

COMMERCIAL SURROGACY: A CLUSTER OF ISSUES AND COMPLEXITIES OF RIGHTS UNDER CONSTITUTION OF INDIA

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Abstract

Morality is a term which has no definite meaning. It is as fluid as liquid. It will be in one shape at one point of time and in another shape at another point of time. Thus, it changes from time to time. This paper expresses views against the newly proposed Surrogacy (Regulation) Bill, 2019. The exponents who support ban on commercial surrogacy equate it with baby selling. But a major question that arises here is whether undergoing pregnancy for some other couple can be termed baby selling or in reality, is it only a case of advancing gestational services and earning a reward as a result of rendering services as is the case of any other employment? Is it not high time to give legal recognition to this invaluable service and consider it at par with other forms of employment? The Bill, through its numerous provisions, violates various fundamental rights of the parties involved in the process of commercial surrogacy. Some of the most

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important fundamental rights which have been violated are Articles 14, 19 and 21 of the Indian Constitution. There are countries where commercial surrogacy is legal and well regulated. Certain internal conventions also support this view. India is witnessing an upsurge to grant legal recognition to the commercial aspect of surrogacy. In such a situation, a change in the interpretation of the guaranteed rights is required. There has been a shift in the last few years where judiciary has come forward to protect the rights of individual keeping in mind the present socio-economic scenario of the society. There is again a need to change the concept of commercial surrogacy from one of baby selling to that of a form of dignified employment. Here, the researchers in this paper have tried to justify commercial surrogacy in light of the changing interpretation of the most basic fundamental rights under the Indian Constitution.

I. INTRODUCTION

Today, a lot of people are unable to bear a child due to infertility of either of the partners owing to many reasons like an increase in the marriageable age, mental stress etc. or other reasons like the person being homosexual or single. But a rapid advance in science has made it possible to have a genetically identical child even when one of the parents is infertile, through procedures like the In- Vitro Fertility Technique (“IVF”). Under this technique, a mature egg is fertilized by a sperm outside the body, in a laboratory. Once fertilized, it is

implanted in the uterus of the same or in a different woman's body leading to a successful pregnancy. One of the types of IVF is surrogacy.

In the last few years, India has witnessed a remarkable shift in the way its Constitution and the rights of its people are interpreted. The need to adopt a different perspective arises due to the change in the mindset of the people. Society is neither static nor is the mentality of the people. It changes from generation to generation. Even the age-old thinking has yielded to its modern counterpart. In such a changing scenario, it becomes necessary to also change the law governing people with that mindset. Change in the perspective of morality and public policy gives way to explore new avenues in interpreting laws. If this parallel shift in interpreting laws does not take place with the change in prevailing sociological structure of the society, then these laws remain static in contrast to the changing nature of society and therefore, contribute to confusion and chaos. Hence, it becomes the need of the hour to interpret laws in a way, which is best suited to the present society. Commercial surrogacy is a heated topic all around the world today. This can be attributed to the fact that it leads to exploitation and commoditization of women at times. It has come to be popularly known as a 'baby selling' business. However, the question that arises here is whether this society is not yet receptive enough to accept commercial surrogacy as a dignified employment whereby, like in any other employment, a woman rents her womb in return of remuneration for the services provided. There is exploitation in the name of commercial surrogacy because of the lack of regulations at the international and domestic levels. However, does that, justify the ban without giving any heed to the rights of the concerned parties?

A market reproductive exchange such as commercial surrogacy is profoundly unfair, but a blanket ban on the same is even worse. At face value, the Indian government's ban on commercial surrogacy may seem like a good idea, bolstered by the state's belief that reproductive

exchanges must not be corrupted by money. However, its replacement with altruistic surrogacy is dangerous for women as well.

II. SURROGACY

Surrogacy is an arrangement in which a person or a couple agrees to have a child through the womb of another woman. Such a woman undergoes pregnancy for intended parents, who then become the legal parents of the newborn child. Surrogacy can be categorized on the basis of embryos and on the basis of monetary compensation. Differentiating on the basis of embryos, there are two types of surrogacy: traditional and gestational surrogacy.

¹In traditional surrogacy, the surrogate mother's own egg is fertilized with the sperm of either the intended father or an anonymous donor. After fertilization, it is artificially inseminated in the womb of the surrogate mother and she carries the child for the duration of pregnancy. Therefore, genetically, the child is related to the anonymous donor or the intended father as well as to the surrogate mother.

In gestational surrogacy, sperm of the intended father or an anonymous donor fertilizes the egg of the intended mother which is then fertilized in the laboratory and transferred to the womb of a surrogate mother who then carries the baby.² So, the child is genetically related to the woman who has donated the egg and the man whose sperm fertilised the egg. In gestation surrogacy, the child is not genetically related to the surrogate mother.

¹DR J SRINIVAS RAO & DR MATIN AHMAD KHAN, *Surrogacy in India: Current Perspectives* 3 IJMHR 85, 85-88 (2017).

