IMS UNISON UNIVERSITY
Nurturing Knowledge. Empowering Minds.

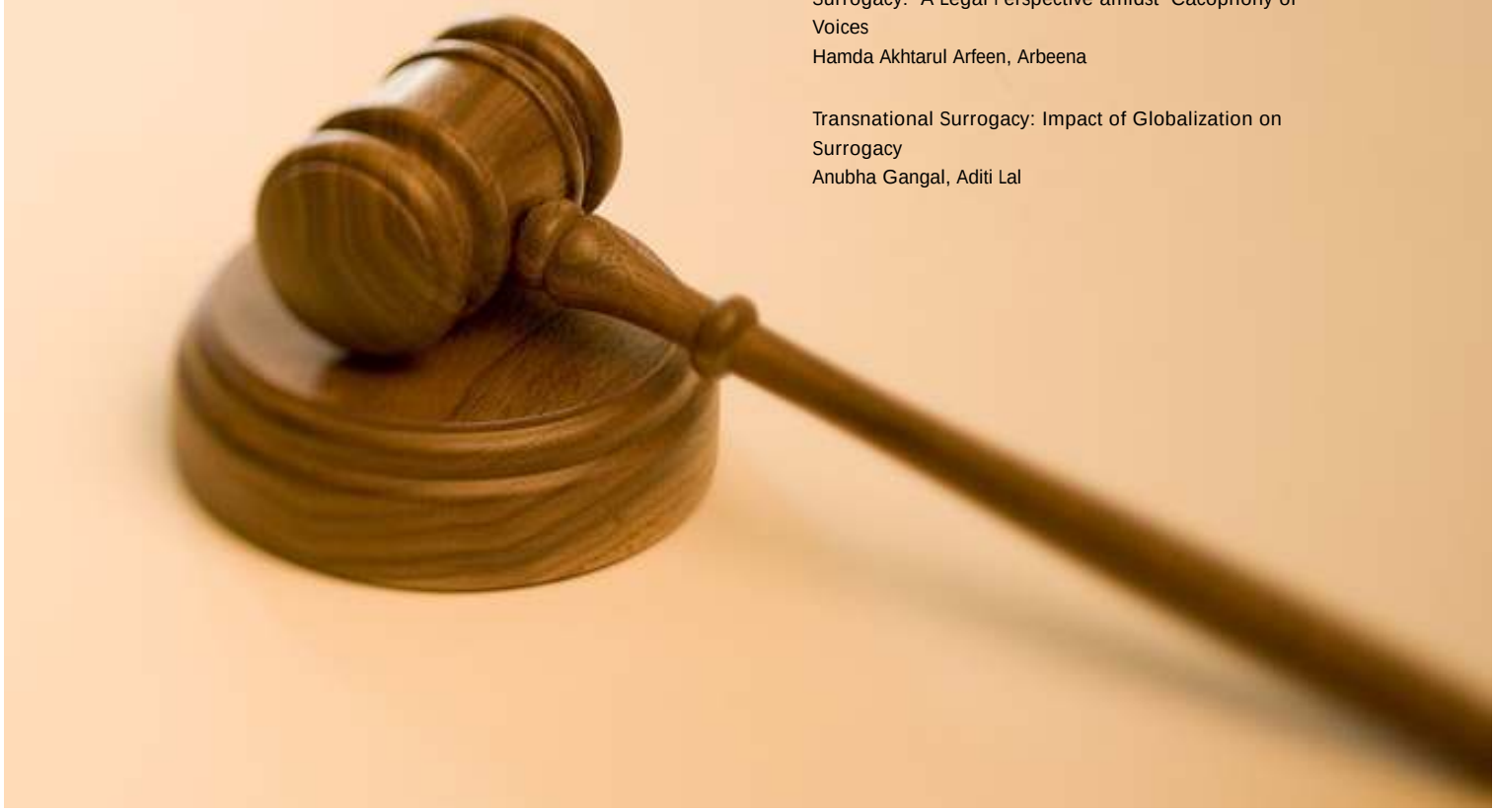
ISSN : 2278-8093

Pragyaan

Volume 7, Issue 1, June 2017

Pragyaan: Journal of Law
a bi-annual refereed Journal

Research Papers



Pragyaan: Journal of Law

Volume 7, Issue 1, June 2017

Panel of Referees

From the Editor

It gives me immense pleasure to present Pragyaan: Journal of Law Volume 7 Issue 1 (June 2017). I am happy to share with you that we are now enlisted in the UGC List of Journals in the category of Social Science. I take this opportunity to acknowledge and thank the Advisory Board, Reviewers and Contributors who have been involved in the journey of Pragyaan: Journal of Law since 2011. The objective of journal is to publish up-to-date, high-quality and original research papers alongside relevant and insightful reviews. As such, the journal aspires to be vibrant, engaging and accessible, and at the same time integrative and challenging.

We are also happy to inform that this issue of the journal is publishing the best six papers presented and adjudged by eminent chairpersons in the 'National Seminar on Surrogacy: Ethical, Legal, Socio-Economic Issues', held on February 17 & 18, 2017 in School of Law, IMS Unison University, Dehradun. The development of science and technology has caused rapid changes and the law must evolve to keep pace with it. Tracing the legal trajectory of surrogacy all over the world, these papers raise questions on its ethical, legal and socio-economic dimensions and also provide alternative solutions to it, for example simplifying of adoption laws.

Awareness about the laws should be created among those who are supposed to be concerned with these laws. Academicians play a very important role in the development of the law, and there is the need to encourage young minds to participate in development of law based on the needs of the rapidly changing society and technical advancements. Pragyaan: Journal of Law provides an excellent platform to all the academicians and practitioners to contribute to the development of sound laws for the country.

We sincerely hope the journal would continue to gain appreciation and accolades as it provides a platform that stimulates and guides the intellectual quest of law scholars. Needless to say, any papers that you wish to submit, either individually or collaboratively, are much appreciated and will make a substantial contribution to the early development and success of the journal.

Best wishes and thank you in advance for your contribution to the Pragyaan: Journal of Law.

Dr. Saroj Bohra

Editor

Pragyaan: Journal of Law

Volume 7, Issue 1, June 2017

ISSN 2278-8093

CONTENTS

Constitutional Validity of The Tamil Nadu Reservation Law 1994

*Dr. A. K. Pandey**
*Rajesh Kumar Dube***

ABSTRACT

The Right to Equality is a fundamental right in our Constitution. This equality is not in numerical or quantitative sense rather in qualitative and substantive sense. It prohibits discrimination, but it permits reasonable classification. Such reasonable classification must be based on intelligible differentia and such differentia must have a reasonable nexus with the objective sought to be achieved. The reservation law should be in accordance with the Constitutional objective and compatible with the Right to equality. The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 [Tamil Nadu Act, 45 of 1994] was inserted under the shield of Ninth Schedule of the Indian Constitution by the Constitution (Seventy Sixth Amendment) Act, 1994. This Act provides 69 per cent reservation which is in contravention of 50 per cent maximum limit of reservation law as established in IndraSawhney case.The paper seeks to assert that the main objective of such an insertion was to protect the Tamil Nadu Act, 45 of 1994, against the judicial review regarding its constitutional validity.One of the very important socio-economic implications of the Tamil Nadu Reservation Law is that being excessive reservation of 69 per cent causes reverse discrimination towards unreserved category candidates which is against the constitutional provision regarding Right to Equality.Is such law inconsistent with right to equality? Is it in accordance with the settled law regarding reservation that it should not be more than 50 per cent?These are the issues discussed in this research paper with an endevour to find out the answers to these questions.

Key Words: Reservation, Right to Equality, The Tamil Nadu Reservation Law, Ninth Schedule, Constitutional Validity

1. Introduction

The State of Tamil Nadu is a pioneer State in providing reservation for the underprivileged and the first communal Government Order was made in 1921. The proportional representation for the communities was made in 1927 in the State of Tamil Nadu.[1] The chronological orders regarding reservations in the State of Tamil Nadu may be summarized as follows:[2]

- 1871- The Madras Census Report of 1871 had documented the fact that non brahminical Hindu and Muslim communities were eliminated from political prospects.
- 1881- Need to make special interest in socially backward entities was suggested.
- 1883- The report of Indian Education Commission states that practically no attention is paid to the problems of general education of the people.
- 1885-Financial support was provided in Madras to spread education.
- 1893- Madras Government provided special educational attention for 49 different castes.
- 1927- Caste was kept a primary factor in the recruitment process for Government jobs in Madras state.
- 1971- Sattanathan Commission recommended introduction of creamy layer and altering reservation percentage for backward classes to

*Dean&Head, School Of Law, SRT Campus, BadshahiThaul, H.N.B. Garhwal University, TehriGarhwal, Uttarakhand

**Assistant Professor, DAV (PG) College, Dehra Dun& Research Scholar,School of Law, H.N.B. Garhwal University, SRT Campus, BadshahiThaul, TehriGarhwal, Uttarakhand

[1] Preamble, The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Tamil Nadu Act, 45 of 1994)

[2] Dr. KSivachithappa and Dr. Jeffrey Lawrence D'Silva, EQUALITY AND SUSTAINABLE HUMAN DEVELOPMENT - ISSUES AND POLICY IMPLICATIONS(Lulu Enterprises UK Ltd.);Dr. L Ganeshan and K. PushpavalIi, RESERVATION POLICIES IN INDIA IS A LEADING OR LACKING ROLE OF DEPRIVED SECTIONS- A HISTORICAL PERSPECTIVE, (Page-21 to 23)available at https://books.google.co.in/books?id=BbvDBgAAQBAJ&dq=reservation+Policies+in+India+by+Dr.+L+Ganeshan+and+K+Pushpavalli&source=gbs_navlinks_s (Last Visited On Dated- May 20, 2017)

16 per cent and separate reservation of 17 per cent to most backward classes (MBCs). DMK government increased OBC reservation to 31 per cent and reservation for SC/ST has been increased to 18 per cent , thus total reservation stood at 49 per cent.

- 1980- ADMK government excluded the creamy layer from OBC reservation benefits. Income limit for availing reservation benefit was fixed at Rs. 9000 per annum. DMK and other opposition parties protested the decision. Reservation for OBC was increased to 50 per cent, and total reservation stood at 68 per cent.[3]
- 1989 - State-wide road blockade agitations were launched by VanniyarSangam, parent body of PattaliMakk"alKatchi, demanding 20 per cent reservation in state government and 2 per cent reservation in central government exclusively for Vanniyar caste. DMK Government split OBC reservations into two parts: 30 per cent for BCs and 20 per cent for MBCs. Separate reservation of 1 per cent was introduced for Schedule Tribes. Total reservation percentage stood at 69 per cent.
- The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 [Tamil Nadu Act, 45 of 1994], hereinafter referred as, Tamil Nadu Act, 45 of 1994, was inserted under the shield of Ninth Schedule of the Indian Constitution by the Constitution (Seventy Sixth Amendment) Act, 1994. It extended the reservation percentage up to 69 per cent.

2. The Tamil Nadu Reservation Act, 1994

Indra Sawhney V. Union of India[4] case, popularly known as Mandal Commission case, was a very important decision of Supreme Court on November 16, 1992 regarding reservation of posts for backward classes. The Court, after referring to the previous decisions on Articles 15 and 16 and also after taking note of the decisions of the U.S. Supreme Court on racial discrimination, made elaborate judgment regarding various issues on reservation. One of the very important issuesthat rose before the Court was: To what extent can the reservation be made?

The Supreme Court answered that total reservation cannot exceed 50% of the appointment of posts in any one year, "*barringcertainextraordinarysituations*". The Supreme Court through Reddy J. observed:

"While 50% shall be rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far- flung and remote areas the population inhabitating in those areas might, on account of their being out of main stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in different way, some relaxation in this strict rule may become imperative."[5]

The extent of reservation in the State of Tamil Nadu had been increased to 69% under The Tamil Nadu Reservation Act, 1994. The issue of admission to educational institution for the academic year 1993-94 came up before the High Court of Madras in a writ petition. The High Court of Madras held that the Tamil Nadu Government could continue its reservation policy as hitherto followed during that academic year and that the quantum of reservation should be brought down to 50% during the academic year 1994-95.[6]

After this ruling of the High Court, the Government of Tamil Nadu filed a Special Leave petition against the High Court of Madras in order that the present reservation policy of the State Government i.e. the extent of reservation should be 69 per cent, should be reaffirmed. However the Supreme Court of India passed an interim order reiterating that the reservation should not exceed 50 per cent in the matter of admission to educational institutions.[7]

After aforementioned ruling of the Supreme Court, that the reservation should not exceed 50 per cent in the matter of admission to educational institutions, the Tamil Nadu Legislative Assembly in the special session on dated November 9, 1993, unanimously resolved to call upon the Central Government to take steps immediately to bring a suitable amendment to the Constitution of India so as to enable the Government of Tamil Nadu to continue its policy of 69 per cent of reservation in government services

---

[3] *Ibid.*
[4] AIR 1993 SC 477
[5] *Indra Sawhney V. Union of India* AIR 1993 SC 477
[6] The Statement of Objects and Reasons – The Constitution (Seventy – Sixth Amendment) Act, 1994 (Para – 3)
[7] *Id.*

and for admission in educational institutions as at present.[8] There had also been a meeting of all parties on November 26, 1993 in Tamil Nadu, urging the Central Government that there should not be any doubt or delay in ensuring the continued implementation of 69 per cent reservation for the welfare and advancement of the backward classes.[9] The Tamil Nadu Government enacted a legislation named as The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Act 45 of 1994), hereinafter referred as "Act 45 of 1994". The Preamble of the Act45 of 1994 states that: "*It is an Act to provide for reservation of seats in educational institutions in the State and of appointments or posts in the services under the State for the Backward Classes of citizens and for persons belonging to the Scheduled Caste and Schedule Tribes in the State of Tamil Nadu.*"

The Act overrides the Indra Sawhney[10] judgment of the Supreme Court and provides that:

"Notwithstanding anything contained in any judgment, decree, order of any court or other authority, having regard to the social and educational backwardness of the Backward Classes of citizens and the persons belonging to the Scheduled Castes and Scheduled Tribes who constitute the majority of the total population of the State of Tamil Nadu, the reservation in respect of the annual permitted strength in each branch or faculty for admission into educational institutions in the State, for the Backward Classes of citizens and for the persons belonging to schedule castes and schedule tribes, shall be 69 per cent."[11]

The Act also provides:

"The reservation referred to in sub-section (1) shall, in respect of the persons belonging to the backward classes, the most Backward Classes and denotified communities, the Scheduled Castes and Schedule Tribes will be as follows: (a) Backward Classes – 30 per cent; (b) most Backward Classes and denotified communities – 20 per cent; (c) ScheduledCastes – 18 per cent and (d) ScheduledTribes 1 per cent."[12]

Similarly there are overriding provisions regarding reservation in appointments of posts in the services under the State. The Act provides that:

"Notwithstanding anything contained in any judgment, decree or order of any court or other authority having regard to the inadequate representation in the services under the State of the Backward Classes of citizens and persons belonging to Scheduled Castes and Scheduled Tribes, who constitutes majority of the total population of the State of Tamil Nadu, the reservation for appointments of posts in the services under the State, for the Backward Classes of citizens and for the persons belonging to the Scheduled Castes and Scheduled Tribes, shall be 69 per cent."[13]

It has been clarified that for the purposes of this Act "services under the State" includes the services under (i) the Government; (ii) the Legislature of the State; (iii) any local authority; (iv)any Corporation or Company owned or controlled by the Government; or (v) any other authority in respect of which the State Legislature has power to make laws.[14]

The Act further provides that the reservation in the appointment of posts in the services under the state will be as follows: (a) Backward Classes – 30 per cent; (b) most Backward Classes and denotified communities – 20 per cent; (c) Scheduled Castes – 18 per cent and (d) Scheduled Tribes 1 per cent.[15]

The Act also provides that the claims of the students or member belonging to the Backward Classes of the citizens or the Scheduled Castes or the Scheduled Tribes shall be considered for the unreserved seats.[16] The Act validated "the reservation of 69 per cent made, and anything done or any action taken on the basis of such reservation, by the Government for admission into education institutions in the State and for appointment of posts in the services under the State for the Backward Classes of citizens and for persons belonging to the Scheduled Castes and Scheduled Tribes during the period commencing on the 16th day of November, 1992 (i.e. the judgment day of

---

[8] *Id.* At Para - 4
[9] *Id.*
[10] *Indra Sawhney and others V. Union of India and others*, AIR 1993 SC 477
[11] Sec. 4(1), Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Act 45 of 1994)
[12] *Id.* Sub – section (2) of the section 4
[13] *Id.* Sub – section (1) of the section 5
[14] *Id.* Explanation of Sub-section (1) of the section 5
[15] *Id.* Sub – section (2) of the section 5
[16] *Id.* Section 6

Indra Sawhney case) and ending with the date of publication of this act in the Tamil Nadu Government Gazette", notwithstanding anything contained in any judgment, decree or order of any court or other authority.[17]

After passing this legislation in the form of Bill in Tamil Nadu Legislative Assembly, Tamil Nadu Government forwarded to the Government of India for consideration of the President of India in terms of Article 31C of the Constitution.[18] The Union Home Minister held meetings with the leaders of the political parties on July 13, 1994 to discuss provisions of the Bill. There was a general consensus among the leaders that Bill should be assented to, and accordingly the President gave his assent to the Bill on July 19, 1994.[19] Afterward, the Tamil Nadu government accordingly notified the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 [Tamil Nadu Act, 45 of 1994] in the Tamil Nadu Government Gazette – Extraordinary at Madras on Tuesday of July 19, 1994.

3. Insertion of the Tamil Nadu Reservation Act, 1994 under Ninth Schedule

The Tamil Nadu Government requested the Government of India on 22nd July, 1994 that the aforementioned Tamil Nadu Act 45 of 1994 is included in Ninth Schedule to the Constitution of India.[20] While making the request, the Tamil Nadu Government cited following reasons:

"The said act attracts Article 31C of the Constitution, as following within the preview of clauses (b) and (c) of Article 39 and Articles 38 and 46 of the Constitution – vide section 2 of the Act. The Act has been passed relying on the Directive Principles of State Policy enshrined in Part IV of the Constitution and in particular, Articles 38, 39 (b) and (c) and 46 of the Constitution. As the Act is to give effect to the Directive Principles of State Policy contained, inter alia, in Article 39 (b) and (c), the said Act will get the protection of Article 31C of the Constitution and therefore cannot be challenged under Articles 14 and 19 of the Constitution with reference to which Article 14, the reservation exceeding 50 per cent has been struck down by the Supreme Court. Now it has been decided to address the Government of India for including the Act into the Ninth Schedule to the Constitution so that the law cannot be challenged as violative of any of the Fundamental Rights contained in Part III of the Constitution including Article 15 and 16 and gets protection under Article 31B of the Constitution."[21]

The Government of India had already supported the State Legislation by giving the Presidential assent to the Tamil Nadu Bill.[22] The Government of India, as a corollary to the above decision, felt it was necessary that the Tamil Nadu Act 45 of 1994 should be brought within the purview of the Ninth Schedule to the Constitution so that it gets protection under Article 31B of the Constitution in regard to judicial review.[23] By Section 2 of the Constitution (Seventy – Sixth) Amendment Act, 1994, on August 31, 1994 the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservations of Seats in Educational Institution and Appointments or Posts in Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1994), was inserted under Entry 257 A of the Ninth Schedule. The main objective the Article 31B read with Ninth Schedule was to protect agrarian reform laws, and the Reservation law like The Tamil Nadu Act,45 of 1994 had never been contemplated when it was inserted within the Constitution by First Amendment Act, 1951.

4. Socio–Economic and Political implications of The Tamil Nadu Reservation Act. 1994

The Tamil Nadu society is historically stratified in various castes and creeds. The political leaders of the State, just for the sake of their politically motivated vested interests, perpetuated the said law. Reservation has always been one of the political means to appease some castes. The objective of the reservation is to provide social justice, but it must be within the Constitutional limitations. Reservation politics is very dangerous for the unity and stability of the society.

It is observed that just for the electoral gains, the reservation has been provided with a view to divert the attention of the people of Tamil Nadu from their basic needs of nutrition, health, education, economic development, etc. The Tamil Nadu Reservation Act,1994 affects the various strata of the society. Those communitieswho are within reserved categoryare enjoying

---

[17] *Id.* Section 9
[18] The Statement of Objects and Reasons , The Constitution (Seventy Sixth Amendment) Act, 1994 (at Para – 5)
[19] *Id.* At Para - 6
[20] *Id.* At Para - 8
[21] *Id.*
[22] *Id.* At Para - 9
[23] *Id.*

the socio-economic advantageous position but forward communities, who are unreserved categories, have been suffering deprivation.

In a case[24] before the Supreme Court, the petitioner, who belongs to the forward community, passed the Higher Secondary Course, in the Public Examination conducted by the Department of Government Examination of the State of Tamil Nadu in March 2014 and he secured 1154 marks out of a maximum 1200 marks. He applied for the admission to the M.B.B.S. Course offered by a college. His Rank was 287 in the order of merit.[25] The petitioner came to know that about 223 candidates, who were above him in order of merit, absented themselves on the date of counselling. Consequently, he was elevated within first 75 candidates in order of merit. If the respondent College had adopted 50 per cent limit of reservation for reserved category candidates, the petitioner would have been selected from unreserved or open category.[26] But the respondent college applied 69 per cent reservation as per Tamil Nadu reservation Law and the petitioner lost the chance of getting admitted, only because of the application of 69 per cent Reservation.[27] Such a situation causes frustration among the deserving candidates of unreserved categories.

One of the very important socio-economic implications of the Tamil Nadu Reservation Law is that being excess reservation of 69 per cent causes reverse discrimination towards unreserved category candidates which is against the constitutional provision regarding Right to Equality. Right to Equality is a fundamental right and it prohibits discrimination, but excessive reservation is the very essence of the Tamil Nadu Reservation Act, 1994. It creates a situation where a society is being established which is not based on a just order, which is a matter of great concern.

5. Constitutional Validity of the Tamil Nadu Reservation Act, 1994

The Tamil Nadu Act 45 of 1994 was inserted under Ninth Schedule for seeking protection under Article 31B of the Constitution in regard to the judicial review. The question arises whether the Tamil Nadu Act 45 of 1994 , which overrides the Supreme Court ruling regarding reservation exceeding 50 per cent, is constitutionally valid or not? For answering this question we will delve into various case laws in this regard. In Balaji case,[28] The Supreme Court attempted to limit the extent of reservation. The Court observed: *" A special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."*[29]

In Devdasan case,[30] the 50 per cent limit of Balaji case was applied to this case arising under Article 16(4) and on that basis the carry forward rule was struck down. In Thomas case[31] it was observed by the Supreme Court that:*"As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases."*

After this case the controversy arose whether 50 per cent rule of Balaji's case was overruled by Thomas case or that should be continued as valid. In Vasanth Kumar case[32] the two Judges were equally divided on this question. In Indra Sawhney case[33] this question was dealt in detail. The Supreme Court observed:

"It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective, clause (4) is a special provision – though not an exception to clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatement of the principle of equality enshrined in Article 14. The provision under Article 16 (4) – conceived in the interest of certain section of society – should be balanced against guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society."[34]

---

[24] Minor K. VaithiVishwanath V. The State of Tamil NaduWrit Petition No.21434 of 2014, Decided on September11, 2014 (JUSTICE V.RAMASUBRAMANIAN)(Madras High Court)
[25] Id. At Para- 3
[26] Id. At Para- 4
[27] Id. At Para- 5
[28] *Balaji V. State of Mysore*, AIR 1963 SC 649
[29] *Id.* At 663
[30] *T. Devdasan V. Union of India* AIR 1964 SC 179 : (1964) 4 SCR 680
[31] *State of Kerala V. N.M. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310
[32] *K.C. Vasanth Kumar V. State of Karnataka*, AIR 1985 SC 1495 : 1985 Supp. SCC 714
[33] *Indra Sawhney and others Vs. Union of India and Others*, AIR 1983 SC 477
[34] *Indra Sawhney and Others V. Union of India and Others*, AIR 1993 SC 477, 1992 Supp. 2 SCR 454

The Court cited the speech of Dr. B.R. Ambedkar in Constituent Assembly:

"Let me give an illustration. Supposing for instance, reservations made for a community or a collection of communities, the total of which came to something like 70 per cent of the total post under State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of the 30 per cent open to general competition could be satisfactory from the point of view of giving effect to the first principle, namely that there shall be equality of opportunity? It cannot be in my judgment. Therefore, the seats to be reserved if the reservation is to be consistent with sub clause (1) of Article 10, must be confined to minority seats it is then only that the first principle could be find its place in the constitution as effective in operation."[35]

The Court by majority opinion concluded the above discussion, that the reservations contemplated in clause (4) of Article 16 should not exceed 50 per cent.[36] This judgment was delivered by a bench of Nine Judges, which is largest so far as regards to the limits of reservation. This Judgment should be treated as an authority regarding the limits of reservation. The Tamil Nadu Act 45 of 1994 is a law relating reservation under Articles 14, 15 and 16, and the State shall not make any law which takes away or abridges the right conferred under these Articles.[37] If the State makes any law in contravention of Article 13(2), the law up to the extent of contravention will be void.[38] Thus the Tamil Nadu Act 45 of 1994 is in contravention of 50 per cent maximum limit of reservation law as established in Indra Sawhney case.

The next question arises whether by merely placing under Ninth Schedule; the Tamil Nadu Act 45 of 1994 would be constitutionally valid? In this question a very important task is to determine the nature and character of protection provided by Article 31B of the Constitution to the Tamil Nadu Act 45 of 1994 placed under Ninth Schedule. According to Article 31B, the acts and regulations mentioned in the Ninth Schedule shall not be deemed to be void or able to have become void, in spite of any adverse judicial pronouncement on the ground that they are inconsistent with or that they take away of abridged any of the fundamental rights. The provision thus immunises the law placed under the Ninth Schedule.

Therefore the fundamental question is whether it is permissible for the Parliament, under Article 31B, to immunise legislations from fundamental rights by inserting them into the Ninth Schedule. Article 31B is put under the heading Right to Property just after Article 31 and 31A. Article 31B begins with the words that *"without prejudice to the generality of the provisions contained in Article 31A"* – which implies the legislative intention that the protection was provided to the statutes dealt with property rights and the Tamil Nadu Act 45 of 1994 is not related with property rights.

In the Statement of Objects and Reasons of the Constitution (First Amendment) Act, 1951 it is stated that unanticipated difficulties had risenregarding Article 31.

"The validity of agrarian reform measures passed by the State Legislatures in the last three years has in spite of the provisions of the clauses (4) and (6) of Article 31 formed this subject matter of dilatory litigation, as a result of which the implementation of these important measures affecting large numbers of people, has been held up."

