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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

RIGHT TO REPRODUCTIVE AUTONOMY OF WOMEN IN THE PARADIGM OF SURROGACY: A REALITY OR PHANTASM?

AUTHORED BY - MADHURIMA NAHA¹

ABSTRACT:

Woman subsists the human race by procreating. Her body is the vessel via which life takes form in this planet but how far has women been able to consciously decide without being influenced by external entities as to whether she wants to use her body for procreation or not and if she is desirous of using her body for reproduction then as to when she wants to do so or what means she wants to employ? Right to reproductive autonomy is concomitant to the dignity of woman and cannot be compromised and sabotaged at any point of time. Surrogacy as a means of procreation has been on the rise for quite some time to procreate round the globe and in India. Until 2021 India lacked any legislation pertaining to the realm of surrogacy. In 2021, a dedicated legislation, the Surrogacy (Regulation) Act, 2021 was enacted to regulate and monitor the process of surrogacy and the entities involved in the realm of surrogacy. The present article is an assessment of the realisation and existence of the right to reproductive autonomy of woman in the realm of surrogacy after the coming into force of the legislation concerned.

Keywords: Surrogacy, Reproductive autonomy, rights, procreation, women,

INTRODUCTION:

To procreate and to have a family is a right to which every individual is entitled to irrespective of any parameter of differentiation. Everyone is entitled to have a family and to have children. Women have been bestowed the ability by nature to give birth. But sometimes due to infertility that is inability to procreate by natural means gives way to childlessness in a lot of individuals and couples and such inability or infertility can either be medical or social. In case of medical infertility such disability can be attributed by any persistent disorder either in men or women concerned who wants to beget a child or can also be attributed by any threat to the wellbeing

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and health of the women so concerned and the existence of any such circumstance debars people to have a child and culminates into a never-ending longing to procreate and beget a child. In case of social infertility people might not be able to beget a child even when being fertile because society does not always acknowledge their right to procreate. With the advent of time and the development of science and technology, people were exposed to a new realm of development known as the Assisted Reproductive Technology which enabled people to beget a child who are not being able to procreate by natural means and are in dire need of assistance to overcome the infertility so attributed either medically or socially.

Surrogacy is one of the many assistances which can be employed to overcome childlessness. Surrogacy is the process where a woman acts as a substitute for another in procreating a child and surrogacy as a means of procreation has been in existence for an extensive period now. Religious texts have also mention of surrogacy from times immemorial. Surrogacy as a means which is being employed has also evolved as a process since its inception. The employment of surrogacy as a means of procreation has been on the rise since the 1980's with India and other developing nations becoming hub for surrogacy owing to the favourable factors necessitated for surrogacy being present. People resort to the process of surrogacy to beget a child which is genetically related to either of the parents so concerned or both of them as the case may be. Surrogacy can also be employed to beget a child which might not be related genetically to either of the parents but the genetic material is contributed by donors who are of the choice of the parents so concerned. But the proliferation of surrogacy had its own share of cons as it had the pros. Surrogacy has given effect to the need and desire of people to beget a child genetically related to them or if not genetically related then in accordance with the genetical composition so desired by the parents who wants to beget a child by surrogacy. But surrogacy as a process has also been exploitative and exploitation in the realm of surrogacy has been meted out to the surrogate mothers who act as substitute and conceive to gestate the child for the entire period of gestation, the parents or the persons who desires to have a child via surrogacy and the children born out of surrogacy. Thus, it can be asserted that surrogacy have at one hand given effect to the desires of some to beget and procreate and to have a family whereas it on the other hand has led to gruesome exploitation of almost all the entities involved in the process either financially or ethically or in respect of physical wellbeing of the entities involved. Non-adherence to medical principles has led to maternal mortality and also physical infirmity in a lot of women who have volunteered to be surrogate mothers and gestate the child which is to be born. Infirmity to some extent have also been faced by the persons who desired to avail the

process of surrogacy to beget a child due to the extraction procedure to avail the genetic material so required. The children born out of such surrogacy arrangements have also been exposed to a whole lot of ethical and legal issues due to which interests of such children have also been compromised many a number of times.

