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**SURROGATE MOTHERHOOD IN INDIA: An Analysis of Surrogacy  
(Regulation) Act, 2021**

*Paramjit S. Jaswal & Jasdeep Kaur*

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# SURROGATE MOTHERHOOD IN INDIA: An Analysis of Surrogacy (Regulation) Act, 2021

*Paramjit S. Jaswal\* & Jasdeep Kaur\*\**

[**Abstract:** Surrogacy as a practice of conception has been prevalent since times immemorial. In the past few decades, there has been excessive commercialization of the surrogacy procedure, and sidelining of the rights of (surrogate) mother and the child born thus. The legislature has tried to deal with the issue, thus, by way of legislation and enactment of the Surrogacy Regulation Act, 2021. This paper critically analyses the provisions of the Act and the procedure therein.]

## I

### General Overview

Surrogacy refers to the situation where a woman agrees to carry a child for the benefit of the *intended* parents. Surrogacy is a sort of artificial insemination.<sup>1</sup> The practice of surrogacy is not a novel idea and has been in practice since the era of Bible.<sup>2</sup> The term appears in Hammurabi's Babylonian code as well.<sup>3</sup> A surrogacy contract is a remarkable option for people who wish to realize their dream of having a child as, nowadays, parents are more interested in having genetically developed children rather than going for adoption.<sup>4</sup> Two of the most common forms of surrogacy are traditional and gestational. In a conventional surrogacy contract, the surrogate mother also serves as an egg donor and is genetically connected to the child.<sup>5</sup> In a gestational surrogacy, on the

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<sup>1</sup> Marci L. Smith, *Surrogacy Agreements (Review of C. Shalev: Birth Power)*, 1991 BYU L. REV. 709 (1991).

<sup>2</sup> Christine Metter Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administration Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237 (2010) at 241.

<sup>3</sup> National Bioethics Consultative Committee, Report 1 on Surrogacy Canberra, April 1990, 3-4 at 4.

<sup>4</sup> Kelly A. Anderson, *Certainty in an Uncertain World: The Ethics of Drafting Surrogacy Contracts*, 21 THE GEORGETOWN JOURNAL OF LEGAL ETHICS 615 (2008).

<sup>5</sup> Robert D. Arenstein, *Is Surrogacy against Public Policy? The Answer is Yes*, 18 SETON HALL LAW REVIEW 831 (1988).

other hand, the intended parents' sperm and eggs are surgically blended and then deposited in a surrogate who has no genetic ties to the child. In both circumstances, the legal provisions of surrogacy for contract are virtually the same.<sup>6</sup>

Surrogacy had become a multibillion-dollar business in India, prompting a plethora of issues and arguments. It was legal in India, despite the fact that it exploits the surrogate and the child. Various attempts to regulate the surrogacy industry had been made, but none were completely successful. The Medical Council of India's National Guidelines, the Law Commission of India's Report, and Government Notifications regulating both national and international surrogacy are among the several endeavors made in this direction. The latest regulation is applicable in the form of Surrogacy (Regulation) Act, 2021, which tends to make commercial surrogacy an offence. The paper makes an attempt to critically analyze and evaluate the different aspects of the present Act.

### ***Surrogacy (Regulation) Act, 2021***

The present Act is preceded by several draft bills for regulating surrogacy *i.e.*, the Assisted (Reproductive Technologies) Bills 2008, 2010, 2014, and Surrogacy (Regulation) Bills, 2016, 2019, 2020.<sup>7</sup> On 5 August 2019, the Lok Sabha passed the Surrogacy (Regulation) Bill, 2019, which was then sent for detailed examination, discussion, and report to the Select Committee, which consists of twenty three Rajya Sabha members. The Surrogacy (Regulation) Bill, 2020, was passed by the Union Cabinet on February 26, 2020, after the Select Committee published its report.<sup>8</sup> The Surrogacy (Regulation) Act, 2021 was eventually enacted after receiving the president's assent on December 25, 2021 and came into force on January 25, 2022.