The said statement made further confirmation that the main objective of the Constitution First Amendment regarding Article 31B was to remove difficulties faced by the State relating to agrarian reforms measures, as these reforms were taking away or abridging the property right conferred under Article 31. Therefore, it cannot be inferred that the statutes placed under Ninth Schedule could be unrelated to property rights. *"It could plausibly be assumed that Article 31B was meant to protect legislation dealing with property rights and not any other type of legislation."*[39]

The Tamil Nadu Act 1994 is related to reservation law. The Constitution validity of this act is dependent upon the same of Article 31B read with Ninth Schedule of the constitution. In *Waman Rao V. Union of India,*[40] the Supreme Court considered the constitutional validity of Ninth Schedule of the constitution. The Court held that the acts and regulations inserted in Ninth Schedule prior to April 24, 1973 would be fully protected. It was the judgment day of *Keshvananad Bharti V. State of Kerala.*[41] The Court also

---

[35] *Id.* At page 24 Para 27
[36] *Id.* At Page 78 Para 94
[37] Article 13 (2) of the CONSTITUTION OF INDIA, 1950
[38] *Id.*
[39] M.P. Jain, INDIAN CONSTITUTIONAL LAW (Wadhwa, Nagpur,5th Edition 2003)
[40] AIR 1981 SC 271
[41] AIR 1973 SC 146

ruled in Waman Rao case that the inserted acts and regulations are also protected against challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred any of the provisions of Part III of the Constitution.[42] However, in this case the Court observed:

"…those acts and regulations which had been inserted in the Ninth Schedule on or after April 24, 1973 will not receive the protection of Article 31B for the plain reason that in the face of the judgment in Keshvanand Bharati there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage or destroy the basic structure of the constitution."[43]

Another very important and recent judgement in*I. R. Coelho v. State of Tamil Nadu*,[44] the bench of ninejudges unanimously held that the laws inserted under Ninth Schedule would not have absolute immunity.[45] The Court observed:*"The validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these Articles."*[46] *Further:*

"The rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant Article, but subject to limitation of the doctrine of basic structure. True, it may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post Kesavananda Bharati's case which has limited the power of the Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of the basic structure."[47]

The Court while explaining the power of judicial review under Article 32 regarding the Acts and Regulations placed under the Ninth Schedule read with Article 31B and the importance of the Basic Structure doctrine, observed:

"The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting ability of majority to intrude upon them. That wall is the 'Basic Structure' doctrine. Under Article 32, which is also part of Part III, Supreme Court has been vested with the power to ensure compliance of Part III. The responsibility to judge the constitutionality of all laws is that is judiciary. Thus, when power under Article 31B is exercised, the legislations made completely immune from Part III results in a direct way out, of the check of Part III, including that of Article 32. It cannot be said that same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not."[48]

The Supreme Court in this case, while referring to the destruction of the Constitutional Supremacy and creation of Parliamentary hegemonyregarding inclusion of the Acts and Regulations under Ninth Schedule read with Article 31B, observed:

"Indeed, if Article 31B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise."[49]

The Court also held that the Parliament has power to amend the provisions regarding Fundamental rights so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Therefore, it may be stated that by merely placing under Ninth Schedule, the Tamil Nadu Act 45 of 1994 would not be constitutionally valid.

6. Conclusion

The reservation law in India has always been very contentious. Indian society is so diverse and multifarious that it creates conflicting interests. The law must be devised in such a manner that it reconciles with various conflicting interests of the society so that there should maximum

---

[42] *Waman Rao and Others V. Union of India and Others,* (1981) 2 SCC 362; 1981 2 SCR 1
[43] *Ibid.*
[44] AIR 2007 SC 861
[45] *Ibid.*
[46] *Id.* At Para-144
[47] *Id.* At Para- 99
[48] *Id.* At Para -103
[49] *Id.* At Para- 104

satisfaction of the interests of maximum number of the members of the society. Constitution of India has been devised in such a manner that it has the capability to reconcile with the conflicting interests. The Right to Equality is a fundamental right in our Constitution. The equality here is not in numerical or quantitative sense rather in qualitative and substantive sense. It prohibits discrimination but it permits reasonable classification but such reasonable classification must be based on intelligible differentia and such differentia must have a reasonable nexus with objective sought to be achieved. The said objective must be Constitutional and politico-legal rather than purely political.

It is concluded that the Tamil Nadu Act, 45 of 1994 which has been placed under the shield of the Ninth Schedule, is not constitutionally valid. This law is inconsistent with Right to Equality and it is violative of the settled law regarding the extent of reservation i.e. should not be more than 50 per cent. The Tamil Nadu Act, 45 of 1994 seems to fulfil the purely political objective rather than the Constitutional and politico-legal objectives of reservation law. It is suggested that the Constitutional validity regarding inclusion of the Tamil Nadu Act, 45 of 1994 in the Ninth Schedule as per the ruling of Waman Rao[50] and I. R. Coelho[51] case laws should be reconsidered. The Ninth Schedule was meant for the protection of agrarian reform laws against the property right as a fundamental right; but in the course of time the said Schedule has become the shelter heaven of many other laws which are not related with property rights. The inclusion of the Tamil Nadu Act, 45 of 1994 under the shield of Ninth Schedule cannot be constitutionally justified. The interest of the whole society must be taken into consideration while setting the limit of reservation in letter and spirit of the Constitution.

[50] *Waman Rao V. Union of India, AIR 1981 SC 271*
[51] *I. R. Coehlo (dead) by L.Rs. v. State of Tamil Nadu, AIR 2007 SC 861*

Analysis of the Armed Forces Special Powers Act

Deborisha Dutta*

ABSTRACT

Terrorism has been a matter of alarm for a long period and the gravity of such acts has been an increasing concern amongst various nations. India has a bunch of important legislation to deal with this serious issue, such as Terrorist and Disruptive Activities (Prevention) Act (Tada), Prevention Of Terrorist Activities Act (Pota), Unlawful Activities Prevention Act, and the Armed Forces (Special Powers) Act. This paper focuses on the working and legality of The Armed Forces (Special Powers) Act. The major question that arises in our mind is whether the Armed Forces (Special Powers) Act 1958 (AFSPA) can at all be said to be a valid law in today's world or is it just another way of inducing torture by the military in the name of giving protection from terrorism? Certain provisions of the AFSPA give unnecessary powers in the hands of the military forces present in the 'disturbed areas.' Such a law in today's world is unacceptable. Not only are such provisions bad as per international standards, they violate the very basic ingredient, i.e. the principle of natural justice. The major controversy with the Act is the usage of the term "disturbed area".This act does not demand any kind of accountability and gives power to act on the basis of suspicion which is something that can never be appreciated nor supported. This paper attempts to compare various international perspectiveswith this Act to understand whether it supports human rights policies or no.

Key Words: Terrorism, AFSPA, Disturbed Area, Special Powers, Liability

1. Introduction

'Terrorism' is a term that strikes immediate fear in the hearts of many after what the world witnessed on the infamous 9/11 in America. Not to forget, the incident that happened right before our eyes in Mumbai on the 26 November 2008, where few people penetrated the border of the country and in a matter of few hours lit the financial capital of the country on fire. Merciless killings at major points of the city left the citizens with no other option but to just leave their lives to faith. There was no doubt that the entire nation was kept in a tight grip of fear.[1]

Undoubtedly, Terrorism is one of the worst kinds of evil that can befall upon a country. However, as per international norms there is no fixed definition for the same as there is no convergence of ideas while defining the term. As Angus Martyn, while briefing the Australian Parliament had stated, "The international community has never succeeded in developing an accepted comprehensive definition of terrorism. During the 1970s and 1980s, the United Nations attempts to define the term floundered mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination."[2]

The United Nations, although not yet successful on framing the correct and exact definition of terrorism, has strived to condemn the act by following a particular political description of the term. In the United Nations Declaration on Measures to Eliminate International Terrorism, Terrorism has been described as, *"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."*[3]

There cannot be a possible denial to the fact that terrorism is leading towards nothing less than the end of world peace and the legislations of the various countries should

*Assistant Professor, North Cap University, Gurgaon

1 BhupendraAcharya, *Anti-terrorism laws in India: Distinguishing Myth & Reality,* LEGAL SERVICE INDIA(11 October, 2010)*available* athttp://www.legalservicesindia.com/article/article/anti&-8208-terrorism-laws-in-india-382-1.html(Last visited on December 10,2016).

2 Angus Martyn, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September,*AUSTRALIAN LAW AND BILLS DIGEST GROUP, PARLIAMENT OF AUSTRALIA*available* athttp://www.aph.gov.au/ About_Parliament/ Parliamentary_Departments/ Parliamentary_Library/Publications_Archive/CIB/cib0102/02CIB08 (Last visited on February 12,2002).

3 United Nations Declaration on Measures to Eliminate International Terrorism annexure to UN General Assembly Resolution 49/60,*Measures to Eliminate International Terrorism* (9 December, 1994) *available* at : UN Doc. A/Res/60/49(Last visited on December 13, 2016).

have the right to incorporate laws that can combat such vice. Hence, the incorporation of anti-terrorism laws seems to be a fruitful answer to such an alarming situation.

2. Anti-Terrorism Laws In India

Very simply, 'Anti-terrorism laws' are those laws that are incorporated at the instances of Terrorism to combat the same. Logically, such laws by nature, overrides certain rights that were otherwise in force. In other words, Anti-terrorism legislation usually includes specific amendments allowing the state to bypass its own legislation when fighting Terrorism-related crimes, under the grounds of necessity. The State can also formulate new substantive laws in this regard.

India also has/had such anti-terrorism laws in place. It may be mentioned in this context that some of these laws have been repealed due to their unpopularity. The major cause for most of such anti-terrorist laws being protested is loisscélérates. This means that wherever such legislations were implemented, any form of popular form of protest was banned or criminalized.[4]

The following is a brief list of a few applicable laws in this context.

2.1. Terrorist and Disruptive Activities (Prevention) Act (TADA)

This anti-terrorism law came in force between 1985 and 1995 (modified in 1987) under the background of Punjab insurgency and was applied to whole of India. It came into effect on 23 May 1985. It was renewed in 1989, 1991 and 1993 before being allowed to lapse in 1995 due to increasing unpopularity and due to widespread allegations of abuse. This was the first anti-terrorism law legislated by the government to define and counter terrorist activities.[5]

2.2. Prevention of Terrorist Activities Act (POTA), 2002

It was an Anti-terrorism legislation enacted by the Parliament of India in 2002 due to several terrorist attacks that took place in India, especially the attack on the Parliament in 2001. It replaced the Prevention of Terrorism Ordinance (POTO) of 2001 and the Terrorist and Disruptive Activities (Prevention) Act (TADA) (1985–95) and was supported by the governing National Democratic Alliance. The Act was repealed in 2004 by the United Progressive Alliance coalition. The Bill was defeated in the Rajya Sabha by a 113-98 vote but was passed in a joint session, as the Lok Sabha has more seats. It was only the third time that a Bill was passed by a joint session of both Houses of Parliament. The act defined 'terrorist act' and 'terrorist' and granted special powers to the investigating authorities described under the act. To ensure certain powers were not misused and human rights violations would not take place, specific safeguards were also built into the act.[6]

2.3. Unlawful Activities (Prevention) Act 1967

It aimed at effective prevention of associations for unlawful activities in India. The main objective was to make powers available for dealing with activities directed against the integrity and sovereignty of India. The National Integration Council appointed a Committee on National Integration and Regionalisation to look into the aspect of putting reasonable restrictions in the interests of the country. Pursuant to the acceptance of recommendations of the Committee, the Constitution (Sixteenth Amendment) Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. In order to implement the provisions of 1963 Act, the Unlawful Activities (Prevention) Bill was introduced in the Parliament.[7]

2.4. Armed Forces (Special Powers) Act,1958

It was passed on September 11, 1958 by the Parliament of India. It is a law with just six sections granting special powers to the armed forces in what the act terms as "disturbed areas." There are concerns about human rights violations in the regions of its enforcement, where arbitrary killings, torture, cruel, inhuman and degrading treatment and enforced disappearances have happened.[8]

The AFSPA is debatably the legislation which is the root of unjust human rights violation. The question that arises is

---

4 *Available* at http://www.encyclo.co.uk/define/Lois%20sc%C3%A9l%C3%A9rates(Last Visitedon December 13, 2016)

5 Terrorist and Disruptive Activities (Prevention) Act, 1987 *available* at: http://www.satp.org/satporgtp/countries/india/document/actandordinances/TADA.HTM (Last visitedon December 15, 2016)

6 Prevention of Terrorist Activities Act, 2002 available at: http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm (Last visitedon December 15, 2016)

7 Unlawful Activities (Prevention) Act, 1967

8 Harsh V. Pant (ed.), HANDBOOK OF INDIAN DEFENCE POLICY: THEMES, STRUCTURE AND DOCTRINES (Routledge India, 2015).

whether the anti-terrorist laws in India are in themselves synonymous to what they are aimed against, i.e., if such laws (particularly the AFSPA) takes away more than what it offers to the country.

3. AFSPA: A Tool for Torture without Liability?

Irom Sharmila, is a name that requires no further introduction. The human rights activist of Manipur is a symbol of pride for many. Demanding withdrawal of the AFSPA, she had been on a hunger strike for sixteen years.[9] Although Irom's ways might be challenged, the intention behind it was unarguably on moral grounds as she believed that the AFSPA leads torture. Iroma'sfast was a symbolization of how much the AFSPA affects the ones on whom the law is applicable. Since the Act is still in place in spite of the huge amount of debates and arguments surrounding it, the same should be deeply analyzed with international standards so as to ascertain as to how well such a law can fit in today's world.

3.1. Provisions

The AFSPA was passed on September 11, 1958, by the Parliament of India.[10] The Act first extended to the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura which are essentially situated at the borders of the territory of India.[11] On a subsequent notification, the purview of the act also stretched to Jammu & Kashmir.[12]

The Act gives the military forces stationed at 'disturbed areas', 'powers' to use forces and gives them immunity from criminal liability in this regard, i.e., while in the discharge of duty. AFSPA is a relatively small act with limited provisions. However, the number of provisions in the Act does not reflect the amount of damage that the Act can cause.

Section 4 of the Act gives any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces in a disturbed area the power to fire or use force if in such person's opinion, the same is required to maintain public order. Other powers granted includes arrest without warrant, enter and search without warrant etc.[13]

Section 6 of the Act subsequently grants immunity from any legal proceeding on force applied in accordance with the Act.[14]

3.2. Implications

It does not take more than one simple reading to safely ascertain that the sections confer almost unlimited powers in the hands of the Army situated in disturbed areas to use force. Such may not be eligible for judicial scrutiny as granted by Section 6. Such absolute power is not only given to high ranked officers but also to the ones at the bottom of the list.

These are the provisions directly responsible for a number of hunger strikes and other forms of rebellion in the

---

9 *Tripura government extends AFSPA for 6 more months*, The Hindu (15 December 2013), *available* at: http://www.thehindu.com/todays-paper/tp-national/tripura-government-extends-afspa-for-6-more-months/article5461858.ece (Last visited on December 15,2016)

10 The Armed Forces (Special Powers) Act, 1958, *available* at: http://www.mha.nic.in/pdfs/armed_forces_special_powers_act1958.pdf(Last visited on December 15, 2016)

11 Sec. 1, The Armed Forces (Special Powers) Act, 1958.

12 Sec. 1, The Armed Forces (Jammu And Kashmir) Special Powers Act, 1990.

13 Special Powers of the armed forces – Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-
(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or morepersons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;
(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;
(c) Arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
(d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.

14 Section 6-Protection to persons acting under Act – No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

country. Although there is a counter to this view, i.e., the fact that such a law is essential to protect the country from internal terrorism, however the act has mostly been criticized not only nationally but internationally.

4. An International Perspective of AFSPA

Agreeably, it is difficult to follow international standards blindly when there are situations of emergency and when there is a requirement to deviate from certain principles while combating terrorism. However, there are certain rights that are just inseparable and also due processes must be exercised while dealing with such situations.

India being the largest democracy of the world abides by certain international norms and such ratifications imply the country's willingness in promoting and protecting basic human rights standards.[15] Not surprisingly, the act violates certain conventions that India has otherwise ratified like International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment.

4.1. International Covenant on Civil and Political Rights (ICCPR):

The ICCPR is regarded as one of the greatest achievements of the United Nations and India has been a party to the same since 1979. The following points indicate how the AFSPA violates the provisions and principles of the Covenant.

4.1.1. Right to life:

The Right to Life as has been mentioned in Article 6 of the convention.[16] The article mentions the very basic norm that should be followed to protect human rights. It also describes that death sentence should be given in the rarest of rare cases and for such judgements adequate reasons should be specified.[17] The provisions of the AFSPA bluntly go against such principles as the scope of the article has increased over time.

4.1.2. Prohibition of Torture, Cruel, Inhuman and Degrading Treatment

This principle has been contained in Article 7.[18] The very language of the article will give a give an indication that the provisions of the AFSPA (Sections 4 and 6) clearly violate the principle of the Article. As per the general comment rendered by the Commission of Human Rights, the committee held that, "In examining the reports of States parties, members of the Committee have often asked for further information under Article 7 which prohibits, in the first place, torture or cruel, inhuman or degrading treatment or punishment. The Committee recalls that even in situations of public emergency such as are envisaged by Article 4 (1) this provision is non-derogable under Article 4 (2). Its purpose is to protect the integrity and dignity of the individual."[19]

The AFSPA is a legislation made for tackling emergency situations and terrorist activities in states that are claiming secession or areas that are 'disturbed'. However, the immunity that is given to the militant forces is often misused by the same and such leads to the gross violation of this provision as such. There have been reports of the army going to the extent of heinous crimes like rape, molestation etc. The mentality of committing such crimes can only come from having the sense of having absolute power which in turn leads to such corruption.[20]

4.1.3. The Right to Liberty and Security of the Person

This principle is expounded in Article 9 of the convention.[21] The AFSPA also violates the principles of this Article as the provision takes away from the local residents, with the imposition of the AFSPA, liberty in most instances and the excessive power in the hands of the militant forces pose as a threat to the security of the persons residing within the states.[22]

---

15 Ratification of International Human Rights Treaties – India, Human Rights Library (2012), *available* at: http://www1.umn.edu/humanrts/research/ratification-india.html (Last visited on December 22,2016)

16 Art. 6, International Covenant on Civil and Political Rights, 1979

17 *Id.*

18 Art. 7, International Covenant on Civil and Political Rights, 1979

19 Art. 7, UN Human Rights Committee (HRC), *CCPR General Comment No. 7: Article 7 Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment*, CCPR General Comment No. 7 (May 30, 1982), *available* at: http://www.refworld.org/docid/4538840021.html (Last visited on December 22, 2016)

20 Armed Forces Special Powers Act: A study in National Security tyranny , SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, available at: http://www.hrdc.net/sahrdc/resources/armed_forces.htm (Last visited on December 22, 2016)

21 Art. 9, International Covenant on Civil and Political Rights, 1979

22 Armed Forces Special Powers Act: A study in National Security tyranny ,SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, available at: http://www.hrdc.net/sahrdc/resources/armed_forces.htm (Last visited on December 22, 2016).

4.1.4. The Right to Freedom of Assembly

Perhaps one of the key instruments of voicing opinions in a democracy, such a right has been incorporated in the convention.[23] Freedom of assembly is of utmost importance to raise a protest which is peaceful in nature. The AFSPA however does not take such into account and prohibits the assembly of more than 5 persons.

4.2. The International Convention on The Elimination of All Forms Of Racial Discrimination (ICERD)

Article 1 (1) of the ICERD defines 'racial discrimination' as including "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms".[24]

It may be questioned as to whether it is due to the difference in language and ethnicities of people residing in the borders of the country that such discriminatory laws being imposed? The ICERD further states in Article 2(1)(c) that States should " amend, rescind or nullify all laws and regulations which have the effect of creating or perpetuating racial discrimination."[25]

In spite of there being serious reports made with relation to the same, at the end of the day, very little has been done. In fact, it may be said arguably that it is because of such discrimination that the secession movement had been started.

4.3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment In 1997

Although not yet ratified, under Article 18(a) of the Vienna Convention on the Law of Treaties, the act of signing entails an international obligation not to defeat the treaty's objective and purpose. This includes, pursuant to the Convention's Preamble, the effective struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.[26]

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of racial discrimination, the right to life, the right to liberty and security and the right to an effective remedy have also been recognized as customary in international law. These are rules binding on States as a matter of state practice and opiniojuris irrespective of whether or not a state is a party to a particular treaty. Unlike for States parties to a treaty, adherence to customary international law is not monitored by a treaty body but subject to monitoring by UN charter bodies, such as the UN Human Rights Council and its special procedures.

4.4. Review by the Human Rights Commission

The Human Rights Commission which watches the ICCPR was asked to test the AFSPA and to see whether it actually violates any international standards. The Committee first raised questions about the scope of the authorization to use lethal force in 1991, during the consideration of India's second state party report on its compliance with the ICCPR. In particular, the Committee *"inquired to what extent [the Act was] consistent with provisions of the Covenant relating to the physical integrity of the person and the obligation to bring a person to trial with the least possible delay and, more generally, to provisions relating to preventive detention and Article 4 of the Covenant; whether the authorization of the use of force even to the causing of death in accordance with [the Act] was compatible with Article 4, paragraph 2, and article 6 of the Covenant."*[27]

In 1997 the Committee, while considering the third periodic report, said that the principles undertaken by Indian Government regarding terrorism should be in conformity with the ICCPR because India was a member of it. The committee had also raised the fact that the term "disturbed area" was exploited and ambiguously used as the states in issue had been described as "disturbed" for decades. Such should have ideally been imposed for a shorter period of time, i.e., only when there was the existence of actual emergency.[28]

Another issue that was raised in the same report was that the military forces should be tried at an unbiased and impartial court so as to render the proper enforcement of the law. The Committee looked into the "allegations that security forces do not always respect the rule of law and that, in particular, court orders for habeas corpus are not always complied with, in particular, in disturbed areas".[29]

---

23 Art. 21, International Covenant on Civil and Political Rights, 1979
24 Art. 1, The International Convention on the Elimination of All forms of Racial Discrimination, 1969
25 Art. 2 (1), The International Convention on the Elimination of All forms of Racial Discrimination, 1969
26 Art. 18(a), The Vienna Convention on the Law of Treaties, 1980
27 Human Rights Committee, Report to the General Assembly, UN Doc. CCPR/46/40 (October 10, 1991)
28 *Id.*
29 *Id.*

On a more general level, the Committee reminded India that immunity provisions, such as those found in the AFSPA, are incompatible with the right to an effective remedy under international human rights law and the concomitant duty to investigate and prosecute gross human rights violations, such as torture.[30]

Notwithstanding the failure of the Government of India to submit a report, it is a recognized practice that the Committee can proceed with examination of a state party's compliance with the ICCPR on the basis of otherwise available information, even in the absence of a state party report. It appears that the Committee still hesitates to use this power in the case of India. If the report is not submitted in the nearest future, the Committee should be prepared to re-consider its position and assess India's performance in terms of compliance of its law and practice with the ICCPR in the absence of the state report.[31] The existence and application of the AFSPA should in this case be among the primary concerns of the Committee, and international and domestic non-governmental actors should take a lead in providing it with examples that illustrate how different provisions of the Act have been applied on the ground.[32]

4.5. Opinion of the Supreme Court

The Supreme Court of India, in the case of *Naga People's Movement for Human Rights v. Union of India*[33] found that that the Parliament had been competent to enact the Act and ruled that its various sections were compatible with the pertinent provisions of the Indian constitution. In particular, the court held that the application of the Act should not be equated with the proclamation of a state of emergency, which led to it finding that the constitutional provisions governing such proclamations had not been breached.

The Union Ministry of Home Affairs set up a committee chaired by a retired justice of the Supreme Court B. P. Jeevan Reddy with the remit to review the provisions of the Act and report to the government on whether amendment or replacement of the Act would be advisable. Having conducted extensive studies and consultations, the committee reported in 2005 that it had formed "the firm view" that the Act should be repealed as "too sketchy, too bOld and quite inadequate in several particulars", emphasising that "recommending the continuation of this Act, with or without amendments, did not arise".[34]

The committee also stated: "We must also mention the impression gathered by it during the course of its work that the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness".[35]

These recommendations were never carried out and the report itself was not officially made public. Also, the Second Administrative Reforms Commission in its fifth Report of 2007 recommended the repeal of the AFSPA. The Commission stated that "after considering the views of various stakeholders it came to the conclusion that AFSPA should be repealed".[36]

Union Finance Minister P. Chidambaram had stressed the need for making the controversial Armed Forces (Special Power) Act (AFSPA) a more "humanitarian" law, but said the Union government could not move forward as there was "no consensus" between it and the Army on the issue.

5. Conclusion

"Power tends to corrupt, and absolute power corrupts absolutely."Such is the situation with the Act being in place. The Act gives unnecessary powers to the army to use force and also grants immunity from judicial trials. Such is almost equal to fighting terrorism with terrorism itself. It is however agreed that to combat terrorism, there is a requirement for strict laws. However, the term strict should not be confused with barbaric. Moreover in today's world, where there is a huge cry for protecting human rights, the existence of such laws is nothing short of embarrassing. Further, the right to protest should ideally be respected and protestors and terrorists should not be treated alike. It is recommended that the provisions of the Act be repealed and an act which is more prone to humanity be passed.

---

30 The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations, ASIAN HUMAN RIGHTS COMMISSION, available at:http://www.humanrights.asia/resources/ journals-magazines/article2/1003/the-armed-forces-special-powers-act-1958-in-manipur-and-other-states-of-the-northeast-of-india-sanctioning-repression-in-violation-of-india2019s-human-rights-obligations (Last visited on December 24, 2016)

31 Rule 70(1), Revised Rules of Procedure of the Committee, UN Doc. CCPR/C/3/Rev.9 (January 13,2011)

32 Art. 7, UN Human Rights Committee (HRC), CCPR General Comment No. 7: Article 7 Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment, CCPR General Comment No. 7 (May 30, 1982), *available* at: http://www.refworld.org/docid/4538840021.html (Last visited on December 22, 2016)

33 Naga People's Movement for Human Rights v. Union of India (1998) AIR 431

34 Report of the Committee to review the Armed Forces (Special Powers) Act, 1958, Government of India, Ministry of Home Affairs, 74 (2005)

35 Report of the Committee 75

36 Report 5 - Public Order 239 Second Administrative Reforms Commission Report (June 2007)

Welfare State of India vs. Triple Talaq

Madhulika Bhatnagar*
Aastha Saxena*

ABSTRACT

The Quran consists of rules which govern every aspect of a Muslim individual's life, including marriage and divorce. However, over the years, an innovative and convenient form of divorce has developed which goes against the very essence of the tenants of Quran known as the Triple Talaq. The practice of Triple Talaq vests in the husband unilateral and absolute power to dissolve the marriage instantaneously without the consent of his wife. It has been considered sinful by the Prophet and disregarded by most of the modern day Islamic countries. However, in India, the validity of this practice is still a burning question which requires deliberation. In 2016, a PIL was filed by Shayara Bano, a divorced Muslim female, who was a victim of this oppressive and exploitative practice. The petition challenged the constitutional validity of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 on the ground that it validates the discriminatory practices of triple talaq, polygamy and *halala*. The aim of this paper is to analyze the chief issue of this petition i.e. triple talaq. The paper scrutinizes the primary religious sources, judicial precedents, the arguments of the parties to the present petition and the constitutional validity of this practice. It also opines whether this practice should be abolished by the Apex Court or not.

Key Words: *Talaq – al – Biddat*, Triple Talaq, Quran, Constitutional Validity, Constitution of India

1. Introduction

Marriage is a sacred institution celebrated in all religions across the globe. However, Islam also provides rules for dissolution of marriage, if it brings misery to the spouses, in its holy book Quran. The different types of talaq can be given as per the conditions specified in Quran and after due attempts have been made for reconciliation. However, over the time interpretations have been made of these rules to give effect to an instantaneous form of talaq known as triple talaq which is based more on convenience than on the principles of Prophet Mohammed.

Triple talaq is opposed on grounds of being violative of a woman's right to equality, liberty and dignity. Leaving her at the caprice of her husband, she has no say or opportunity to prepare against this immediate talaq. It is often affected arbitrarily by men without reasonable cause and hence acts as a tool of abuse in their hands. This issue has been agitatedly discussed before the courts on multiple occasions, however, the Courts have refused to deal with the issue directly. Now, after several years of continued exploitation and abuse of women through this arbitrary practice, the Apex Court has taken cognizance of the issue and has begun hearing the arguments with respect to the constitutional validity of this practice. If it decides in favour of the issue, it will affect the fate of millions of Muslims females across the country.

2. Status of Triple Talaq under Islamic Law

The institution of marriage under the Islamic Law is considered to be a civil contract. It comprises of offer (ijab), acceptance (qubool) and consideration (mehr). Hence, it can be repudiated or dissolved like a contract by the parties.

Repudiation under Shariah law is the dissolution of a valid marriage contract forthwith or at a later date by the husband, wife or their agent, duly authorized by them to do so, using the word 'talaq' or a deviation or a synonym of the same.[1]

The Quran classifies divorce into several categories based on the person affecting the dissolution. Where the dissolution proceeds from the husband it is called 'talaq'. When the divorce takes place at the instance of the wife it is known as 'khulla'. If the dissolution of marriage is with mutual consent of the husband and the wife it is known as 'mubarat'. When the divorce takes place through the judicial process it is termed as 'faksh' or 'lian' as the case may be.