²Diane S. Hinson, Esq. & Linda C. ReVeal, *Overview of the Surrogacy Process*, HUMAN RIGHTS CAMPAIGN, (January 27, 2019), <https://www.hrc.org/resources/overview-of-the-surrogacy-process>.

Traditional surrogacy is generally avoided because of the presence of a biological tie between the child and the surrogate mother which makes it challenging for the surrogate mother to give away the child. That is why most of the countries like Russia and Ukraine do not allow traditional surrogacy agreement.

Based on monetary compensation, surrogacy can be divided into altruistic and commercial surrogacy. In altruistic surrogacy, the surrogate does not get any monetary compensation for her pregnancy over and above the medical expenses incurred. Altruistic surrogacy usually takes place when there is some relationship between surrogate and the intended parents. A surrogate in exchange of monetary compensation undertakes commercial surrogacy, which is over and above the medical expenses. It is a service undertaken by the surrogate in which she helps the intended parents to get a genetically related child while she also earns for all the labour that she has undergone during pregnancy. Commercial surrogacy is more of a concept related to employment and has now become a worldwide business.

Due to the absence of any regulation on commercial surrogacy, India is a great destination for the same. However, this will not be the case anymore due to the ban imposed on commercial surrogacy through The Surrogacy (Regulation) Bill, 2019 which was passed in Lok Sabha on 19th December, 2018. The Bill aims at banning commercial surrogacy in order to protect women from exploitation.³ It has a number of lacunas, which form the subject matter of this paper. It includes prohibiting unmarried, single and foreign couples from undertaking surrogacy and furthermore, imposes a blanket ban on commercial surrogacy. The Bill is inefficient because it does not give effect to the

³Sushmi Dey, *Lok Sabha Clears Bill Banning Commercial Surrogacy*, TOI, December 20, 2018.

concept of social engineering.⁴ In addition to this, the Bill has also violated a number of rights of both the parties involved in commercial surrogacy by banning it completely. The major violation of surrogate's rights to compensation for the services provided is one of the results of this Bill. On the other hand, reproductive autonomy of the parents and right to have a child of homosexuals and single parents has been violated through this Bill. All this goes on to show the inability of the Bill to achieve the objective and ideal of social engineering and failure to maintain the balance between the conflicting interests of people. Another lacuna of the proposed Bill is that it allows altruistic surrogacy only by a 'close relative' of the couple. The Bill, however, has not defined this 'close relative'.⁵ Any woman from the family can become a surrogate mother. But a major drawback of this is that it can lead to a number of genetical problems. For example, if the sister of the husband acts as a surrogate mother where she donates her own egg, which is then fertilized with the sperm of her brother, it could lead to congenital disorder in the child so born.

III. CONSTITUTIONAL OVERVIEW OF THE GOLDEN TRIANGLE: ARTICLES 14,19 AND 21

India, being the largest democracy of the world, has entrusted its people with a number of fundamental rights under Part III of the Indian Constitution. These rights protect the interest of the people against state actions, and ensure development of a person's individuality. In the recent past, there has been a tremendous shift in the interpretation of these Articles to ensure that they fulfil the needs of the society to the

⁴The rationale behind social engineering is that the conflicting interests of the persons must be resolved by taking a middle path through which both sides of interests could be satisfied to some extent.

⁵The Surrogacy (Regulation) Bill, 2019, PRS LEGISLATIVE RESEARCH (January 25, 2019, 11.22 PM), <http://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019>.

maximum extent. The change in the interpretation of laws is important so as to be in pace with the changing needs of society and to leave no room where individual rights could be hampered due to state actions. The advent of shift in the interpretation of Constitutional Articles was in the landmark case of *Maneka Gandhi v Union of India*, (“*Maneka Gandhi*”)⁶ whereby the concept of golden triangle was laid down. Golden triangle is formed by the interplay of Articles 14, 19 and 21.⁷

The rationale behind the golden triangle is that any law which deprives a person’s right to life and personal liberty under Article 21 must qualify the test laid down under Articles 14 and 19 also. This means that a law not only needs to be formal but also reasonable under Articles 14 and 19 of the Indian Constitution. The Bill in question violates various aspects of Articles 14, 19 and 21 of the Indian Constitution. The purpose of discussing commercial surrogacy in light of these Articles is to highlight the need of extending interpretation of these Articles to include legalized commercial surrogacy in India with better regulations.

A. Violation of the Right to Equality by the Bill: Article 14

The proposed law, which imposes a complete ban on commercial surrogacy and a partial ban on altruistic surrogacy by allowing it only to legally married infertile Indian couple, is an infringement of Article 14 of the Indian Constitution which guarantees “*equality before the law and equal protection of the law*” to all the persons. By permitting altruistic surrogacy only to married and infertile Indian couples and disqualifying all the others on grounds of marital status, sexual

⁶*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁷Simran Aggarwal and Lovish Garg, *The New Surrogacy Law in India Fails to Balance Regulation and Rights*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (January 28, 2019, 03.35 AM), <http://blogs.lse.ac.uk/humanrights/2019/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/>.

orientation and nationality, the Bill infringes the right to equality because this is not a reasonable classification and there is no intelligible differentia.