*Features of the Act:* Surrogacy Act, confers different rights and protections on the surrogate and the child born through surrogacy. Various governing and certification authorities for surrogacy and surrogacy treatments are also established under the Act.

*Prohibition and regulation of surrogacy clinics:* The Act states that no surrogacy clinic may conduct, associate with, or assist in the performance of activities relating to surrogacy and surrogacy treatments unless it is registered under the Act.<sup>9</sup> There is a prohibition on any person or entity, including a surrogacy clinic, pediatrician, gynecologist, embryologist, registered medical practitioner or other, from engaging in any form of commercial surrogacy<sup>10</sup> or promoting, publishing, canvassing, propagating or

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<sup>6</sup> Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK UNIVERSITY LAW REVIEW 717 (2002-03) at 721.

<sup>7</sup> Press Trust of India, *government introduces bill to ban commercial surrogacy*, India Today (Jul. 15, 2019), available at: <https://www.indiatoday.in/india/story/government-introduces-bill-ban-commercial-surrogacy-1569363-2019-07-15> (last visited on January 23, 2022).

<sup>8</sup> The Surrogacy (Regulation) Bill 2019, PRS India, available at: <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019> (last visited on January 23, 2022).

<sup>9</sup> S. 3(i), Surrogacy Regulation Act, 2021, No. 47, Acts of Parliament 2021 (India).

<sup>10</sup> *Id.*, section 3 (ii).

advertising anything that encourages a woman to act in the role of a surrogate mother.<sup>11</sup> Under the law, an abortion cannot be performed or caused during a surrogacy without the express consent of the surrogate mother and a registered medical practitioner (including gynecologists, pediatricians, embryologists, intended parents, and others).<sup>12</sup>

Commercial surrogacy or commercialization of surrogate motherhood or surrogate motherhood procedures are expressly prohibited by this law. It applies to surrogacy clinics as well as any other location where such procedures may be performed.<sup>13</sup> It is provided through the provisions of the Act that surrogacy will not be undertaken unless the certificate of essentiality obtained by the intended couple. It is further provided that the certificate should be given by the appropriate authority and that has to be verified by the in-charge of the surrogacy clinic as well. Further, the intended parents are required to provide the certificate of infertility from the District Medical Board which will authenticate as to which or both the intended parents are suffering from infertility. The Act requires the surrogate mother to obtain postpartum delivery complications insurance for a period of sixteen months. It is required to be provided through an insurance company or agent who is duly recognized by the Insurance Regulatory and Development Authority.<sup>14</sup>

*Registration of surrogacy clinics:* The Act provides that in order to provide services of surrogacy, it is mandatory for the surrogacy clinic to get its registration process done.<sup>15</sup> Further it is provided through the provisions of the Act that the application for the registration is required to be made within sixty days from the date of appointment of appropriate authority under the Act.<sup>16</sup> The Act debars the surrogacy clinic to carry forward any procedure in relation to surrogacy unless and until registration is not done after the expiry of sixty days from the date of appointment of appropriate authority. It is further provided that such registration will remain valid only for the period of three years and after that the clinic is required on mandatory basis to get the registration done again.<sup>17</sup>

*Establishment of national and state Surrogacy board and other authorities under the Act:* The Act provides for the establishment of surrogacy boards on national and state levels, with the latter being the most comprehensive.<sup>18</sup> Minister in-charge of the Ministry of Health and Family Welfare will preside over the Board as ex officio member; Vice-Chairperson will be the Secretary to the Government of India and will be in-charge of the Department dealing with the surrogacy issue and will preside over the Board; three women from

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<sup>11</sup> Section 3 (v), Surrogacy Regulation Act, 2021.

<sup>12</sup> Section 3 (vi), Surrogacy Regulation Act, 2021.

