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Rights of Women and Surrogacy - A Study of Reproductive Freedom

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ABSTRACT

The Right in the direction of privacy means that one's information is not subjected to community examination. In the recent landmark case the Hon'ble Supreme Court of India got a prospect to deal with two main reproductive rights issues relating to surrogacy and reproductive freedom. The Supreme Court has held that right to privacy is a fundamental right and a woman has the right under Article 21 to make her own reproductive choices whereas the Medical Termination of Pregnancy Act places the choice of abortion within the fulfilment of the medical practitioners. There are various privacy concerns implicated in the process of surrogacy. In this milieu, the research paper proposes to study and discuss various privacy issues triggered in surrogacy. The author would further explore the validity of the medical termination of pregnancy act in the brightness of the Supreme Court judgment on women's right to reproductive choices and provide suggestions for reproductive justice of women. The paper aims to provide and highlight the International conventions and instruments in respect to Universal declaration of Human Rights and Women Convention on the elimination of all forms of discrimination against women.

Keywords: *Right to Privacy; Fundamental Right; Surrogate Mother; Reproductive Right.*

I. INTRODUCTION

The Privacy concept is found in the Indian constitution as the Indian courts have decided upon this particular matter of the right to privacy as a fundamental right in many of the Indian cases has ruled that the right to privacy is not a fundamental right and later on the judgment gave its decision in interpret the scope of the Article 21 of the constitution giving a wider interpretation in one of the issues of the privacy. And the privacy is not explicit in nature, which is more implicit in nature. And privacy is an absolute right but the interpretations made that the right is an intrinsic but not absolute in nature. The privacy concept in the Indian context is totally a different scenario in the other countries. The apex court in India has been incidentally right to privacy and has explicitly guaranteed on the case basis the Article 21 of the Indian constitution has the personal liberty as we can make an intelligence of the

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individual privacy² that are inherent and is private.³ However, the supreme court of India has incidental right to privacy from ones explicitly guaranteed. Article 21 of the Constitution contains a guarantee of personal liberty and it also involves the right to privacy. Article 21 is the expression 'Personal Liberty'. The Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights (ICCPR), 1966 provides for the protection of the person against arbitrary interference with his/her privacy. According to Article 12 of the Universal Declaration of Human Rights, 1948 says "No one shall be subjected to arbitrary interference with his privacy, family, home and reputation". Everyone has the right to protection of the law against such interference or attacks. Further according to Article 17 of the International Covenant on Civil and Political Rights (ICCPR), 1966 "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence or to unlawful attacks on his honour and reputation".

II. DEFINITION OF SURROGACY

The term *Surrogacy* means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, where as the gametes belongs to her or her husband, and with the intention is to carry for a term and hand it over the child to the person or it can be persons for which she is acting as a surrogate mother.

According to the Surrogacy (Regulation) Bill, 2019 under which Section 2(zc) defines the surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.⁴ And the term who is a surrogate mother can also be traced out to the meaning of the word surrogate mother as according to the Oxford vocabulary the term Surrogate mother is "a woman who bears a child on behalf of an another woman's, either from her own egg or through implantation in her womb of a fertilised egg from the other woman.

III. SURROGACY LAW IN INDIA

The background of the surrogacy in India emerged as a surrogacy focal point in recent years. The multiple reports say that the unethical practices, exploitation of surrogate mothers, abandonment of children and the rackets involving intermediaries importing human embryos and gametes. The law commission of India also highlighted need to enact legislation on

² James Q. Whitman, *Two Western Cultures of privacy: Dignity versus liberty*, 113 YALE L.J. 1151, 1161 (2004).

³ MARGARET MEAD, *COMING OF AGE IN SAMOA: A PSYCHOLOGICAL STUDY OF PRIMITIVE YOUTH FOR WESTERN CIVILIZATION* 219 (1973).

⁴ Section 2(zc) of the Assisted Reproductive Technologies (Regulation) Bill of 2019.

surrogacy law. The Indian historical background of the surrogacy can be looked into the past as in India the number one foremost case where the In Vitro fertilisation was used for the first time as the baby was born in the place of Kolkata and the method of usually the assisted reproductive technology in short abbreviation we can call it as ART which has been an rapid development. And the country of India has started the commercial surrogacy in the year of 2002 which was made open. And there are countries for example the United States where in some states the women will be paid to carriage of another child through genetics and the process undergoing through the In- Vitro Fertilisation and the transferring of the embryo.