The object sought to be achieved by the Bill is to protect women from exploitation, to prevent commoditisation of the birth process and to stop trafficking in the market of surrogacy. However, there seems to be no nexus between the object sought and the classification made as by completely banning commercial surrogacy and restricting altruistic surrogacy only to married and infertile Indian couples, the Bill has failed to provide any option of surrogacy, whether altruistic or commercial, to homosexual couples, single persons, and foreigners. This certainly cannot be deemed as a solution to check exploitation and trafficking in the market of surrogacy. In fact, such provisions infringe the right to equality of the homosexuals, single intended parents and foreigners.

By restricting surrogacy only to married couples, the Bill reinforces the majoritarian Indian morality that condemns the idea of live-in relationship and homosexuality. It suppresses the rights and freedom of these sections of society. Here, it is important to note that in India, live-in relationships and homosexuality are not illegal anymore and limiting the access of altruistic surrogacy is a clear indication of discrimination against these sections of society.

The ban runs counter to the idea of Hindu Marriage Act, 1955 and Juvenile Justice Act, 2015 that allow a single person to adopt a child while this Bill bans surrogacy for the singles. On one hand, the law is permitting single persons to adopt a child while on the other, it is restricting the single persons from adopting the method of surrogacy. In addition, under Central Adoption Resource Authority (“CARA”), the foreigners are allowed to adopt a child while this Bill bans the foreigners from employing the means of surrogacy.

Protection under Article 14 is available to all the persons including foreigners. There is no reason for prohibiting them from adopting the mode of surrogacy. The only rationale behind this could be the exploitation of the Indian surrogate mother due to unequal bargaining power.

However, this reason alone cannot be the ground for prohibiting foreigners from having a child from an Indian surrogate mother. The only possible solution for this is to enact a well-knit legislation to regulate the surrogacy market in India instead of banning it altogether. The previously mentioned contradictions make the restrictions under the Bill illogical and vague.

*B. Infringement of Freedom of Trade and Commerce of the
Surrogate Mother: Article 19(1)(g)*

Article 19 of the Constitution of India protects various freedoms of the citizens. These rights as provided under Article 19 are subject to certain restrictions as provided under Article 19(2) to Article 19(6).

Article 19(1)(g) provides freedom to practise any profession, or to carry on any occupation, trade or business. Restriction on clause (g) of Article 19(1) is provided in Article 19(6). Article 19(1)(g) protects the interests of a surrogate mother who wants to earn money through surrogacy and also of the doctor who practices in Assisted Reproductive Technology (“ART”) for procreating a child through a surrogate mother. The State cannot impose an absolute restriction on the practice of surrogacy or ART procedure.⁸ In place of imposing absolute restriction on surrogacy, State can bring such laws, rules and regulations, which can protect the surrogate mother from exploitation and at the same time, regulate the practice of commercial surrogacy.

⁸Har Shankar & Ors. Etc. vs The Dy. Excise & Taxation Commr, AIR 1974 SC 1121.

Imposing an absolute ban on surrogacy in order to prevent exploitation of women is not a solution. This restriction also does not come under the ambit of public interest, a ground given in Article 19(6). The expression ‘interest of the general public’ comprises of any matter, which affects the public order, morality, health etc. It is an unclear expression and gives wide powers to the executive for curtailing the rights given under Article 19(1)(g). The court has to see whether any restriction on Article 19(1)(g) is in the interest of general public or not. Banning commercial surrogacy only on the ground of morality does not seem to be correct in law because the concept of morality is dynamic and changes with time. What was considered immoral earlier, in those prevailing circumstances, might not be immoral in the current socio-economic structure. This is best evidenced by the recent judgement of the Supreme Court, which decriminalized section 377 of the Indian Penal Code.⁹ If something which was considered a crime could be accepted by the society due to a change in the view of the society towards its people, then why can commercial surrogacy not be accepted as a reality in the 21st century? It is bread and butter for not only surrogate mothers but also for numerous clinics and doctors who are involved in surrogacy. In *Chintaman Rao v. State of M.P.*,¹⁰ the court held that the restriction imposed on a person’s enjoyment of the right should not be of excessive nature beyond what is required in the interest of the public. A blanket ban on commercial surrogacy, which harms the interests of numerous stakeholders of this multibillion-dollar industry, cannot be justified and is excessive of what is required.

C. Right to Life and Reproductive Autonomy: Article 21

One of the major aims of all the rights ascribed to an individual is to protect her life while also giving the most of the opportunities to enhance the quality of life and to develop the individual’s personality.

⁹Navtej Singh Johar v. Union of India, Petition (Criminal) No. 76 OF 2019.