<sup>13</sup> Section 4, Surrogacy Regulation Act, 2021.

<sup>14</sup> Section 4 (iii), Surrogacy Regulation Act, 2021.

<sup>15</sup> Section 10, Surrogacy Regulation Act, 2021.

<sup>16</sup> Section 10 (3), Surrogacy Regulation Act, 2021.

<sup>17</sup> Section 11, Surrogacy Regulation Act, 2021.

<sup>18</sup> Section 14, Surrogacy Regulation Act, 2021.

Members of Parliament will serve on the Board, two of whom will be elected by the House of the People and one by the Council of States; three members of the Ministries of Central Government in-charge, of whom one from the Legislative Department of the Ministry of Law and Justice, one from the Ministry of Home Affairs and other the Director General of Health Services of the Central Government will also be Member, ex officio; ten expert Members to be appointed by the Central Government; four Chairpersons of the State Boards to be nominated by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the numerical order; and the Director General of Health Services of the Central Government, as Member. The Act establishes the National Assisted Reproductive Technology and Surrogacy Registry, which is used for the registration of surrogacy clinics, among other things.<sup>19</sup>

*Eligibility criteria for surrogate:* According to the Act, a surrogate must be a woman who has been married and has at least one child of her own, and she must be between the ages of twenty-five and thirty-five on the day of implantation. It also stipulates that she should only be a close relative of the couple who are getting married. Furthermore, she should refrain from providing her own gametes and from acting as a surrogate mother more than once in her whole life span. It also states that surrogates must obtain a certificate of physical and psychological fitness for surrogacy and surrogacy treatments from a registered medical practitioner before proceeding with the procedure.<sup>20</sup>

*Eligibility criteria for intending couple:* The Act stipulates that the intended couple's age on the day of certification shall be between twenty three to fifty years in the case of a female and between twenty six to fifty five years in the case of a man.<sup>21</sup> Furthermore, it stipulates that the intending partners must have been married for at least five years and be nationals of India. It is also needed that the intending couple has not previously had any children, whether biologically, through adoption, or through surrogacy, who are still living. The parents of children who are mentally or physically challenged, who suffer from a life-threatening disorder, or who are sick with a terminal disease for which there is currently no cure, can also seek approval from the appropriate authorities and obtain a medical certificate from the District Medical Board before going through with surrogacy. The Act also stipulates that divorced and widowed women between the ages of thirty five to forty five shall be permitted to serve as a single commissioning parent for their children.<sup>22</sup>

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<sup>19</sup> Section 15, Surrogacy Regulation Act, 2021.

<sup>20</sup> Section 4(b), Surrogacy Regulation Act, 2021.

<sup>21</sup> Section 4(c), Surrogacy Regulation Act, 2021.

<sup>22</sup> Ranjit Malhotra, *highlights and brief analysis of the surrogacy (regulation) bill, 2020 and suggested potential safeguards*, INTERNATIONAL BAR ASSOCIATION, available at: <https://www.ibanet.org/article/B5C65969-4901-49A9-82CF-8DC4C8BEB1E2> (last visited 23 Jan., 2022).

*Surrogate right to withdraw consent:* As per the provisions of the Act, no person shall seek or conduct surrogacy procedures unless he or she has informed the surrogate mother concerned of all known side effects and after effects of such procedures and has obtained her written informed consent to undergo such procedures in a language she understands. It is provided in the Act that a surrogate mother has the opportunity to withdraw her consent for surrogacy before the embryo is implanted in her womb.<sup>23</sup> The Act further states that no one, including a person, organization, surrogacy clinic, laboratory, or clinical facility of any sort, will coerce a surrogate mother to abort at any point of the surrogacy process, with the exception of those authorized by law.<sup>24</sup>

