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THE BAN ON COMMERCIAL SURROGACY IN INDIA: A CONSTITUTIONAL EXAMINATION OF WOMEN'S AUTONOMY

By- Samrina Zahedin, Final Year Law Student.

Abstract –

The Surrogacy (Regulation) Act, 2021 introduced a comprehensive prohibition on commercial surrogacy in India while permitting only altruistic surrogacy under limited conditions. Although the legislation seeks to prevent the exploitation of women and the commercialization of reproduction, it has generated significant constitutional concerns regarding reproductive autonomy, bodily integrity, and economic freedom. This article critically examines the constitutional validity of the ban through the framework of Articles 14, 19, and 21 of the Constitution of India. It analyses the statutory scheme governing surrogacy and the judicial recognition of reproductive choice, privacy, and dignity as integral components of personal liberty. The article argues that while the State has a legitimate interest in protecting vulnerable women, an absolute prohibition on compensated surrogacy may disproportionately restrict women's autonomy and decision-making capacity. It concludes that a rights-based regulatory framework offering safeguards and regulated compensation would better reconcile protection with constitutional freedoms.

Keywords –

Commercial Surrogacy, Reproductive Autonomy, Women's Rights, Constitutional Law, Article 21, Privacy, Dignity, Surrogacy Regulation.

INTRODUCTION –

‘Infertility’ as recognized by the World Health Organization (WHO) is a medical condition of a male or a female where there is an inability to achieve pregnancy even after 12 months of unprotected sexual intercourse. This hinders the natural ability of both male and female to conceive a child, causing a natural rise in the demand for alternate reproduction techniques.

Surrogacy has become one of the most significant developments in Assisted Reproductive Technology (ART) which offers individuals and couples an alternative means of parenthood where they were unable to conceive naturally. Widely Surrogacy is referred to as 'a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth'¹ There are two categories of Surrogacy, one is altruistic surrogacy where there is no financial compensation beyond medical expenses and insurance coverage; and the second is Commercial Surrogacy which entails payment to the surrogate mother for her reproductive services. This practice raises serious concerns regarding the legal, social, ethical and constitutional conditions that surround pregnancy and reproduction.

For decades India has been the global hub for commercial surrogacy because of advanced medical infrastructure, and comparatively lower costs. One of the major factors contributing towards the increasing rates of surrogacy in India is the availability of willing surrogate mothers, this attracts intending parents from across the world. Comprehensive commercial surrogacy became legal in India in 2002, which opened the floodgate to scandals and exploitation of women, yet the market grew steadily. The legalization was a part of the country's efforts towards promoting medical tourism, the Confederation of Indian Industry predicts that this practice now generates US \$ 2.3 billion annually.² This industry generated significant economic opportunities for women, particularly those from economically disadvantaged sections of the society.

However, commercialization of reproduction and lack of regulatory oversight and instances of cross border disputes called for stricter state supervision and control. In response, the Indian Legislature enacted "*The Surrogacy (Regulation) Act, 2021*", which completely prohibits Commercial Surrogacy and permits Altruistic Surrogacy under specified conditions.

While, the objective being the prevention of Exploitation, the outright ban on commercial surrogacy has raised considerable constitutional debate. The woman's ability to make autonomous decisions regarding her body and reproductive choices is protected under the rights enshrined under Article 14, 19, and 21 of the Constitution of India. This article examines

¹ National ART & Surrogacy Portal, Dep't of Health Rsch., Ministry of Health & Fam. Welfare, Gov't of India, <https://artsurrogacy.gov.in/> (last visited June 8, 2026).

² Priya Shetty, *India's Unregulated Surrogacy Industry*, 380 **Lancet** 1633, 1633–34 (2012).

whether the prohibition is constitutionally justified or whether it disproportionately restricts women's autonomy, dignity and reproductive freedom.

THE LEGAL FRAMEWORK GOVERNING SURROGACY IN INDIA

The Indian surrogacy regime is governed under *The Surrogacy (Regulation) Act, 2021*, which strictly prohibits foreign nationals from accessing surrogacy services in India, whether commercial or altruistic. This move was made to prevent the exploitation of Indian women and to regulate the process under ethical guidelines.

Only Indian citizens, NRIs (Non-Resident Indians), and OCI (Overseas Citizen of India) cardholders are eligible for altruistic surrogacy, provided they meet specific conditions like a minimum of five years of marriage, proven infertility, and age criteria. Additionally, the surrogate must be a close relative, married, and have a biological child of her own. She can act as a surrogate only once in her lifetime.

The Law has made India's surrogacy framework highly restrictive for international couples, shifting global surrogacy demand to countries with more inclusive legal systems.