¹⁰Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118.

In India, this is ensured through Article 21 of the Indian Constitution, which states, “*the State shall not deprive any person of his life and personal liberty without the procedure established by law*”. The changing interpretation of this Article over a period of time has led to how it stands today. After *Maneka Gandhi* case, it was very clear that any law not only needs to be enacted through a proper procedure but it also needs to be reasonable and rational.

a) Right to Privacy

In India every person here has the right to make choices concerning their personal space and thus, does not appreciate any interference in that particular space which we call privacy. Privacy is that private space of a person where any interference is unacceptable, especially when the interference is by the State in the personal matters of a person. Until the passing of *Justice K.S. Puttaswamy (Retd) v. Union of India*¹¹ judgment, right to privacy was not formally considered the part of Article 21. After this judgment, right to privacy has become a part and parcel of Article 21. The most intimate matters of privacy are marriage, family, procreation motherhood etc. In *B.K. Parsarathi v. Government of Andhra Pradesh*,¹² it was held that reproductive rights or right to reproductive autonomy form a part of right to privacy. Any encroachment on right to reproduction or procreation is an encroachment on privacy. Procreation is a matter out of the ambit of State control or interference. A couple has an absolute right to decide the mode of conceiving a child, whether natural, adopted, through surrogacy or any other method. The Bill bans the fertile parents from receiving the service of surrogacy, whether through altruistic or commercial means. There is no rational basis for the provision to prohibit fertile couples from adopting surrogacy. This is purely the

¹¹Justice K.S.Puttaswamy(Retd) v. Union Of India, Writ Petition (Civil) No 494 OF 2012.

¹²B.K. Parthasarathi v. Government of A.P. And Others, AIR 2000 AP 156

choice of the couple, whether fertile or infertile. We cannot ignore the fact that in this rapidly changing and competitive era, many women do not want to undergo labour pain but at the same time, desire to have a biological child. In such a situation, they may find surrogacy as the best option whereby a woman voluntarily wants to undergo pregnancy for someone else and expects some compensation in return for the services provided by her. This is the reproductive autonomy of a woman whether to undergo pregnancy or not, even when she is fertile. Not allowing fertile couples to get the services of surrogacy is in a way forcing a fertile woman to undergo pregnancy to have a biological child, even when she is not willing to do so. In *Suchitra Srivastava v. Chandigarh Administration*,¹³ it was held that ‘reproductive choices can be exercised to procreate as well as to abstain from procreation.’ This is a major encroachment on the choice of procreation, which in turn violates the right to privacy under Article 21 of the Indian constitution. In addition to this, infertility has to be proved to get the service of surrogacy. Proven infertility, according to the Bill, means inability to conceive a child even after 5 years of unprotected coitus preventing a couple from conception. No concern is given to the fact that there might be a medical condition whereby a woman can conceive or is fertile but cannot carry a child for the gestational period.

b) Right to Livelihood

The blanket ban on commercial surrogacy also violates the right of a surrogate woman to use her body in the way that she wants to. In this rapidly changing era, people are venturing into new avenues of employment and moneymaking. Right to life is hampered not only by taking away a life without the procedure established by law but also by taking away the means to sustain life, which is in the form of livelihood and ensures decent living. The easiest way to deprive a person of her right to life is to deprive her of her livelihood. Livelihood can be earned

¹³*Suchitra Srivastava v. Chandigarh Administration*, Civil Appeal No. 5845 OF 2009

in any manner whatsoever as the right under 19(g) gives its citizens the right to freedom of trade and commerce subject to few restrictions. The Bill in question violates the right to livelihood of a surrogate mother by not allowing her to get the compensation for the services provided by her.¹⁴ This makes the surrogate woman vulnerable as gestational services are also extracted out of her but she is not fairly paid for it. Like any other employment, the interpretation of surrogacy should be changed to consider it as a pure and dignified employment. This is because a surrogate woman undergoes all the labour and pain to provide a child to the intended couple, there is no reason why such a woman should not be compensated for her services like any other employment, over and above the medical expenses. There is no question of immorality involved here because womb renting is technically not baby selling but only a sale of gestational service, like any other service, to the people who desire to have a child through surrogacy. Instead, not providing a fair compensation to a surrogate would in fact amount to her exploitation, whereby, she has provided all her labour and services but is not being given anything in return. Thus, a ban on commercial surrogacy will deprive a large number of women of the livelihood they could have earned by this very concept of womb renting.

c) *Right to Human Dignity*

The Bill also violates the right to life of people who have been debarred from hiring the services of surrogate under the Bill. Right to dignity is a major aspect of right to life. Right to dignity ensures that right to life is not a mere animal existence but is much more than that. It includes everything which is important to sustain an accomplished life. One of the major aims of marriage under Indian philosophy is to have a child. One of the major breakthroughs in the last few months has been the