*Prohibition regarding abandoning of child born through surrogacy:* The Act prohibits the abandonment of a child born through a surrogacy procedure for any reason, including a genetic defect, birth defect, any other medical condition, the development of defects later on, the child's gender, or the conception of more than one child by intended parents, whether in India or elsewhere. In addition, it states that the child would be treated as the biological child of the intending spouse, and that he or she will be entitled to all of the rights and privileges that would otherwise be given to a natural child under any law already in effect.<sup>25</sup>

*Prohibition of commercial surrogacy, exploitation of surrogate mothers, and children born through surrogacy:* It is prohibited by the Act for any private individual, organization, surrogacy clinic, laboratory, or clinical establishment of any kind to engage in or provide commercial surrogacy, to run a racket or an organized group to empanel or select surrogate mothers, or to use individual brokers or intermediaries to arrange for surrogate mothers and surrogacy procedures at such clinics, laboratories, or clinical establishments of any kind, whether in such clinics or laboratories or in any other location. The publication, distribution, and communication in the form of advertisement regarding commercial surrogacy are also prohibited by the law. It is also required that any such organization should not abandon, disown or exploit children born through surrogacy, or cause children born through surrogacy to be abandoned, disowned or exploited in any way, under any circumstances. In addition, the exploitation of surrogates is illegal under the law. The Act also prohibits the authorities from selling human embryos or gametes for the purpose of surrogacy, as well as from operating an agency, a racket, or an organization for the purpose of selling, purchasing, or trading in human embryos or gametes for the purpose of surrogacy.<sup>26</sup>

*Offences and penalties under the Act:* The Act stipulates that no person, organization, surrogacy clinic, laboratory, or clinical institution of any type is permitted to engage in commercial surrogacy activities. Moreover, it is illegal in the Act that such clinics or

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<sup>23</sup> Section 6, Surrogacy Regulation Act, 2021.

<sup>24</sup> Section 10, Surrogacy Regulation Act, 2021.

<sup>25</sup> Section 7, Surrogacy Regulation Act, 2021.

<sup>26</sup> Section 35, Surrogacy Regulation Act, 2021.



businesses will look for surrogate mothers, use individual brokers or intermediaries to arrange for surrogate mothers, or perform surrogacy treatments if they are not affiliated with a recognized surrogacy organization.<sup>27</sup> All of these situations are punished by imprisonment for up to ten years, as well as a fine that can reach a maximum of ten lakh rupees, under the Act. These offences have been declared as cognizable, non-bailable, and non-compoundable by the Act.<sup>28</sup>

## II

### Critical Analysis of the Act

Despite the fact that the Act has been enacted with the intention of regulating the practice of surrogacy and combating exploitation of women and surrogates, its provisions are discriminatory against women.<sup>29</sup> Women can be exploited rather than protected, and there are concerns that the Act may increase the use of unlawful commercial surrogacy. In the succeeding paragraphs, the lacunae in the Act is highlighted.

#### *Infringement of Women's Reproductive Rights*

The right to reproductive choice refers to a woman's ability to determine whether or not to have children, as well as whether or not to keep or end an unintended pregnancy and select the family planning and contraception technique that she prefers.<sup>30</sup> These rights have been expanded to include access to contraception, the right to a legal and safe abortion, the right to make decisions regarding reproduction free of discrimination, coercion, and violence, the right not to be subjected to harmful practices such as coerced childbearing.<sup>31</sup> The Supreme Court and the high courts have established, in a number of cases, that the right to reproductive autonomy is a part of the right to life and personal

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<sup>27</sup> Section 38, Surrogacy Regulation Act, 2021.

<sup>28</sup> Section 43, Surrogacy Regulation Act, 2021.

<sup>29</sup> Mohini Priya, *Critical Analysis Of Surrogacy (Regulation) Bill 2021 And Assisted Reproductive Technology (Regulation) Bill 2021*, LIVE LAW (Mar. 5, 2022), available at: <https://www.livelaw.in/columns/surrogacy-regulation-bill-2021-srb-assisted-reproduction-technology-regulation-art-bill-2021-surrogacy-regulation-bill-2016-193425>. (last visited 20 Oct., 2022).

