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RESEARCH ARTICLE

REPRODUCTIVE RIGHTS OF WOMEN : A STUDY IN REFERENCE TO NEW SURROGACY LAW OF INDIA

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Abstract

Women right of reproduction is a fundamental right guaranteed by Indian constitution under article 21 i.e. right to life and personal liberty. In a recent landmark judgment of right to privacy hon'ble supreme court has again affirmed that women has full liberty to decide whether to have or not to have their child. Bearing a child is one of the important aspects of the institution of marriage. However, there may be various instances where this task is not achieved owing to medical infertility or medical complications either of husband or wife or of both. Although there are several instances where, in order to maintain the physical fitness certain women having no such medical complications or infertility opt for artificial procreation. Single Individuals, divorced, widows and so on and so forth may be fertile but are unable to have a child as the process of procreation requires a male and female. Homosexual individuals and couples also fall under this head. Taking into account the plight of these groups Indian Parliament has recently passed two new legislations namely, The Assisted Reproductive Technology(Regulation) Act 2021 and The Surrogacy (Regulation) Act 2021¹. It was not like that, before these enactments children were not born using these Assisted Reproductive Technology, but in the garb of infertility several poor women were exploited in the name of commercial surrogacy and they were left in lurch after the prospective parents refused to take the child or some citizenship issues arises and the poor overburdened family was forced to take care of that child. This lead to several court cases. This paper will deal with the new laws as well as judicial pronouncements relating to women's right of reproduction and how these laws will help in protecting the women's right of reproduction.

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Introduction:-

1. Both the act came into force on 18 December and 25 December 2021 respectively.

To have a child born is considered a pious gift of god, the reason of this piousness are many, ranging from seeing generation prosper to the performing of various religious obligations. Since time immemorial the purpose of

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marriage was considered to be for procreation of children or we can say that the process of procreation was connected with marriage. With the passage of time the whole process of marriage as well as procreation of children went through transformation and now without marriage children are born and in some cases even after marriage the child birth could not take place. This transformation has led to advancement of technology in field of Artificial Reproduction. Every advancement has its own merit and demerit and in the case of Artificial Reproduction there was a rampant misuse in the garb of infertility and women's right of reproduction. Several unregulated clinics started functioning and India became a hub of commercial surrogacy. The result of this practise was that Indian courts were flooded with litigations relating to citizenship, natural guardian, legal heir etc. of new born child. As there was no law regulating these practises the only regulation was that of ICMR Guidelines issued in 2005.

To fill this vacuum the Indian parliament has recently passed new legislation, namely, The Assisted Reproductive Technology (regulation) Act and Surrogacy(regulation)Act². Health Minister MansukhMandaviya said in Indian Parliament that the idea of new legislation is to regulate and supervise assisted reproductive technology clinics and surrogacy, and to curb unethical practices related to issues such as sexual selection and the exploitation of surrogate mothers, while also providing for monetary penalties as well as imprisonment for violations³. The Bills aimed at regulation of the multi-million-dollar industry of reproductive medicine, specifying who may avail assisted reproductive technologies and procedures like IVF and surrogacy, conditions in which donation and surrogacy may be carried out, and laying down requirements to run clinics.

The Bills only permit married, infertile couples and specific categories of women to avail themselves of assisted fertility treatments and surrogacy. The Acts are restricted only to two categories of persons, that is, intended parents who are undergoing ART. The national board

2.Indiacode.nic.in

3.PRS.ORG bill summary

has to give the certificate of necessity/infertility for an intended couple having medical.

Features of the new act

In the new acts⁴ the couple is required to have a Certificate of Essentiality, including proof of infertility by one or both individuals, a court order of paternity and custody of a child born via the woman requirement of a surrogate in question, and coverage of surrogate mothers health care for 16 months, including for complications after the child is delivered. The new law also sets out specific criteria of qualification for both a surrogate-seeking couple and a surrogate. The activist added that the new legislation lists lengthy, boring criteria, even for straight married couples seeking to have children through surrogacy.

The provisions in the Surrogacy Bill that limit surrogacy to heterosexual married couples in strict age groups also discriminate against members of the LGBTQ community, older couples, and people without marriages who may want children. In India, only Indian citizens and married couples (male and female) are allowed to obtain children through surrogacy. Only altruistic surrogacy through a woman who is related to a gene is allowed, which greatly limits choices available to the couple or woman. Altruistic surrogacy in a marital union is flawed as a concept, burdened with patriarchal control of women as reproductive choices, and goes against the very foundations of privacy rights and reproductive rights, which are cherished basic rights.