India has been a hub for surrogacy owing to the favourable conditions required for proper administration of surrogacy along with the entire process being a lot more inexpensive as compared to the developed countries. Women in India already had and still have their share of miseries and forms a marginalized section of the society majorly where their whims and opinions are not given proper mode of expression and their rights in any realm neither were and not are very secured and abridgments were and are very frequent. Surrogacy as a process and surrogate mothers as the bearers of someone else's child are stigmatised because of people not having proper exposure as to the process of conception that precedes surrogacy in India and so women who volunteered to be surrogates attracted social stigma and derogatory treatment in the society by the people at large. Also, India being a country where a huge population is below the poverty line, women due to lack of other employments and some due to levy of pressure of their husbands or other family members resorted to the process of surrogacy to be a surrogate mother to cater to the needs of their family and also to subsist their own lives. India lacked any legislative enactment pertaining to the realm of surrogacy until recently when the Surrogacy (Regulation) Act, 2021 was enacted by our Parliament to regulate the realm of surrogacy in India. The Act have enumerated rights that women pertaining to the realm of surrogacy are entitled to and the Act has in turn done away with a number of rights that women were entitled to previously in the realm of surrogacy.

RIGHT TO REPRODUCTIVE AUTONOMY OF WOMEN:

The right to reproductive autonomy refers to the right to decide if any women is desirous of procreating a child or is desirous to abstain from procreation. Thus, the authority to decide vests in the woman to ascertain and decide as to if she wants to procreate a child or rather wants to refrain from it or if she wants to procreate then as to the number of children they want to procreate and the spacing between such children if she decides to have more than one child and the employment of the means as to the procreation. Reproductive autonomy is having the power to decide and control contraceptive use, pregnancy and childbearing. For example, people with reproductive autonomy can control, whether and when to use contraception, which

method to use, and whether and when to continue pregnancy.² Thus, Women is entitled to make choice as to the time, spacing and number of children she wants.

The right to reproductive autonomy is a right which has not been readily available to woman and a large section of women of the world is devoid of the right to make this choice and is often influenced, forced and coerced. Women has had barriers while exercising this option as to when she wants to get pregnant, the number of offsprings she chooses to have, the spacing between the offsprings and the method she wants to adopt to have children of her own and this right also includes the liberty to choose not to have a child at all and the right to abort within the time frame as provided for in the appropriate legislation. Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception but woman and girls continue to experience significant barriers in full enjoyment of their reproductive rights, including poor quality health services and denial of woman's and girl's decision-making authority. Historically, reproductive health-related laws and policies in India have categorically failed in prioritising women's needs and safeguarding her interests and rather focused on targets such as population control, while also implicitly or explicitly undermining woman's reproductive autonomy through discriminatory provisions such as consent of the spouse of the woman concerned for access to reproductive health services. Several International Conventions specify and lay down this right to reproductive autonomy where the signatory states are directed to allow to the individuals residing in their respective nations to exercise such right to reproductive autonomy.

In the case of *Suchita Srivastava v. Chandigarh Administration*³ it was held by the Supreme Court that reproductive choices of women can be exercised by her and accordingly a woman can choose to procreate or to abstain from procreation as such right is inherently implicit under Article 21 of the Constitution of India. Article 21 of the Constitution of India contains the right to life and personal liberty and every individual without any sort of discrimination is said to be entitled to this right. The interpretation of this Article has been widened in leaps and bounds in the years since independence and the right to life and personal liberty is said to include within its facet the right to procreation and thus includes within its realm the right to reproductive autonomy. In *B.K. Parthasarathi v. Government of Andhra Pradesh*⁴, the High

² <https://bixbycenter.ucsf.edu/>

³ (2009)14SCR 989

⁴ 2000(1) ALD 199,1999(5) ALT 715

Court of Andhra Pradesh was of the view that the “right to reproductive autonomy” is an important aspect of the “right to privacy” that every individual is entitled to. In the recent cases of *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Ors*⁵ and *A (Mother of X) v. State of Maharashtra & Anr.*⁶, the Indian Judiciary has asserted that right to abortion is also a facet of right to reproductive autonomy of women and the interest, well-being and will of the woman should be given prominence at all times.

Thus, from the analysis of the decisions and interpretation of Article 21 of the Constitution of India it can be asserted that right to personal liberty as enshrined in the Constitution of India includes the right to procreate for oneself and also for someone else as one of the facets of the right and the right to procreation is an important right of an individual but such right should also be regulated in the interest of the society as a whole.

