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## Right To Parenthood- A Left Crevice in Surrogacy Regulation Act 2021: Review

<sup>1</sup>Aditi Gupta, <sup>2</sup>Ashok Moondra, <sup>3</sup>Sachin Kumar Meena

<sup>1</sup>Postgraduate student, Department of Forensic Medicine and Toxicology, Government Medical College, Kota, Rajasthan, India

<sup>2</sup>Senior Professor and Head, Department of Forensic Medicine and Toxicology, Government Medical College, Kota, Rajasthan, India

<sup>3</sup>Assistant Professor, Department of Forensic Medicine and Toxicology, Government Medical College, Kota, Rajasthan, India

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### ABSTRACT

Surrogacy refers to a practice whereby one woman bears and gives birth to a child for an intended couple with the intention of handing over such a child to the intended couple after birth. The right to parenthood, often referred to as the right to procreate or reproductive rights, is a fundamental human right. It encompasses individuals' ability to make decisions about having and raising children without undue interference from the state or other entities. This right is rooted in various legal and constitutional principles including the right to privacy, family autonomy, and personal liberty. In this case, we have tried to scrutinize the laws of the surrogacy act and how they impacted the life of an intending couple. The Supreme Court has protected the right of parenthood of a woman suffering from a rare medical condition by staying the operation of a law that threatened to wreck her hopes to become a mother through surrogacy.

### Introduction

“Surrogacy” refers to a practice whereby one woman bears and gives birth to a child for an intended couple to hand over such a child to the intended couple after birth. Gestational surrogacy refers to a practice whereby a surrogate mother carries a child for the intended couple through the implantation of an embryo in her womb, and the child is not genetically related to the surrogate mother. It is of two types:

1. Commercial surrogacy
2. Altruistic surrogacy.

-Commercial surrogacy means commercialization of surrogacy services or procedures or its component services or component procedures, including selling or buying of human embryo or trading in the sale or purchase of human

embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration, or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except for medical expenses and other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother. Altruistic surrogacy refers to surrogacy in which no charges, expenses, fees, remuneration, or monetary incentive of whatever nature, except for medical expenses and other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative. Surrogate mothers are women who agree to bear a child (who is genetically related to the intended couple or intended woman) through

Corresponding author

Email Address: dr. drsachinmeena@gmail.com

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surrogacy from the implantation of the embryo in her womb. She should be a close relative of the couple, be married, and have at least one child. The patient's age was 25-35 yrs. She could only be a surrogate mother once in her lifetime. The Surrogacy Regulation Act was enacted in 2021 and 2022. It prohibits commercial surrogacy and allows only altruistic surrogacy. It aims to protect reproductive rights and prohibits surrogates from receiving any kind of financial compensation for their roles, except insurance and medical coverage. It states that no woman shall act as a surrogate mother by providing her own gametes. A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.<sup>(1)</sup> This review article tries to audit the Supreme Court decision and its result on society and humankind.

## Case Scenario

The Arun Muthuvel Vs Union of India was a writ petition filed in the Supreme Court in September 2022, 756/2022<sup>2</sup>. In the writ petitions they have filed, it is stated that the petitioners were married women with a congenital disorder known as Mayer-Rokitansky-Kuster-Hauser (MRKH) syndrome, also known as Müllerian aplasia, which is characterized by aplasia of the uterus and upper part of the vagina of female 3 with normal secondary sex characteristics and a normal female karyotype (46, XX). Under these conditions, it affects the reproductive system of the female and is caused by abnormal development of the Müllerian ducts, which are structures in the embryo that develop into the uterus, fallopian tubes, cervix, and upper part of the vagina. MRKH syndrome involves absolute uterine factor infertility, and the only option for persons with such disabilities to achieve biological motherhood is through gestational surrogacy, because there is no development of the uterus. In this type of scenario, another option is uterine transplantation, which is not possible worldwide. Petitioners want to achieve motherhood through gestational surrogacy within the legal rules and framework noted in India, they have filed these writ petitions/applications seeking to assail substitution of paragraph 1(d) in Form 2 which is the Consent of the Surrogate Mother and Agreement for Surrogacy read with Rule 7 of the Surrogacy (Regulation) Rules, 2022 made under the Surrogacy (Regulation) Act, 2021 (here in after referred to as the "Surrogacy Rules" and the "Surrogacy Act," respectively for the sake of brevity). Rule 7-Consent of the surrogate mother. - The consent of a surrogate mother should be as specified in Form 2.