The Surrogacy law in India even in the non-attendance of the statutory frame work, the surrogacy in India is not illegal, thus the country becoming the favourite destination for the international destitute of children. Looking forward by the glossary provided in Baby Makers, Gestational Surrogacy is a treatment process in which another woman, known as the gestational surrogate in which undergoes the embryo transfer of process and then carries the pregnancy to a certain period or term. Gestational Surrogacy may be achieved with the help of the intending mother eggs or with eggs from the donor or a donor. The Artificial Insemination surrogacy occurs when a surrogate mother becomes pregnant after which being inseminated with the sperm. After the birth, the surrogate mother will relinquishes all parental rights and the child is given to the persons whose baby she is carried. The Assisted Reproductive Technology comprises a group of therapies in which that manipulates the egg or sperm or early conception in order to establish a sustainable pregnancy. In the case of *Baby Manji Yamada v. Union of India*⁵ the Honourable Supreme Court, apart from tracing the etymological roots of surrogacy, has delineated the different types of surrogacy, such as traditional surrogacy it is also known as the straight method, gestational surrogacy it is also known as the Host method and in which in this case it was matter of altruistic surrogacy and commercial surrogacy.

And slowly the India has legalised and it started flourishing producing of overseas surrogacy requirements and the fertility tourism and the commercial surrogacy was banned in the year of 2015 and was legalised before in the year of 2002. So, in the year of 2002 the Indian Council of Medical Research (ICMR)⁶ has placed the guidelines for surrogacy in order to protect the surrogate mother and the commissioning parents to have a practice of surrogacy legally. And the ban was on the basis of the sex selective surrogacy and to ensure the right to privacy of the mother and at the same time the donor and other related birth certificate matter.

⁵ (2008) 13 SCC 518.

⁶ Guidelines of the Indian Council of Medical Research (ICMR) of 2005.

Since 2002 we can say that the commercial surrogacy was made legal and later the Supreme Court of India in the Baby Manji Yamada case⁷ was held that commercial surrogacy to be legalised in India and the court also gave the guidance and directions to pass a relevant law governing surrogacy in India in the legislature. And later the flow of the laws made in the relation to the surrogacy the legislature which came up with the draft of the assisted reproductive technique clinics guidelines in the year of 2008 and we can say that this only the guiding and governing law of the surrogacy transactions in the India. Later another bill was proposed and the draft was made in the year of 2016 as Surrogacy (Regulation) Bill of 2016 which aimed to ban commercial surrogacy and allowed to practice of the altruistic surrogacy in the Indian country.

And later the bills were drafted in the year of two thousand eight, two thousand ten and two thousand thirteen had allegedly proposed that the assisted reproductive technology in India which made accessible to all and also for the single persons and the foreign couples. The point that has to be observed here is that the draft assistive reproductive technology bills of two thousand fourteen and the 2016 was made confined surrogacy only to the Indian married infertile couples who are unable to procreate a child due to infertility.⁸ The Assistive reproductive bill of 2016 the cabinet approved the surrogacy (Regulation) Bill, 2016 and this Bill of 2016 was replaced with the 2019 Surrogacy (Regulation) Bill, 2019.

IV. RIGHT TO PRIVACY OF WOMEN AND ITS EXTENT

The Scope of Privacy of Women can be looked into the view of the right to privacy as one of the fundamental right that is made available to every woman if we stand in the foot of the fundamental rights subject. Every individual shall have a right to his privacy which includes confidentiality of communication made to, or, by him including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; *confidentiality of his private or his family life*; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and financial transactions, medical and legal information and protection of data relating to individual.⁹ The Apex Court of the land went a way forward in the case of *K.S.Puttaswamy v Union of India* and the nine judge bench with out exception decided that right to privacy includes personal freedom relating to the body , mind and to making choices, as well as

⁷ (2008) 13 SCC 518.

⁸ Assistive Reproductive Technology Bill of 2016.