¹⁴*Supra Note 8.*

decriminalization of gay sex. After almost 158 years of treating it as a crime, the Indian Supreme Court finally decriminalized it and has taken a tremendous shift in recognizing the change in interpreting morality and held that “*societal morality cannot trump constitutional morality. Societal morality cannot overturn the fundamental rights of even a single person.*”¹⁵ Since gay sex has been allowed, soon gay marriages will also get legal recognition. Thus, a very important issue arises pertaining to the parenting rights of this section of the society? Other than surrogacy, these people will have no option to have their own biological child. Once gay marriage gets legal recognition, it will be paradoxical to ban these people from availing surrogacy services. Because, on one hand, they will be given right to get married but on the other hand, they will not be able to have their own biological child. This section of society is in the most urgent requirement of availing service of surrogacy because they cannot have a biological child unlike their heterosexual counterparts. This is a grey area where eventually questions are going to arise and it is high time to think on these lines. Another grey area of this Bill is where it prohibits single people from availing surrogacy services. There seems no logical nexus between the object of the Bill, which is to check exploitation of women due to commercialization of surrogacy, with banning single people from availing surrogacy. There is no rationale in prohibiting a single person from having her biological child by way of surrogacy in a case where she does not have her other counterpart. Surrogacy is the best suited option for such sections of society and by prohibiting it for them, this Bill has, in numerous ways, violated their right to life under Article 21.

¹⁵*Supra Note 10.*

IV. RECUSAL COMPARATIVE ANALYSIS OF COMMERCIAL SURROGACY IN DIFFERENT COUNTRIES

The concept of smooth regulation of commercial surrogacy is not as utopian as it might seem. There are a number of countries where commercial surrogacy is legal and is very well regulated. There is no exploitation of surrogate mothers or intended parents in the name of commercial surrogacy in these countries on account of the comprehensive regulations. Such laws could very well be borrowed and could be effectively applied in India in order to legalize commercial surrogacy and to prevent the parties from exploitation at the same time. Following are the countries where commercial surrogacy is legal.

A. Russia

Commercial surrogacy is legal in Russia. The arrangement is governed by a contract. It is regarded as a job or work. There surrogate mothers are financially motivated. Altruistic surrogacy is also rejected. The major reason to consider surrogacy as a work is that only gestational surrogacy is allowed and traditional surrogacy is illegal. Gestational surrogacy means where the gamete is not that of a surrogate woman but is either of the intended mother or of any other donor. Russia allows only gestational surrogacy and does not allow traditional surrogacy in contrast to India where traditional surrogacy is allowed. The genetic relatedness to the child makes the woman emotionally attached to the child. Gestational surrogacy makes sure that the surrogate mother is not genetically related to the child and considers surrogacy as care work rather than as mothering. This makes it easier for the surrogate woman to take surrogacy as purely a form of work and prevents her from cultivating any maternal feelings for the child but at the same

time, she is also not indifferent to the life growing inside her due to the compensation paid for carrying the child. This attitude of surrogate women and other people make surrogacy purely a business where a woman earns by renting her womb to the couple desiring a baby. It also allows foreign couples, unmarried couples and single persons to enter into surrogacy arrangements. Any woman aged between 20-35 years, whether married or unmarried, can become a surrogate. She should already have a child of her own to maintain her mental status with the surrogate child. She can be a surrogate any number of times depending upon her physical and mental fitness. Proper screening of both the parties is mandatory before entering into the contract.

B. Israel

Surrogacy arrangement is governed by a contract between both the parties. The agreement contains the payment details, which are to be made to the surrogate mother for her gestational services. Surrogacy arrangements with family members are prohibited. Only gestational surrogacy is allowed. Only an unmarried, single, divorcee woman who already has a child of her own can become a surrogate. State controlled surrogacy is practiced in Israel.¹⁶ The surrogacy contract is not valid unless it is affirmed by the Approvals Committee, which comprises of a group of legal and medical professionals and clergy tasked with ensuring that all surrogacy agreements are in the best interests of the parties, including the society at large. The committee ensures that the agreement is fair. There is no inclusion of third party, which prevents exploitation of both the parties.

C. Ukraine

¹⁶Victoria R. Guzman, *A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy*, 38 HOUS. J. INT'L L. 619 (2019)

Ukraine allows commercial surrogacy. Married couples, whether foreigners or local, can enter into surrogacy arrangements. Written consent of both the parties is required before entering into the surrogacy arrangement. Gestational surrogacy is preferred over traditional surrogacy. Ukrainian law also treats intended parents who are genetically related to the resulting children and those that use donor eggs and sperm in the same manner.¹⁷

D. United States of America

Some states of USA allow the practice of commercial surrogacy. California has the world's best surrogacy laws and is known as a 'surrogacy friendly' state. Surrogacy arrangements here are governed by the surrogacy agreements. California allows intending parents, regardless of their marital status or even sexual orientation, to enter into the contract of surrogacy. Commercial surrogacy is legal in California. Contracts for gestational surrogacy are reinforced on a regular basis here. It is important that the parties involved in the contract have their advocate's advice before entering into the contract to make sure that all the parties involved have a clear understating of their rights and duties. The gestational surrogacy contracts are notarized so as to make them valid. Intending parents, in case of gestational surrogacy, are the natural and legal parents of the child. The contract strictly establishes the parenting rights of the intending parents and that the surrogate mother has no legal parenting right over the child. This ensures that conflicts regarding parentage do not arise in future. In *Johnsen v. Calvert*,¹⁸ the California court held that surrogacy contract is not barred by public policy.