<sup>30</sup> Carmel Shalev, *Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women*, 4(2) HEALTH HUM. RIGHTS 38 (2000) at 39.

<sup>31</sup> Arijeet Ghosh, Nitika Khaitan, *A Womb of One's Own: Privacy and Reproductive Rights*, 52 EPW 42 (Oct. 2017).

liberty under Article 21 of the Indian Constitution.<sup>32</sup> The Andhra Pradesh High Court held in *B K Parasarathi v. State of Andhra Pradesh*<sup>33</sup> that "the freedom to make a decision regarding reproduction is ultimately a very personal decision on the side of the man or woman." The Supreme Court ruled in *Suchita Srivastava v. Chandigarh Administration*<sup>34</sup> that a woman's freedom to make reproductive decisions is a part of her 'personal liberty,' as defined by Article 21. The court went on to explain that acknowledging that reproductive decisions can be utilized to both reproduce and refrain from procreation is crucial. *K. S. Puttaswamy (Retd.) and Others v. Union of India*, Justice K. S. Puttaswamy (Retd.) also reiterated that the reproductive choice of the women is an aspect of personal liberty under Article 21 of the Constitution of India.<sup>35</sup> In any debate of privacy, the Supreme Court of India's nine-judge bench reiterated the importance of decisional autonomy. In the instances of *Navtej Singh Johar v. Union of India*<sup>36</sup> and *Joseph Shine v. Union of India*,<sup>37</sup> the courts established a constitutional requirement to strike down laws that reflect discriminatory stereotypes and obstruct women's sexual autonomy, which includes the freedom to make reproductive decisions.<sup>38</sup> Despite all these landmark judgments, the Act excludes certain classes of women from the benefits of surrogacy which in fact is a violation of the reproductive right of women and bodily autonomy which has also been recognized in various foreign countries.<sup>39</sup>

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<sup>32</sup> The Act allows Intending women and Intending Couples only to undertake surrogacy. For details See Surrogacy (Regulations) Act, 2021, S. 2 (r) and (s).

<sup>33</sup> 1999 (5) A.L.T. 715.

<sup>34</sup> (2009) 9 S.C.C. 1.

<sup>35</sup> (2017) 10 S.C.C. 1.

<sup>36</sup> A.I.R. 2018 S.C. 4321.

<sup>37</sup> 2018 S.C.C. OnLine S.C. 1676.

<sup>38</sup> Dipika Jain and Payal K. Shah, *Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India*, 39 *CARDOZO J.L. & GENDER* 3 (2020).

<sup>39</sup> The Kenyan Constitution of 2010 guarantees access to safe and legal abortion, and the High Court of Kenya in Malindi has ruled that patients and medical professionals cannot be arbitrarily detained or prosecuted for seeking or providing abortion (*PAK and Salim Mohammed v. Attorney General and Three Others* (Malindi High Court Petition Number E009 of 2020).

Abortion up to 24 weeks of pregnancy has been deemed legal by the Colombian Constitutional Court. Before the verdict, abortion was illegal in Colombia with few exceptions (*Causa Justa Lawsuit to Decriminalize Abortion in Colombia* (Colombian Constitutional Court) Lawsuit of unconstitutionality of Article 122 of Law 599 of 2000 of the Penal Code.

The Kansas Supreme Court establishes, for the first time, that the right to abortion is a fundamental right protected by the Kansas Constitution, independently of the protections afforded by the U.S. Constitution (*Hodes & Nauser MDs, P.A., et. al. v. Schmidt & Howe* (2019).