⁹ Definition of Right to Privacy under The Privacy Bill, 2011.

which includes informational privacy. The personal freedom relating to the body, mind and to make their own choices essentially which involves women's rights to make their sexual and reproductive decision making. And it can be observed that in the above mention case of the decision made by the highest court of India was ruled in the previous judgements of some of the precedents in which overruled and gave its decision saying that the privacy is a right that includes any matters of human body, the making of choices is considered as the privacy and also the information which is received is also a matter of privacy that can not be disclosed to anyone. And the point that had to be noted that in case of making of choices which essentially includes the rights of the women to have their own decision making to sex and the Reproduction which falls under the per view of right to privacy

V. REPRODUCTIVE FREEDOM OF SURROGACY IN WOMEN'S PERSPECTIVE

The reproductive rights that also includes in the woman privilege to bear a pregnancy for the complete period to give a birth and eventually give raise to the children and these rights are part of the woman's right of privacy in the manner of dignity and bodily integrity. The reproductive autonomy of a woman can be exercised to procreate as well as to abstain from procreating¹⁰. *The above right of women has been time and again acknowledged by the Honourable Supreme Court of India.* The Apex Court of India has held that a woman has the right under Article 21 to make her own reproductive choices whereas the Medical Termination of Pregnancy Act, 1971 places the option of abortion within the satisfaction of the medical practitioners. Here lies the conflict.

Abortion means to terminate the pregnancy. Abortion can happen due to miscarriage or voluntary termination by medical assistance. Generally many women die every year due to unsafe abortion¹¹. Earlier abortion was punishable¹² now Laws have legalised the process of medical abortion in India¹³. The main idea of legalising the abortion is to have safe and hygiene process in certain cases where a woman is been a victim of rape and there is a need to terminate in the first trimester with the permission of the court or when there is danger either for the life of the mother or the foetus in the womb or parents wanting to have limited number of children¹⁴. But the main purpose of enacting the Medical Termination of Pregnancy Act has been misunderstood, where justification for restricting abortions is based on sex selective

¹⁰Suchita Srivastava & others vs Chandigarh Administration of 2009.

¹¹ Sebastian, Mary Philip, M E Khan, and Daliya Sebastian (2014): "Unintended Pregnancy and Abortion in India.

¹² Before 1972.

¹³ The Medical Termination of Pregnancy Act 1972.

¹⁴ Section 3 of the Medical Termination of Pregnancy Act 1972.

of the womb. Indian parents are not willing to give birth to female child as she would bring more expenses to that family in future. Law particularly allows only the registered medical practitioner to abort the child, if not it is to be a punishable offence.¹⁵

According to the Section 3 of the Act which allows the practitioners who are the medical practitioners who has only been registered which they can have the termination of the woman's pregnancy and it basically depends on the belief of the good faith and that kind of the pregnancy really puts into the risk to the woman which affects the life or any kind of the physical and any mental abnormality. And there is a week that has been prescribed in the mens of the week where as if the woman has been there as pregnant who is under the twelve weeks the permission of the medical practitioner is actually essential. And if the pregnancy is of between the twelve and twenty weeks the medical practitioners has to be authorised containing of the two in number when it is in the case of the pregnancy below twelve weeks in such circumstance only one medical practitioner permission is required. And similarly in the Section 5 of the Act is applied in the case of the above the twenty weeks and only in circumstances the medical practitioner if he has the belief to do so the abortion is made in order to save the life of the woman.

VI. IS SURROGACY BILL A VIOLATION OF RIGHT TO PRIVACY?

As the Bill has imposed prohibition on surrogacy, it is a violation of right of privacy as it would also restrain infertile couple from having children through the legal process of surrogacy. Every individual has right to privacy as a fundamental right, as they as right to reproductive choice and similarly can choose the means to have children. Commercial surrogacy is banned in India, because of it many couples who are in real need of children are been affected. The bill allows surrogacy only for the couples who are married and which exclude the live in relation couples, sole, widowed or divorced individuals to get a child which is against the Indian Constitution¹⁶, Hindu Adoption and Maintenance Act of 1956¹⁷ and Juvenile Justice Act of 2015¹⁸. Any one apart from the married couples who enter into the contract of surrogacy would be criminalised under the bill. According to Section 38 of the bill outlines jail terms and fines for those who contravene any of the bill's provisions, and for whom specific penalties have not been provided elsewhere in the bill. While non-recognition may not always equal criminalisation, this bill in particular does criminalise the act of choosing surrogacy for everyone apart from married couples.

¹⁵ Section 5(2) of The Medical Termination of Pregnancy Act 1972.

¹⁶ Article 14 of Indian Constitution.

¹⁷ Section 7 & 8 of Hindu Adoptions and Maintenance Act, 1956.

¹⁸ Section 57 of Juvenile Justice (Care and Protection of Children) Act, 2015.