¹⁷*Id.*

¹⁸*Johnson v. Calvert*, 5 Cal. 4th 84, (1993).

The right to procreation is recognised to be implicit in the right to privacy. The legendary American case of *Roe v. Wade*¹⁹ has been alluded to by the Supreme Court of India in a number of decisions dealing with the subject matter. In the instant case, the US Supreme Court held that a citizen has the “*right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other.*”²⁰

V. INTERNATIONAL INSTRUMENTS ON SURROGACY RIGHTS

At present, there is no single or specific international document or instrument, which specifically talks about surrogacy rights.

Article 1 of the UN Charter states its purpose as, “*to achieve international cooperation....., to promote and encourage the respect for human rights and for fundamental freedoms of all.*”²¹ So, the question that arises is whether surrogacy can be claimed as a human right. Every person has the right to become a parent, which is one of the most basic human rights. Surrogacy can also be claimed under reproductive rights, which includes diverse fields of rights like civil, political, economic, social and cultural rights, which affects reproductive rights of an individual and of couples.

There are various international conventions, which put obligation on States to uphold the individual’s reproductive rights.

¹⁹Roe v. Wade, 410 U.S. 113 (1973).

²⁰Diksha Munjal-Shankar, *Medical Tourism, Surrogacy & The Legal Overtones - The Indian Tale*, Vol. 56 No.1 JILI 62, 62-77 (2014)

²¹Charter I, *Article 1 Purposes and Principles of the United Nations*, (20/01/2019, 2.00.PM) C.f. <http://www.un.org/en/sections/un-charter/chapter-i/>.

A. Reproductive Rights

a) Universal Declaration of Human Rights, 1948

Article 16 (1) of the Universal Declaration of Human Rights, 1948 (UDHR) asserts, “*Men and women of competent age without any limitation due to nationality, race or religion, have the right to marry and the right to start a family.*”²²

The expression ‘to start a family’ denotes the reproductive rights of an individual. Thus, procreation of a child can be done through normal conception or ART or adoption. However, the above-mentioned right is available only to men and women.

b) Teheran Conference on Human Rights in 1968

The reproductive rights to a certain extent are new in the international law. The reproductive right for the first time was recognized in the Teheran Conference on Human Rights in 1968, which provides that the “*rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights.*”

c) International Conference on Population and Development, 1994

The International Conference on Population and Development (“**ICPD**”) or popularly known as *Cairo Conference* has specifically talked about the reproductive rights of the individuals in its Para 7.3.²³

²²Universal Declaration of Human Rights, 1948, Article 16(1), (Oct. 10, 2019, 3:00 PM) C.f. <http://www.un.org/en/universal-declaration-human-rights/>.

²³*United Nations Population Information Network*, 1.12, U.N. Doc. A/Conf.171/13, Report of the ICPD, (Oct. 18, 1994), UNITED NATIONS, (Jan. 23, 2019, 3:45PM) <http://www.un.org/popin/icpd/conference/offeng/poa.html>.

The aim of the conference is to provide an opportunity to individual and couples to exercise the rights like right to have a child in the way they want, the number of children, spacing and timing between them etc.

d) *Beijing Conference, 1995*

The Fourth World Conference on Women (1995) in Beijing has sustained the reproductive rights. It states that the human rights of women also include the right to control over her body. She is free to decide the matters relating to her body including reproductive health, violence and discrimination.²⁴

As provided by the above rights of the international conventions and instruments, we can conclude that reproductive right is a broadly recognized right.

B. *Reproductive Rights of Women*

A woman's life, liberty and security, health, autonomy, privacy, equality and non-discrimination and education cannot be protected without ensuring her right to determine when, how and whether to bear children, to have a complete control over her body and reproductive health, information and services. Women's human rights cannot be realized without promoting women's reproductive rights.²⁵ Therefore, it is very important to protect the reproductive rights of the women.

²⁴*Report of the Fourth World Conference on Women*, Beijing, China, Sept. 4, 1995, 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), UNITED NATIONS, (Jan. 24 2019, 2:00 AM)

<http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>.