Form 2-Consent of the Surrogate Mother and Agreement for Surrogacy 1. That I understand that the methods of treatment may include: a) .....

b) .....

c).....

d) the fertilisation of a donor oocytes by the sperm of the husband."

Rule 14-Medical indications necessitating surrogacy: A woman may opt for gestational surrogacy if

Petitioner does not have a uterus, or it is missing or most of the time, it is an abnormal uterus (e.g., hypoplastic uterus, intrauterine adhesions, thin endometrium, small unicornuate uterus, T-shaped uterus), or if the uterus is surgically removed due to any medical condition such as gynecological cancer. However, by the notification dated 14.03.2023, the aforesaid paragraph 1(d) has been substituted as follows:

(I) Couple who wants Surrogacy must have both gametes from the intending couple and donor gametes is not allowed

(II) A single woman (widow/divorcee) wants Surrogacy to use herself eggs and donor sperm to avail surrogacy procedures. As a result, petitioners/applicants who are incapable of producing oocytes owing to MRKH syndrome are unable to avail of gestational surrogacy, although under Rule 14(a), they are eligible for gestational surrogacy. We can say that the contribution of the husband through his sperms is possible, owing to MRKH syndrome, the wife of the intending couple, that is, the petitioner, ABC, and the applicants are not able to produce any oocytes. Due to this condition, the intending couple, who are the petitioners/applicants herein, despite having complied with all other conditions, owing to the amendment made to Form 2, which has, 5 in fact, to be signed by the potential surrogate mother, cannot achieve biological motherhood through gestational surrogacy. Therefore, amendments to this writ petition were spoken, and consequential prayers were sought by petitioners/applicants who were intending couples within the meaning of Section 2(r) of the Surrogacy Act. However, the process of attaining motherhood through surrogacy began much earlier, and hence, the insertion of substituted paragraph 1(d) has now disrupted the process of couples wishing to obtain gestational surrogacy. The substitution of paragraph 1(d) came into effect from 14.03.2023 as the learned counsel appearing for the petitioner Shri Sanjay Jain and other petitioners/applicants told the Court and got the same realized to the Court.

They proved in court that substituted paragraph 1(d) may be read prospectively and not applied to petitioners/applicants in a retrospective manner. It was also contended that the substitution of paragraph 1(d) in Form 2 is contrary to what is stated in Rule 14(a) of the Surrogacy Rules, which recognizes the absence of the uterus caused by MRKH syndrome. It also states that MRKH syndrome is a disability that justifies gestational surrogacy. During discussions in court, it was also submitted that under these circumstances, the reliefs sought by the petitioners/applicants may be granted. The learned ASG appearing for the Union of India took us through the various provisions of the Act and the Rules, and in particular Section 2(1) (zg) to contend that the object of the Act is to nip the exploitation of women through

the practice of surrogacy and 6 therefore, the intention of the Parliament must be given effect to. If, for any reason, donating oocytes is forbidden, then the same should be respected as the oocytes and the sperm of the intending couples are to be used only to obtain gestational surrogacy; otherwise, the only other option they have is to adopt a child. Learned ASG submitted that there is no merit in these writ petitions or applications, and therefore, the same may be dismissed. <sup>(2)</sup> The Supreme Court gave the order on 11-pages; the court agreed with Mr. Jain's argument that the law permitting gestational surrogacy was "woman-centric." The birth of the surrogate child totally depends on the woman's inability to become a mother because of her medical or congenital condition. Such a condition included the "absence of a uterus or repeatedly failed pregnancies, multiple pregnancies, or an illness that makes it impossible for her to carry a pregnancy to term or would make the pregnancy life-threatening". The amendment cannot contradict Rule 14(a), which specifically recognizes the absence of a uterus or any allied condition as a medical indication necessitating gestational surrogacy. Addressing the government's contention that the surrogate child should be "genetically related" to the couple, the court pointed out that the child would be related to the husband. "In this regard, it may be noted that the expression 'genetically' related to the intending couple has to be read as being related to the husband when Rule 14(a) applies," the court interpreted. <sup>(3)</sup>