According to the tenants of Islamic Law, the divorce by husband can be further classified into two categories : 'talaq - al - sunnat' and 'talaq - al - biddat'. Talaq - al -

* Students, Amity Law School, Indraprastha University, Delhi

[1] Jamal J. Ahmad Nasir, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION, Vol. 3,120 (Brill Publication, 3rd Edn, 2009)

sunnat is the divorce which is in conformity to the dictates of the Prophet while talaq – al – biddat is an innovation therefore not in conformity with the dictates of Prophet.[2]

Triple Talaq is a form of talaq – al – biddat. It involves three pronouncements made in a single tuhr period either in one sentence, for example "I divorce thee thrice" or in three separate sentences, example "I divorce thee. I divorce thee. I divorce thee."

The concept of Triple Talaq was not allowed during the lifetime of Prophet Mohammad. It was developed and practiced during the Jahiliyah period (times of ignorance).[3] Hence, it is considered lawful though sinful in Hanafi Law, and is not permissible in Ithna, Ashart and Fatimi law.

As per the Quran, a husband has the unilateral power to pronounce talaq. However, he has to be very judicious in its exercise. The view that a Muslim husband enjoys an arbitrary unilateral power to inflict instant divorce is not in accordance with the Islamic injunctions.[4] It is a popular fallacy that a Muslim male enjoys under the Quranic law unbridled authority to liquidate the marriage.[5]

The Quran requires that the following rules be strictly followed when a husband dissolves the marriage[6] :-

(i) He will not ordinarily exercise it and avoid it as much as possible.

(ii) If he finds it unavoidable then he shall do it with a sense of justice and rationally.

(iii) Before the procedure of talaq is to be started the spouses should try to reconcile with each other by appointing arbitrators, one from the side of the wife and the other from the side of the husband.

In spite of being expressly mentioned in Quran, these requirements are rarely followed before pronouncing divorce especially in cases of triple talaq.

Personal laws in India are codified in the form of legislations. The Islamic Law is codified and enacted through the Muslim Personal Law (Shariat) Application Act, 1937. It provides that if both the parties are Muslims then any matter relating to inheritance, property, marriage, dissolution of marriage, maintenance, dower, guardianship, gift, trust and wakf will be governed by the Muslim personal laws.[7] Thus, any custom or usage which is contrary to Muslim law cannot be applied by the courts. The sources of Islamic law such as Quran and Sunnah do not recognize triple talaq as a valid form of divorce and hence the judiciary in various matters before it has time and again recognized its irregularity.

The courts in India in several cases noted that this practice of triple talaq by Islamic males is not only arbitrary in most of the instances but also irregular viz-a-viz the tenants of Islamic law. The system of triple talaq has been viewed as a one – sided engine of oppression in the hands of the husband.[8]

In the case of Mohamed Ahmed Khan v. Shah Bano[9], Per Chandrachud C.J.I. "Triple Talaq confers on the husband a privilege to discard his wife whenever he chooses to do so for reasons that can be good, bad or indifferent or for no reason at all."

The Quran states that a man is forbidden to divorce his wife as long as she is faithful and obedient. Considering the state of affairs in India, the teachings of Prophet Mohammed and the verses of Quran have taken a contrary course and a misconception prevails over the exercise and rights of women in case of triple talaq.[10]

The court in the landmark Shamim Ara case[11] enforced and recognized the restrictions imposed on the power of a husband to divorce his wife under Quran. The Supreme Court observed that: -

(i) The talaq should be obtained for a valid and reasonable cause.

(ii) The parties should make attempts of reconciliation through arbitrators before dissolving the marriage.

If these two conditions are not satisfied then the talaq is not valid and is not recognized.

---

2 Furqan Ahmad, Understanding the Islamic Law of Divorce, Vol. 45(3), JOURNAL OF INDIAN INSTITUTE OF LAW 489 (2003)

3 Samreen Hussain, Triple Talaq: A Socio – Legal Analysis, Vol. 1(1), ILI LAW REVIEW 136 (2010)

4 Yousuf v. Sworanma, AIR 1971 Ker 261[Yousuf case]

5 Id.

6 Hussain, supra note 3, at 134

7 Sec. 2, The Muslim Personal Law (Shariat) Application Act, 1937

8 Shamim Ara v. State of U.P., 2002 (7) SCC 518 [Shamim Ara case]

9 Mohamed Ahmed Khan v. Shah Bano, 1985 AIR 945

10 Yousuf case, AIR 1971 Ker 261

11 Shamim Ara case, 2002 (7) SCC 518

The Quran commands for reconciliation between the parties and if such an attempt fails and the marriage is subsequently dissolved, it is deemed to be a reasonable cause for dissolution of marriage.[12] However, this requirement is rarely ever followed by the Muslim males who dissolve the marriage by way of triple talaq. The pronouncement is deemed to be final and irrevocable by the husband and the recognition of the same by the Muslim clerics despite its irregularity leaves very limited avenues for the females to seek justice.

The most significant interpretation of the system of triple talaq was given by the Delhi High Court in the case of Masroor Ahmed v. NCT of Delhi.[13] The court interpreted that the three pronouncements of talaq made by the husband in one go will not be termed to be three talaqs but will be considered as one pronouncement only.

The court noted that the harsh abruptness of the practice of triple talaq leaves no scope of reconciliation for the divorced women. It considered the system of triple talaq as a development which may have filled a need during a specific period of time in the history but it is contrary to the essential precepts of Islam, Quran and the decisions of Prophet Mohammed. Thus, it held that the triple talaq will be regarded as one revocable talaq.[14]

This interpretation of the practice of triple talaq allows a scope of reconciliation for the divorced women since the husband can revoke the pronouncement of talaq before the completion of the iddat period. However, the misconception among the Muslim males that the marriage can be validly dissolved through triple talaq and the continued validation of this practice by the Muslim clerics despite its inconsistency with the religious tenants and the law in India allows the continued violation of rights of these divorced Muslim women.

3. The Current Debate

The debate on Triple Talaq was reopened when in 2016 the Supreme Court took cognizance of the PIL filed by Shayara Bano, a victim of domestic abuse, instantaneous triple talaq and denied maintenance. In her petition she implored that the court declare the practice of instantaneous triple talaq, halala and polygamy as unconstitutional.

The case in itself is controversial, as activists have pointed out that points of law already adjudicated upon have been agitated yet again. These points include the issues of right to maintenance and validity of triple talaq.

The PIL seeks ban of the innovative method of instantaneous triple talaq, which dissolves the marriage without the lapse of prescribed iddat period, on the ground of it being unconstitutional. The petition submits that the practice of triple talaq is violative of Articles 14, 15, 21 and 25 of the Constitution of India. It deprives the woman of her right to dignity as she neither has a say in the divorce nor gets an opportunity to beseech it. She is entirely at the mercy of her husband, not knowing if and when he might discard her.

According to the Quranic principles, divorcing one's wife without reason only to harm her, or out of her inability to meet one's unlawful demands or contrary to the procedure prescribed by the Shariat, is irregular and undesirable. The divorce must not only be for a just reason, but should only be given when all means to effect reconciliation have been exhausted. The notion that a man is permitted to discard his wife at his mere caprice is a grave distortion of the Islamic law.

In the case of Sri Jiauddin Ahmed v. Mrs. Anwara Begum[15], Baharul Islam J. quoted several Quranic verses, commentaries by eminent scholars like Mahammad Ali, Yusuf Ali and pronouncements of great jurists like Ameer Ali and Fyzee while deciding upon the issue of triple talaq. He disapproved the notion that the whimsical divorce by a husband is “good in law though bad in theology”. He further observed that the underlying attitude of such a statement is that women are chattel belonging to men and this attitude is not a preaching of the Holy Quran.

However, the All India Muslim Personal Law Board in its affidavit in the Shayara Bano case has defended the practice. They have taken the defense of Articles 25 and 26 read with Article 29 of the Constitution of India, which guarantees them the right to profess, practice and propagate their religion.

The practices and ceremonies of marriage and divorce are subject matter of Personal laws and are governed by the tenants of each religion. The Supreme Court has previously held[16] that the protection of Articles 25 and 26 is

[12] Kunhimohammed v. Ayishakutty, AIR 2012 Ker 60

[13] Masroor Ahmed v. NCT of Delhi, 2008 (103) DRJ 137 (Del.)

[14] Masroor Ahmed v. NCT of Delhi, 2008 (103) DRJ 137 (Del.)

[15] Sri Jiauddin Ahmed v. Mrs. Anwara Begum, (1981) 1 GLR 358

[16] Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp (2) SCR 496; State of Madras V/s. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282, 1954 SCR 1005

not limited to matters of doctrine or belief but also extends to acts done in pursuance of religion and therefore contained a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. It was further held that what constitutes an essential part of religion or its practice has to be decided by the Courts. In this determination due regard would have to be given to the religious doctrines of a particular religion including the customs and usages which are regarded as an integral part of the religion by the community.

At this point the question to be determined first is whether the method of divorce forms an essential part of the religion. Surely a practice that is condemned by the religion as sinful though not explicitly prohibited cannot be regarded as an essential part of the religion.

The Muslim law board also appealed to the argument that in various instances the primary sources of the religion themselves gave effect and recognition to the practice of triple talaq though condemning it. Several Islamic jurists and scholars have advocated the view that all three utterances of triple talaq are effective and result in the termination of marriage immediately.

Imam Abu Jafar Tahawi, a revered scholar of the Hanafi school was of the view that triple talaq in one go is effective. This view was maintained and supported by various other scholars such as Imam Abu Hanifa, Imam Abu Yusuf and Imam Muhammad.[17] The consensus view of the book Sunnah and other classical authorities is that triple talaq is effective, even if it is pronounced in one go. The act in itself is, however, a sin.[18] Thus, if one divorces his wife thrice in a single utterance, this divorce will be effective and he cannot remarry her unless she goes through halala.[19]

There are several instances from Prophet's times suggesting that triple talaq, though undesirable, is an effective termination of marriage. One such incident stipulated in the Hadis is that of Hasan's wife Aishah Khathmiya upon whom triple talaq was pronounced. In such a situation, the prohibition of remarrying an irrevocably divorced wife was deemed applicable and thus the triple talaq was effective.[20]

Another such suggestion manifested itself when someone presented before Caliph Umar was ordered to be whipped because he had resorted to triple divorce in one go and yet was not separated from his wife as the pronouncement's consequence.[21]

The Apex Court in a case[22] before it crystalized the progressive spirit of our nation into words. Per Chandrachud C.J.I: "We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values".

The Muslim Law board has raised the argument that for personal law to evolve, the readiness of the community to embrace the change is a precondition. Today, women are increasingly becoming empowered and are at equal footing with men in various aspects of life. Women are no longer viewed as a chattel or liability on the man in the present society, a liability whom he is entitled to get rid of. Instead she is celebrated as a fellow human being who is an active contributor to the society and an instrument in the progress of the nation.

According to a survey conducted by the Bharatiya Muslim Mahila Andolan among 4710 Muslim women from 10 states, 92% of the Muslim Women want a total ban on the practice of oral instantaneous triple talaq.[23]

The Central Government in its affidavit before the Supreme Court dated October 7, 2016 has demanded that the validity of triple talaq and polygamy be seen in light of gender justice. It has relied upon constitutional principles of gender equality and secularism. Citing international covenants and religious rules governing Muslim marital laws it has advocated against Triple talaq. The government also relied on the examples of Islamic states enforcing Shariah law such as Pakistan, Bangladesh, Turkey and Afghanistan which too have forsaken triple talaq. It reasoned that a progressive secular democracy such as India could have no reason to continue with such indignity under the garb of it being "essential" to the religion.

---

17 Abu Jafar Taahhawi, SHARAH MAANI AL- AATHAR, 3, 59

18 Imam Abu Bakr al-Razi al-Jassas, AHKAM AL- QURAN LIL JASSAS, 1, 459

19 Nasir ibn Sulaiman ibn Muhammad 'Imran, AYAT AL-AHKAM FI AL-MUGHNI LI-IBN QUDAMAH, 10, 334

20 Al- Sunan Al- Kubra lil Bayhaqi,.HADIS NO.14492

21 HADIS NO.18089

22 National Textiles Worker's Union v. P.R. Ramakrishnan, AIR 1983 SC 750

23 Rituparna Chatterjee, 92% of Muslim Women in India Want A Total Ban on Oral Talaq, Survey Finds, HUFFINGTON POST, (15 July 2016), available at http://www.huffingtonpost.in/2015/08/21/muslim-women-talaq_n_8018674.html (Last visited on May 1, 2017).

Referring to the Muslim Board's affidavit in the case, the Centre submitted that the practices of triple talaq, halala and polygamy cannot be considered as an essential part of the religion and thus are not entitled protection under Article 25 of the Constitution.

At this juncture it is crucial to determine whether women, half the population of our secular democratic nation, can be denied their right to equality and dignity in the name of this distorted picture of religion?

The Government took the stance that any practice placing women in a socially, emotionally or financially vulnerable state or subject to the mercy or caprice of men is irreconcilable with the fundamentals of equality promised under of Constitution. It reaffirmed that gender equality and dignity of women are "non-negotiable, overarching constitutional values" which cannot be compromised with.

It submitted that India, being the hallmark of secularism and democracy, could not deny fundamental rights to any citizen, especially someone belonging to a religious sect when theocratic societies of that very religion have undergone reforms to protect them. It further emphasized that personal law is a "law" within the meaning of the Constitution and any such law inconsistent with fundamental rights is void.

4. Recommendations

The movement against triple talaq which came into the limelight through the Shayara Bano case gathered national attention after BJP's promise to remove this practice during the U.P. State elections.

However, the difference between the two stances is that while the Shayara Bano case challenges the constitutional validity of Section 2 of the Muslim Personal Laws (Shariat) Application Act, 1937 on the grounds that it permits practices such as instantaneous triple talaq, polygamy and halala, the affidavit of the Central Government in this case adopts a more progressive approach as it demands a complete ban of the practice of triple talaq and polygamy.

The precedents by various courts in India have declared instantaneous triple talaq to be invalid. However, there is a lack of consistency in the decisions of the courts with respect to the system of triple talaq.

While the Supreme Court in the above-mentioned cases has declared triple talaq to be invalid and arbitrary, it has held triple talaq to be valid in other cases. The Supreme Court in the case of A.S. Parveen Akthar v. Union of India[24] held triple talaq to be constitutionally valid. A similar view was taken by the court in the case of Ahmedabad Women's Action Group (AWAG) v. Union of India.[25] In this case the court exercised judicial restraint while dealing with the issue of triple talaq. Here, the practice of triple talaq and Muslim personal law regarding polygamy was challenged on the ground of it being in violation of right to equality. The Supreme Court in this case held that since the petition raised questions relating to social policy it fell outside the scope of its power.[26]

This practice is a convenience and the validation it has received from the Islamic scholars and clerics makes it an instrument of abuse in the hands of the husband. The unilateral power vested in the husband allows him to dissolve his marriage without just cause. Being instantaneous and irrevocable, the wife is left with no other course of action besides approaching the judiciary and filing long drawn out cases. Due to the conflicting stance of the judiciary on the issue and its reluctance in interfering with the personal law there is no guarantee of relief for the divorced women.

Considering the impact triple talaq has on the rights of a Muslim woman it is imperative for the Supreme Court in the present matter to take a strong stance on the issue and to declare it unconstitutional.

The atrocities that this practice inflicts on the woman can be clearly seen from the facts of the A.S. Praveen Akhtar[27] case, where the divorced wife was not even informed of the talaq by the husband himself. The fact that he had unilaterally dissolved the marriage was communicated to her by her father.

The manner of practice of triple talaq in the status quo by the Muslim male makes it an arbitrary system which is in violation of Article 14, 15, 21 and 25 of the Constitution. It is an irrevocable form of divorce and is unilateral with absolute power vested in the men to divorce their wives without their consent. This practice deprives the women of their economic security, social security and her right to choice since the divorce is pronounced without her

---

[24] A.S. Parveen Akthar v. Union of India , (2003) 1 LW 370 [A.S. Parveen Akthar case]

[25] Ahmedabad Women's Action Group (AWAG) v. Union of India, AIR 1997 SC 3614

[26] Id.

[27] A.S. Parveen Akthar case, (2003) 1 LW 370

consent. Hence, this practice is highly discriminatory since it takes away their right to equality and right to dignified life.

The doctrine of equality is an essential feature of the Constitution.[28] The practice of triple talaq violates the principle of equality since the talaq takes place at the will of the husband without any say on part of the wife with respect to whether she wishes to dissolve the marriage or not.

In the case of Zohara Khatoon v. Mohd. Ibrahim,[29] the court expressed its concern towards the arbitrariness of triple talaq. It observed that the unilateral pronouncement of divorce by the husband is the most common form of divorce practiced under the Islamic law and is peculiar to only Muslim law.

The courts have in several precedents noted that this practice is discriminatory in its very essence since the unilateral power to dissolve the marriage lies solely in the hands of the husband. The husband can pronounce divorce whenever he wishes to without the consent of the wife.

It is also discriminatory since the husband under this system can dissolve the marriage just pronouncing the word 'talaq' thrice while in case of Talaq – e –Tafweed, where the woman has the power to dissolve the marriage, the wife has to first establish before the clerics that the husband has committed atrocities against her and has to justify the reason for ending the marriage.

Article 21[30] provides that no person shall be deprived of their right to life and personal liberty except according to the procedure established by law. The concept of due process as mentioned in the article has two forms: -

(a) Substantive due process i.e., the law must be fair and just and not arbitrary or oppressive.[31]

(b) Procedural due process i.e., the party is given an adequate opportunity to be heard.

However, the arbitrariness and the lack of initiative to reconcile before triple talaq make it violative of Article 21.

Further, the practice of triple talaq also violates the right to live with human dignity of the Muslim females. The Supreme Court has held that right to life includes the right to live with human dignity.[32] As can be seen in the Shayara Bano case, a divorced Muslim woman's access to her mehr and maintenance is subject to the discretion and willingness of the husband to pay the same. In several situations, despite being denied their mehr and maintenance, the females due to ignorance of law are unable to access the courts for justice.

This denial of these rights violate a woman's right to live a life with human dignity since after the divorce, in most of the cases, the woman's only source of maintaining herself and her children is the maintenance she is entitled to from her husband. Thus, this practice violates the basic human and fundamental rights of these women.

The Supreme Court should give due consideration to the several instances of arbitrary triple talaq being reported by the Muslim females in the media while deciding the constitutional validity of the issue.

In fact, several Islamic countries have introduced reforms with respect to triple talaq. Countries like Egypt[33], Sudan[34], Iraq[35] and Jordan[36] consider triple talaq to be one pronouncement. This same principle is followed by countries like Morocco, Yemen and Syria.

Iraq also provides women with equal rights in the matter of divorce. Most of the Islamic countries are now reforming their personal laws especially with respect to triple talaq in order to protect the rights of the females.

Triple talaq is no longer considered to be final and the parties are open to continue the marriage if reconciliation takes place between the parties within the prescribed period.[37]

Thus, the question that now remains is if the above mentioned Islamic countries can reform their personal laws to protect the basic rights of women then why is the Supreme Court hesitant in declaring this arbitrary practice unconstitutional?

---

[28] Raghunath Rao Ganapath Rao v. Union of India, AIR 1993 SC 1267

[29] Zohara Khatoon v. Mohd. Ibrahim, AIR 1981 SC 1243

[30] Art. 21, THE CONSTITUTION OF INDIA, 1950

[31] Delhi Airtech Services Pvt. Ltd. v. State of U.P., (2011) 9 SCC 354

[32] Oliga Tellis v. Bombay Muncipal Corporation and Ors., AIR 1986 SC 180

[33] Art. 3, Law No. 25, 1929; Art. 5, Law No. 25, 1929

[34] Sec. 3, Sudanese Manshur – i – Qadi al – Qudat, 1916

[35] Art. 37, Iraqi Code of Personal Status, 1959

[36] Sec. 60, Jordanian Code of Personal Status, 1976

[37] Tahir Mahmood, FAMILY LAW REFORMS IN MUSLIM WORLD, 251 (LexisNexis Butterworth, 3rd Edn., 1972)

5. Conclusion

The practice of triple talaq is a long standing instrument of oppression and exploitation vested absolutely in the hands of a Muslim husband. Quran itself regards triple talaq as a sinful practice, something to be looked down upon. Thus, the contentions of the supporters of this practice that it is an essential part of Islam cannot be sustained.

The Quran requires the husband to wait for a tuhr before each pronouncement of talaq, therefore to say that instantaneous triple talaq is in consonance with the Prophet's will would be incorrect. It also states that before any step is taken towards dissolution of marriage, due initiative should be taken by the spouses for reconciliation through the help of arbitrators. The practice of triple talaq goes against the very essence of these tenants as embodied in the Quran since it instantaneously gives effect to the dissolution of marriage and at no stage any effort of reconciliation is made by the husband. Therefore, continued validation of this practice and considering it good in law though bad in spirit will only lead to further exploitation of the aggrieved women.

What the Court must do in this case is recognize that in a welfare state, no ideology and no person is above the constitutional mandate. The Court must declare Section 2 of the Muslim Personal Law Act as violative of the Constitution since it violates the basic fundamental and human rights of the Muslim women. At this juncture, it is essential for the Court to get rid of its hesitancy in taking a firm stand in issues of personal laws and must act as the protector of rights and justice for these women.

It is also imperative that we, the people of India, embrace this demand for change. We must strive towards the enforcement of the true provisions of Quran relating to marriage and divorce. This change is essential for the harmonious living of all the citizens and for the purpose of ensuring equal rights for men and women not within a particular religious sect but uniformly among all the people of India. Resisting this change would only lead to resentment and repression.

We must remember, that we, the People of India have solemnly pledged to secure to all our fellow citizens justice, equality and dignity.

Baby-Selling vs Baby-gifting- A Legal Conflict

Haramrit Kaur*
Tanvi Sharda**

ABSTRACT

The paradigm shift in the notion of "Baby-gifting" to "Baby-selling" became the researcher's motivation to understand its resultant legal issues, especially arising in cross-border unenforced surrogacy agreements. The idea of the research began by digging into the nature of surrogacy arrangements whilst unfolding the strong reasons to initiate unethical practices like commodification of babies, exploitation of women, human right violations, etc. The recent restrictive surrogacy Bill has plugged the flourishing surrogacy-friendly market of India and impacted India as a destination for foreigners to reproduce through a third party system by use of Assisted Reproductive technologies (ART). The change in the system became an interface to acknowledge various legal hurdles that remain unsolved in transnational commercial surrogacy. In totality, the scenario also defies the soul concepts of International Humanitarian law. Further, this paper discusses the legal complexities regarding the most crucial aspect of person's belongingness to a state i.e. Citizenship and the conflicts regarding legal parentage. In conclusion, it is suggested, that surrogacy laws should be flexible to some extent as such arrangements are solution to many infertile couples, nationally or internationally, and have become source of money for many. On the other hand, regulation should be the prime focus which must keep a check on the unethical practices and weed out under-ground market deals.

Key Words: Transnational surrogacy, International conflict, Commercial surrogacy, provisional citizenship, Regulation

1. Introduction

From computer support and hotel reservations to laboratory results and radiographic interpretations, it seems everything can be 'outsourced' in our globalized world. One would not think so with parenthoodhowever, especially motherhood, as it is a fundamental activity humans have historically preserved as personal and private. In our modern age, however, the advent and accessibility of assisted reproductive technologies (ARTs) and the ease with which they have traversed global borders, has fundamentally altered the meaning of childbearing and parenting.[1]

The phenomenon of transnational surrogacy has given rise to a thriving international industry where money is being 'legally' exchanged for babies and 'reproductive labor' has taken on a lucrative commercial tone.

Gestational surrogacy, the latest trend in reproductive tourism, a sub-industry of medical tourism, has increased exponentially over the last several years as Americans, Europeans and other seek out surrogacy services abroad.[2] In Baby Manji Yamada vs Union Of India &Anr,[3] it was held by the Hon'ble Supreme Court that in some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them. Although it is perfectly acceptable that a surrogate be reimbursed for costs associated with her diet, clothing or medical needs, it is illegal that she receives payment for her reproductive services specifically.[4] India in particular has become a transnational hub for reproductive tourism. According to the National Commission for Women, there are about 3,000 clinics across India offering surrogacy services to couples from America, Australia, Europe and the other continents.[5]

*Advocate, Punjab and High Court, Chandigarh
**Student,UILS, Panjab University

1 Sayantani Dasgupta And Shamita Das Dasgupta, *Globalization and Transnational Surrogacy in India-Outsourcing life*, LEXINGTON BOOKS (2014), *available* at https://rowman.com/ISBN/978-0-7391-8742-5# (Last visitedon January 2, 2017).

2 Nicole Bromfield, *Global Surrogacy in India: Legal, Ethical and Human Rights Implications of a Growing "Industry"*, *available* at https://rewire.news/article/2010/06/11/stateless-babies-legal-ethical-human-rights-issues-raised-growth-global-surrogacy-india/ (Last visitedon January 2, 2017).

3 Baby Manji Yamada v Union of India &Anr. (2008) 13 SCC 518

4 Vida Panitch, *Global surrogacy: exploitation to empowerment*, JOURNAL OF GLOBAL ETHICS, available at http://carleton.ca/philosophy/wp-content/uploads/V.-Panitch-Exploitation-to-Empowerment.pdf(Last visited on January 5, 2017).

5 India Business Report, *Regulators Eye India's Surrogacy Sector,* BBC World, (18 March 2009) available at http://news.bbc.co.uk/2/hi/business/7935768.htm. (Last visitedon December 29, 2016).

International commercial surrogacy is a 'hot potato' in the jurisprudence of private international law. Due to the conflict of laws among various nations, the surrogacy agreements lack enforceability and it is difficult to resolve disputes arising from it. Hence, states have dealt such problematic petitions with ad-hoc solution by not asserting anything on the issues of citizenship, legal parentage, nationality, etc. There needs to be a universal instrument inviting the nations to ensure legislative and judicial comity which is a long arduous process.

2. Commercial surrogacy

The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.[6]

Since the inception of practice of surrogacy involving a third party to carry a child for a couple unable to complete their family due to certain medical conditions, it has been perceived as a pious service with a "gift-giving" thought. In today's globalised world, with accessible options of easy exchange of ideas, commodities or movement of a person, fertility market have flourished globally. The introduction of "Commercial surrogacy" in various countries has led to lowering down the parameters to unethical level. While looking at this concept through the prism of socio-economic angle, it can be traced that inequalities of power at multiple steps in the process of surrogacy has led to significant psychological readiness by a woman to agree to surrogacy. The structural inequalities have changed the very motive of the concept from "baby-gifting" to "baby-selling". Commercial surrogacy has come up with unethical appendages attached to it; hence, some countries have completely banned commercial surrogacy by viewing it as an exploitative act for the women and "commodification of the babies". Countries like India and Thailand have become the global hub for "baby-selling" under the cover of medical tourism. With the permissive environment for commercial surrogacy, commissioning parties have chosen such destinations for their desirable act to rent a womb, which is popularly called "International Surrogacy or Transnational Surrogacy".

2.1 Inequalities of Power: Preliminary reason for proliferation

The proposition laid here is that there are various stages involved in the process of surrogacy,anddifferential powers of bargaining at concerned levels thereto have expanded this culture with colors of exploitation of weaker sections in society. The inequalities lies between all the parties concerned as given below:

The Society	#	The poor woman
The professional clinics	#	the poor woman
The Globe	#	the women and children

Women have always beena weaker section in the society, lacking sources of income and with the belief that such agreements can topple the financial depression, they readily give consent.