The Supreme Court has held that right to privacy is a fundamental right, and that a woman has a right, as per Section 21, to make her own reproductive choices, while the Termination of Medical Pregnancy Act places abortion choices in the purview of a health care provider.

In SuchitaShrivastava&Anr v. Chandigarh administration⁵, the apex court reiterated that the independence and reproductive freedom of a woman is a fundamental right and is a facet of individual freedom under Article 21. Article 21 of the Constitution covers women's rights regarding her reproductive choices, as well as other rights such as carrying the baby to its full

4. The Assisted Reproductive Technology (Regulation)Act and Surrogacy (Regulation) Act 2021

5.2009 14 SCR 989, 2009 9 SCC 1term, which is nine months, giving birth to a baby, and her rights of dignity and privacy, the court said. The reproductive rights of women, which includes not just the provisions mentioned earlier,

and cases under MTP Act, 1971, but also includes the rights of surrogate mothers provided in Surrogacy (Regulation) Bill, 2016.

Recently, there was a petition filed in the Supreme Court of India, alleging that the Assisted Reproductive Technology Act, 2021 and Surrogacy Act, 2021 are violating Women's reproductive rights. The Law Commission of India, in its 228th report, submitted on August 5, 2009, addressed the issue of need for legislation regulating assisted reproductive technology clinics as well as rights and obligations of parties in surrogacy, and recommended banning of commercial surrogacy as it lacked adequate legal framework. The SC, in its Constitution bench judgement in *K.S. Puttaswamy (2017)*⁶, stressed the constitutional right of women to have a reproductive choice. The Act's ostensible purpose of banning commercial surrogacy was to prevent the exploitation of women.

In keeping with gender prejudices still present in our society, the Act allows for the birth through surrogacy to only legally married men and women in India, thus, non-binary and same-sex couples are unable to enjoy the joys of parenthood, even if they want it. Unless these reforms are implemented, and access to surrogacy is recognized as a reproductive right, surrogacy regulations in India will fail to safeguard the bodily autonomy of surrogates, and the parental rights of intending parents. The exploitative nature of commercial surrogacy needs to be considered with regard to the other employment options available to a surrogate.

On the other hand, emotional exploitation by the altruistic surrogates in-home situation may be highly damaging, interfering with their reproductive rights and health. The commercial aspects of surrogacy offer the surrogateas psychological disassociation with the child, and strengthens that the intended couples or women are the natural, biological parents. The lack of laws and regulatory bodies to regulate commercialization of surrogacy led to exploitation of a woman and the baby, which were forced to live in poor, unhygienic conditions. Surrogates that testified before him said they chose to practice commercial surrogacy because other options of livelihood, such as working at home or at a clothing factory, were more exploitative, while surrogacy provided them with sufficient income that would benefit their families positively.

6.(2017) 10 SCC 1, AIR 2017 SC 4161

Conclusion:-

The machinery to deal with the issue of non-adherence to reproductive rights of women must be strict in implementing it because they contain elements of human rights. The Prohibition of Child Marriage Acts⁷ new proposal aims in prohibiting the promotion and support of customary practices, rites, and practices that encourages child marriage in India. Since the majority of people adhere to such practices and are still unaware that such a proposal has been made, it is now essential to seek the assistance of members of the medical, legal, and ethical communities who can explain to the public how these practices harm children's reproductive health and why they should be abandoned once they become a part of the aforementioned Act.

In the new Assisted Reproductive Technology (Regulation) Act 2021 and The Surrogacy (Regulation) Act 2021, various new concepts such as the risks associated with pregnancy through ART techniques in menopausal women, multiple embryo transplantation, and so on, are dealt in detail with every possible intellect. In addition, it is important for us to recognize that assisted reproductive technology (ART) or surrogacy services are not intended to treat the problem of infertility. Because of the risks and harm associated with these procedures, it is essential to encourage and include provisions relating to adoption in this act. The prevailing adoption laws, as well as the ART(Regulation)Act, 2021, and the Surrogacy(Regulation) Act, 2021, need to be sync so that, in the worst to worst scenario, a couple who is unable to bear a child through various ART techniques as provided in the act will at least have the option to adopt the child if he/she has the option in the act. It is essential to know that the 2017 Adoption Regulation⁸ forbids same-sex couples from adopting a child. In other words, a same-sex couple cannot be named as the adopted child's legal parents in India. As a result, legalizing adoption for same-sex couples in India is a pressing issue that needs to be taken into consideration.

Although insurance coverage is provided for in the ART (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021, our policy makers should begin a program to promote the compulsory health insurance for surrogate mothers and children born through surrogacy, with premiums to be paid by genetic parents or prospective parents.

7. Act of 2006

8. Came into force on the 16th January 2017.