The Surrogacy law in which the bill which also strictly restricts on the freedom of the married couples and surrogates who are potential with imposing the conditions very rigorous and the necessities of the eligibility certificates for the both the sides. And the point that has to be noted here is that in case of the couples who are married they cannot be forced to disclose or publicise the infertility matters which is a concern of the privacy and particularly in the case of infertility frequently that is attached to the stigma. The other issue is that the surrogate mother's would not be willing to disclose their personal details anywhere, as it may affect their future in anyways, as in our India it is not a tradition to be a mother before getting married. But the law forces the surrogate mother to disclose her details.

In India Article 21 of the Indian Constitution is deemed to be the strength of fundamental rights where various derivative rights have come up. Article 21 protects right to life, were this Article include all the concept of life together with to all the need for survival i.e. even right to privacy. Right to privacy is considered to be one of the derivative rights of right to life and personal liberty under Article 21. In the recent landmark case of Justice K S *Puttaswamy v Union of India*,¹⁹ the nine judge decision of the Honourable Supreme Court of India has confirmed and settled an issue in rest and held that right to privacy is a fundamental right and an inalienable right guaranteed under Article 21 of the Constitution of India. The reproductive rights that also includes in the woman privilege to bear a pregnancy for the complete period to give a birth and eventually give raise to the children and these rights are part of the woman's right of privacy in the manner of dignity and bodily uprightness. The reproductive autonomy of a woman can be exercised to procreate as well as to abstain from procreating. The above right of women has been time and again acknowledged by the Honourable Supreme Court of India. The Apex Court of India has held that a woman has the right under Article 21²⁰ to make her own reproductive choices whereas the Medical Termination of Pregnancy Act, 1971 places the option of abortion within the satisfaction of the medical practitioners.

VII. UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The Human Rights and Women the universal declaration of Human Rights which aims to protect the human persons in the equal rights of men and women and it doesn't matter whether the country is large or small. And the Universal Declaration of Human rights beliefs in the fundamental human rights in having a dignity and worth. The Human rights can be defined as the rights and freedoms that every person on the land is entitled to enjoy for

¹⁹ Decided on August 2017.

²⁰ See Constitution of India in the year of 1950.

example right to social security, right to equality and life. And there cannot be any kind of discrimination based on the race, colour, sex, language and religion. As per the declaration of human rights, woman along with men are also entitled for the civil and political rights. As looking into the view of Article 12 of UDHR (Universal declaration of human rights) it says that No one shall be subject to arbitrary interference with his/her privacy family, home or correspondence nor to attacks upon his/her honour and reputation. The surrogacy law in perspective of women as it is clearly stated in the Article 12 of UDHR (Universal declaration of human rights)²¹ in which invasion of right to privacy in to the family which is universally recognised as a human right. In case if this is violating the rights of the surrogate woman which is considered as the violation of human rights. And it also says that the arbitrary interference into the privacy of his/her family shall not be subjected. And to be more precise about the Universal declaration of human rights India is a signatory to it and it is the obligation in which it has to adhere to the convention in order to protect the human rights.

VIII. CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Human rights of women convention on the elimination of all forms of discrimination against women (CEDAW) where the women constitutes almost half of the worlds society and they are considered as one of the weaker and vulnerable sections in the society. All the member states of the United Nations convinced that there should have the full and complete development of a country, welfare of the world and the maximum participation of women on equal terms. The convention on the elimination of all forms of discrimination against women, 1979 (CEDAW) this convention which was adopted by the general assembly of the united nations on 18th December, 1979 and came into force on 1981. The main purpose of this convention on discrimination against women which kind of distinction, on basis of equality of male and female. According to the Article 16 of the convention on the elimination of all forms of discrimination against women (CEDAW)²² in which it eliminates discrimination in all matters relating to marriage and family relations as the point to be noted is that the similar rights and responsibilities as parents irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be overriding.

IX. CONCLUSION

As going by observation the state has the duty to protect the individual rights as to safeguard

²¹ 1948 of General Assembly Resolution of 217 A.

²² Adopted in the Year 1979.

the basic rights that are guaranteed in not infringing the privacy and take necessary measures. And the legislature has to take into consideration in order to protect the rights of the surrogate mother of reproduction and the child rights. There is a need to check the abuse of surrogate mothers in the process of surrogacy. Therefore, there needs to be a legal frame work that's governs the surrogacy practices and protection of child rights who are born out of surrogacy. And therefore, the reproductive right of women a part of fundamental right and a privacy right thus the justice has to be rendered for the surrogate mothers in reproduction. Therefore, in the landmark of Supreme Court has recognized the reproductive rights of women under the right to privacy as a part of fundamental right and thus has rendered reproductive fairness for women.