Key Definitions under section 2

Section 2(1)(b), of *The Surrogacy (Regulation) Act, 2021*³ titled "Altruistic Surrogacy," defines altruistic surrogacy as a surrogacy arrangement in which the surrogate mother receives no monetary compensation other than medical expenses, prescribed expenses, and insurance coverage. The provision reflects the legislative intent that surrogacy should be based on assistance rather than financial gain.

Conversely, **Section 2(1)(g)**⁴, of the Act titled "Commercial Surrogacy," defines commercial surrogacy as any arrangement involving payment, reward, remuneration, monetary incentive, or other financial benefit to the surrogate mother or her representatives beyond the permissible medical and insurance expenses. The definition also includes the sale or purchase of embryos, gametes, and surrogate motherhood services.

Through this provision, Parliament clearly distinguished permissible altruistic arrangements from prohibited commercial transactions.

³ The Surrogacy (Regulation) Act, No. 47 of 2021, § 2, India Code (2021).

⁴ Ibid

Section 38: “Prohibition of Commercial Surrogacy, Exploitation of Surrogate Mothers and Children Born Through Surrogacy”⁵

The strongest expression of legislative policy appears in Section 38. Under the marginal note “Prohibition of Commercial Surrogacy, Exploitation of Surrogate Mothers and Children Born Through Surrogacy,” the provision prohibits any person, clinic, organization, or intermediary from undertaking commercial surrogacy, advertising surrogacy services, exploiting surrogate mothers, trading in embryos or gametes, importing embryos for surrogacy purposes, or engaging in sex selection.

Section 38(2)⁶ imposes stringent penalties for violations, prescribing imprisonment of up to ten years and a fine that may extend to ten lakh rupees. The severity of these penalties demonstrates Parliament's intention to eradicate commercial surrogacy altogether rather than merely regulate it.

COMMERCIAL SURROGACY AND CONSTITUTIONAL PROTECTION OF REPRODUCTIVE AUTONOMY

The constitutional debate surrounding the prohibition of commercial services fundamentally a debate about the reproductive autonomy First stop the concentration of India does not expressly recognise reproductive rights However judicial interpretation has progressively expanded the scope of Article 21 to encompass an individual’s freedom to make intimate and personal decisions relating to reproduction parenthood and bodily integrity. Any restriction on surrogacy has to be examined against the constitutional guarantees of privacy dignity personal liberty and decisional autonomy.

Reproductive Choice as a facet of personal Liberty under Article 21⁷.

Article 21 guarantees that no person shall be deprived of life or personal defective except according to the procedural established by law. The ever-expanding scope of article 21 has transformed it into a repository of substantive rights necessary for a dignified existence. One of such developments is the Freedom to make Reproductive choices, including decisions concerning procreation, contraception and parenthood.

⁵⁵ Supra Footnote 3 §38

⁶ Ibid

⁷ CONSTITUTION OF INDIA art. 21.

The leading authority on this issue is *Suchita Srivastava v. Chandigarh Administration*⁸, where the Supreme Court unequivocally recognized that a woman's reproductive choices constitute an integral aspect of personal liberty under Article 21. The Court held that reproductive autonomy includes both the right to procreate and the right to abstain from procreation. Importantly, the judgment emphasized that reproductive freedom encompasses a woman's entitlement to make decisions regarding her body without unwarranted state interference. This recognition established reproductive choice as a constitutionally protected interest rather than a mere statutory privilege.⁹

The constitutional foundation of reproductive rights was further strengthened in *Justice K.S. Puttaswamy v. Union of India*,¹⁰ wherein a nine-judge bench recognized the right to privacy as a fundamental right. The Court expressly held that privacy includes decisional autonomy in matters relating to family life, marriage, procreation, sexual orientation, and bodily integrity. Reproductive decisions were identified as among the most intimate choices that an individual can make and therefore deserving of the highest degree of constitutional protection¹¹.

Thus, state action that substantially interferes with reproductive decision-making must satisfy the requirements of legality, necessity, and proportionality.

CONSTITUTIONAL CONCERNS SURROUNDING THE BAN

The prohibition of commercial surrogacy under the Surrogacy (Regulation) Act 2021 has raised a constitutional debate regarding the extent to which the state may restrict the reproductive choices in the name of protecting women from exploitation. While the legislation seeks to eliminate the commercialisation of reproduction, its blanket ban raises concerns relating to the autonomy equality and economic liberty.

Women's Autonomy and Bodily Choice

A central criticism of the ban is that it limits a woman's ability to make decisions concerning her own body and reproductive capacities. The tournament on reproduction is recognised as an aspect of personal liberty under Article 21 of the Constitution of India, which includes the

⁸ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1

⁹ Rohini Patil & Mahipal Parmar, *Commercial Surrogacy: Examining the Issues Framed by the Supreme Court*, LiveLaw (June 8, 2024, 10:29 AM), <https://www.livelaw.in/articles/supreme-court-and-commercial-surrogacy-surrogacy-regulation-act-259962>.

