacy services violates principles of equality and non-discrimination. Moreover, restrictive age criteria and the requirement for surrogates to be close relatives hinder reproductive autonomy and create unnecessary barriers for individuals seeking to form families.

Despite these setbacks, the law does represent a shift in the regulation of surrogacy in India. However, in its current form, it fails to fully recognize the diverse needs of modern families, as well as the economic rights and personal freedoms of individuals. To foster a more inclusive, equitable, and rights-based approach, the law needs to be reconsidered and amended in several key areas.

Suggestions for Improvement

1. Allow Compensation for Surrogates:

The ban on commercial surrogacy should be reconsidered to ensure that women acting as surrogates are fairly compensated for their labor. This would recognize the value of women's reproductive labor and provide financial autonomy for surrogate mothers, while also safeguarding against exploitation through strict regulation and oversight.

2. Ensure Equality for All Individuals

The law should be amended to allow access to surrogacy for LGBT individuals, single fathers, and unmarried couples. Discriminatory provisions based on sexual orientation, marital status, or family structure contradict the principles of equality and non-discrimination enshrined in both the Indian Constitution and international human rights instruments. The law should guarantee the right of all individuals to start a family, regardless of their marital or sexual identity.

3. Revise Age Restrictions

The age limits for both men and women should be reconsidered. Age restrictions should be based on medical rather than arbitrary or gendered considerations, and they should be flexible enough to accommodate individuals who wish to become parents later in life due to delayed marriage or remarriage. The law should also provide clarity on how situations involving one partner meeting the age criteria while the other does not should be addressed.

4. Simplify the Certificate of Necessity and Certificate of Essentiality

The requirements for these certificates should be simplified to remove unnecessary bureaucratic obstacles for medically eligible couples. These certificates should not be a barrier to access for couples who may be physically unable to procreate but are otherwise fit to raise children.

5. Rethink the Requirement for a Close Relative:

The provision that mandates the surrogate mother be a close relative of the intending couple should be revisited. Instead

of focusing on familial relations, the law could explore broader frameworks to ensure the surrogate's welfare and informed consent, without unnecessarily limiting the pool of available surrogates. This would make the process more inclusive while maintaining the necessary ethical standards.

6. Promote Awareness and Support Systems

A broader public awareness campaign about surrogacy and ART should be launched to educate people about the rights and responsibilities of all parties involved. Furthermore, psychological counselling and support systems should be made available for both intending parents and surrogates to ensure the well-being of everyone involved.

Final Thoughts

The law governing surrogacy and ART in India should reflect a commitment to human dignity, reproductive rights, and equality for all citizens. While it is important to prevent exploitation and safeguard the rights of surrogate mothers, it is equally important to ensure that the law does not infringe upon the autonomy and rights of intending parents. A careful balance must be struck between regulation and the preservation of individual freedoms, with a focus on creating a just, equitable, and inclusive framework for surrogacy and assisted reproduction in India. By addressing these issues through thoughtful amendments, the law can evolve into a more progressive and rights-respecting instrument.

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