The professional clinics which are trained, literate and exploitative of poor women often coerce them to bargain at lower rates and make huge money from clients who are generally foreigners ready to pay high costs. Clinics have a financial incentive to prioritize the health of the foetus over the health of the surrogate. There is nothing to prevent physicians from cutting costs by scrimping on surrogate follow-up care, or to ensure they behave responsibly when something goes wrong during the pregnancy.And a striking example is the use of Caesarean section (termed 'the scissor' by many Indian surrogates) reported by Amrita Pande. She states about exploitation in international paid surrogacy arrangements:

"*. . . surrogates are subjected to another form of medical intervention: caesarean sections. Only two surrogates in th[e] study had natural, vaginal deliveries. This is partly to accommodate the scheduling needs of the intended parents (especially international clients) and the scheduling needs of the clinic.*[7] *Pande quotes Razia, a 25-year-old surrogate and mother of two, who says: I delivered yesterday - it was a scissor. My first two children were normal delivery at home. I have never come to a hospital before. Not even when I fell sick with typhoid! I was very scared when they told me I need a scissor. I am very scared of blood and injections".*[8]

The global inequalities between the countries regarding the restrictive or permissive norms and economic differences have led to concentration of such activities to few specific nations worldwide which have exposed exploitative episodes concerning the human rights of the women and children involved.

Commercial Surrogacy amounts to the "commercialization of motherhood" and constitutes a form

[6] 228th Report of the Law Commission of India (2009)

[7] Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*COLUMBIA UNIVERSITY PRESS, 122(2014)

[8] *Id.*

of exploitation using the bodies of women which can be described as "downtrodden." This practice is an "infringement of fundamental rights" guaranteed under the Indian Constitution, specifically "unknowing exploitation."[9]

2.2 Improper Agreements

A valid consent requires:

- Sufficient information (with an opportunity to digest and understand);
- Capacity or competence; and
- Voluntariness (the absence of distorting or controlling influences, such as coercion or manipulation).

Indian surrogates typically have no more than a fifth grade education. They often cannot read contracts drafted in English. The surrogacy process makes a mockery of consent. Surrogates routinely do not understand their payment schedule or what health care services are being provided or the risks of surrogacy. Also, there are putative threats to voluntariness: lack of acceptable alternatives, offers that are 'too good to refuse', and background poverty and coercion from their spouses.

A few of the many issues raised by surrogacy include: the rights of the children produced, the ethical and practical ramifications of the commoditization of women's bodies without regulation, fraud committed by surrogacy companies, the exploitation of poor and low income women desperate for money, the moral and ethical consequences of transforming a normal biological function of a woman's body into a commercial transaction. The only reason a woman in India, South Africa or Ukraine would be a surrogate is for desperately needed cash.[10] The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decisions regarding their own body and life.

3. India's restrictive Bill on Surrogacy

So far India did not have any concrete regulations or norms for surrogacy. Since 2002, when India liberalized commercial surrogacy in order to attract "medical tourism" from rest of the world, the judiciary and the foreign intending parents have dealt with unprecedented private international conflicts[11] which were resolved with temporary solutions thinking best in the interest of the children. The Indian Council for Medical Research (ICMR), working under the Ministry of Health and family welfare, finalized the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technology (ART) Clinics in India(2005) after extensive public debate all over the country with all stakeholders. Successive draft ART (Regulation) Bills in 2008, 2010 and 2013, had reportedly proposed that ART in India would be available to all, including single persons and foreign couples. However, successive draft ART Bills of 2014 and 2016, are stated to restrict surrogacy to Indian married infertile couples only and even persons of Indian origin: Non Resident Indians as also overseas citizens of India have been debarred from commissioning surrogacy in India. Also, the 228th Law Commission of India on Surrogacy proposed to ban the surrogacy agreements for commercial purposes. The Indian government in August 2016 cleared the final draft legislation that seeks to ban commercial surrogacy. The Surrogacy Bill 2016 allows only married Indian infertile couples to use surrogacy, and only close relatives can become the surrogate mothers. Unmarried couples, single parents, live-in partners and gay couples will be barred from surrogacy. Violators would face at least five years in jail and a fine of up to 1 million Indian rupees (nearly $15,000). Thus, infertility clinics will now be banned from contracting surrogates to foreigners.

Several activists believed the unregulated surrogacy industry exploited poor women.Justifying the new legislation, Dr. SoumyaSwaminathan, Director-General of the Indian Council of Medical Research, said, *"The money may be helping the surrogate mothers, but is this the India we want to have, where the poor women have to rent out their wombs to earn a living?"*Many so-called childless couples were misusing the wombs of poor women. It was a matter of great worry because there were instances where

---

[9] Julie Macarthy, *Why Some Of India's Surrogate Moms Are Full Of Regret*, (18 September 2016)*available* at http://www.npr.org/sections/goatsandsoda/2016/09/18/494451674/why-some-of-indias-surrogate-moms-are-full-of-regret(Last visited on December 29, 2016).

[10] *Arthur Caplan,"Paid Surrogacy Is Exploitative", Sept, 23, 2014, available at* http://www.nytimes.com/roomfordebate/2014/09/22/hiring-a-woman-for-her-womb/paid-surrogacy-is-exploitative (Last visited on January 2, 2017).

[11] Supra note3, In the landmark case Baby Manji Yamada v. UOI, the commissioning parents went through marital discord and the father insisted on having custody of the child. Indian law doesn't allow a single father to adopt a girl child. The grandmother was sent to bring the child and a petition was filed before the Hon'ble Supreme Court of India. The government seemed to be helpless as there were no laws governing the effect of surrogacy. The apex court directed the National Commission for Protection of Child rights was the apt body to deal with this issue. Father was held to be the genetic father of the child and he was given custodial rights of the child.

a girl child or disabled children have been abandoned soon after birth.[12]

The Bill has faced criticism from surrogate women who depend on money for their needs and sustenance. Banning transnational surrogacy would certainly affect their livelihoods.Banning foreigners shuts the multimillion-dollar fertility tourism. Various ART clinics have also denied out rightly any kind of exploitation of poor women. According to them, no one is pushed into it. They voluntarily enter this profession and the ban will deny them the right to work.

However, banning such arrangements will not prevent the business from thriving underground. There have been instances where surrogates were transported to countries like Nepal and Cambodia to deliver babies. The ban [in India] will push intended parents to engage in far riskier places like Cambodia, where there is a serious lack of medical support services, such as neo-natal care units. Mark Henaghan, a New Zealand-based law professor, who follows the issue closely, believes that outlawing international surrogacy will only lead to more abuse of the surrogates.

"*It is unlikely that the entire industry will cease now that it has been banned. It seems more likely that a black market or underground industry will spring up in its place, which will afford much less protection for everyone involved, especially the surrogates and the resulting children*," says Henaghan.[13] The country needs more healthy debates on this Bill including all the stakeholders, especially the women surrogates, to balance the conflicts and bringing answers to legal complexities.

4. International Human Rights law vs. Surrogacy

The International human rights law also provides some useful guidelines, especially three major human rights treaties:[14]

- The International Covenant on Economic, Social and Cultural Rights;
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- The Convention on the Rights of the Child (CRC).

Although, the direct discussion regarding the concept of Surrogacy cannot be traced in these conventions but these have ensured certain indispensible rights to a human including, *interalia*, Right to health, Right to know one's origins, Right to family, Right to support, etc. If surrogacy is allowed, be it commercial or altruistic, then these rights should be affirmatively assured to the women and the children involved. In some cases, this may be accomplished through regulations[15] or contractual provisions, say, the assurance for the gestational mother of free pre-natal care. In other cases, this may be more difficult, such as treatment for as yet unknown conditions that may result from the hormonal treatments necessary for surrogacy. If, for any reason, such assurances are impossible, surrogacy should be barred as a violation of human rights. Because there is no human "right to a child,"[16] even those who can *only* have a genetically-related child with the help of a surrogate, including single gay men and gay couples, have no basis for a claim.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) address protections for families and children. The Convention on the Elimination of All Forms of Discrimination AgainstWomen (CEDAW) requires “the proper understanding of maternity as a social function” and calls for special protection for women during pregnancy in work harmful to them. CEDAW's definition of maternity as a social function may preclude commercial contract pregnancy.[17]

The Preamble of the Convention on the Rights of the Child

---

[12] In the Baby Gammy's case, an Australian couple accused of abandoning their child with his Thai surrogate mother after discovering he had Down syndrome and taking home his healthy twin; In Baby Dev case in India, the Australian parents whose first born was a boy, came to India for surrogacy but abandoned one of the twins, a boy, while taking the girl back with them.

[13] NilanjanaBhowmick, After Nepal, Indian surrogacy clinics move to Cambodia (28 JUNE 2016)*available* at http://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html (Last visited on January 10, 2017).

[14] Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, *Maurice A. Deane School of Law at Hofstra University*, *available* at Barbara.J.Stark@hofstra.edu (Last visited on January 10, 2017).

[15] Elizabeth S. Scott, *Surrogacy and the Politics of Commodification, (*72)LAW&CONTEMP.PROBS.109, 146 (2009) (noting that, "well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy.").

[16] Barbara Stark,*The Women's Convention, Reproductive Rights, and the Reproduction of Gender, (*18)DUKE J. GENDER L. &POL'Y 261, 274-78 (2011).

[17] Marcy Darnovsky& Diane Beeson, *International Forum on Intercountry Adoption & Global Surrogacy III: Global Surrogacy Practices*, ISSN: 2013-2956, (November 2016), available at http://www.academia.edu/20259664/_2015.11_Darnovsky_Marcy_Beeson_Diane._International_Forum_on_Intercountry_Adoption_and_Global_Surrogacy_III._Global_Surrogacy_Practices.

(CRC) asserts that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 7 (1) asserts the child's right to "be registered immediately after birth", to "acquire a nationality" and *"as far as possible… to know and be cared for by his or her parents"*. Article 9(1) state that *"a child shall not be separated from his or her parents against their will, except when such separation is necessary for the best interests of the child".* Article 2 of the Optional Protocolto the CRC on the Sale of Children, Child Prostitution and Child Pornography defines the sale of children as "*any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."* In some jurisdictions, for example in the Australian state of New South Wales, commercial surrogacy has been viewed as falling within the CRC's and the Optional Protocol's definition of sale of a child.

Among the issues raised by CRC that are relevant to surrogacy are children's rights to information about their conception, the providers of gametes (i.e. their genetic parents), and the woman who carried and gave birth to them (whether or not she is genetically related); and to preserve their identity, including nationality, name, and family relations.

The 1926 Convention against Slavery states: *"Slavery is the status or condition of an individual over whom any or all powers attributing ownership rights are exercised*". Surrogacy is also incompatible with The Convention on the Elimination of All Forms of Discrimination against Women, 1979. Article 6 requires that "*State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women"*. Article 11(f) adds that States must ensure, *"the right to health protection and to safety in working conditions, including the safeguarding of the functionof reproduction*". This applies perfectly to the exploitation of the reproductive function of surrogate mothers.Therefore, these conventions are appropriate in safeguarding and protecting the rights of children and women involved in such arrangements whilst any international norms to deal private interests are proposed in the coming times.

5. Transnational surrogacy- a legal bedlam

In terms of *cross-border* surrogacy, the prohibitive or restrictive legal approach of many States to surrogacy (in particular, *commercial* surrogacy)[18], combined with the liberal approach of a minority, means that prospective intending parents are often using surrogacy services abroad because they are prohibited or restricted a home.[19] Other motivating factors may be low costs or fewer perceived risks abroad. The growth in these *cross-border* arrangements has undoubtedly been facilitated by the Internet and other modern means of communication, and the ease of international travel.

Another contributing factor to the rise in the demand for surrogacy services may be related to changes in the field of inter-country adoption. For example, in some States of origin there are now established Child Protection systems in place and there has been an increase in national adoption. This, in turn, has caused a change in the profile of adoptable children in these States, with many children in need of inter-country adoption now tending to have special needs. Inter-country adoption can also be a long and complicated procedure and international surrogacy may therefore be seen as a quicker, easier alternative (with the added advantage that the child born may be genetically linked with one or both of the prospective parents).[20]

A cross-border surrogacy agreement may involve two or more nations, further, pushing it hard into the turmoil. The complexities of international surrogacy raise certain legal questions such as should a sperm donor be considered the legal parent? How does the law regard a mother who gives birth to a child who is genetically unrelated to her? Can a contract require a surrogate mother to submit to an abortion if the intending couple wishes? Is the child a citizen of the country where he or she was born or where the intending parents - the industry name for parents who

---

[18] J. Millbank, *The New Surrogacy Parentage Laws in Australia: Cautious regulation or '25 brick walls*, (2010) M.U.L.R. at Pg. 28, *available* at www.surrogacyaustralia.org (Last visited on December 26, 2016). Some research suggests a correlation between international travel for surrogacy and "commercial" payment which reports on the study by the parent support group, Australian Families Through Gestational Surrogacy which surveyed overseas IVF clinics providing surrogacy services to Australian intending parents and found that of 35 international arrangements, 32 arrangements involved payment to the surrogate mother.

[19] Lorraine Culley, *Transnational Reproduction: An exploratory study of UK residents who travel abroad for fertility treatment*, June 2011, DE MONTFORT UNIVERSITY, LEICESTER,*available* at http://www.esrc.ac.uk/my-esrc/grants/RES-000-22-3390/read , (Lastvisited on December 26, 2016) .

[20] See, The Guide to Good Practice No 2 under the Hague Convention of 29 May 1993 on *"Protection of children and Co-operation in Respect of Intercountry Adoption: "Accreditation and Adoption Accredited Bodies"",* The Permanent Bureau (Spring 2012), under "Intercountry Adoption Section", then "Guides to Good Practice", paras 57 and 117 *available* at www.hcch.net (Last visited January 2, 2017).

seek a surrogate - reside?

While answering the above legal questions welfare of the child and the surrogate has been the prime consideration for the States. While at least one commentator[21] rejects the "best interest of the child test" itself as inapplicable in this context, most raise more concrete, specific questions. Who is legally responsible for the child if the intending parents split up? What ifthey change their minds or die? What if the baby is premature or has health issues? What if the baby has health problems resulting from the surrogate's drug use or alcohol intake during pregnancy? How will the child deal with her unusual origins?Broadly, the legal questions in round-table debates are on the subject of parentage, nationality, citizenship, issuance of Passport, grant of visa and other family law issues.

It has been reported that families have desperately utilised (sometimes criminal)measures to attempt to take the children born cross-border back "home" e.g. the French intending father who attempted to smuggle twin girls born to a surrogate mother in Ukraine into Hungary[22] or the Belgian same-sex couple who tried to smuggle their child from Ukraine into Poland.[23] Further, if they are able to travel "home", children may be left with "limping" legal parentage, with the consequent child protection concerns that this involves. These and other child protection issues arising as a result of such arrangements implicate the fundamental rights and interests of children, including the right not to suffer adverse discrimination on the basis of birth or parental status, the right of the child to have his or her best interests regarded as a primary consideration in all actions concerning him or her, as well as the child's right to acquire a nationality and to preserve his or her identity.[24]

5.1 Attribution of Citizenship and Legal parentage: An impasse

The citizenship can be defined upon few doctrines like *iussanguinis* or *ius*filiationis (by father's or mother's blood), *ius soli* (by place of birth), *iusdomilicii* (by domicile) or*iuspecuniae* (i.e. a global market for citizenships in which individuals can bid for membership status anywhere and states can set the admission price).[25] Few scholars have put forth the argument to desert the attribution of citizenship upon children quaiussanguinisand draft a modern procedure, independent of biological descent, to suit the contemporary times. Their critiques have debated against the complete abandonment of the usage of biological link for designating any citizenship, as the alternatives are either not morally successful or become exclusionary for migrants. In surrogacy agreements, the birthright citizenship of parents acts as a savior against children of intended parents being called foreigners in their nation or being stranded in the birth place.Alternatively they "establish a universal status of (legal) childhood that confers fundamental rights regardless of their or their parents' citizenship or migration status."

This is what the Children's Rights Convention, which is one of the most widely signed and ratified human rights documents, aims to do. The question is not only whether States are willing to respect these rights, but whether they can be held responsible for not protecting them. For this, children need not only human rights; they also need their parents' citizenship.[26] They opined that following the procedure purely onius soli(which is followed in U.S, giving citizenship at the birth place being U.S., also allows children born out of citizen parents in some other place to be nationals), will have vicious exclusionary effects for migrants. But the combination of ius soli andiussanguiniscan lead to a situation giving an independent birthright citizenship at the place of birth and then applying residence based naturalization, when the intended parent migrate to their parent nations. It will also save the immediate conversion of the child's citizenship uponmigration and also follow a legal procedure.And in order to make sure that children are not caught between conflicting legal norms and can develop stable relations to

---

21 Glenn Cohen, *"Regulating Reproduction: The Problem with Best Interests"*,96 MINN. L. REV. 423, 437-42 (2011)

22 Availableat http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom _is_not_risk_free/24215336.html (Last visited on January 10, 2017).

23 Available at http://www.msnbc.msn.com/id/41800437/ns/world_news-wonderful_world/t/boy-stuck-years-ukraine-arrives-belgium/) (Last visited on January 10, 2017).

24 See, Article 2, 3, 7, 8 and 9, The United Nations *Convention on the Rights of the Child*, 20 November 1989

25 *"Should citizenship be for sale?" and JelenaDzankic (2015) Investment-based citizenship and residence programmes in the EU*, The EUDO CITIZENSHIP forum, EUI Working Papers RSCAS 2015/08, Florence.

26 Rainer Bauböck, Iusfiliationis: a defence of citizenship by descent, (EUDO CITIZENSHIP co-director, EUI), available at http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1389-bloodlines-and-belonging-time-to-abandon-ius-sanguinis?showall=&start=1

their countries of citizenship, it is important that their citizenship status does not change automatically when they become part of a new family.[27]

5.1.1Provisional citizenship: A new legal construction

Scholars have discussed the definition of a 'citizen' given by Aristotle considering one who "give judgments and can hold office". Taking the reality their basis, they argued that a minor is, in fact, a "Provisional Citizen" who becomes active in the nation's political community only after attaining majority. The lawof the land will wait till the time a child has fullydeveloped rationality and is equipped with skills. It is suggested that a designation of citizenship should be delayed till majority and meanwhile 'Provisional Citizenship' should be ensured because a minor is dependent on the State for health and educational services. Hence, in a world of territoriality, where States control immigration, iussanguinis (oriusfiliationis) is as indispensible as ius soli for protecting the children of migrants. It provides them with the right to stay and to be admitted in their country of birth as well as their parents' country of origin. No other legal status can secure these rights as well as a birthright to dual nationality.[28]

5.2 Legal parentage

The aspect of citizenship becomes inevitable to define parentage of a child. The establishment of that duty bound link between surrogate mother & child or child & the commissioning parents will decide the parental responsibilities. In transnational surrogacy with conflicting local laws, the citizenship and parentage thereon has emerged as an issue. The incongruity between reproduction, legal parentage and citizenship is not an issue triggered solely by advances in reproductive technologies. Traditionally, children born out of wedlock could not acquire the father's citizenship through descent. Many countries still maintain special procedures for the acquisition of citizenship by children born out of wedlock to a foreign mother and a citizen father.

In most cases this implies submitting a request for citizenship after parentage is legally established by way of Parental Order, in some States pre-birth orders are passed which establish the link between the child and intending parents from the agreement.Many problems arise due to unregulated international market for assisted reproduction, which means that national regulations often conflict with each other. Countries that oppose surrogacy consider the surrogate mother as the legal mother even if they are not genetically related to the child. According to this reasoning, the husband of the surrogate mother is the presumed father of the child. However, countries that encourage surrogacy usually recognize the intended mother and father as the legal parents, regardless of whether they are genetically related to the child.[29]

In India, such issues are resolved only by *ad-hoc*adhesives[30] that too after a long legal struggle by the commissioning parents. The nations who consider the welfare of the child provides the citizenship in order to save the child from being "stateless"and in cases if they refuse with an intention to stop the controversial agreements, it again exploit the child involved, as Justice Hedley put it, "*marooned, stateless and parentless*".[31] Due to these reasons India intends to completely ban the transnational commercial surrogacy leaving the protagonists of surrogacy unsatisfied. The 228 Law Commission report (2009) has also proposed to ban arrangement made for commercial purposes.[32]

---

[27] Supra note 17 at 17.

[28] Costica Dumbrava,"*Bloodlines and Belonging: Time to Abandon IusSanguinis?",*MAASTRICHT UNIVERSITY, available at http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1389-bloodlines-and-belonging-time-to-abandon-ius-sanguinis?showall=&limitstart.

[29] Supra note 28 at 22.

[30] Jan Balaz v. Anand Municipality, a German couple entered into a contract of surrogacy through which twins were born. The couple was working in UK and the children required Indian passports to travel. Germany, their parent state did not recognize surrogacy. Their citizenship was being litigated in the courts. The Supreme Court denied the passports but granted an exit permit and the German authorities decided to give the couple an opportunity to adopt and fight for the rights of the children. The Supreme Court opined that no surrogate child should undergo difficulties as faced by these two children who were already of 2 years of age by this time and had still not been granted citizenship in any country.

[31] Re:X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (U.K.) *available* at http://www.familylawweek.co.uk/site.aspx?i=ed28706 (Last visited on January 13, 2017)

[32] The 228th Law Commission Report, Page 25- Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

6. Private international law

In any proposition of "conflict of laws", the interested legal systems appear to be:

- State of origin (personal law of the surrogate mother – say, her habitual residence);
- Receiving state (personal law of the intended parent(s) – say, their habitual residence);
- Principal place of business of the surrogacy services provider (if any);
- Branch office of the surrogacy services provider;
- Locus of reproductive procedure/services;
- Place of birth of child, likely to coincide with state of origin; and
- Personal law of the child (say, its habitual residence, arguably coinciding with the state of origin, depending on the facts).

In existence of a personal law connection between the participants, it will pass without any legal conflict but when it comes to more than one state with varied choice of law it will end up in a legal difficulty for the child and the intending parents. It becomes a real arduous task in the Private International Law to deal this problematic situation for the sole reason that there is lack of judicial comity among nations. Some nations[33] step back from giving citizenship to the surrogate baby and others are afraid of its proliferation, only few encourage such agreements.

There are States which have given express approval to Surrogacy and regulate either through pre-approval or retrospective decision of legality of *ex post facto* surrogacy. It would include the legislative provisions with respect to legal parentage, consent & agreement, number of times for being a surrogate, etc. It is considered that this group includes, amongst others: Australia (the Australian Capital Territory (ACT), Queensland (QLD), New South Wales (NSW), South Australia (SA), Victoria (VIC), Western Australia (WA)), Canada (Alberta, British Columbia); China (Hong Kong SAR), Greece, Israel, South Africa, United Kingdom and, to a certain degree, New Zealand. Many of these States have enacted this legislation within the past ten years: *e.g.*, Australia (ACT (2004), QLD (2010), NSW (2010), WA (2008), VIC (2008)), Canada (Alberta (2010), British Columbia (2011, not yet in force)), China (Hong Kong SAR, Ordinance came into effect in 2007), Greece (2002 and 2005), Russia (2011), South Africa (law came into effect in 2010).

On the contrary, the States which have expressly prohibited the surrogacy arrangements as a "violation of the child's and the surrogate mother's human dignity",[34] reducing both, it is said, to mere objects of contracts; include, China (mainland), France, Germany, Italy, Mexico (Queretaro), Sweden, Switzerland, United States of America (*e.g.*, Arizona, District of Columbia).[35]

Further, there are States which are silent on such arrangements whereas, some have banned only Commercial Surrogacy or some of them have incongruity among various provincial laws in a State. This group includes States such as Argentina, northern territory of Australia, Brazil, Canada, Czech Republic, Ireland, Japan, Netherlands, Czech Republic, Mexico, New York or Michigan in USA and Venezuela. Some of the States promoting the welfare of the child have opted for "*ad-hoc*" remedies with the aim of returning the child born out of international surrogacy arrangements to his "home".

In international surrogacy cases, intending parents may present the authorities with a number of documents from abroad evidencing their legal parentage: *e.g.*, an original or amended birth certificate, a judicial decision, an administrative decree or an adoption order and there have been instances when the evidence of foreign established paternity was recognised in the interest of child. But there are couple of recent cases in which the foreign decrees or certificates were not recognised. Hence, the gist of the problem in Private International Law is the "conflict of laws" or "non- recognition" of the foreign decisions on the defence of violation of "Public Policy".

Jurisdiction, in the sense of rules conferring competence on a court to determine issues arising in any given area of law, is normally the first matter to be addressed in a conflict of laws analysis or harmonisation exercise.

---

[33] Surrogacy has been banned in much of Europe, for example, usually on the ground that it commodifies women. *See* Arlie Hochschild, *"Childbirth at the Global Crossroads",* 20 AMERICAN PROSPECT, Sept. 19, 2009, at 25, 27 (stating that surrogacy is banned in China, New York and much of Europe), *available at* http://prospect.orglarticle/childbirth-global-crossroads-0 (Last visited on January1, 2017); Hague Conference on Private Int'l Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, at 3, Prel. Doc. No. 11, *available at* http://www.hcch.net/upload/wop/genaff20l1pd11e.pdf (Last visited on December 23, 2016)

[34] S. Gössl, *National Report on Surrogacy: Germanin Trimmings and Beaumont* (n 1) 131-42, 131, *E.g.*, Germany and Switzerland.

[35] Hague Report, *Non-state actors in International Law: Aims, Approach, Scope of project and legal issues* (2010), INTERNATIONAL LAW ASSOCIATION

In the context of cross-border surrogacy, disputes potentially requiring court determination may arise pertaining to any one or more of the following issues:[36]

1. Contractual issues (pertaining to negotiation or contractual terms)
2. Enforcement issues (pertaining to agreement enforcement and its disputes such as non-payment of compensation, etc.)
3. Regulatory issues (assessment of participants or securing consents)
4. Parental civil status issues (conferral of legal parenthood and obligations thereto)
5. Child civil status issues (pertaining to citizenship, permitted departure or receiving state)

These are the dimensions lying in suspension and are making the governments handicapped. There is a considerate need to come on the international platform and decide for the legal questions that have arisen so far.

7. Recommendations:

1. Allowing and Regulating: The surrogacy in our country has helped many and will continue the same. The contemporary world has traversed too far from the archaic perceptions. Therefore, if putatively "Baby-selling" is satisfying both the parties, provided the health and rights are ensured, it can be of no harm to the ethics of the society. The regulations must be strict and be properly implemented.
2. Eliminate inequalities: It was contended that the inequalities of power has led to exploitation and it has become the root-cause of the issue. There must be some efforts through a registered body to record the women's consent for surrogacy and she should be further introduced to better economic opportunities, rather than going for such medical procedures. Other measures like fixing the compensation amount to eliminate bargaining differences should also be taken.
3. Registered surrogacy: It must be allowed only through registered institutions and qualified practitioners following a proper pre and post-natal care.
4. If allowed, give citizenship as per *iusfori*: In countries allowing commercial cross border surrogacy, it should ensure the independent right of the child to save him from being stateless.
5. A common international instrument: Internationally, a common instrument shall be proposed and "mutual recognition" shall be given to set laws resolving the legal issues involved in the process.
6. Surrogacy contracts: The contracts should be enforced only if they contain valid terms and conditions regarding child and women welfare against exploitation.

8. Conclusion

After a thorough scrutiny of the entire scenario around surrogacy it is observed that the world is divided into two for understanding the issues of surrogacy. State interference in commercial surrogacy is the result of the unregistered and non-accounted exploitative and unethical practices, concerning women and children rights. A global situation similar to cross-border trafficking, organ-donation, prostitution has emerged where the protagonists are taking the contention that such arrangements are governed by a consenting contract. The research reports and international results speak the truth of how the financial weakness of a consenting woman has become the tool of exploitation where she lacks the bargaining power. Hence the inequalities, being the root cause, should be eliminated.

There is no doubt that the Constitution of India has Article 14 and 19 which include Right to privacy and non-interference in reproductive rights but such commercialisation, has resulted in an unregulated chaos. The 2016 Bill has suddenly touched the edge of the other extreme from the first deliberately allowed set-up. It should be a step-by-step transition, taking into account the statistics and opinions to avoid rivalry. This Bill, as a paradigm shift,has left many unsatisfied and brought in chances ofencouraging illegal ways to fulfil desire. There is more of supply than demand for being involved in surrogacy. In this way, it will be difficult to keep record of such activities. Instead, it can be partially banned, while ensuring the protection of women and children through regulators. In absence of international comity on the legal issues, any trans-national agreement should keep a provision of a prior approval from the respective State for indulging in surrogacy, failing which heavy penalties can be imposed.