In two landmark rulings, the United Nations Human Rights Committee determines that Ireland's strict ban on abortion subjected women to cruel, inhuman and degrading treatment (*Mellet v. Ireland* (2016), *Whelan v. Ireland* (2017) (United Nations Human Rights

*Contd...*

### ***Discrimination against Disabled Children***

The existing Act discriminates against disabled children by dividing disabled and non-disabled children for the purpose of undertaking surrogacy.<sup>40</sup> Even while it is unlawful for other parents who do not have disabled children, the Act expressly provides that if the parents have a disabled child, they are allowed to employ surrogacy.<sup>41</sup> It goes against the UN Convention on the Rights of Persons with Disabilities, which provides that children with disabilities should have the same access to all human rights and fundamental freedoms as other children and should not be discriminated against on any basis, especially on the basis of their disability.<sup>42</sup>

### ***Banning Commercial Surrogacy is no Solution***

There are concerns that just prohibiting commercial surrogacy will drive the industry underground, allowing it to survive illegally. Legal or illegal agreements will be created if there are willing parents and women willing to be surrogates.<sup>43</sup> If the law is well-regulated, the surrogacy sector will be less likely to thrive in underground marketplaces, and surrogates will be less likely to be exploited.<sup>44</sup> If surrogacy is made illegal for the large segments of the population, it is likely that people will find other ways to meet their needs. Surrogacy for the sake of benevolence comes with its own set of dangers.<sup>45</sup> In India, women in these situations are rarely the final decision-makers. Mild persuasion may be used to persuade a woman in the family to take on the role of surrogate when a

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Committee).

The United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) rules that Peru's failure to guarantee access to essential reproductive health services, including legal abortion, violates international treaty obligations (*L.C. v. Peru*: CEDAW Committee 2011).

<sup>40</sup> Karan Babbar and M. Sivakami, *The Surrogacy Regulation Act 2021: Another Attempt to Reproduce A Heteronormative Patriarchal Society*, FEMINISM IN INDIA (Feb. 19, 2022) available at: <https://feminisminindia.com/2022/02/02/the-surrogacy-regulation-act-2021-another-attempt-to-reproduce-a-heteronormative-patriarchal-society/> (last visited 12 Aug., 2022).

<sup>41</sup> Section 4 (C) (II) Proviso, Surrogacy Regulation Act, 2021.

<sup>42</sup> UN Convention on Rights of the Persons with Disability, U.N.G.A. Res. A/RES/61/106 (Dec. 13, 2006) Preamble, Article 3 and 7.

<sup>43</sup> G. Seetharaman, *Ban on surrogacy for foreigners: How govt's recent decision will push a booming industry into black market*, (Nov. 8, 2015) available at: <https://economictimes.indiatimes.com/news/politics-and-nation/ban-on-surrogacy-for-foreigners-how-govts-recent-decision-will-push-a-booming-industry-into-black-market/articleshow/49703554.cms?from=mdr> (last visited 15 Aug., 2022).

<sup>44</sup> Bhupender Kumar Jodhta, *Surrogacy in India: Issues and Perspective*, 18 (1 & 2) NYAYA DEEP: OFFICIAL JOURNAL OF NALSA 10 (2017) at 15.

<sup>45</sup> Astha Srivastava, *The Surrogacy Regulation (2019) Bill of India: A Critique*, 22(1) JOURNAL OF INTERNATIONAL WOMEN'S STUDIES 140 (2021).

family feels the need for a child through surrogacy.<sup>46</sup> Further apart from persuasion emotional, psychological, and physical trauma can also be used against such a relative to undertake surrogacy against her wish. The chances increase further as the Act makes surrogacy limited to ever married or widowed women who can be easily victimized in case they are living alone.