REPRODUCTIVE AUTONOMY AND SURROGACY IN INDIA:

Every woman thereby should be entitled to choose whether she wants to procreate or not and if she wants to then the kind of motherhood she wants to embrace also comes within the purview of the right to reproductive autonomy as a facet of her realisation and exercise of her right to personal liberty. With the proliferation of Assisted Human Reproduction Technologies, surrogacy has emerged as one of the most resorted practices by individuals and couples round the globe with India being no exception. A woman thus should have the right to exercise her choice to be a surrogate mother or a commissioning mother in the realm of surrogacy. Different countries have different legislations regulating and governing the process of surrogacy. In India in the light of the newly enacted legislation of Surrogacy (Regulation) Act, 2021, the practice of surrogacy, the arrangement of the process and also the eligibility of women who can avail the process of surrogacy or can participate in the process of surrogacy has witnessed dynamic changes and such modifications has curtailed the sphere and ambit of realising the right to reproductive autonomy of women in India.

Commercial surrogacy has been strictly prohibited by the legislation outrightly and only altruistic surrogacy can be practised after the coming into effect of the Surrogacy (Regulation) Act, 2021 and therefore the right to reproductive autonomy of women to exercise their choice

⁵ Civil Appeal No. 5802 of 2022

⁶ Civil Appeal No. 5194 of 2024

as to the process of begetting a child or to gestate a child for another is compromised by the implementation of this legislation. Prior to the enactment of the Act women in India were able to exercise their reproductive autonomy and choose to gestate a child for another in lieu of remuneration paid for engagement in the process but now only altruistic surrogacy is allowed to be operational in the domain of India wherein no monetary incentive in cash or in kind can be paid to the woman who agrees to gestate a child for another except for the medical expenses and insurance coverage for the surrogate woman. Also, the Act specifies the eligibility criteria of being a surrogate mother. For a woman to be a surrogate mother has to be married and within the age bracket of 25 to 35 years and shall have a living child of her own and shall also have a certificate of medical and psychological fitness. A woman can be a surrogate mother only once in her entire lifetime. The Act has therefore imposed restrictions with regard to the age of the surrogate woman and also has categorically specified her marital status alongside the requirement of her being a mother to a child of her own. The Legislation has thus, excluded the right to reproductive autonomy to an array of women who are either not within the age bracket specified or is unmarried or who does not have a child of her own and also woman who has already been a surrogate once are not allowed to be a surrogate mother subsequently. Thus, the enacted legislation has constrained the scope of exercise of the right of reproductive autonomy of woman who chooses to be a surrogate.

The Surrogacy (Regulation) Act, 2021, also specifies the eligibility criteria of women who wants to pursue surrogacy to beget a child of their own. Woman if married has to have a certificate from an appropriate authority specifying that either she or her husband due to medical complications cannot bear child via the natural course and also the woman should be within the age bracket of 23 to 50 years of age and shall have no living child either naturally or through adopted or through surrogacy unless the child is mentally or physically challenged or suffers from a life-threatening disease. The Act, has thus curtailed the reproductive autonomy of woman married by specifying the age bracket and also by the criteria of not having a surviving and healthy child by any procedure before. The Act, allows single woman who have previously been married and is presently either a widow or a divorcee to avail the process of surrogacy provided such woman has a certificate from an appropriate authority necessitating surrogacy for her and also, she has to be within the age frame of 35 to 45 years. Thus, no woman who has never married can be an intending woman under the Act and is outrightly disqualified to avail the process of surrogacy to beget a child and also if a widow or a divorcee is not within the age of 35 to 45 years then she cannot employ the process of

surrogacy. The legislation has therefore, curtailed and narrowed down the scope of exercise of the right of reproductive autonomy of intending woman by specifying stringent eligibility criteria for availing the process of surrogacy.

CONCLUSION:

The dedicated enactment for the regulation and monitoring of the employment of the process of surrogacy in India, the Surrogacy (Regulation) Act, 2021, despite being a 21st century legislation has not given proper effect, implementation and scope of exercise of the right of reproductive autonomy of women within the realm of surrogacy in India. The Act has categorically excluded single woman who have not been married both from the purview of being a surrogate mother or an intending mother. Thus, single women or women in same sex relationship are not given the free choice to exercise their right of reproductive autonomy by surrogacy under the Act. Also, the marital status of woman has been given prominence for her to qualify as eligible to be able to be a surrogate mother or an intending woman by completely disregarding her freedom, choice and opinion concerning her body. Thus, the Surrogacy (Regulation) Act, 2021 fails to give women the liberty to exercise her right to reproductive autonomy. Reproductive autonomy of woman is her right to her dignity, body and privacy which are facets of the right to life and personal liberty under Article 21 of the Constitution of India and every woman without any parameter of differentiation or prejudices should be able to exercise her right.

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