---

[36] Brunet Laurence et al, *Comparative study on the regime of surrogacy in the EU member states, 2012,* European Parliament, Brussels, Belgium.

Surrogacy: Making Families or Selling Babies?

Falguni Pokhriyal*

ABSTRACT

Surrogacy has its roots in society since time immemorial. However surrogacyin the modern milieu is usually a legal arrangement of bearing a child for intended parents. Surrogacy is also the preferred method of conception for same sex couples. Over the years surrogacy has become a booming business in India, with over 3000 fertility clinics being established. In 2005, the first attempt at regulating surrogacy was made by the Indian Council of Medical Research (ICMR). The ICMR issued guidelines for regulating Assisted Reproductive Technique (ART) clinics. However, these are not enforceable and hence have been repeatedly flouted. The legislature in 2008 drafted the Assisted Reproductive Technique (ART) Bill, which is yet to be tabled. The 228th Law Commission of India in Report 2009 added suggestions to the ART Bill. The paper seeks to assert that it is ironical that people are engaging in the practice of surrogacy when nearly 12 million Indian children are orphans. This is primarily because adoption of a child in India is a complicated and a lengthy procedure for those childless couples who want to give a home to these children. There is a dire need to revamp and make the adoption procedure simple for all. This will bring down the rates of surrogacy. Surrogacy Laws should be passed and implemented to bridge the gap between the professed and actually granted rights to the women and children.

Keywords: Surrogacy, India, adoption, laws, ethical issues

1. Introduction

Surrogacy, in the modern milieu, is usually a legal arrangement of bearing a child for intended parents.Intended parents seek a surrogacy arrangement for various reasons such as when pregnancy is impossible, pregnancy may result in danger to the mother's health. Surrogacy is also the preferred method of conception for same sex couples.

There are essentially two kinds of surrogacy depending on the genetics of the child being carried:

a. Traditional Surrogacy: In this case the surrogate (or carrier) is impregnated either naturally or artificially. The child resulting from this surrogacy is biologically related to the surrogate.

b. Gestational Surrogacy: In this ilk of surrogacy, the pregnancy results from the transfer of an embryo created by In Vitro Fertilization (IVF). The surrogate is a mere carrier and is not biologically related to the surrogate mother. This is said to be the less complex method of surrogacy in terms of legal issues involved.

In terms of payment received by the surrogate, there are further two ilks of surrogacy:

a. Commercial Surrogacy: When the surrogate receives monetary compensation along with medical expenses for carrying the child, it is referred to as commercial surrogacy.

b. Altruistic Surrogacy: When no monetary compensation is given beyond medical and any other reasonable expenses, such surrogacy is deemed to be altruistic in nature.

2. Ethical Issues pertinent in Surrogacy

While there are many religious organizations that frown upon the process of surrogacy, this concept is oftentimes the only option for some individuals to start a family and bring their bundle of joy home. But some highly controversial and key ethical issues are to be dealt with.

a. Attachment with the Gestational Mother - In a surrogate set up, the gestational mother is the woman who carries the baby to term. In this process the gestational mother, both physically and emotionally, gets drained. And uniqueness of this process lies on the fact that after the surrogate mother physically carries the baby throughout the pregnancy; she ultimately needs to physically and emotionally detach herself from the child as soon as he/she is born.

b. Involvement with the Gestational Mother - Because the gestational mother will not likely be the child's primary caretaker, there could be legal questions that arise in terms of what - if any - involvement she will

*Research Scholar, IMS Unison University, Dehradun

have with the child once born.

c. Identity of the Child - There are also ethical considerations that are brought to mind in terms of informing the child of his or her surrogate mother, as doing so may have an effect on the child's self-identity. May be after the child grows up he goes through a severe identity crisis in the society he is brought into.

d. In addition to the above issues, there is also the factor of compensation payable to the surrogate mother. It is typically expected that the intended parents of the child will reimburse the surrogate mother for her medical and other related expenses. This includes amount for her medical expenses during her stay in the hospital as well as incidentals such as her maternity clothing, meals, and other similar costs that she may bear out during her time of pregnancy.

There are also surrogate situations where the individual or couple who are the intended parents will pay a fee to the surrogate mother for carrying their baby. With this in mind, it is thought by some that surrogacy could be thought of as being a luxury that is only available to the wealthy - and in some cases it could even be thought of as pregnancy-for-hire.In any case, however, the process that allows for a loving individual or parents to have a child of their own can allow intended parents to follow through on their intentions of starting a family, regardless of any medical or other factors that would otherwise prevent them from being able to do so.

3. The Controversy

Despite the growing number of surrogate babies born every year, there continues to be much controversies and debates surrounding surrogacy. Issues such as the morality and the ethical aspect of the practice have been argued between both advocates and detractors on the topic of surrogate mother. Inappropriate use of surrogacy is another argument between the pros and cons on this topic. Because there is a monetary payment involved, some argue that surrogate mother has become a business of some sort.

One process or one birth from a surrogate mother can cost up to $60,000. The cost includes the agency's fee for screening and finding a potential surrogate mother, the medical procedures, and compensation fee for the surrogate mother that will be given to her after the birth of the child. With this knowledge, poor but healthy woman are drawn in by the money and offer themselves to serve as surrogate mother. Because money can purchase a surrogate mother to carry a child for whoever, rich couples and women view it as "convenience" way to have a child or children[1]. "Allowing this ilk of surrogacy to continue will result in poorer women of every country "selling" their wombs for financial gain and ending up becoming nothing more than a class of "breeder women"[2]. Regardless of some illegality of surrogacy in the United States, there are surrogate agencies who are making a lot of money from couples or women who seek the service of surrogate mothers by offering them exclusive deals in selecting traits for the baby they want and finding a perfect surrogate mother for them.

An article on the 'Fertility Race' by psychologist Hillary Hanafin compares the whole process of surrogate mother as "like cherry picking, like you're creating a child through a catalogue".Washington Lawyer and activist Andrew Kimbrell on the same article says "it is the attempt to commodify the act of child bearing and to commodify children. It is baby selling pure and simple which is forbidden in all 50 states"[3]

Together with the rising cost of using a surrogate mother, there are also considerable emotional facts about surrogacy. The entire process can be physically and emotionally draining to the surrogate mother. Nothing is more hopeful and joyous than bringing a life into the world. A very real possibility that a surrogate mother will get emotionally attached to the baby she is carrying needs to be considered. This can create great amount of suffering on all sides,"not to mention potentially leading to a long and messy legal battle."[4] There is a special bond that happens during the pregnancy that reasons to the attachment to the baby. Surrogate can develop a close bond to the unborn baby and will feel devastated when she has to hand the child over to the intended parents. This can cause stress that lead to post-partum depression and it will require medical attention.

Some women were asked about what they think about surrogate mother and one in particular justly said: "I don't

---

1 Available at http://humupd.oxfordjournal.org (Last visited on January 31, 2017).

2 (Kerns, 2010).

3 http://american radioworks.publicradio.org (Last visited on February 2 ,2017)

4 Lounsbury,Delwyn"What are the Pros and Cons of Surrogacy?"

think I could be a surrogate. I could not have a part of me out there that I'm not taking care of."[5]

Surrogacy refers to a contract in which a woman carries a pregnancy "for" another couple. Although this arrangement appears to be beneficial for all parties concerned, there are certain delicate issues which need to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents. The ever-rising prevalence of infertility world over has led to advancement of assisted reproductive techniques (ART). Herein, surrogacy comes as an alternative when the infertile woman or couple is not able to reproduce. Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy. Commercial surrogacy is legal in India[6], Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. In contrast, countries like Germany, Sweden, Norway, and Italy do not recognize any surrogacy agreements. India has become a favourite destination of fertility tourism. Each year, couples from abroad are attracted to India by so-called surrogacy agencies because the cost of the whole procedure in India is as less as one third of what it is in United States and United Kingdom (Rs.10-20 lakhs).

4. Is surrogacy profitable for all?

At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets the much needed money, an infertile couple gets their long-desired biologically related baby and the country earns foreign currency; but the real picture reveals the bitter truth. Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system, and the chances of getting involved in legal problems is there due to unpredictable regulations governing surrogacy in India. Although in 2005, ICMR[7] issued guidelines for accreditation, supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated.[8] Frustration of cross border childless couples is easily understandable who not only have to deal with language barrier, but sometimes have to fight a long legal battle to get their child. Even if everything goes well, they have to stay in India for 2-3 months for completion of formalities after the birth of baby. Cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage and the rights of the child. There are occasions where children are denied nationality of the country of intended parents and this results in either a long legal battle like in case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage. There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage .[9]

If we look at the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right to take decisions regarding their own body and life. In India, there is no provision of psychological screening or legal counselling of intended surrogate mothers, which is mandatory in USA. Thus surrogacy has become more of a commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.[10]

5. Indian scenario

Surrogacy has been present in Indian society over several hundreds of years. Indian mythology itself is replete with instances of "miraculous births". Queen Sudeshna sends her maid to be her surrogate and bear her sons in the 'Mahabharata'. When Vishnu hears Vasudeva pleading with Kansa not to kill all his sons, he "transfers" an embryo from Devaki's womb to the womb of Rohini, who is another wife of Vasudeva. Rohini thus births Balaram, brother to Lord Krishna, and this fact is concealed from Kansa. Surrogacy is present in the Old Testament of the Bible as well. Sarah "commissions" her maid Hagar to bear a child

---

5 http://humupd.oxfordjournals.org/content/(Last visited on February 2 , 2017)

6 http://surrogacylawsindia.com/legality.php?id=%207 and menu_id=71(Last visited on February2,2017)

7 The Indian Council of Medical Research available athttp://icmr.nic.in/ (Last visited on February 5,2017)

8 http://www.icmr.nic.in/art/art_clinics.html (Last visited on February 5, 2017)

9 http://www.timesonline.co.uk/tol/news/world/asia/article/7113463.ecc (Last visited on February 5, 2017)

10 http://www.nydailynews.com/news/world/india-surrogate-motherbuisness-raises-questions-global-ethics-article-1.276982 (Last visited on February 8, 2017)

with Abraham. Thus the concept of surrogacy has been present throughout ancient times as well. However, the concept, as well as the milieu of surrogacy has undergone a sea of change.

Surrogacy in India is estimated to be a $ 2.3 billion industry, but surrogate mothers are paid less than a tenth of what they get in the US. The mushrooming of IVF clinics, absence of a regulatory framework, and the availability of poor women willing to rent out their wombs has made India an attractive option for foreigners seeking a surrogate child. Several questions have been raised over the alleged exploitation of surrogate mothers, and over the need to safeguard rights of the people involved.

The Supreme Court in the 2008 Manji case[11] held that commercial surrogacy was permissible in India. Baby Manji was commissioned by Japanese parents (through an unknown egg donor and the husband's sperm) and was born to a surrogate mother in Gujarat. The parents divorced before the baby was born. The genetic father wanted the child's custody, but Indian law barred single men from it, and Japanese law did not recognise surrogacy. The baby was ultimately granted a visa, but the case underscored the need for a regulatory framework for surrogacy in India. This was the genesis of the Assisted Reproductive Techniques (Regulation) Bill, 2014.In an affidavit to the Supreme Court, the government said it would henceforth "prohibit and penalise commercial surrogacy services" so as to protect the "dignity of Indian womanhood", and to prevent "trafficking in human beings" and the "sale of surrogate child". Only needy infertile Indian couples would be able to opt for surrogacy of the altruistic kind.

5.1 Assisted Reproductive technology legislation

A 2013 survey by the Centre for Social Research along with the Women and Child Development Ministry showed 68% of surrogate mothers in Delhi and 78% in Mumbai, were housemaids by profession. The report said India had become a 'rent-a-womb' destination and called for a rights-based framework where surrogacy would involve no monetary transactions, barring the medical costs. However it also explicitly said that the law should allow single parents and unmarried couples to opt for surrogate children - the Bill, which is expected to be tabled in Parliament soon, has chosen to ignore this recommendation.

The Indian government has drafted legislation, earlier floated in 2008, finally framed as ART Regulation draft Bill 2010. The Bill is still pending with Government and has not been presented in the Parliament. The proposed law has taken consideration of various aspects including interests of intended parents and surrogate mothers. The proposed draft needs to be properly discussed, and its ethical and moral aspect should be widely debated by social, legal, medical personal, and the society before any law is framed.

The Bill acknowledges surrogacy agreements and their legal enforceability.[12] The surrogacy agreements under it are treated at par with other contracts under the Indian Contract Act 1872 and other laws applicable to these kinds of agreements. Both the couple/single parent and surrogate mother need to enter into a surrogacy agreement covering all issues, which would be legally enforceable. Some of the features of proposed bill are that an authority at national and state level should be constituted to register and regulate the I.V.F. clinics and A.R.T centres, and a forum should be created to file complaints for grievances against clinics and ART centres. The age of the surrogate mother should be 21-35 years, and she should not have delivered more than 5 times including her own children. Surrogate mother would not be allowed to undergo embryo transfer more than 3 times for the same couple. If the surrogate is a married woman, the consent of her spouse would be required before she may act as surrogate to prevent any legal or marital dispute. A surrogate should be screened for STD, communicable diseases and should not have received blood transfusion in last 6 months as these may have an adverse bearing on the pregnancy outcome. All the expenses, including insurance of surrogate, medical bill and other reasonable expenses related to pregnancy and childbirth should be borne by intended parents. A surrogacy contract should include life insurance cover for surrogate mother. The surrogate mother may also receive monetary compensation from the couple or individual as the case may be, for agreeing to act as such surrogate. It is felt that to save poor surrogate mothers from exploitation, banks should directly deal with surrogate mother, and minimal remuneration to be paid to the surrogate mother should be fixed by law.

Guidelines dealing with legitimacy of the child born through ART state that the child shall be presumed to be the legitimate child of the married/unmarried couple/single parent with all the attendant rights of

[11] Baby Manji Yamada v. Union of India (2008) 13 SCC 518

[12] http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf (Last visited on February 5, 2017)

parentage, support, and inheritance. The ART clinics should not be allowed to advertise for surrogacy for its clients, and couples should directly seek facilities of ART Bank. The intended parents should be legally bound to accept the custody of the child/children irrespective of any abnormality in the child/children. Confidentially should always be maintained, and the right to privacy of the donor as well as surrogate mother should be protected. If a foreigner or NRI is seeking surrogacy, they should enter an agreement with written guarantee of citizenship for the child from their government, and they should also appoint a local guardian who would be legally responsible for taking care of the surrogate during and after the pregnancy till the child is delivered to the foreign couple or reaches their country. Sex-selective surrogacy should be prohibited, and abortions should be governed by the Medical Termination of Pregnancy Act 1971.[13]

6. International surrogacy

The current trend of surrogacy in India is that many foreign couples from industrialized nations such as Japan and the USA some to India to seek a surrogate, due to the low cost of surrogacy in India, as compared to their own countries. International surrogacy of such kind leads to the inception of various legal as well as social issues. While the language barrier and cultural differences are the social issues, the legal issues are even more complex.

Laws of the two countries must be at par in order to harmonize the process of surrogacy. Many countries, such as Germany, Italy and England do not recognize the validity of surrogacy contracts. Differential nationality laws also create a deadlock when taking a child back to the parents' country. Therefore there is a dire need for a uniform surrogacy legislation that could solve the problems in the international scenario as well thereby reducing the complexity of the present trend of international surrogacy.

7. Conclusion and Recommendations

It is clearly manifested from the above discussion that in the practice of surrogacy imbibes some prominent questions which are still unanswered. Firstly, the child who was conceived by unknown donors can have an identity crisis. Secondly, if the intended parents only wanted one child, in case of birth of twins the future of the other child is at stake. Thirdly, in case a surrogate child is born with disability and the intended parent changes their mind because they don't want to take care of a child with disability it can lead to a clear abandonment of the child. Fourthly, the liability of payment of medical bills of the surrogate mother facing complications resulting in miscarriage remains uncertain. Therefore appropriate measures should be taken to curb the ill use of surrogacy.

The irony is that people are opting for the practice of surrogacy when almost 12 million Indian children are orphans and are dreaming of an ideal family. Adoption of a child in India is a labyrinthine and a lengthy process for those childless couples who want to give a home to these orphan children.Even after 70 years of Indian independence, there is no comprehensive adoption law applicable to all its citizens, irrespective of the religion or the country they live in as Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) or Overseas Citizens of India (OCIs). As a result, they resort to the options of IVF or surrogacy. The Guardian and Wards Act, 1890 permits Guardianship and not adoption. The Hindu Adoption and Maintenance Act, 1956 does not permit non-Hindus to adopt a Hindu child, and requirements of immigration after adoption have further hurdles.[14] Thus there is a dire need to modify and make the adoption procedure simple for all. This will automatically raise the number of adoptions and bring down the rates of surrogacy in our country. Altruistic and not commercial surrogacy should be promoted so that its misuse can be prevented.

A few recommendations to improve the present situation and to prevent the misuse of the concept of surrogacy are as follows:

a) The concept of adoption of the orphans should be promoted by the government through awareness programs, schemes and campaigns.
b) Revamping of the laws of adoption and making its procedure simple and flexible will help more people opt for it.
c) Passing of strict laws by the Parliament against the illegal use of surrogacy for commercial purpose.
d) Passing of progressive judgements by the apex court on surrogacy will set an ideal precedent for the cases which will arise in the future.
e) Setting up of committees to monitor the implementation of the guidelines given by the courts regarding surrogacy.
f) Joint venture of all the countries across the globe by adopting laws regarding international surrogacy and setting up a monitoring agency in the international scenario to deal with problems arising out of it.

---

[13] http://www.mp.gov.in/health/acts/mtp%20.pdf (Last visited on February 5, 2017)

[14] http://www.adoptionindia.nic.in (Last visited on February12, 2017)

Surrogacy : Exploring the Golden Triangle Perspective

Palak Kaushal*
Ishaan Chopra*

ABSTRACT

Commercial surrogacy has been a contentious issue, both from the legal and the social point of view. This paper outlines the implications of surrogacy and analyses the provisions of Surrogacy (Regulation) Bill, 2016 along with the viability of the surrogacy model established by it. The authors have relied upon the empirical study conducted by CSR and recent Supreme Court judgments to efficaciouslyanalyse this problem. An inclusive study of surrogacy requires studying it from its social genesis. Patriarchal society of India combined with abject poverty, turns out be an inferno for a household woman, who undertakes surrogacy to earn her livelihood. In the Indian legal framework, hallmarked with lack of regulations, a superior bargaining position is enjoyed by the intermediaries, whereby they generally use tactics to ensure favourable profit bisection. Surrogate mothers are usually ignorant of the terms of surrogacy agreements, which is detrimental to their interests. The Surrogacy (Regulation) Bill, 2016, appears as a blessing in disguise by establishing redressal mechanism, however it restricts surrogacy only to altruistic surrogacy ,of which black market is an inevitable outcome .At this juncture it is imperative to outline the judicial developments in this field. The Supreme Court, by taking cognizance of diaspora of declarations and glaring foreign judgments, has upheld the moral sanctity of surrogacy. This research paper uses the Golden Triangle of the Indian Constitution i.e., Articles 14, 19 and 21 as a lens for analysing the provisions of the new bill. Ahypothetical model of commercial surrogacy has been proposed by the researchers, emphasising on the proper determination of eligibility of a surrogate mother and dis-incentivising surrogacy by providing alternate employment, by garnering the maternal skill of surrogate mothers in building a specialised workforce.

Key Words: Commercial Surrogacy, Surrogacy regulation Bill, Social Profile, Golden Triangle, Indian Constitution

1. Introduction

The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth. In the Indian context, altruistic surrogacy (which does not involve money as consideration and may have been done purely out of love and affection for the commissioning parents) and commercial surrogacy (which is purely monetary) have both been judicially recognized[1]. In both cases, the commissioning parents bear the necessary expenses of medication incurred on account of the surrogate.

The use of assisted reproductive technology has become increasingly prevalent since the initial skepticism faced by India's first IVF baby way back in 1978. Surrogacy, in particular, is a thriving market in India with several takers amongst Indian and foreign couples. The Indian surrogacy market, hailed as an international fertility tourism destination, boasts of a turnover of over 445 million dollars annually and an annual growth rate of 20%.

The moral issues associated with surrogacy are pretty obvious, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money.[2] Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement.

Besides these, there are many issues relating to the legal aspects surrounding surrogacy which are complex, diverse and mostly unsettled. Diverse situations may arise where the nationality of the child and its guardianship may not be certain; which may subject him to adverse situations and condition. Keeping the above scenario in mind, Indian government has unveiled a draft law to ban commercial surrogacy completely, a move that would block homosexuals, single parents, live-in partners and foreign couples from hiring Indian women to have a baby. The Bill only permits Indian couples, married for at least 5 years to avail surrogacy services. Hence,it is imperative to analyze the viability and legal validity of the proposed Surrogacy Regulation Bill.

* Students, NLIU, Bhopal

1 BabuSarkar. Commercial Surrogacy: Is it morally and ethically acceptable in India?, (2011) PL December S-11

2 228th Report of the Law commission of India, Page 54

2. Profile of Indian surrogate

This section aims to discuss and analyze the background of the Indian surrogates and the conditions they are exposed to for a better understanding of the correlated issues. It is quite ostensible thatsince surrogacy is an exorbitant practice, the commissioning parents are generally more educated and belong to a higher income stratum of the society than surrogate mothers and their partners. Such disparities are even greater in the regions and countries where poverty is more pronounced. The Center for Social Research (CSR) in India conducted a study in 2012, where over 100 surrogates, as well as their families, commissioning person(s), clinics, agents, and other stakeholders were interviewed. It reported that the most common reason behind an Indian women's decision to become a surrogate is 'Poverty'.[3]

Poverty leaves these women with negligible career prospects predominantly because they are uneducated and unskilled; forcing them to work in unorganized sectors as casual labourers. Such poor economic background instills relentless struggle to earn money in order to manage daily meals, maintain family, build a permanent shelter and if possible educate their children. Hence these women are majorly the ones who are victims of abject povertythat causes them to agree to conceive on behalf of another couple in return for a sum of money that would otherwise take them many years to earn.

Nevertheless the decision to be a surrogate is not as simple as it is stigmatized and looked down upon by the orthodox Indian society. Most women who go for surrogacy insist on anonymity as a result of the social stigma that surrounds surrogacy. The husbands of surrogates sometimes have problems with their wives' "occupation". In one particular case the surrogate mother's fiancée left her for another woman, because the husband would not lay eyes on her anymore after she was inseminated.[4] If one digs deeper the surrogates begin to reveal the trauma and turmoil they experienced before plunging into what some of them call the -last decent resort to earn money. While there are many religious organizations that frown upon the process of surrogacy, this concept is oftentimes the only option for some individuals to start a family. The possibility of earning large amounts of money through surrogacy made India one of the leading destinations for commercial surrogacy in the world.

2.1 Abuse and Exploitation

Understanding the background of the surrogates is important as it plays a major role in making them susceptible to exploitation and abuse by various stakeholders of the industry. Since long it has been an issue that the middlemen, clinics, commissioning persons from relatively affluent economic backgrounds, or other stakeholders intentionally, or unintentionally, take advantage of such vulnerable women.

Potential surrogates may, in some cases, also lack independent representation and therefore be more vulnerable to manipulation (by a broker/agent, the assisted reproductive clinic, or the commissioning person(s)) regarding not only price, but also the terms of the contract, including that the surrogate bears most of the risks.[5] For example, in the above-mentioned CSR study conducted in India[6], it was found that surrogates were often illiterate and relied on clinics to inform them of the terms of the contract, without independent advice. When asked, surrogates could not explain or recall any of the terms of the contract they had entered into. Contracts were often not signed until mid-way through the fourth month of pregnancy, meaning the surrogates would bear all risks and losses if the pregnancy miscarried or was aborted due to foetal abnormalities.

The global commercial surrogacy market, undoubtedly, is also bound to be inflicted with trafficking of the poor and vulnerable women for use as surrogates to profit the agents or brokers due to the unregulated environment. For example in 2012, Rotabi and Bromfield's work on Guatemalan surrogates provided that:

"In the global environment of assistive technology and the demand for babies, Guatemalan women are at risk of human sales of their offspring in global surrogacy schemes. These women (often teenage girls) were commonly called 'breeders', and were paid small amounts of money in exchange for their child by the agents/merchants."[7]

Such a risk is predominantin countries like India, Bangladesh, China, Thailand,etc. where similar conditions prevail.Trafficking, sale and commodification of children have also been a part of the harsh realities of the unregulated commercial surrogacy in India. That is, while in many cases the commissioning person(s) may wish

---

3 Surrogate motherhood- ethical or commercial, CENTRE FOR SOCIAL RESEARCH (CSR), availableat http://www.womenleadership.in/Csr/SurrogacyReport.pdf, (Last visited on December 1, 2016).

4 Id.

5 Jennifer Rim, Booming Baby Business: Regulating Commercial Surrogacy in India,UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW, 1449 (June 2009).

6 Centre for Social Research, supra note at 1.

7 Karen Smith Rotabi and Nicole Footen Bromfield, The Decline in Inter-country Adoption and New Practices of Global Surrogacy,SAGE, 16 (May 2012)

to procure a child that they will love and care for, the ability to procure a child by payment in commercial surrogacy arrangements, has given rise to clear examples of exploitation and abuse.[8] There have also been recent cases in which children have been abandoned, when they have not met the expectations of the commissioning persons. In one such case, the Australian commissioning persons left a child with Down's syndrome, called Baby Gammy, behind with a surrogate in Thailand, one of the leading destinations for commercial surrogacy, while taking his healthy sister and reportedly asking for their money to be refunded.[9] Such instances form part of the 'evidence base' that commercial surrogacy involves many social and ethical issues which need to be urgently addressed.

3. Golden triangle and the Surrogacy Regulation Bill, 2016

The inter-relationship between Articles 14, 19, and 21 was carefully examined in the caseManeka Gandhi v. Union of India (1978) in which it was observed that:

"The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of "personal liberty" and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. The golden triangle of our Constitution is composed of Articles 14, 19 and 21. Incorporation of such a trinity in our paramount parchment is for the purpose of paving such a path for the people of India which may see them close to the trinity of liberty, equality and fraternity."[10]

The recently proposed draft Surrogacy Regulation Bill 2016, passed by the Health Ministry, was cleared by the Union Cabinet on the August24, 2016.The essential features of Bill are enlisted below:

i Surrogacy will not be allowed for the following:

- Homosexual couples
- Single parents
- Couples in live-in relationships
- Foreigners
- Couples with children
- Attempts at commercial surrogacy

ii. Couple must be married for at least 5 years.

iii. Either one of couple must have proven infertility.

iv. Only Indian citizens; NRIs are also not included.

v. Age of couple: 23-50 for females and 26-55 for males.

vi. Women can be surrogates only once and a married couple can only have one surrogate child.

vii. The couple should employ an "altruistic relative", i.e. the surrogate mother should be a relative who is sympathetic to the situation.

viii. Egg donation is banned.[11]

It is important to critically analyze the provisions of the Bill to assess its efficacy in the prevailing conditions and its validity with respect to the rights guaranteed to the citizens by the constitution.

3.1 Position w.r.t Article 14 of the Constitution

Article 14 of the Constitution ensures right to equality which has been recognized as a part of the basic structure of the Constitution.[12] The framework of Article 14 permits reasonable classification of persons based on intelligible differentia with a rational nexus to the object it seeks to achieve.[13] Restricting conditional surrogacy to married Indian couples and disqualifying others on the basis of nationality, marital status, sexual orientation or age, does not appear to qualify the test of equality and has no connection with the intended objectives of the proposed legislation which is to prevent rampant exploitation of the women and to prevent the creation of "baby farms", like those which have prospered in Anand, Gujarat. In order to decide whether a restriction satisfies the above criteria, the Court must look into the underlying purpose of the restriction and the evils sought to be remedied by the law,[14] while examining the adequacy of a less restrictive alternative.[15]

---

8 Paula Gerber & Katie O'Byrne,SURROGACY, LAW AND HUMAN RIGHTS, 36 (1st ed. 2015).

9 Lindsay Murdoch, Australian Couple leaves Down Syndrome baby with the Thai surrogate, The Sydney Morning Herald, (1 August, 2014)availableatwww.smh.com.au/national/austrailian-couple-leaves-downsyndrome-baby-with-thai-surrogate.20140721/zz3xpl.html (Last visited on December 1, 2016).