### ***Infringement of the Right to Livelihood***

Human embryos and gametes must not be sold or traded. Including traditional surrogacy in this new definition of "commercial surrogacy" could, however, be construed as a breach of the Constitution's Article 19 (1) (g).<sup>47</sup> The ban is detrimental to the surrogate mother's interests, as surrogacy could be her only source of income. Only the 'reasonable limits' mentioned in Article 19 (1) (g) can be used to limit the privilege granted by Article 19 (2). The limitations of the Act do not appear to be fair, and thereby contravene Article 19 (1) (g).<sup>48</sup> Putting a complete ban on commercial surrogacy is also violative of Article 21 as was held in *Consumer Education and Research Center v. Union of India*,<sup>49</sup> that "the expression 'life' under Article 21 has a wider meaning, including the 'right to livelihood'". The same has also been recognized in *Olga Tellis v. Bombay Municipal Corporation*.<sup>50</sup>

### ***Restricted Definition of Intending Couple/Woman***

When it comes to the exclusion of specific groups of persons from the definition of intending couple/woman, it is important to note that the word "intending couple" refers to a married couple of Indian origin who has a medical indication.<sup>51</sup> In addition, an Indian woman who is a widow or divorced is not considered as an "intending woman."<sup>52</sup> According to a study of these two interpretations, foreigners, homosexual couples, couples in a live-in relationship, and unmarried couples are all prohibited from employing surrogacy under the Act.<sup>53</sup> These exclusions are unreasonable and may stand

<sup>46</sup> Pros and Cons of Altruistic Surrogacy, CONCEIVE ABILITIES BLOG (Jun. 06 2019), available at: <https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy> (last visited 12 Oct., 2022).

<sup>47</sup> Vibha Nadig, Profession and Privacy: Critiquing the Surrogacy Bill, LAW AND OTHER THINGS BLOG (Sep. 20, 2020), available at: <https://lawandotherthings.com/profession-and-privacy-critiquing-the-surrogacy-bill/> (last visited 15 Aug., 2022).

<sup>48</sup> Stency Mariya Mark, *Commercial Surrogacy with Special Reference to Capabilities Approach*, 3 (1) GLS LAW JOURNALS 71 (2021) at 81.

<sup>49</sup> (1995) 3 S.C.C. 42.

<sup>50</sup> 1985 S.C.R. Supl. (2) 51.

<sup>51</sup> Section 2(r), Surrogacy Regulation Act, 2021.

<sup>52</sup> Section 2(s), Surrogacy Regulation Act, 2021.

<sup>53</sup> Anudev Shah, *The New Surrogacy Bill Won't Let Live-in and LGBTQ Couples Become Parents*, NEWS 18 (Dec 20, 2018), available at: <https://www.news18.com/news/india/the-new-surrogacy-bill-wont-let-live-in-and-lgbtq-couples-become-parents-1979055.html>. (last visited 12 Aug., 2022).

in violation of Article 14 of the Indian Constitution, as they fail to pass the reasonable classification test, especially when individuals of any marital status are allowed to adopt children and a child born out of a live-in relationship has been given the status of the couple's legitimate child.<sup>54</sup> Furthermore, the Act ignores the rights of the third gender, which were recognized in the *National Legal Services Authority v. Union of India* case.<sup>55</sup>

### ***Exploitation of Women***

The Act enables only close relatives to act as surrogates.<sup>56</sup> It will, on the other hand, aggravate women's exploitation. They may be forced to act as surrogates by their families. This will strain the family and may result in violence towards women. Furthermore, these provisions place unreasonably restrictive restrictions on the bodily autonomy and reproductive rights of women who desire to be surrogates for friends or family but do not fit the criteria. According to the authorities, there is no logical reason why unmarried and childless women should not be surrogates. Without such explanation, every physically and mentally fit woman should be entitled to decide on her own whether or not to pursue a surrogacy arrangement.<sup>57</sup>

### ***Absence of Provisions for Fixation of Time Limits in Certain Cases***

Surrogacy cases are to be handled by the courts, according to the Act. However, the Act makes no mention of a deadline. The courts are already overburdened with the pendency of ordinary cases. If the parties have a disagreement, it will have an impact on deciding matters like parentage, reasonable expenses, and insurance, among others and will result in further delay due to non-fixation of time limit through the provisions of the Act. A paternity and custody order for a surrogate child is also established by the Act, which is to be adjudicated by a Magistrate court. There is, however, no time limit prescribed for same.