## Discussion

The Indian Constitution provided for the right to equality under Article 14 of Indian law. This is fundamental right. It guarantees to every person the right to equality before law and equal protection of the laws. It is not only right of Indian citizens but also right of non-citizens article 14 says "The state shall of India." Article 14 states that no one is above law. All are equal in the eye of law. 1.1 Equality before law "The state shall not deny to any person equality before the law". 1.2 Meaning of the right to equality: This means that every person living within the territory of India has the same right before the law. The meanings of are all equal along the same line. There was no discrimination on the basis of religion, race, caste, sex, or birthplace. This implies that all are treated as equal. There was no discrimination based on lower or higher class. <sup>(4)</sup> The Surrogacy (Regulation) Act 2021 allows a widow, a divorced woman between the ages of 35 and 45 years, and an infertile couple to avail the benefit of surrogacy. Limiting the right to become a mother and discriminating against a woman on the basis of her marriage status was discriminatory and violative of her fundamental rights to equality and life under Articles 14 and 21 of the Constitution. The argument is that the law allows divorcees and widowed women to have children through surrogacy. The exclusion of unmarried women boiled down to "patriarchal stigma" against them.

The law has made marriage a basis for classification and not discrimination. Married and unmarried women enjoy the same status and rights to pregnancy termination. They were treated on par even in the case of adoption. However, we are concerned that it is impossible for single women to have a child through surrogacy. Society may not be accustomed to having a single woman bear children, but is that a reason to deny them the right? A multitude of women choose not to marry; some do not get married, not because they wish to... Their choices have to be respected. We cannot force them to get married to have a child. Parliament argued that a single woman could have a child through assisted reproductive technologies (ART). How many ART procedures have been performed in India for unmarried women? We should keep in mind the pulse of the Indian Constitution. The patriarchal stigma is so deeply rooted in our country that it will take a lifetime to overcome it. The law does not define the concept of a 'close relative.' It curtails the rights of transgender persons, LGBTQIA+ people, and even single women to opt for surrogacy as a method of reproduction. <sup>(3)</sup> Other landmark judgements related to surrogacy. *Baby Manji Yamada v. Union of India* (2008) 13 SCC 518: In this landmark case, the Supreme Court addressed the legal status of a child born to a Japanese couple through surrogacy. The case highlighted the lacunae in the legal framework governing surrogacy and underscored the need for comprehensive legislation. The Court recognized the rights of the child and emphasized the need for the state to protect these rights. <sup>(4)</sup> *Jan Balaz v. Anand Municipality* (2010) 3 SCC 1: This case involved a German couple who sought to take their surrogate twins, born in India, back to Germany. The Supreme Court had to navigate the complexities of citizenship, nationality, and legal status of children born through surrogacy. The Court's decision underscored the need for a clear legal framework to address the rights of children born out of surrogacy. <sup>(5)</sup> *K. Kalaiselvi v. Chennai Port Trust* (2013) 9 SCC 181: In this case, the Supreme Court considered the employment benefits available to a woman with a child through surrogacy. The Court held that the absence of a biological connection did not deprive the woman of maternity leave benefits, thus affirming the rights of intending mothers under surrogacy arrangements. <sup>(6)</sup>

## Conclusion:

The Surrogacy (Regulation) Act, while a significant step towards structuring surrogacy practices in India, falls short by imposing restrictive eligibility criteria that exclude LGBTQ individuals, unattached women, and single parents, highlighting the urgent need for amendments to ensure equitable access to surrogacy for all. As societal norms evolve, it is crucial that the legal framework adapts to protect the rights of all potential parents, fostering a more inclusive and just reproductive landscape.

## Conflict of interest:

Nil

## Ethical clearance:

Nil This case has been presented by me as a Podium Presentation at RAJFMTCON2024 in KOTA (RAJASTHAN)

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