10 T.R. Kothandaraman v. T.N. Water Supply & Drainage Board, (1994) 6 S.C.C 282

11 Feminismindiacritical evaluation of ART bill , 2016available at https://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/ (Last visited on December 1,2016).

12 RaghunathraoGanpatrao v. Union of India, AIR 1993 SC 1267

13 In re: The Special Courts Bill, 1978, (1979) 1 SCC 380

14 Israel Military Industries Ltd. v. Union Of India & Anr., WP (C) 2620/2012

15 M.J. Sivani and Ors. v. State of Karnataka and Ors., (1995) 6 SCC 289

Most countries having statutes governing surrogacy have excluded foreign nationals from availing surrogacy services because of the inconsistency in national policies governing legal recognition of the children born out of surrogacy agreements.[16] For instance, the European Court of Human Rights refused to grant legal recognition to parent-child relationships that had been legally established through international surrogacy arrangements.[17] The apparent object behind the exclusion of foreign nationals from being commissioning parents is to avoid issues regarding the citizenship of the children born pursuant to the agreement. However, the Union ministry of Women and Child Development has a diametrically opposite policy with respect to inter-country adoptions where it facilitates fast-track adoptions from India by foreigners. The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) allows a court to give a child for adoption to foreign parents, irrespective of the marital status of such a person, in accordance with the guidelines notified by the Central Adoption Resource Agency (CARA). The latest guidelines governing adoption of children notified on July 17, 2015, have streamlined inter-country adoption procedures. Hence by all accounts, it seems there are different barometers in matters of adoption and surrogacy.

Talking about single parents, the Indian law allows women to adopt children irrespective of their marital status. Section 8 of the Hindu Adoption and Maintenance Act, 1956 allows for unmarried Hindu women to adopt a son or a daughter. Under the Juvenile Justice (Amendment) Act, 2006 the ability of a woman to adopt has been recognized irrespective of her marital status.[18] Courts have also recognized that the term maternity extends to females who employ services of another female to procreate with or without a male partner.[19] In this context, it has been held that a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[20] This denial of equal protection is in contravention of the Constitution.[21] It is therefore apparent that the provisions of the Bill place an unreasonable restriction on a single woman's right to free choice of procreation.

India has also accorded legal recognition to live-in relationships by considering them to be relationships[22] in the nature of marriage.[23] Similarly the children born out of such relationships are also considered legitimate.[24] The Court has also put to rest all questions regarding the best interests of the child by endorsing the view that if the best possible permanent family route for a child is with a couple who are not married, then the law should not stand in the way of such an arrangement.[25] It is hence argued that after having recognized live-in relationships as intrinsically similar to marriages, depriving infertile women in such relationships of the right to commission surrogacy would amount to an unreasonable restriction on their right to procreate. The possibility of women giving birth outside a marriage or during the subsistence of a marriage which has been subsequently dissolved has been ignored under the instant classification. Courts have discouraged any discrimination against classes of women that curtails their reproductive autonomy.[26] And regulations impinging on this autonomy can only be upheld if they have no significant impact on the woman's exercise of her right and are justified by compelling state health objectives.[27] In the instant case, there are no public health concerns arising out of gestational surrogacy that affect single and unmarried surrogates more than they affect married surrogate offering surrogacy services.[28] Thus, there is no rationale to exclude single and unmarried women from offering surrogacy services.

3.2 Position w.r.t Article 19 of the Constitution

The Constitution of India guarantees freedom to its citizens

---

16 K (Minors) (Foreign Surrogacy), EQHC (Family Division), Case No: FD09P02848.

17 Mennesson v. France, no.65192/11, ECHR (2014); Labassee v. France, no.65941/11, ECHR (2014).

18 Section 41(6), Juvenile Justice (Amendment) Act, 2006; In Re: Adoption of Payal @ SharineeVinayPathak and his wife SonikaSahay @ Pathak, 2010 (1) Bom CR 434.

19 ABC v. State (NCT of Delhi), AIR 2015 SC 2569; Section 6(b), Hindu Minority and Guardianship Act, 1956.

20 ABC, supra note 37.

21 Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416.

22 Uday Gupta v. Aysha and Anr,.2014 (7) SCJ 209.

23 vetlana, supra note 43.

24 S.P.S. Balasubramanyam v. Suruttayan Alias AndaliPadayachi and Ors., AIR 1992 SC 756.

25 Indra Sarma v. V.K.V. Sarma, AIR 2014 SC 309; R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions, [2003] 2 AC 295.

26 Inspector (Mahila) Ravina v. UOI and Ors., W.P.(C) 4525/2014.

27 Planned Parenthood of Central Missouri. v. Danforth, 428 U.S. 52 (1976).

28 Anu, Pawan Kumar, Deep Inder, Nandini Sharma, Surrogacy and Women's Right to Health in India: Issues and Perspective, 57 INDIAN JOURNAL OF PUBLIC HEALTH 2 (2013).

of six different types under Article 19 which includes freedom to practice any profession, or to carry on any occupation, trade or business.

Firstly, the doctors' and the clinics' right to practice surrogacy as a trade or profession is violative of their rights under Article 19(1) (g) of the Constitution. The Supreme Court has held that the term 'freedom' under sub clause g of this this article means that every citizen has a right to choose his own employment or to take up any trade or calling, subject only to the limits as maybe imposed by the state in the interest of public welfare and the grounds mentioned in Article 19(6).[29] The right extends to all professions, trade and occupations except those that have been considered inherently noxious and outside commerce and thereby excluded from the guarantee under Article 19(1) (g).[30] In the instant matter, commercial surrogacy has been recognized as legal.[31] In discussing the same, the Supreme Court has previously acknowledged that there is nothing inherently wrong with the practice of commercial surrogacy as such and has quoted examples from jurisdictions across the world to establish that it is a prevalent practice.[32] As per Article 19(6), the state may make any law imposing restrictions on the right guaranteed under Article 19(1) (g) in the interests of the general public, so long as such restrictions are reasonable.[33] In the instant case, the restrictions imposed by the Act are not in the interest of the general public and therefore are not saved by Article 19(6). The term 'in the interest of general public' has been said to include public order, public health, public security, morals, and economic welfare[34] whereas none of these objectives are fulfilled by the Bill.

Secondly, concerns are raised over allowing foreign nationals from availing surrogacy services in India since it causes the fear of glaring exploitation of surrogate mothers who have reduced bargaining power in such cases. But it is contended that banning cross-border surrogacy will not reduce exploitation and rather bolster it as the same service would be provided to foreign citizens through unauthorized clinics and agents in isolated or hidden places leading to a flourishing business as the demand for surrogate mothers will remain constant so will the number of women who wish to earn via surrogacy. The prime example of such black markets is found on the case of the commercial organ trade industry.[35] Therefore, no public interest is served in banning foreign nationals from availing surrogacy services. Instead a regime of regulation must be put in place and the surrogates, doctors and clinics must be allowed to continue catering to foreign nationals in pursuance of their right under Article 19(1) (g).

Similarly, reasons to disallow single women from being surrogates include threat of exploitation and social stigmatization. In examining this claim, it is important to take into account the judicial attitude towards professions which are claimed to have the potential to be exploitative. In relation to women working in bars, it has been held that instead of putting curbs on women's freedom, regulation of the concerned profession would be a more tenable and socially wise approach to prevent exploitation.[36] The Court emphasized on regulation and not on the exclusion of parties to undertake a particular profession, stating that empowerment should reflect in the law enforcement strategies of the State.[37] Therefore, in imposing this restriction, not only is no public interest served, but also a socially regressive move is given effect.

3.3 Position w.r.t Article 21 of the Constitution

The Article 21 of the Constitution guarantees right to protection of life and personal liberty to the citizens. However the provisions of the bill curtail the Right to Privacy guaranteed by this article in the following ways.

a) Reproductive autonomy: The right to privacy enshrined under Article 21 of the Constitution recognizes that all individuals have the right to safeguard the privacy of his or her own, family, marriage, procreation, motherhood, child bearing and education among many other matters.[38] It has been held that an individual's reproductive autonomy must be upheld against state intrusion so as to forbid the State from usurping such rights without overwhelming social justification.[39] Moreover, the

---

29 Saghir Ahmed v. State of U.P, [1955] 1 SCR 707.

30 ManushiSangathan, Delhi v. Government of Delhi and Ors., 168 (2010) DLT 168.

31 Baby Manji Yamada v. Union of India and Anr., (2008) 13 S.C.C 518.

32 Union of India and Anr.v. Jan Balaz and Ors., 2015 (4) RCR (Civil) 881.

33 Rajasthan Pradesh V.S. Sardarshahar and Anr. v. Union of India (UOI) and Ors., AIR 2010 SC 2221

34 Mirzapur, supra note 16

35 Illegal trade in human organs, Letter by the Chairperson of National Human Rights Commission to the Prime Minister, January 29, 2004

36 AnujGarg and Ors.v. Hotel Association of India and Ors., (2008) 3 SCC 1.

37 Id.

38 Gobind v. State of Madhya Pradesh and Anr., 1975 CriLJ 1111.

39 T. Sareetha v. T. VenkataSubbaiah, AIR 1983 AP 356.

Courts have reasoned that the right to submit to medical techniques should be included within the cluster of legally protected choices such as the right to use contraceptives[40] and the right to abortion.[41] Extending this line of argumentation, if the Constitution protects coital reproduction from state interference, it can be inferred that non-coital reproductive means involving the couple's own gametes should also beget equal constitutional protection.[42]

b) Bodily integrity: The Right to Privacy guaranteed by Article 21 encompasses the right to bodily integrity and personal liberty. That is, the right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.[43] The right to make decisions about reproduction also falls within the ambit of personal liberty.[44]

c) International legal instruments: The Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights provide men and women of full age without any limitation due to race, nationality or religion the right to marry and found a family.[45] Reproductive rights include the right to make decisions concerning reproduction free of discrimination, coercion and violence with the aim of achieving informed consent.[46]

d) The provisions of the Bill also violates the Right to Livelihood under Article 21.The right to life extends to all those faculties that are necessary to live a life with dignity and equality.[47] The restrictions of right to livelihood can be justified if it is according to procedure established by law, such law being fair, just, and reasonable both substantively and procedurally.[48] In the instant case, only single and unmarried women were barred from being surrogate mothers. This denies them the right to earn their livelihood in this sector and consequently places them at an economic disadvantage as compared to the married surrogates. In disqualifying the aforesaid groups of people from availing surrogacy, a sizeable proportion of the demand is eliminated which has an adverse effect on the income of both the surrogate mothers as well as the clinics.

e) The bill also violates the Right to Health interpreted and covered under the article in the following ways:

I) Commissioning Parents: Infertility has been defined as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[49] The growth in the use of ART methods is due to the recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples.[50] The Courts have held that right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution.[51]

ii) Surrogates: The surrogates are entitled to full knowledge regarding the risk to their health before they give their consent and the contract is signed. The concept of informed consent i.e., the patient having an adequate level of information about the nature of the procedure to which he is consenting to has been held to be integral to all medical procedures.[52] In the instant case, since the point of consent is the signing of the contract, such contract cannot be signed without the involvement of the ART clinics since it is the clinics that are best placed to inform the surrogates of the possible health risks.

iii) International legal instruments: Under international conventions such as the United Nations Commission on Human Rights, the right to health includes the right to a system of health protection which provides equality of opportunity for people to enjoy the highest

---

40 Griswold v. Connecticut, 381 U.S. 479, 484 (1965); SuchitaSrivastava and Anr. v. Chandigarh Administration, AIR 2010 SC 235.

41 Medical Termination of Pregnancy Act, 1971; Roe v. Wade, 410 U.S. 113 (1973).

42 Lifchez v. Hartigan, 735 F. Supp. 1361 (1990).

43 Kharak Singh v. State of U.P. and Ors., AIR 1963 SC 1295.

44 S. Amudha v. Chairman, Neyveli Lignite Corporation, (1991) 1 MLJ 137.

45 Art. 16(1), UN General Assembly, Universal Declaration of Human Rights, December 10, 1948; Art. 23(2), UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966; United Nations Treaty Series, Vol. 999, P. 171.

46 Report of the International Conference on Population and Development, Principle 1, A/CONF.171/13 (18 October 1994).

47 Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.

48 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

49 Revised Glossary of ART Terminology, International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (2009); Section 2(v), Draft Assisted Reproductive Technology (Regulation) Bill, 2014.

50 Report of the Law Commission of India (2009)

51 C.E.S.C. Limited and Ors. v. Subhash Chandra Bose and Ors., AIR 1992 SC 573.

52 Samira Kohli v. Dr. PrabhaManchanda and Anr., AIR 2008 SC 1385; Canterbury v. Spence, 1972 [464] Federal Reporter 2d. 772.

attainable level of health as well the right to sexual and reproductive freedoms.[53] The prevention and appropriate treatment of infertility has been included in the International Conference on Population and Development Program of Action(hereinafter, the Program of Action 1993) as a component of the primary health care system.[54] The Program of Action 1993 further provides the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.[55] Since India is signatory to the Program of Action 1993 and a member of the UNCHR, the aforementioned commitments are binding.

4. Recommendations and Conclusion

Providing surrogates with employment opportunities will go a long way in disincetivizing their further exploitation due to economically weaker background. For a person, barely able to make ends meet, a rapid inflow of 4000-5000 is a life transforming event. Tempted by windfall financial gains, woman take up surrogacy despite social resistance and an acute social stigma attached with it. However the surrogate might be duped by several means as the sector is unregulated.

An alternative employment opportunity in the maternity sector would address the root of the problem of weak financial status. Though the new employment might not provide 'quick money', it will earn surrogates a greater level of social acceptance and social security. The surrogate is already aware of the care and precaution necessary during pregnancy like dietary intake,medicines, tests, checkups and pertinent dos and don'ts. Additional training can enhance their skill, knowledge and expertise in the field. This will also help in addressing the acute problem of high infant and maternal mortality rate India has been facing.

Besides this, a surrogate also learns something which is essential to the occupation of surrogacy: Ensuring that an emotional bond is not developed with the baby she is nurturing within. Having gone through a tumultuous experience of controlling emotions to resist the motherlyfeelings of love and attachment, she can guide the current surrogates regarding the same.

Such employment opportunities would give no more incentive to again act as a surrogate which would serve a long term object of minimizing the exploitation that several surrogates face as they become reliant on surrogacy to feed their families.

Making a woman serve as a surrogate multiple time incentivizes their exploitative breeding which provides the middlemen an opportunity to recover the costs that have been incurred in 'procuring' , 'nurturing' or 'breeding' a woman as a surrogate. In some cases woman are nurtured from an early age to become capable 'baby bearers' which is a glaring violation of their human rights. The middle men which seek to derive profit from wombs invest in the potential surrogates by incurring costs of , for example, basic residency costs(including food and shelter), clothing and medical assistance , medical cost incurred before , during and after the delivery, contingent expenditures in case of a complication, etc. The exploiters earn profits by using surrogates throughout their reproductive age for various deliveries. Hence the surrogates are converted into a long term investment which provides regular returns.

Doing cost and benefit analysis of the situation, by limiting the number of times a woman can act as a surrogate by law, the costs of procuring and maintaining a surrogate will exceed the returns from a single surrogacy arrangement. Thus it will de-incentivize the practice of breeding and trafficking of the vulnerable section of women for surrogacy.

It is important to bring the body inducting and recruiting surrogates to the doctors under statutory regulatory authority for transparency and reduction of exploitation of the disadvantaged party. There should be government run Assisted Reproductive Technique (ART) clinics or private clinics with proper government license to provide the surrogates to the doctors for commercial surrogacy.This would help to maintain record of the enrolled surrogates and their pertinent details along with the cases they are allotted. This would drastically affect the exploitative business of the middlemen/agents which severely causes unfair loss and infringement of rights of the surrogate.

The surrogate mother should fulfill requirements as specified under guideline 3.8 and 3.10 of the ICMR guidelines. Professional counselors can be employed to facilitate surrogate induction. In case it is primafacie evident that the prospective surrogate is being coerced into the practice, the induction can be denied.

Another vital aspect is that couples availing surrogacy generally come from higher middle class or rich sections of

---

53 Factsheet No. 31, UN Commission on Human Rights (2003); Committee on Economic Social and Cultural Rights, General Comment No. 14 (2000); Paragraph 41, UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

54 Programme of Action 1993; CEDAW Committee General Recommendation 19, Violence against Women, U.N. Doc.A/37/48.

55 Principle 8, Programme of Action.

the society. Obtaining an offspring is a highly emotional task for them that has great social significance and also tends to impacts the future of the prospective parents in a big way. The couples will be more than willing to pay more for obtaining the offspring through legitimate and regulated means rather than bargaining for an offspring from unauthorized and illegal middlemen. Thus the regulated environment will incentivize the commercial surrogacy in India and also the stakeholder, adding to Indian health tourism, a significant revenue source for the government.

Surrogate Motherhood: Rights and Legal implications

Mahak Paliwal*
Deepanshi Mehrotra*

ABSTRACT

Surrogacy rate in India has considerably increased in the past few years and has taken many varied forms with the development of technology, getting broadly categorised into gestational and traditional surrogacy. India is considered as the Surrogacy Capital of the World, however ironically enough, it lacks the necessary legislations required to regulate the stretch of this practise. Due to this transformation of the practise of surrogacy, initially aimed at providing happiness to a childless couple, into an ever-growing and profitable industry; there arises a need for the legislature to introduce necessary laws to regulate the extent of it and the violation of rights associated with the same. Therefore the present government has taken the initial steps in this direction and drafted the Surrogacy Bill 2016, which has been much in debate because it relates to certain integral aspects of surrogacy.By taking an active part in this debate, the researchers seek to give an overview of the concept of surrogacy through an analysis of its current legal position and the inferences that can be drawn from a vivid study of the same. The researchers aim to discuss the current laws and guidelines by outlining the lacunae and ambiguities prevalent, highlighting the perquisites of the same, recommending the necessary modifications and scrutinizing the changes which the government intends to introduce which might alter the course of the concerned law.

Key Words: Surrogacy Bill, Legislations, Rights, Analysis, Recommendations

1. Introduction

Infertility is one of the most prominent persistent problems and takes within its bound a substantial percentage of the population of couples in the world. Infertile couples are often faced with the problem of limited choices while dealing with this issue, namely, surrogacy and adoption.

Surrogacy is one of the unique processes through which a childless couple can gain happiness of giving birth to their own child, a child at least biologically related to either of the parents. The process involves an arrangement or an agreement between the intended parents and a woman (surrogate mother) to carry within her womb the child of the intended parents, and who, after birth would be termed as their child.

There are primarily two types of surrogacy – Traditional Surrogacy (also termed as genetic or straight surrogacy) which involves natural or artificial insemination of a surrogate using the sperms of the intended father, thereby making the new-born child genetically related to the intended father and the surrogate mother; and Gestational Surrogacy (also known as host surrogacy) wherein an artificial embryo is created through an advanced Assisted Reproductive Technique (ART) procedure using the egg and the sperm of the intended parents or of donors and is implanted in the womb of the surrogate, thereby making the child born genetically unrelated to the surrogate mother. Surrogacy can also be categorised into Commercial Surrogacy wherein the intended parents pay a fees to the surrogate mother in exchange for carrying and delivering a baby; and Altruistic Surrogacy wherein a relative of the intended parents agrees to bear a child for them without any compensation, monetary or otherwise.

The main issues revolving around the increasing rate of surrogacy primarily involves the problem of commercial surrogacy or rent-a-womb which leads to exploitation of the surrogate mothers. Another important issue is the enforcement of the surrogacy agreements which renders the intended parents helpless in situations of the surrogate refusing to give up the child[1]; and also the citizenship or the legal status of the new-born child can be problematic.[2] The Indian Government, taking into consideration the prevailing situation, has realised the need for legislation in this respect and has therefore drafted The Surrogacy Bill, 2016.

2. Analysis of legal position of Surrogacy in India

Premila Vaghela had agreed to be a surrogate mother for an American couple to provide for her children. Eight months into her pregnancy she died of complexities, but the baby survived- for the priority of the doctors was the life of the baby. This case clearly highlights the exploitation of women by merely treating them as 'womb-for-hire'. When India had legalized commercial surrogacy,[3] it slowly gave rise to an industry dealing in ART procedures and led to a rise of fertility tourism. While no clear economic numbers are available, a World Bank study conducted in 2012 estimated the surrogacy business to be worth almost $400 million a year, with 3,000 fertility clinics across India. But an increase in the number of cases of surrogacy had forced the medical fraternity to take measures to regulate the process, thus leading to the formulation of National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India by the Indian Council of Medical Research (ICMR), working under the help and guidance of the Ministry of Health and Family Welfare. These

*Students, Symbiosis Law School, Pune

1 In re Baby M, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988)

2 Jan Balaz v. Anand Municipality, A.I.R. 2010 Guj. 21

3 Supra note 4, at 7.

guidelines provide no bar for the usage of ART technology by any individual and provides for the rights of the child over the intended parents.

Thereafter, the draft ART (Regulation) Bill, 2008, the draft ART (Regulation) Bill, 2010 & the draft ART Bill, 2013, stated to be revised based on the recommendations of the Ministry of Law and Justice. These draft bills were extensively circulated for public opinion and sent to State Governments, statutory bodies, Non-Governmental Organizations and medical professionals for approval. But so far none of the Bills were passed by the legislature and made into concrete statutes.

Surrogacy has been identified as one of the most complicated transactions encountered by the legal fraternity and this complexity has been endowed to it by various factors such as the number of stakeholders taking part in a surrogacy transaction and ambiguity in law. This has led to widespread problems, not just in India but also on an international level as it poses potential threat of abuse and exploitation of women or children born out of a surrogacy transaction. The Law Commission in its 228th Report, Need for Legislation to Regulate Assisted Reproductive Technology Clinic as well as Rights and Obligations of Parties to a Surrogacy, has made certain recommendations with respect to surrogacy transactions including proficient recommendations such as prohibition of sex selective surrogacy, financial support for the surrogate child and life insurance for the surrogate mother. Such recommendations may be looked into by the legislature while drafting legislation to govern surrogacy contracts.

The Supreme Court had held in the case of R. Rajgopal v. State of Tamil Nadu[4] that right to privacy is read into the Right to Life under Art. 21 and the right to have reproductive choices is considered to be a part of right to privacy.[5] The guidelines of both ICMR and a surrogacy contract are not adequate enough to deal with the regulatory aspect of a surrogacy transaction and fail to address issues of citizenship. Moreover, a surrogacy contract becomes void when intervened by statutory enactments since the contract involves bartering of human lives and infringes public policy. A surrogacy contract fails to satisfy all the requirements of a contract as laid down under the Indian Contract Act, 1872.[6]

Also, the business of surrogacy is ripe with the opportunities to exploit women and children and has turned children into commodities because of high expectations of the intended parents. Given the dismissal financial condition of many Indian families, becoming a surrogate seems to be viable option to earn money but poverty does not allow for a truly free choice to be made. An Indian surrogate had stated that surrogacy is a compulsion for them to survive.[7] Commercial surrogacy arrangements raise concerns of forced surrogacy and manipulations and considering the newness of the technologies, the intersection between human trafficking and surrogacy has been largely overlooked. Women's bodies are sold internally and on the global marketplace for sex trafficking, and it seems inevitable that organized crime will shift into the surrogacy market and sales of women's reproductive capacity.[8]

Therefore, the Bill introduced by the government is extremely necessary in certain cases in India, for example in Gujarat a baby farm exists where underprivileged women are rounded up in scores and given out as surrogates to potential parents.[9] To put an end to such instances of exploitation and baby-selling conspiracies, the proposed bill seems a necessity.

3. The Surrogacy Bill 2016[10]

After the judgement of the Supreme Court in the case of Baby Manjhi,[11] surrogacy has become an ever-growing industry in India leading to various legal complications. Consequently, the Indian Centre for Medical Research had issued certain non-binding guidelines regulating the practise of surrogacy in the country. With further developments and legal complexities arising out of this issue, the government decided to introduce certain rules to alter and control surrogacy transactions taking place in the country. As a result of which The Assisted Reproductive Technologies (Regulation) Bill, 2010 was drafted which could never be passed by the Parliament.

Meanwhile surrogacy industry expanded enough to lead to exploitation of women and misuse of the technique to benefit adversely. Thus, after much debate and draft regulation, the then Health Minister J.P. Nadda introduced The Surrogacy (Regulation) Bill, 2016 on November 21, 2016 with the primary objective of imposing a ban on commercial surrogacy, promoting altruistic surrogacy and creating authorities to regulate surrogacy transactions and surrogacy clinics throughout the country.

3.1 Salient Features of the Bill

The most distinguishing feature of the Bill is the ban that it imposes on the practise of commercial surrogacy widely prevalent in the country. However, it allows for the continuance of altruistic surrogacy with no monetary compensation except for the medical expenses and insurance.It imposes a jail term of at least 10 years and a fine not less than 1 million rupees for any activity aiming at commercialisation of surrogacy, abandoning the surrogate child, exploitation of the surrogate mother and selling or importing of human embryo. The Bill allows for

---

4 (1994) 6 SCC 632

5 B.K. Parthasarthi v. Government of Andhra Pradesh, AIR 2000 AP 156

6 Roux Caroline, Surrogate Motherhood and Human Rights Analysis of Human, Legal and Ethical Issues, (September2015), available at http://shodhganga.inflibnet.ac.in/bitstream/10603/57389/10/10_chapter%204.pdf

7 Allison Bailey, Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy,Vol. 26 (Issue 4), HYPATIA 715, 717 (2011)

8 The Ethical Case Against Surrogate Motherhood: What We Can Learn From The Law Of Other European Countries,available at http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf

9 Ravi supra note 7, at 11.

10 The Surrogacy (Regulation) Bill, 2016, Bill No. 257 of 2016 (introduced in LokSabha on November 21, 2016)

11 Baby Manjhi Yamada v. Union of India (2008) 13 SCC 518

altruistic surrogacy to only Indian infertile couples who have been married for at least 5 years and are between the age of group of 23-50 years and 26-55 years for female and male respectively.

It proposes the establishment and composition of National and State Surrogacy Boards to regulate the prevalence of surrogacy in the country and to keep a check on the activities of the surrogacy clinics. The Bill makes it mandatory for all the ART (Assisted Reproductive Technology) clinics to get themselves registered to an appropriate authority, the National or State Surrogacy Boards, and maintain a record of surrogacy for 25 years post the passing of the Bill. The Bill prohibits surrogacy to homosexuals, single-parents, foreigners, couples in live-in relationship, couples with children, biologically related or through adoption or through surrogacy which excludes mentally and physically challenged children or those who are suffering from life threatening disorder with no permanent cure, and all the couples who make an attempt at commercial surrogacy.

The Bill explicitly provides that the surrogate mother should be a married woman who has had at least 1 child, is between the age group of 25-35 years and a close relative of the intended parents. It provides for an insurance cover for the surrogate mother of reasonable and adequate amount and requires the intended parents to take care of all the medical expenses incurred during the surrogacy procedure.

The Bill requires the intended parents to essentially present two certificates, namely certificate of eligibility and certificate of essentiality, both fulfilling the necessary requirements and both approved by an eligible authority. A certificate of eligibility is provided on the fulfilment of the following conditions- (i) Indian citizens and are married for at least 5 years; (ii) female is between 23 to 50 years old and 26 to 55 years old male; (iii) they do not have any surviving child (biological, adopted or surrogate) and this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness. Other conditions may be specified by regulations.

A certificate of essentiality requires the following conditionstobemet: (i) be a close relative of the intending couple;(ii)beamarried woman having a child of her own; (iii) be 25 to 35 years old; (iv) be a surrogate only once in her lifetime; and (iv) possess a certificate of medical and psychological fitness for surrogacy. The Bill unequivocally states that a surrogate child will be entitled to all those rights to which a biologically related child is entitled to.