²⁵*Reproductive Rights are Human Rights '2009'* C.f. CENTER FOR REPRODUCTIVE RIGHTS (Jan. 25, 2019, 3:00 PM), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/trarehr_final.pdf,

There are two major international instruments, which protect the reproductive rights of the women.

a) *The Convention on the Rights of Persons with Disabilities (Disability Rights Convention), 2006*

It is the first international human rights instrument, which expressly and specifically recognized the women's reproductive right as a human right under Article 23.

b) *Convention on the Elimination of All Forms of Discrimination against Women, 1979:*

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") has defined its purpose as prevention of 'discrimination against women' in all its forms and manifestations.²⁶ In addition to the civil rights issues of the women, the Convention also protects the reproductive rights of women.

Article 4 of CEDAW confirms the reproductive rights of women; it states, "*role of women in procreation should not be a basis for discrimination.*"²⁷ The States also have "*to adopt special measures with the aim to protect the maternity without any discrimination.*"

Article 11.1.(c) states that "*the women's right to free choice of profession and employment and State should not make any*

²⁶ *The convention on the Elimination of All Forms of Discrimination against Women 'CEDAW' (1979)*, UNITED NATION, C.f. (Jan. 25, 2017 7.00AM), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.html>.

²⁷ CEDAW. art. 4.

discrimination in the area of employment.”²⁸ So, under the umbrella of this Article, commercial surrogacy can be legalized and justified.

Article 12 protects the right to health of the surrogate mother. It states “*State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*”²⁹

Some institutions and organizations like The UN International Research and Training Institute for the Advancement of Women (“**UN-INSTRAW**”), The United Nations Population Fund (“**UNFPA**”) and the World Health Organization (“**WHO**”) are also working to improve the lives of the women. They also support the reproductive rights of the women.

The right to procreate is a very basic right of any person. Therefore, it should not change with sexuality or gender orientation of the person. However, declining the right to have children to the childless people which is possible through surrogacy is nothing but refusing equal treatment to them, which clearly amounts to adverse distinction.³⁰

Sadly, even today, there is no international instrument which specifically talks about or protects the practice of surrogacy as a human right. However, when reproductive rights were protected, then surrogacy automatically got protected because surrogacy is one of the most important shades of the reproductive rights.

In India, under the National Commission for Women Act, 1990, the human rights of women are protected. A National Commission to

²⁸CEDAW. art. 11.1.(c).

²⁹CEDAW, art. 12.(2).

³⁰K. Svitnev, *Legal control of surrogacy – International perspectives*, (Jan 26, 2019, 11:48 PM) http://www.jurconsult.ru/publications/ethical_dilemmas/13_Legal%20control%20of%20surrogacy%20international%20perspectives.pdf,

addresses their grievances (“NCW”) was also established by the Act. In addition to this, the Government has also enacted the Protection of Human Rights Act, 1994 for protection of the human rights of people and established Human Right Commission at the national, state and district levels.

VI. SOCIOLOGICAL PERSPECTIVE WITH REGARDS TO COMMERCIAL SURROGACY

The only reason that the human species have survived the attack of time is because of its ability to adapt to the changing social structure. Society is not the same as it was two hundred years ago. This is because of the change in the thought process or mentality of the people living in that society. India in these cases lags far behind the western countries when it comes to adaptation. People here still adhere to the age-old futile principles which do nothing more than create an impediment in development of the society. People here are still stuck with their patriarchal notions. This is the major reason because of which commercial surrogacy is considered as exploitative and altruistic surrogacy is supported. The basic reason behind this is that the society still lives under the mind-set that motherhood is the prerogative of a woman and she should do it if she wishes to live with dignity in the society. She is expected to give birth to a child not because she wants to but because she is expected to do this by the society. She is expected to do this out of altruism even if she undergoes pounds of labour pain, which is beyond the imagination of any human who has not experienced it. Any reward in return of undergoing such labour pain is vehemently opposed by the agents of patriarchal notions because they see it as something that a woman should do and can do and there is no requirement of a reward for it. But isn't this very contradictory in the 21st century where we reward even a casual worker for his services but can't accept that surrogacy is also a gestational service for which the woman is rightly entitled to be rewarded or compensated over and

above her medical expenses? The very basic question arises that why can a woman not use her body in the way she wants to. If she is willing to rent her womb for a good cause by which she can help others and also earn a living for herself, then why does society create obstacles for her? Morality should not be the ground here because morality is not static. It changes with time. There is no precise definition of morality, it is subjective and varies from person to person. For a narrow-minded person, some act might be immoral but for an open-minded person, the act might be moral and normal. It is indeed paradoxical that gay sex, which was a crime earlier and considered to be immoral, has now been accepted by the society but the same society refuses to accept the reality of the commercial aspect of giving birth. No doubt there is exploitation in this business also as there is in any other business. However, if there is exploitation in any business, the entire business is not shut down, rather laws are put in place to regulate it in a proper manner so as to minimise the exploitation. In response to exploitation, the complete ban on commercial surrogacy will lead to underground business, which will still be a reality but will be out of the control of legal system. In such a case, there will be even more exploitation than it could be imagined. Exploitation is possible in both the scenarios but the only difference will be that in the case of legalized commercial surrogacy, there would be a chance to regulate such exploitation whereas in a case where it is banned, it will still find its way by becoming an underground business and will then be out of any regulating mechanism. The state cannot impose its inability to prevent exploitation by abridging the rights of the people. Commercial surrogacy is not a utopian idea. As we have seen above, there are countries where it is legal and very well regulated. Commercial surrogacy is such a concept where all the parties involved can fulfil their interest with utmost contentment, if the mechanism is regulated properly. The couple desiring a biological child can get so by gestational surrogacy and the surrogate woman can, by voluntarily

renting her womb for a good cause, earn her livelihood. The only requirement to make this possible is a well-knit mechanism.