### ***Ambiguity in Provisions of the Act***

The establishment, control, or monitoring of ART Bank has not been addressed in the Act. The term 'appropriate authority' is included in the Act, although the requirements do not specify who should be appointed to the authority. There is no provision in the Act for the surrogacy procedure or the surrogate's name to be made public or

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<sup>54</sup> B.C. Nirmal, *Surrogacy Law in Making: The Indian Scenario*, 49 BANARAS LAW JOURNAL 9 (2020) at 30.

<sup>55</sup> (2014) 5 S.C.C. 438.

<sup>56</sup> Prasanna Mohanty, *The Surrogacy (Regulation) Bill 2019: A Casual approach to a Serious Concern*, BUSINESS TODAY (Aug 15, 2019), available at: <https://www.businesstoday.in/latest/policy/story/surrogacy-regulation-bill-2019-infertility-indian-council-of-medical-research-icmr-surrogate-mothers-in-vitro-fertilisation-ivf-222257-2019-08-15> (last visited 12 Aug., 2022).

<sup>57</sup> Astha Srivastava, *The Surrogacy Regulation (2019) Bill of India: A Critique*, 22(1) JOURNAL OF INTERNATIONAL WOMEN'S STUDIES 140 (2021) at 149.

confidential. The Act states that a surrogate can only act as a surrogate once in her lifetime, but there are no limits on the number of embryo transfers that can be performed to help her produce the child. Surrogate abortion is only permitted with the surrogate's written consent, according to the Act. There is, however, no mention of a time limit. The Act is silent on how long the custody of the intended parents must be given over. The child's right to breastfeed is also exploited if the infant is handed over right away, which is not included in the Act's requirements.

### III

#### **Concluding Remarks and Suggestions**

The present Act seems to be an impressive piece of legislation that aids women and safeguards rights and interests of surrogates. However, instead of protecting surrogates and regulating black marketing, there is concern that it may foster surrogacy exploitation and the underground black economy, where surrogates (other than relatives as provided by the Act) and intended parents will be undertaking commercial surrogacy without being disclosed to any other. In relation to surrogacy arrangements in India, it is respectfully proposed that the Act should include the following clauses:

- a. The right to reproductive autonomy is a personal one for both men and women. It should not be violated by limiting surrogacy to married couples only. In today's world, all people, regardless of gender, are guaranteed reproductive autonomy. In no way should this liberty be curtailed.
- b. The right to know one's true identity should be extended to surrogate children. The intended parents should tell the youngster everything he needs to know about his surrogacy delivery. In addition, the newborn should be allowed to breastfeed through surrogate for at least 6 months as a matter of right to protect her health and give better care and protection. In addition, when it comes to surrogacy adoption, the Act should abolish the distinction between impaired and able-bodied children.
- c. Instead of explicitly forbidding commercial surrogacy and allowing only altruistic surrogacy, it is suggested that controlled commercial surrogacy be allowed within the Act's restrictions, as altruistic surrogacy has its limitations and can lead to women's exploitation within the family. The Act's requirements can be implemented in such a way that surrogacy is only performed at government hospitals, and the amount to be paid to the surrogate should also be decided by the Act, ensuring that surrogates are not exploited. Poor women who are forced to work for free, will be able to protect their right to a living this way.
- d. Unreasonable distinctions between married couples who are allowed to bear surrogates and others who are not, such as single men, single females, live-in

partners, and persons of third gender, should be repealed, as they obviously violate Article 14 of the Indian Constitution.

- e. The Act's provisions regarding the fixing of the time period, the concerned authorities, the need for surrogate counseling, the surrogate's situation in the event of a postpartum delivery, the embryo transfer limit, the clarity of the entire surrogacy procedure's expenses, and the surrogate's anonymity must all be clarified.