4. Analysis of the Bill

A mere observation of the essential features of the Bill brings to lightthe Government's effort to frame a concrete legislation relating to surrogacy. The new Bill proposed by the Health Ministry has answered certain necessary questions and resolved important issues surrounding surrogacy and the provisions incorporated in the Bill have completely transformed the concept of surrogacy as was prevalent in India. It defines surrogacy as:"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."[12]

The categorisation in the Bill is not based on intelligible differentia and fails to establish a reasonable nexus between the provision and the objective the law seeks to achieve[13], thereby making the proposed distinction not justifiable on a cogent basis. Barring homosexuals undermines their position and legal status in the society and brings to the forefront the retrograde mind set of the government. Mrs. Sushma Swaraj, Minister of External Affairs, had very clearly stated that surrogacy for a homosexual is againstIndian ethos.[14] Sec. 377 of the Indian Penal Code (IPC)[15] criminalises sexual intercourse between homosexuals terming it as an unnatural offence but does not criminalise homosexuality as such. Therefore, denying homosexuals participation in a surrogacy transaction based on their sexual preferences is discriminatory as per Article14 of the Constitution.

Further it prohibits single parents which act as a negative repercussion of them exercising their Right to Life under Article21 of the Indian Constitution. It has been clearly established in the case of Lata Singh v. State of U.P.[16] that Right to Life also includes within its purview right to marry which further includes right not to marry. Therefore, refusing a single person the happiness of having a child through surrogacy just because he/she exercises their right to not marry someone is ultra vires the Constitution. Similarly, denying surrogacy to couples in live-in relationship is in consonance with their current legal position in India, portraying the failure of the legislature to formulate a legislation defining the legal status of a couple in a live-in relationship.

Furthermore, the prohibition on foreigners is imposed to check the prevalence of commercial surrogacy which can be justified on the ground that India has become a hub of commercial surrogacy for the foreigners leading to widespread exploitation of women who were becoming surrogates and abandonment of the child born.[17]

Moreover, the citizenship of the new-born child was also questionable in cases of various states refusing to acknowledge a child so born and generally grant the citizenship of the state to which the intended parents belong to. The prohibition on couples with children is justifiable as surrogacy is a privilege and a last resort for childless and infertile couples. Therefore, the category of people who are excluded from being surrogate parents is too large to be rationalized and denying them this

---

[12] Supra note 3,at 7 http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf

[13] Art. 14, THE CONSTITUTION OF INDIA, 1950.

[14] Malavika Ravi, A Critical Analysis Of The Surrogacy Regulation Bill 2016,(August 31, 2016) available athttps://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/

[15] Sec. 377, Indian Penal Code, 1860.

[16] Lata Singh v. State of U.P., AIR 2006 SC 2522

[17] Cabinet approves introduction of the Surrogacy (Regulation) Bill, PRESS INFORMATION BUREAU GOVERNMENT OF INDIA CABINET (August 24, 2016)

happiness violates the constitutional pledge of equal treatment.

Except for these fallacies, the Bill has many provisions which resolve various issues surrounding surrogacy in India. It provides for parentage and custody related orders to be passed by a court of the Magistrate of First Class which makes sure that the newly born child enjoys all the rights that a biologically born child would enjoy. The step of imposing a complete ban on commercial surrogacy and providing for altruistic surrogacywas taken in furtherance of securing the rights of a surrogate and the child born and to prevent any form of exploitation from taking place. A woman's capability to reproduce is a natural gift and this capability or a child in itself cannot be treated as a commodity or be made the subject matter of a contractual agreement. Moreover, a surrogacy contract cannot be enforced as per the provisions of the Indian Contract Act for it refuses to consider a child as consideration for the purposes of the relevant sections.[18]

The other most important aspect of the Bill is the establishment ofregulatory boards to regulate surrogacy services and surrogacy clinics in the country. It also provides for a transitional provision according to which a gestation period of 10 months is given to all the couples who are having their children through surrogacy, during which the new legislation would not apply to them to protect the wellbeing of already existing surrogate mothers and the child to be born.

5. Recommendations for improvising The Surrogacy Bill

The Surrogacy Bill 2016 proposed by the government makes some drastic changes in the practise of surrogacy as is prevalent in the country. To cope with these changes, certain recommendations are proposed. The scope of surrogacy should be extended by making this privilege available for all the sections including the ones that have been excluded under the Bill.Both the sale and purchase of embryo and gamete is debatable as it makes gestational surrogacy impossible if the both intended parents are infertile, therefore necessary provisions should be made in this regard.

The provision of the child being genetically related to either of the intending parents is irrational in cases of both of them being infertile and needs be eliminated.Provision requiring the surrogate to be married and to have had a child should be done away with provided the medical fraternity provides her with a certificate of medical fitness.The Bill needs to provide a time period within which the concerned authority is supposed to grant certificates to the intended parents and the surrogate.A system of appeal or review should lie against the decisions of the boards.

6. Conclusion

The practise of surrogacy as is prevalent in India is that of commercial surrogacy, where a woman receives payment for carrying the baby, the womb of the woman is treated as a part distinct from her entire body, a part which can be 'rented-out'. Therefore, the new Bill formulated by the government aims to rectify this loophole.

The research reveals that although the Bill proposed by the legislature promptly deals with all the necessary aspects of surrogacy but it fails to stand the test of modernity, thereby requires reconsideration and modification.

---

[18] Sec.2(d), Indian Contract Act, 1872.

Surrogacy: A Legal Perspective amidst Cacophony of Voices

Hamda Akhtarul Arfeen*
Arbeena*

ABSTRACT

Infertility is seen as a social stigma and has a devastating influence on the life of an individual for not fulfilling the biological role of parenthood for no fault of his or her own. To overcome this trauma and agony pertaining to reproduction,people resort to surrogacy. But it would be a mistake to attribute commercial surrogate mothering to a simple synergy of needs of two classes of women – one group the affluent in India or abroad needing healthy wombs, and the other group needing money. Commercial surrogacy is a topic not restricted to medical circles; it has been generating feminist, ethical, legal, social debates for more than three decades. It has raised questions on the dignity and rights of the people involved in this scenario. It has led to new kind of exploitation by the developed countries of under developed countries and given a new idea of class exploitation. India is considered a hub of commercial surrogacy for years and The Surrogacy (Regulation) Bill, 2016 has already raised many questions which will be addressed in this paper. The paper examines different aspects of human and legal rights that are being violated by the practice of surrogacy for years. It will focus on the legality of the contract of surrogacy and its implications on the parties. It will also cover the international legal frameworkof this field and cases that have developed the notions of Human Rights under surrogacy.

Key Words: Surrogacy, Exploitation, Contract, Human Rights, Law

1. Introduction

Surrogate implies substitution and is derived from the 'Subrogare' which means "appointed to act in place of another". Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. It is the cherished desire of every woman to become a mother. This strong desire and basic cause of surrogacy arose out of the societal belief that woman is not considered as complete woman until and unless she will be a mother of child or bears child, because "Parents give the biological status to child and child gives sociological status to parents."

Traditionally, surrogate motherhood referred to an arrangement between a married couple unable to have a child and a fertile woman who agrees to conceive the husband's child through artificial insemination and carry it to term, and then surrender all parental rights of the child and is known asGestational surrogacy. Commercial Surrogacy is when the poor, illiterate and needy woman, who hardly understands the institutionalization and legal exploitation, enters into the contract of surrogacy with the highly literate, rich couples with complete autonomy that our law permits to rent her womb. This state of commercial surrogacy attracts the attention and has become the bone of contention in this vital area.[1]

Surrogacy is subjected to a lot of controversy due to the various social, legal and ethical problems associated with it, such as changing concept of 'motherhood and family', 'mother child bonding' , 'maternal health and objectification of the surrogate body' . Due to the lack of proper legislation, it has become an alternative family formation technique as emergence of artificial insemination has not only separated procreation from intimacy but also allowed anonymity, by simply allowing the purchase of genetic material. It has a lot of issues causing harm to the society, to women and children in general.

Critics have labeled the popularity of surrogacy arrangement in India as 'baby booming business', 'womb on hire', 'baby farm,' 'parenthood by proxy', and described India as 'a reproductive tourism destination.'[2] The suffering of infertile couples should not conceal the fact that surrogate motherhood raises crucial issues regarding human rights that must be addressed before implementing a legal framework. The Bill introduced in 2016 however is yet to be debated and has put a complete ban on 'commercial surrogacy'. It has also restricted surrogacy to heterosexuals married couples not having any offspring. The Bill has been criticized by various leaders and groups to be rhetoric and unjust.

2. Surrogacy: Beyond Borders

Surrogacy has been a legal issue over the years. Many countries still find it difficult to fit surrogacy under one umbrella. Different countries have acted on it differently according to their customs and practices. Many countries of Europe realized the dangers of surrogacy agreements

*Students, Aligarh Muslim University, Aligarh

1 Sugata Mukerjee, Legal and Ethical issues of Commercial Surrogacy: An overview, Academiaavailable at:http://www.academia.edu/1955503/LEGAL_AND_ETHICAL_ISSUES_OF_COMMERCIAL_SURROGACY_IN_INDIA_AN_OVERVIEW, (Last visited on January 8, 2017).

2 R.S. Pornima, Surrogacy :Wombs for Rent, Academia, available at http://www.academia.edu/3354351/SURROGACY_THE_CONS, (Last visited January 8, 2017).

and, in pursuit of the 'best interest' of the child, enacted legislation to ban or strictly regulate surrogacy. Germany,Austria, France, Switzerland, Sweden, Norway, Italy and Bulgaria completely prohibit all surrogacy agreements. Surrogacy agreements are against public policy in these countries. On the other hand, the United Kingdom has differentiated between commercial and altruistic surrogacy agreements and banned all commercial agreements.[3]

Though in places like Germany where surrogacy is completely banned the courts have tried to provide help to surrogate baby by providing them German Nationality by adoption.[4]

In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state.[5] In Australia, all jurisdictions except the Northern Territory allow altruistic surrogacy; with commercial surrogacy being a criminal offense. The Northern Territory has no legislation governing surrogacy.

In Canada, the Assisted Human Reproduction Act (AHRC) permits only altruistic surrogacy: surrogate mothers may be reimbursed for approved expenses but payment of any other consideration or fee is illegal. In Finland, all surrogacy arrangements (both commercial and altruistic) have been illegal since 2007. In France, since 1994, any surrogacy arrangement that is commercial or altruistic, is illegal or unlawful and is not sanctioned by the law. Religious authorities in Saudi Arabia do not allow the use of surrogate mothers, instead suggesting medical procedures to restore fertility and ability to deliver.[6] After the Baby Gammy incident in 2014, Thailand since July 30, 2015, has banned foreign people travelling to Thailand, to have commercial surrogacy contract arrangement, under the Protection of Children Born from Assisted Reproductive Technologies Act. Only opposite-sex married couples as Thailand residents are allowed to have a commercial surrogacy contract arrangement. In the UK and Thailand, the surrogate mother is the legal parent, which makes her legally responsible if the baby is abandoned.[7]

India, in the proposed Bill (2016) has imposed a blanket ban on commercial surrogacy but has allowed altruistic surrogacy by 'close relatives'. The term 'close relatives' is yet to be expanded by the drafters of the Bill and it will be interesting to see who are included in the given term. India has also disallowed homosexuals and live-in partners to practice surrogacy. But the Bill has provided all the rights to the surrogate child similar to that of a biological child. The Bill is yet to be debated in both houses of Parliament.

3. Concerns over Surrogacy

Surrogacy, generally presented as an altruistic and charitable action, actually opens the door to all kinds of abuse because it does not respect the dignity of the persons concerned. It merely takes the nature of contract. Neither the woman nor the child is treated as human beings; rather they are treated as objects. This is clearly divergent to the recognition of the inherent dignity of all members of the human family, to quote the Preamble of the Universal Declaration of Human Rights.[8] Commercial surrogacy paves the way for baby-selling and women's exploitation. In some places, the same rings seem to be involved in prostitution and surrogacy. Surrogacy is contrary to numerous international and European law provisions, especially regarding human dignity, adoption, protection of women and children and trafficking of humans.

The business of surrogacy is ripe with opportunities to exploit women and children. In the United States, between $100,000 and $150,000 must be paid, around half of that in Russia or Ukraine and a quarter of that in India. Some shamelessly promote their “low cost” carrier mothers and have different prices for the eggs they offer depending on whether the woman who donated them was Indian or Caucasian. It is estimated that the annual turnover of the reproduction market, which was $400 million in India in 2011, has risen to 2 Billion now, according to the Confederation of Indian Industry and $6.5 billion in the United States.[9]

Religious fundamentalists, the Roman Catholic Church, and feminists alike have condemned the practice of contractual surrogacy as 'baby selling'—one that demeans and threatens women.[10]

---

3 AlexanderaTemblador, Surrogacy Around the World, The Next Family(Aug.24 2015),available at http://thenextfamily.com/2015/08/surrogacy-laws-around-the-world/ (Last visited January 8, 2017).

4 Dhananjay Mahapatra, German Surrogate Twins to Go Home, Times of India (27 May 2010),available at :http://www.timesofindia.indiatimes.com/india/German-surrogate-twins-to go home / articleshow /5978925.cms?from=mdr, (Last visited January 9, 2017).

5 Kim.L.Armour, An Overview of Surrogacy Around The World, Nursing for Women Health, Volume 16 Issue 3(2012), available at http://www.familiesthrusurrogacy.com/wp-content/uploads/2015/12/Overview-of-Surogacy-Around-The-World.pdf (Last visited January 9, 2017).

6 Soibam Singh, India proposes commercial surrogacy ban: A look at laws across the world, Hindustan Times (26 August 2016) available at http://www.hindustan.com/india-news/india-proposes-ban-on commercial-surrogacy-a-look -at- laws-across - the-world/story-qgj1isvdxgw0cgbn4kdfsk_amp.html, (Last visited January 9, 2017).

7 Helier Cheung,Surrogate babies: Where can you have them, and is it legal? , BBC News (6August 2014) availableat : www.bbc.com/news/world-28679020,(Last visited January 9, 2017).

8 Lindsey Coffey, Surrogacy: A Human Right, Institute of Asian-Pacific Business Law (6 September 2011)

9 Claire De La Hougue& Caroline Roux,Surrogate Motherhood and Human Rights: Human, Legal and Ethical Issues, No Maternity Traffic (September 2015)

10 Janice C. Ciccarelli& Linda J. Beckman, Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy, 23 (2005)

The egg donation industry has also witnessed a shift in mentality of couples demanding children that are good looking and can achieve academic success. Medical and psychological studies highlight the importance of the links created during pregnancy between the mother and the child, and their importance for the child's development. Surrogates and contracting couples view the surrogate pregnancy as a business transaction from the outset which results in psychological detachment from the child during pregnancy. In other words, once the contracting couple gets from the surrogate what they could not accomplish on their own, the motivation to care for the surrogate's well-being disappears.[11]

A child born after a surrogacy agreement may have up to six adults claiming parent's rights over him or her: the genetic mother (egg donor), the gestational mother (surrogate), the commissioning mother; the genetic father (sperm donor), the husband of the gestational mother (presumption of paternity) and the commissioning father. Such manipulations are contrary to the genetic truth, which is paradoxically more and more sought, especially in fatherhood determination. They also violate the child's right to know his or her origin and identity, as guaranteed in Article 7 of the Convention on the Rights of the Child. Moreover, such concurring claims inevitably give rise to litigation.[12] Article 29 of Hague Convention forbids contact between adoptive and biological families until the consent has been given, i.e. after birth, which is violated in the case of surrogate motherhood. Article1 of theHague Convention states, "to establish safeguards to ensure that inter country adoptionstake place in the best interests of the Child and (…) prevent the abduction, the sale of, or traffic in children." The aspect of 'best interest' often varies according to situations.

Reproductive rights were first introduced in document approved by the Teheran Conference on Human Rights in 1968. Even Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) focuses on the health of the pregnant woman; it is not inconsistent with gestational surrogacy. Rather, it confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. To theextent CEDAW focuses on maternity as a "social function," however, it is difficult to reconcile with commercial surrogacy.[13]

The surrogacy situation in India magnifies the problem with surrogacy world-wide, even where it is "voluntary": Women's bodies become commodities through which others can purchase what they wish to have and most or all care, concern, and medical attention is directed at the child while the surrogate mother is left to fend for herself. As Ms. Bailey rightly pointed out,

"What about the possible long-term, harmful effects fertility drugs, obstetric complications, or surgical procedures might have on surrogacy workers? Are these risks less morally acceptable in developing-world contexts? Are clinics or contracting parties responsible for surrogacy workers' medical care if the gestational labor they did under contract causes cancer, sterility, or long-term pregnancy-related disabilities? Can these harms be written off as occupational job hazards?"[14]

4. Legal Perspective

In order to see whether the contract is legal or valid, one has to see the legal requirements of the valid contract. First of all for a valid contract, there must be an (1) offer (2) acceptance and (3) consideration.[15] In contracts for surrogacy, the offerors are the contracting parents. They offer money to a woman, 'the offeree', to carry a child to term to which she will not have a legal claim. Medical bills for both routine check-ups and complications are included as part of the costs for which the offerors will pay. Many offerors will also pay the living expenses of the offeree during the pregnancy. Acceptance occurs when the surrogate signs the contract and complies with the contracting parents' terms, such as medical check-ups. Consideration is exchange of money for the services of the surrogate. However, forbearance can serve as consideration in a contract. Forbearance in the context of contracts means that the offeree has given up something that she had a legal right to do.[16] Even if the contract is altruistic; it will serve as a consideration due to result of love or affection towards the intended parents. By examining basic contractual terms, it is evident that surrogacy contracts encompass the necessary elements of a valid contract. The legal aspects of surrogacy in any particular jurisdiction tend to hinge on a few central questions:

- Are surrogacy agreements enforceable void, or prohibited? Does it make a difference whether the surrogate mother is paid (commercial) or simply reimbursed for expenses (altruistic)?
- What, if any, difference does it make whether the surrogacy is traditional or gestational?
- Is there an alternative to post-birth adoption for the recognition of the intended parents as the legal parents, either before or after the birth?
- What happens when no one wants a handicapped newborn? Should the couple andsurrogate remain unknown to each other?

Laws differ widely from one jurisdiction to another. It is therefore unsurprising that the issue of surrogacy provokes numerous responses. On one extreme, it has been argued that "a contractis a contract," in much the same sense as any other commercial bargain. On the other, it is often felt that a baby is both personal and sacred and thus should be kept out of the marketplace. Accordingly, and as children

---

[11] Anne Schiff, The Ethics of International Surrogacy, The Jerusalem Post,(17 May 2015) available at http://www.jpost.com/Opinion/The-ethics-of-international-surrogacy-403350 (Last visited January 11, 2017).

[12] Surrogate Motherhood: A Violation of Human Rights, European Centre for Law and Justice(26 April 2012),available at : http://www.eclj.org

[13] Barbara Stark, Transnational Surrogacy & International Human Rights Law, Maurice A. Deane School of Law Hofstra University(2011)

[14] Allison Bailey, Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy, 26HYPATIA 730,732 (2011)

[15] Sec. 2(a), (b) & (d), Indian Contract Act 1872.

[16] Golnar Modftahedi, No body's Child: Enforcing Surrogacy Contracts, WHITTIER LAW REVIEW 249 (1999)

are not items of barter, a total ban on surrogacy is advocated. Conflicts among legal frameworks obstruct the flow of children and parents from the states in which the genetic components are extracted and assembled and in which births take place to those of the newly constituted family's intended residence. Incompatible norms complicate or foreclose altogether the recognition of parental statuses on which rights to transmit citizenship—and hence to obtain identity documents and international exit and entry rights-are predicated. The issue of filiation as it relates to definitions of maternity and paternity constitutes the fundamental stumbling block. While concerns about commoditization-often raised in debates over reproductive surrogacy may underlie filiation's laws and policies, it is the rules regarding states recognition of the nexus between particular children and particular parents that govern the attribution of nationality and citizenship. Thus, the viability of solutions predicated on contractual autonomy with respect to the legal identification of a "mother," "father," or "child" is a function of the frameworks regulating filiation that operate both at the national and international level.[17]

In re Baby M[18] was a custody case that became the first American court ruling on the validity of surrogacy. William and Elizabeth Stern entered into a surrogacy agreement with Mary Beth Whitehead, whom they found through a newspaper advertisement. According to the agreement, Mary Beth Whitehead would be inseminated with William Stern's sperm (making her a traditional, as opposed to gestational surrogate), bring the pregnancy to term, and relinquish her parental rights in favor of William's wife, Elizabeth. After the birth, however, Mary Beth decided to keep the child. William and Elizabeth Stern then sued to be recognized as the child's legal parents. The New Jersey court ruled that the surrogacy contract was invalid according to public policy, recognized Mary Beth Whitehead as the child's legal mother, and ordered the Family Court to determine whether Whitehead, as mother, or Stern, as father, should have legal custody of the infant, using the conventional 'best interests of the child' analysis. Stern was awarded custody, with Whitehead having visitation rights.

In Jan Balaz v. Anand Municipality[19], this question was debated. Twin children were born out of the surrogacy agreement in question. The couple was from Germany, working in the United Kingdom and the children required Indian passports to travel. Their citizenship was being debated in court, leading the passport authorities to withhold the passports. Germany, the home state of the couple did not recognize surrogacy. The Court denied the passports but granted an exit permit to the children. The German authorities decided to give the couple an opportunity to adopt the children thereafter. By the time such a decision was rendered, the twins were already two years old. This case brought forward the glaring need for legislation in the surrogacy industry.

In Baby Manji Yamada v. Union of India[20] Baby Manji Yamada was a child born to an Indian surrogate mother for a Japanese couple who before a month of the child's birth separated and the future of the child was left in dark. The biological father, Ikufumi Yamada wanted to take the child to Japan but the legal framework had no such provision for such a case nor did the Japanese government permit him to bring the child back home. In the end, the Supreme Court of India had to intervene and the child was allowed to leave the country with her grandmother. The biggest impact of the Baby Manji Yamada decision has been that it spurred the government of India to enact a law regulating surrogacy.

The legislature in 2008 drafted the Assisted Reproductive Technique (ART) Bill, which is yet to be tabled. The Bill seeks to formally legalize commercial surrogacy in India. The Bill sets an age threshold for the surrogate mother between 21 and 35. It also lay downs that a single surrogate cannot give birth to more than 5 children (including her own) in a lifetime. In the presence of a surrogacy agreement, the legitimacy of the child being born to the parents commissioning the surrogacy will not be up for question. Administrative framework to regulate surrogacy has also been laid down in the Bill. The Bill provides for government certified ART banks that will be used to keep a database of surrogates and donors. The draft Bill envisions many of the problems surrounding surrogacy and seeks to mitigate them through legislation.

The 228th Law Commission of India Report in 2009 added suggestions to the ART Bill. In August 2009, the Law Commission of Indian delivered the Report which stated that:

"The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the sametime, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones."[21]

However, Law Commission Reports are merely suggestive in nature and have not been implemented. With India growing as a market for international surrogacy, it is time

---

[17] Martha M. Ertman & Joan C. Williams eds., 2005 For a discussion of the growing role of private On the commodification debate, Rethinking Commodification: cases and readings in Law and actors in international law, Paul D. Stephan, Privatizing International Law, 97 VA. L. REV. 1573 (2011)

[18] In re Baby M 537 A.2d 1227 (N.J. 1988)

[19] Jan Balazv. Anand Municipality AIR (2010) Guj 21

[20] Baby Manji Yamada v. Union of India (2008) 13 SCC 518

[21] 228th Report of the Law Commission of India (August 2009) on Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy.

that the legislature passes a law that adequately regulate the complex issues surrounding it.[22]

The thriving business of Surrogacy was not regulated by any legislations or guidelines, which resulted in many unethical practices. The introduction of the Bill was required as the Government felt that there was a lot of exploitation in this field. The Surrogacy (Regulation) Bill, 2016 is an effort of the government to regulate the practice of surrogacy in India. By legalizing surrogacy the government has pulled the issue out of the grey area in which it has so far been. This bill contains numerous measures which have been overlooked in the prior legislations. Though this Bill aims at achieving constructive changes, it has also flamed the issues of human rights.[23]

The bill was passed on August 24, 2016 by the Union Cabinet and will shortly be introduced in the Parliament. It aims at a complete ban on commercial surrogacy and safeguarding the rights of surrogate mothers and children.[24]

The Bill has been a debatable issue since its inception and has been criticized on various aspects by people from variant fields. It has again ignited the suppressed voices of women and homosexual rights. The Bill is blamed to be unfair and arbitrary to women's choice of their body and soul. The alternative of surrogacy was generally preferred by women who were economically backward and therefore had seen it as means to generate income. The bill has failed to anticipate the effect of banning commercial surrogacy. The necessity of only a 'close relative' being a surrogate mother will edge the possibility of surrogacy to a very large extent.[25] The feature that the surrogate mother will not receive any financial aid will also squeeze the number of women willing to indulge in surrogacy.

The idea of 'altruistic surrogacy' expressed in the Bill greatly limits both potential surrogate mothers as well as couples wanting children: since women can become surrogates only once, and since couples who cannot find willing relatives have only one solution that is "adoption".[26] However the claim that the Bill has been drafted keeping in mind the 'Indian ethics and culture' forgot the need of Indians to have a biological heir.

The value of 'consent' of women is overshadowed by the usage of the term 'exploitation'. But what the potential framers of the Bill ignored was that the question of exploitation does not arise when ' the women have consented to surrogacy and its aftermaths'. Surrogacy laws should be set out in such a way that there is full consent of the woman in question. Here, instead of regulating the ways and policies in which a woman's exploitation is prevented, what the bill has done is to eliminate the idea entirely. Women in India still lack the right to their own body and soul which can also be linked to the 'rights of the sex workers'.[27]

According to Article 14 of the Indian Constitution all citizens are equal before the law. By placing restrictions on the right to have a surrogate child such that it is accorded to heterosexual couples alone, the government has negated the equality that the Constitution guarantees to single parents and homosexuals. Moreover, as per a Supreme Court ruling, live-in relationships are at par with marriage and children born out of long-standing live-in relationships are legitimate. By limiting the option of surrogacy to legally married couples, the government is countering the acceptability of live-in relationships and setting a wrong precedent. Thus the restriction of allowing only married Indian couples to undergo surrogacy and denying other people the same right only on basis of nationality, marital status, sexual orientation and age does not seem to fulfill the test of equality, or of it being a reasonable classification.[28]

Article 21 of the Constitution also encapsulates the 'right to reproductive autonomy', which is inclusive of the right to procreation and parenthood. The state does not have the authority to interfere in this fundamental right. It is upon the person and not the state to decide the modes of parenthood, be it naturally or through surrogacy as stated in the case of B.K Parthasaathi v Government of Andhra Pradesh.[29] Parenthood should be a privilege and equal for all irrespective of anything.

If the intent of the Bill is to protect surrogate mothers and the children born out of surrogacy, then the legislation must provide a legal framework that restricts the exploitation of the surrogates and the children, and penalize those who do not honor contracts.[30] The

---

[22] MeghnaSengupta, Womb for Rent : Legal Issues Involving Surrogacy in India, Insights (2 August 2016) available at :http://blog.pocketlawyer.com/surrogacy-in-india/ (Last visited January 11, 2017).

[23] R.Bhatacharya, Draft Surrogacy (Regulation) Bill 2016:Rhetoric or Surrogate-centric?, Space& Culture Volume 4 (2 November 2016) available at http://www.academia.edu/29922063/Draft_Surrogacy_Regulation_Bill_2016_Rhetoric_or_Surrogate-centric(Last visited January 12, 2017).

[24] Col DS Chahal, Critical Analysis of Surrogacy (Regulation)Bill 2016, Olive Green Institute (18September 2016)available at http://www.olivegreens.co.in/blog/is-ban-on-commercial-surrogacy-justified, (Last visited January 12, 2017).

[25] Malvika Ravi, A Critical Ananlysis of Surrogacy(Regualtion) Bill 2016, Feminism In India.com(31 August 2016),available at https://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016(Last visited January 12, 2017).