VII. CONCLUSION & SUGGESTIONS

From the above research, it can be concluded that the Surrogacy (Regulation) Bill, 2019 has failed in many aspects in maintaining the balance among various interests of different sections of the society. There is no nexus between many provisions of the Bill and the objects sought to be achieved by the Bill. Moreover, these provisions violate some of the most important Fundamental Rights of the people as enshrined under Part III of the Indian Constitution like Article 14, Article 19 and Article 21. The prevalence of exploitation due to commercial surrogacy is not denied but banning the practice altogether is not a solution to stop this exploitation. As seen above, there are many countries where the practice of commercial surrogacy is legal and is very well regulated. To stop the exploitation caused due to commercial surrogacy, the need is to enact a comprehensive legislation, which while legalizing the commercial aspect of surrogacy, also regulates the exploitation that may be the result. It must have provisions for enforceable contract, mandatory screening, only gestational surrogacy to be legal etc. Such a comprehensive legislation is required not only at the domestic level but also at the international level to check trans-boundary commercial surrogacy. Along with the regulation, a central authority is also required to act as a watchdog for keeping a check on the smooth practice of commercial surrogacy. Here are a few suggestions to regulate commercial surrogacy,³¹

³¹Mrinal Vijay, *Commercial Surrogacy Arrangements: The Unresolved Dilemmas*, 3 UCLJLJ 200, 200-236 (2014)

Enforceable contract - To leave no room for future disputes between the parties regarding parenthood rights or payment or anything that may concern, there must be an enforceable contract between the parties. Parties must enter into this contract only after consultation with their respective solicitors. This will ensure that both the parties are aware of their rights and obligations relating to surrogacy and are not short of legal advice on any matter.

Mandatory screening – The practice of surrogacy can have a psychological effect on the parties. Before entering into the contract, there should be a proper screening of both the parties. This will make sure that the parties are mentally stable to enter into a surrogacy agreement. Additionally, it will help to ensure that the surrogate mother does not enter into contract unwillingly and under financial pressure. Counselling sessions must be conducted to make them aware of the risks and technicalities as well as the procedure of surrogacy, so that no party stays in abeyance or enters into surrogacy agreement with lack of knowledge.

Gestational surrogacy - Only gestational surrogacy should be allowed. In this type of surrogacy, the surrogate woman cannot donate her own egg. The egg is either of the intended mother or of any other donor. The surrogate woman is only the carrier of the child. This will ensure that surrogate woman is not emotionally attached to the child because the child is not genetically related to her. Further, this ensures that no maternal feelings are developed because since the child is not genetically related to her, she loses all the parental rights over her. She carries the child only with the intention of giving it back once it is born.

Legitimizing payments - Payment to the surrogate must gain legal backing. All the details regarding payments to the surrogate must be explicitly mentioned in the contract to avoid any future dispute in this regard. In the absence of this, there are chances of exploitation of not only the surrogate woman but also of the intended parents as the

surrogate may demand a higher price than it was agreed upon in lieu of handling the child to the intended parents.

Regulatory authority and a nationwide Act - To regulate commercial surrogacy, there can be appointment of a national authority under an act, which could look after the mechanism of surrogacy. Enactment of a comprehensive act is required in this regard which could address most of the issues that arise in commercial surrogacy. A proper procedure should be laid down to enter into a surrogacy contract. The act should also lay down the eligibility criteria to become a surrogate mother such as age of the woman. A mechanism should be put in place to determine the mental and physical health status of the woman before entering into a surrogacy contract. An estimated amount of payment should be mentioned in the act, which is to be paid to the surrogate worker for rendering her gestational services. In case of a failure to pay, the intended parent must be held liable for penalty or compensation to be paid for breach of contract. Similarly, provision for specific performance should be there in case the surrogate woman breaches the contract. The clinics must be strictly regulated so as not to leave any room where these clinics could exploit the parties.

In the present sociological scenario, we cannot turn a blind eye to the reality of commercial surrogacy. Society has changed a lot in the past few years and now, it is important to accept these changes. Motherhood is not perceived in the same way as it was perceived some years ago. It is high time we recognize the labour involved in the process of giving birth, and recognize the right of a woman to be legally compensated for the same.