¹⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

¹¹ Supra Footnote 8

freedom to make choices regarding procreation and parenthood. Critics argue that a woman who voluntarily chooses to become a surrogate mother should be entitled to decide whether she wishes to receive compensation for her reproductive labour. By prohibiting all forms of compensated surrogacy, the law arguably has prioritised state protection over individual choice and autonomy, further it assumes that women are incapable of making informed decisions and this ban has been criticised as reflecting a paternalistic approach rather than a regulatory one.

Equality and non-arbitrariness

The legislation further raises concerns Under article 14 of the constitution¹² Which prohibits Arbitrary state discrimination. The Act has permitted altruistic surrogacy while prohibiting commercial surrogacy on the premise that financial compensation Will lead to exploitation. The question arises whether the distinction is constitutionally sustainable or not? If surrogacy itself is legally permissible the mayor presence of compensation may not necessarily render the arrangement as exploitative.

Furthermore, altruistic surrogacy may also involve coercive family or societal pressures Which are not addressed by the legislation The distinction drawn between altruistic and commercial surrogacy they are 4 raises questions regarding whether the classification has a rational access to the objective of preventing exploitation.

Economic Freedom

The impugned legislation Further affects the economic interests of women who View Surrogacy as a legitimate source of livelihood. Before the enactment of the legislation, commercial surrogacy has provided financial opportunities to many women, particularly those from economically disadvantaged backgrounds. It is contended that instead of imp Our blanket ban, the state Would have adopted a regulatory framework Which included ensuring informed consent medical safeguards and fair compensation.

From this perspective, the prohibition may be viewed as restricting economic choice without adequately considering less restrictive alternatives First in the Constitutional debate thereby extends beyond Mere reproductive rights and encompasses broader concerns regarding women's participation in economic activities which involve reproductive labour.

¹² CONSTITUTION OF INDIA art. 14.

BALANCING AUTONOMY AND PROTECTION: THE WAY FORWARD

The concerns regarding the provision of commercial surrogacy is not to be dismissed lightly India's experience with an unregulated surrogacy market has revealed genuine risks of exploitation unequal bargaining power inadequate medical care and the commercialization of women's reproductive capacities. The state there Possessed a legitimate interest in ensuring that surrogacy arrangements are not too compromised or welfare of the surrogate mothers.

However, the existence of exploitation doesn't justify a blanket prohibition. A complete band assumes that all compensated surrogacy arrangements are inherently coercive Android overlooks the possibility that women might voluntarily also choose to engage in service as a form of reproductive labour. Prohibition On compensation altogether can Exchanged with a more balanced approach which would involve regulating the conditions under which compensation may be provided. Such frameworks would recognise women's autonomy while simultaneously addressing the concerns of exploitation. Text Lyn

A right based regulatory model includes the following –

- *Mandatory counselling Independent legal advised an informed consent procedure which are balanced with psychological assessment and comprehensive health care protections throughout pregnancy and the postpartum period.*
- *Full Compensations should be standardised and monitored by regulatory authorities to prevent coercive or exploitative arrangements.*
- *Additionally strict licencing requirements for surrogacy clinics transparent contractual safeguards and continuous oversight by state and national surrogacy Boats would strengthen accountability within the sector.*

Finally, the challenge does not lie in choosing between autonomy and protection But in designing a legal framework that accommodates both. Effective regulation rather than absolute prohibition will offer a more constitutionally compatible solution capable of safeguarding interests of women while respecting their capacity for informed decision making.

CONCLUSION

The debate surrounding commercial surrogacy in India reflects a broader constitutional tension Between the states duty to protect the vulnerable individuals and the individual's right to

autonomy and self-determination. the Surrogacy (Regulation) Act 2021 Was enacted with the laudable objective of preventing exploitation and curbing the commercialization of reproduction. The legislation raises important questions regarding the extent to which the state may restrict a woman's control over her reproductive capacities in pursuit of protective goals.

Where constitutional jurisprudence increasingly recognises privacy, dignity, bodily integrity, and reproductive choices as integral components of personal liberty, any limitation upon such return has to satisfy the standards of reasonable less and proportionality.

While the risks associated Unregulated surrogacy market are undeniable the assumption that compensation Necessarily results in exploitation remains open to discussion. Furthermore, the constitutional inquiry should not be whether Surrogacy is to be permitted or prohibited in absolute terms but whether the law strikes a fair balance between protection and choice.

The future of surrogacy regulation in India therefore lies in harmonizing the two through a rights-based legal framework that treats women as both rights-bearing individuals and beneficiaries of meaningful legal safeguards.