[26] PoojaKurian, Surrogacy (Regualtion) Bill,2016: An Analysis, The LexWarrier (17 November 2016) available at http://lex-warrier.in/2016/11/surrogacy-regulation-bill-2016-analysis(Last visited January 12, 2017).

[27] PRS Legislative Research ,The Surrogacy (Regulation)Bill,2016: All You Need To Know, Legally India(23 November 2016) available at http://www.legallyindia.com/blogs/the-surrogacy-regulation-bill-2016-all-you-need-to-know last (Last visited January 13, 2017).

[28] PriyankaChaturvedi, Surrogacy Bill 2016: Disappointing ,to say the least, Observer Research Foundation(29 August 2016) available at http://www.orfonline.org/expert-speaks/surrogacy-bill-2016-disappointing-to-say-the-least/(Last visited January 12, 2017).

[29] B.K Parthasarathi v. Government of Andhra Pradesh 2000(1)ALD 199

[30] Express News Service, Surrogacy Bill: Necessary Controls, Some Concerns, The Indian Express(26August2016) available at www.indianexpress.com/article/explain/surrogacy-bill-what-is surrogacy-to 2996395/lite/(Last visited January 12, 2017).

government should guarantee that the surrogates are properly counseled about the medical and economic implications of surrogacy. It should also ensure that all surrogacy contracts must mandatorily cover the medical care, hygiene, and nourishment of the surrogates not just during the pregnancy but also in the post-partum period.[31]

The draft Bill is not just loaded with ideological and ethical issues but it will be impossible to enforce. Eugene Bardach[32] correctly points out in his book on policy analysis that regulating entry is laden with "problems of collecting information". By proposing to regulate who can apply for surrogacy and who can be a surrogate mother, the government is plunging into an area that will be beset with problems of data verification that will make the Act (if it were to be passed in its current form) un-implementable. Anyhow, blanket ban on this industry will not lead help in achieving the objectives of the Bill as it will only accelerate black marketing of the same as was witnessed in the case of organ donations. Only drafting a bill would not lead to expected results, the success of the same depends highly on its implementation and enforceability. It is important that during the debates both Houses of Parliament analyse all aspects thoroughly.

5. Conclusion and Suggestions

Surrogacy commodifies both the surrogate mother and resulting baby, resulting in exploitation of the surrogate and a parental situation that is not in the best interests of the child. How a treaty regarding surrogacy is framed, what transactional narrative it encodes into international law and how human rights' law is interpreted will affect the treaty's ability to stand up to its inevitable and legally mandated scrutiny under human rights law. But who will make the necessary determinations? From their discussions and decisions regarding surrogacy, the nexus between the rules governing filiation and those pertaining to nationality and citizenship may emerge profoundly reconfigured. At the moment, international commercial surrogacy appears destined to remain only loosely regulated.

India is emerging among the favorites on the list of countries to be searched by intending parents requiring surrogate mothers as in developed countries the services of a surrogate mother are extremely costly. The condition of commercial surrogacy in India is that of 'legality without legislation' albeit it is the question that how far such legalization has been accepted by Indian culture or not. Surrogacy arrangements pose many legal questions. Some involve only one particular phase of the process; others question the procedure as a whole.[33]

There is legal vacuum in this area of medical advancement and adequate measures have to be taken in these medico-legal issues specifically to regulate surrogate motherhood in India.In this process due consideration should necessarily be given on all the social-ethical and legal issues inherent in surrogate motherhood by engaging an expert committee representing scientists, medical practitioners, lawyers, legal academicians, sociologists and psychologists so that the procreative liberty and social welfare may be balanced.

Right to Privacy of donor as well as surrogate mothersshould be protected.It is important to maintain and monitor the anonymity of the surrogate mothers.In case of citizenship the Indian government needs to take a stand in conferring dual-citizenship to the surrogate child.There should be the schemes of Health and Life insurances for both the surrogate mothers and surrogate child to ensure their protection.

However the question that remains is whether this Bill would be sufficient to protect the interests of surrogate mothers and children born to them. It is a question that the government will have to consider as surrogacy is poised for legislative approval in India. Although the key aim of the Bill is to empower surrogate women and the babies born out of them by preventing exploitation entailed in the billion dollar baby-making industry, the Bill currently in its embryonic form is rhetoric and draconian. Contrary to the claims made by the concerned Ministry, the current form of the bill fails to serve the larger interest of the society. It is undemocratic in the sense that it fails to incorporate all sections of the society. Therefore, the bill requires rigorous logical discussion and debates to cater to the needs and aspirations of the larger society, before it can be finally passed in the Parliament.[34]

---

[31] IANS, Salient Points of Surrogacy Bill,The Economic Times(24 August 2016)available at www.economictimes.com/news/politics-and-nation/saleint-points-of-surrogacy bill /amp_articleshow /53847817.cms(Last visited January 12, 2017).

[32] Nidhi Gupta, What's Wrong With The Surrogacy Bill, The Hindu(9September2016)available at www.thehindu.com/thread/politics-policy/article9090866.ece (Last visited January 12, 2017).

[33] Avi Katz., Surrogate Motherhood and the Baby Selling Laws, COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 20 (1986)

[34] MrinalBarua,Surrogacy Debate.Letters, Li (37) ECONOMIC AND POLITICAL AND WEEKLY,4-5(2016)

Transnational Surrogacy: Impact of Globalization on Surrogacy

Anubha Gangal*
Aditi Lal*

ABSTRACT

Surrogacy prima facie appears to be a universal phenomenon, a practice that presumably exists in every nation. But the arena of transnational surrogacy is a grey area that has not been defined and recognised conclusively. Transnational surrogacy is a unique form of surrogacy that involves citizens of two nations as parties to the act. It only seems to be the logical derivative of the advent of globalization in all spheres of human life. The real test for which is not the nature of such agreements, but their enforceability and their effect on the parties involved, especially when contrasted with laws of the nations. Under the scheme of transnational surrogacy, wombs are essentially outsourced. The low cost of travel, medical facilities and lenient laws, attract desolate couples looking to have a child through surrogacy. Also part of the equation is the rapidly growing phenomenon of cross border reproductive care along with the assisted reproductive techniques where, financially competent infertile couples and economically weak fertile women form the core group. Surrogacy poses severe legal, biological and cultural complications owing to its distinctive factual context. The transnational surrogacy arrangements are complicated owing to the lack of definitive guidelines to regulate or monitor such cases. Moreover, the intersection of surrogacy laws of home country and that of the destination country creates a wide room for exploitation. This paper reflects upon the legal and the technical difficulties that the intended parents, surrogates and the gamete providers undergo during the process of surrogacy and to identify and comprehend the limitations of transnational surrogacy as a by-product of globalisation. It also seeks to understand the extent and scope of transnational surrogacy arrangements in the light of the changing surrogacy laws in India.

Key Words: Transnational surrogacy, Globalization, Agreements, Assisted Reproductive Techniques, Cross Border Reproductive Care

1. Introduction

Surrogacy prima facie appears to be a universal phenomenon, a practice that presumably exists in every nation. The universality of surrogacy stems from the ubiquitous infertility problems of couples and the advancement of assisted reproductive technology that cuts across all borders. While national laws of each country deal comprehensively with the legality or illegality of surrogacy, the lack of an international rule or custom to the effect of the same is worrying.

With the advent of globalization, borderless movement of trade and technology has become the norm and so has the interaction of international citizens. Globalization has blurred borders of nations and made every citizen a global citizen. An unlikely but logical by-product of this development has been transnational surrogacy. It is a form of surrogacy that transcends borders yet retains its essential objectives. Recent reports have documented a rise in the practice of surrogacy, to include arrangements that cross national borders.[1] To put it simply, it is a scheme where, wombs are essentially outsourced from a country other than the resident country. While it seems to be the logical derivative of globalization, the arena of transnational surrogacy is still a grey area that has not been defined and recognised conclusively.

2. Need for Transnational Surrogacy Agreements

Transnational surrogacy or cross border surrogacy is an arrangement involving a surrogate mother, intended parents or parent from different countries. The agreement of this form of surrogacy may be entered into in the destination or resident country, or in some cases in a different country altogether. The governing factors for the place of agreement vary from party to party, but are mostly related to the applicable laws of their own countries. Such arrangements require the movement of parties or either of the party to another country in order to conclude or enforce the agreement.

Increased advances in medical technology, primarily in cross border reproduction and assisted reproductive techniques which includes artificial insemination and

*Students, Amity Law School, Delhi. GGSIP University

[1] Permanent Bureau, Hague Conference on Private International Law: A Preliminary Report on The Issues Arising From International Surrogacy Arrangements,(2012), available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI_ET(2013)474403_EN.pdf (Last visited on March 8, 2017).

embryo transfer has led to tremendous increase in the popularity of surrogacy. The factors affecting the increase in cross border reproductive arrangements include (but are not restricted to): firstly, the availability of advanced reproductive care facilities in another country; secondly, the relaxed or friendly surrogacy laws of destination country; thirdly, the expanding culture of cross border referrals by medical practitioners to aid infertile couples; fourthly, economic viability of surrogacy procedures in developing countries with globally recognised medical expertise.

One of the critical factors is the nature of surrogacy laws of the country that the intended parents or parent resides in. Countries where surrogacy is either restricted or illegal include Britain, Japan, Australia, Taiwan, and Kuwait. Countries like Bulgaria, China, France, Germany, Italy, Saudi Arabia, Switzerland, Portugal, Taiwan and Turkey have banned surrogacy in all forms.[2] For childless couples or individuals in these countries, having a child through surrogacy is impossible or a long and complicated battle, consequently making cross border surrogacy an appealing alternative for them.

As mentioned earlier, economic viability is an influencing factor as the cost of surrogacy in certain countries, especially developing countries is far less than that in developed countries. The costs involved for the intended parents to obtain a surrogate child vary widely. Within Greece the estimates are in the range of €14000 to €50000. In the UK the median cost was estimated as €11780.[3] Cases have been reported of costs as high as €27,120.[4] The cost effectiveness of fertility treatments and the amount given to the surrogates has made India a favorable destination for the foreign couples who intend to hire surrogate wombs.

Other reasons include restricted access due to age or limited number of IVF treatments that had failed, vicinity of treatment, legal barriers etc. Prohibition for religious or ethical reasons, unavailability of the service because of lack of technology or personnel, inadequate safety guarantees have also been cited as reasons for the move to opt for transnational surrogacy.[5]

3. Nature, Extent and Scope of Transnational Surrogacy Agreements

The process of surrogacy is initiated with an agreement formed on the common understanding of parties that gestation has been initiated in order to provide the intended parents with a child and the surrogate mother with costs and compensation for providing her womb. It is an agreement that includes the rights and obligations of the surrogate and commissioning parents during the term of pregnancy and after the birth of the child respectively and generally involves two parties. However it may also include doctors, clinics and intermediaries who act as agents for the parties. A transnational surrogacy agreement brings to the fore the international identity of involved parties, but precludes the application of any international law over such agreements.

3.1 Nature of agreement

A surrogacy agreement can be informal or formal, depending upon the parties. The consequences of either form of the agreement vary substantially. Formal agreements are in the nature of legal contracts, detailing the nature of the relationship of the parties for the course of the surrogacy, the rights & duties and the matters concerning costs and remunerations. A transnational surrogacy agreement is much more complex because of the different laws that the parties are subjected to and the fact that these are usually a part of an unorganised sector. Also, such agreements postulate that the concerned surrogate mother is literate or competent to understand and comprehend the terms of the contract. Surrogate mothers with higher education attainment have an enhanced negotiating power in the surrogacy process.[6] However the fact remains that most transnational surrogacy takes place in developing countries, thus the probability of finding literate surrogate mothers is considerably less. Most surrogate mothers are either illiterate or on an average have completed only up to middle school. Surrogate mothers have the least 'functionalities' in terms of education, knowledge, contacts and financial capacity.[7] Add to that the scanty legal awareness and guidance, the surrogate mother is likely to

---

2 Amrita Pande,Wombs in Labor: Transnational Commercial Surrogacy in India, 12COLUMBIA UNIVERSITY PRESS (2014).

3 Marilyn Crawshaw, Eric Blyth, OIga van den Akker, The changing profile of surrogacy in the UK – Implications for national and international policy and practice, Vol. 34JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 267-277 (2013)

4 KirstyHorseyandSallySheldon, Still Hazy After All These Years: The Law Regulating Surrogacy, Vol. 20(1) MEDICAL LAW REVIEW,67-89 (2012)

5 Eric Blyth &Abigail Farrand, Reproductive tourism – a price worth paying for reproductive autonomy?, Vol. 25(1)CRITICAL SOCIAL POLICY, 91–114 (2005)

6 SheelaSaravanan, An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India.Vol.8(10) PHILOSOPHY, ETHICS AND HUMANITIES IN MEDICINE1-12 (2013)

7 Id.

be at the receiving end of technical loopholes in the contract that could weaken her case in the event of a dispute.

Informal surrogacy agreements essentially are a consequence of consensus formed between the intended parents and the surrogate mother regarding their roles in the surrogacy process. These agreements are generally devoid of defined rights and obligations like in the case of formal agreements. The internet plays a crucial role in cross-border reproductive care. Apart from providing information it makes ART accessible to a broader audience, (homosexual couples, and single men) and also facilitates medical tourism. This symbiotic relationship between the internet and ART has radically changed the field of human reproduction.[8] The intervention of agencies to arrange the surrogacy has been substantially reduced. The case of TT (a minor)[9] highlights the advent of Internet surrogacy sites that make informal surrogacy agreements possible. JP v LP is another case highlighting the pitfalls of entering into informal surrogacy arrangements.[10] The case of Re Z[11] involved a baby boy (Z) born as a result of an informal surrogacy arrangement where the commissioning parents, had made contact with the eventual surrogate via a Facebook forum; thus highlighting the scope and extent of informal agreements.

3.2 Competency

An important aspect of surrogacy agreements is the competency of the surrogate mother. Such competency concerns the eligibility in terms of age, health, soundness of mind, marital status etc. Most countries withsurrogacy laws prescribe the minimum age requirement of the surrogate mother e.g. India[12], Netherlandsand Russia[13]. Countries like United Kingdom[14], Greece[15] and South Africa[16] have not specified the minimum age of the surrogate mother. Some countries require the surrogate mother to be married and having the consent of the husband prior to the commissioning of surrogacy, while other countries have no such pre-requisite. In the event of such an agreement being a transnational surrogacy agreement, it becomes imperative that the parties involved fulfil all the pre-requisite legal conditions of the concerned states to effect a valid agreement.

4. Legal and Technical difficulties in the process of Surrogacy

In the process of surrogacy a number of legal, medical, technical, ethical issues are associated on various levels, the most important among them being the legality of the process of surrogacy which varies significantly from country to country. At the center of the surrogate agreement is the affirmation by the surrogate mother to give up the custody of the child and the affirmation of the other party to accept the child. In return of the agreement by the surrogate to carry the child, the commissioning parents bear the whole cost that is incurred during the term of the pregnancy which includes the medical expenditure of the surrogate. This however is subject to the form of surrogacy that the agreement refers to – commercial or altruistic.

4.1 Right to Reproduce

To deliberate upon the legal complexity of surrogacy, firstly the Right to Reproduce and to found a family needs to be understood. Article 16.1 of the Universal Declaration of Human Rights, 1948 recognizes that men and women have the right to marry and found a family.[17] The Judiciary of India also recognizes the right of reproduction as the basic human right.[18] The 'right of reproductive autonomy' of an individual as a facet of his 'right to privacy' has been duly acknowledged by the courts.[19] The right to reproduce has been recognized as 'one of the basic civil rights of man' by U.S. Supreme Court as well.[20] However, the judicial systems of various nations have held different views regarding legal aspects of surrogacy.

Arguably the most complicated aspect involves formal recognition following a cross-border surrogacy. While difficulties apply in relation to legal parenthood, the situation can be further exacerbated when the rules on legal parenthood in the two countries are mismatched.

---

8 Dawn R. Swink. AndBradReich, Outsourcing Reproduction: Embryos and Surrogacy Services in the CyberProcreation Era,Vol. 14ETHICS AND BUSINESS LAW FACULTY PUBLICATIONS (2011)

9 In the matter of TT (a Minor) Judgment , 2011, EWHC 33 (Fam) [Matter of TT (a Minor) case]

10 (JP v LP & Others)Judgment, 2001, EWHC 595 (Fam)

11 (Re Z) Judgment, 2016, EWFC 34 (Fam)

12 The Surrogacy (Regulation) Bill, 2016 (introduced in LokSabha on November 21, 2016).

13 Art. 51-52, Russian Family Code, 1995.

14 Surrogacy Arrangements Act, 1985.

15 Art. 1458, Greek Civil Code.

16 Chapter 19, Children's Act, 2005.

17 Art. 16.1, Universal Declaration of Human Rights, 1948

18 228th Report of the Law Commission of India (2009)

19 B.K. Parthasarthi v Government of Andhra Pradesh, AIR 2000 A. P. 156

20 (Jack T. Skinner v State of Oklahoma)Judgment, 1942, 316 (US Supreme Court)

Complications arise where a country either prohibits surrogacy, or makes no express provision for it. For example, under Ukrainian[21], Russian[22] and Californianlaw the intended mother can be automatically regarded as the legal mother, while for most Member States of the European Union legal motherhood is attributed on the basis of parturition, irrespective of where the birth took place. Similar difficulties can arise in relation to legal fatherhood, as well as the recognition of two parents of the same sex. This can potentially leave a child not only legally parentless, but also stateless and without citizenship given that their birth registration documentation is not recognised beyond the country of birth. This scenario is particularly problematic when the child needs not just civil status travel documentation (i.e. a passport), but also a visa to gain entry into the home country of the intended parent(s).[23] Citizens of several European and Asian countries, including the UK, France, Germany, Spain, Belgium and Japan, have been refused travel documents for their children under the suspicion that such offspring have been born as a result of transnational commercial surrogacy as they are considered to be against the country's public policy.[24]

In a number of recent cases in Australia, 'parental responsibility orders' have been granted to intending parents to attribute them with the ability to make day-to-day decisions concerning the child. However, legal parenthood has not been conferred in these cases.[25] It is apparent that there is scarcity of a uniform approach concerning disputes over transnational surrogacy agreements, however regardless of the form and nature of the arrangement the welfare of the child is given paramount importance. In the Matter of TT (a Minor)[26] the surrogate mother refused to give the baby to the intended parents because of the attachment formed during the course of the pregnancy. The court's decision to award care to the surrogate mother was guided by the paramount consideration of the baby's welfare.

The diversity of court decisions can be assessed by referring the available cases,[27] for instance, the Wisconsin Supreme Court in In re the Paternity of F. T. R.[28] while considering whether the couples' written agreement was enforceable in the case of a straight surrogacy arrangement ruled that such agreements are enforceable, provided enforcement of the contract is believed to be in the child's best interests.[29]

4.2Contractual issues

There are a number of circumstances and contingencies that might create friction in the contractual agreement between the parties and might have an impact on the future welfare of children. The risk of opportunistic behaviour by either the parents or the surrogate is quite relevant. This is often related to asymmetric information, with one of the parties having access to more or withholding information from the other.[30] Since the surrogate mothers are vulnerable, they are likely to be involved in unjust contracts due to their comparatively disadvantageous socio-economic position and needs such as health, nutrition, employment, education and other such basic necessities.[31] Agencies and medical practitioners too exploit the surrogates by appropriating their fees and diverting any benefits received from the intended parents by relying on the fine print of the contracts.

Another serious issue under the surrogacy contracts is that it leads to the exploitation of the surrogate mother. It has been argued that the core group of surrogate mothers includes poor women who are in need of money. These poor and illiterate women of rural background are often impelled and forced to enter into such deals by either their spouse or other middle men in order to earn fast money. In case of an unfavorable result of pregnancy by a surrogate they are either paid meagerly or not paid at all. It has been found that there is often lack of transparency in the surrogacy system which often leads to exploitation of the surrogates and the surrogacy contract does not contain any provisions for the medical insurance or the post-pregnancy psychiatric support for the surrogate mothers.

---

21 Art.123(2), Family Code of Ukraine, 2002.

22 Art.51-52, Russian Family Code, 1995.

23 European Parliament &Directorate General for Internal Policies,A Comparative Study on the Regime of Surrogacy in EU Member States, (2013), available athttp://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI_ET(2013)474403_EN.pdf (Last Visited on March 24, 2017)

24 Richard F. Storrow, Travel into the future of reproductive technology,Vol. 79 UMKC LAW REVIEW, 295–307 (2010)

25 JenniMillbank,The New surrogacy Parentage Laws in Australia: Cautious Regulation or '25 brick walls'?Vol.35(2) MELBOURNE UNIVERSITY LAW REVIEW, 1-44 (2011)

26 Supra note 9.

27 The Matter of N (a Child), Judgment, 2007 EWCA Civ 1053 (Supreme Court of Judicature)

28 In re the Paternity of F. T. R(David J. Rosecky v Monica M. Schissel) Judgment,2013, 66 (Supreme Court of Wisconsin)

29 Child Abduction: Surrogacy(W and W v H) Judgment, 2002, Federal Law Reports, 252 (English High Court)

30 Hugh V. McLachlan and J.K. Swales, Commercial agencies and surrogate motherhood: a transaction cost approach, Vol.8HEALTH CARE ANALYSIS, 11-31 (2005)

31 KalindiVora, Indian transnational surrogacy and the disaggregation of mothering work, 50(2)ANTHROPOLOGY NEWS, 9–12 (April, 2009)

The contractual disputes may pertain to alleged non-performance or defective performance of the contractual terms, non-payment of expenses/compensation to the surrogate mother, competence of surrogate mother, consent of parties, legal parenthood and custody of the surrogate child.

4.3. Moral and Ethical Issues

Reproductive tourism is a stratified practice, although infertility and its psychological effects afflict all social strata equally.[32] Frustration of the childless couples has impelled them to travel to the third world countries to undergo the process of surrogacy to give birth to their child. But due to the complexity of the process the couple has to go through not only legal but ethical and moral complications as well. On the other hand, if the problems of the surrogate mothers are looked upon they have various ethical, psychological, and moral concerns. The poor surrogates go through various social barriers, as in backward rural areas the phenomenon of surrogacy is considered as "the selling of the child and not the surrender of the child". It intersects both biological and social domains, because it involves commoditization of the traditionally natural process of reproduction.[33]

Though there is an informed consent to give the child to the commissioning parents, the surrogate mother develops an emotional and an affectionate connection with the child during the course of pregnancy which often leads to psychiatric stress while giving the child to the intended parents and may often lead to refusal of the surrogate mother to surrender the custody.[34] Another issue that usually arises is that the intended parents are usually fickle minded about whether to allow their child to be informed about the person who had been its surrogate mother. Compensation to the surrogate mothers too touches upon ethical malpractices because of its meager or unjust amount when compared to the resident country payment standards. Thecross-border surrogacy arrangements benefit wealthy Westerners at the expense of destitute women in developing countries.[35] Therefore the gap between the underprivileged and the privileged population has given rise to serious concerns under the head of transnational surrogacy and this discourse is still found to be embedded in the interpretation of surrogacy arrangement in various countries.

5. Transnational Surrogacy and India: Changing Equations

India has been described as the 'surrogacy capital of the world' largely due to the abundance of cheap labour and lax laws, and the positive reputation and sophisticated infrastructure of the fertility clinics.[36] The foreign intended parents come to rely heavily on the Indian Clinics. Commercial surrogacy has been legal in India since 2002. In 2008, the Supreme Court of India in baby Manji's case (Japanese Baby)[37] had held that commercial surrogacy is permitted in India. In fact many Indian fertility clinics offer packages aimed specifically at international clients which combine accommodations and tourist attractions with treatment schedules. Along with the clinics, the Indian surrogates stand to profit too, as they may earn an amount equivalent to more than a decade's worth of wages, especially in rural communities.[38] Thus, it can be safely presumed that the cost effectiveness of transnational surrogacy arrangements in India have been benefiting both the parties. Also, the lack of proper legal regulations and enforcement agencies has provided an unrestricted platform for transnational surrogacy arrangements to flourish in India.

There has neither beenan effective implementation of guidelines on the subject of surrogacy regulation nor an effective control of the government agencies. Thus there is a crucial and an inescapable need to constitute and enforce the laws and guidelines on this subject for the protection of the interest of the surrogate mother and the intended parents. Therefore, the Indian Government undertook to draft a bill known as Surrogacy (Regulation) Bill, 2016 and a bill to regulate the Assisted Reproductive Technology known as the ART (Regulation) Bill 2010 which are still pending.

The trend of transnational surrogacy is likely to reach an end if the Surrogacy (Regulation) Bill, 2016 is passed and comes into effect. The impact of this bill, if it were to become an Act would be far-reaching. The legal enforceability and the validity of the surrogacy arrangements/agreements has been recognized and given effect to in the Bill. These agreements have been treated at par with other contracts under the Indian Contract Act 1872 and similarly other related laws are equally applied to these kinds of agreements.The Bill

---

[32] L.J. Martin, Reproductive tourism in the age of globalization, (6)GLOBALIZATIONS 249-263 (2009)

[33] SusanMarkens, The Global Reproductive Health Market: US Media Framings And Public Discourses About Transnational Surrogacy,74(11) SOCIAL SCIENCE & MEDICINE, 1745-1753 (2012).

[34] Supra note 9, 31.

[35] Mary Welstead, Addicted to motherhood – A cautionary tale, Vol. 22 DENNING LAW JOURNAL, 209-218 (2010)

[36] SreejaJaiswal, Commercial Surrogacy In India: An Ethical Assessment Of Existing Legal Scenario From the Perspective Of Women's Autonomy And Reproductive Rights, 16(1) GENDER, TECHNOLOGY AND DEVELOPMENT1-28 (2012)

[37] Baby Manji Yamada vs. Union of India and Another(2008) 13 SCC 518

[38] Alison Bailey, Reconceiving Surrogacy: Toward A Reproductive Justice Account Of Indian Surrogacy. 26(4)HYPATIA 715-741 (2011)

provides for various aspects of surrogacy such as the age of the surrogate mother, eligibility criteria for a surrogate and the intended couple, kind of surrogacy that can be undergone, registration of the surrogacy clinics, National and the State Surrogacy Boards to perform functions required, and punishment and penalty for the offender.

The Bill seeks to regulate the eligibility of participants for the purpose of surrogacy. The provisions allow only a married Indian couple (comprising a male & female citizen) to enter into a surrogacy arrangement. The Bill excludes foreigners, individuals and unmarried couples from being participants of surrogacy arrangements. This outrightly limits the scope of transnational surrogacy in India to a great extent. The Bill further lays down that only the close relative of such an Indian couple shall be eligible to be the surrogate mother. Thus the probability of contracting the services of an unrelated foreign surrogate by an Indian couple and that of an Indian surrogate by a foreign couple has been reduced to zero. The effect of this shall be reflected in the substantial decline of medical tourism that was driven by the ease of transnational surrogacy arrangements in India. The eligibility of the surrogate mother has been categorically defined in the Bill, which excludes the citizenship or nationality as an eligibility factor. This means that the close relative of an Indian commissioning couple can become the surrogate mother even if she does not have Indian citizenship. Thus, it can be said that the Bill conservatively retains an aspect of transnational surrogacy.

The changes proposed to be made to the existing surrogacy legal framework suggest that foreign couples are excluded from entering into any surrogacy arrangements with an Indian surrogate. The citizenship requirement is mandatory for any couple to opt for surrogacy in India. The transnational surrogacy industry existing in India is likely to be affected with such a step. India, being a favourable destination for transnational and commercial surrogacy will be taken off the map once the Act comes into existence, the impact of which will be felt by the medical sector- organised and un-organised. Another major change that is proposed is the move to illegalize commercial surrogacy. It is to be seen as a positive step towards the eradication of commoditisation of wombs and children born out of surrogacy. India will eventually become a part of the league of those nations that restrict the egg-donors and embryo-carriers of their citizens in surrogacy arrangements. The effect of such a move and its extent in the infringement of the right to make reproductive choices will be seen in the days to come.

6. Conclusion

The process of surrogacy raises several and severe concerns and in today's world it is a challenging issue. Globalisation and the pervasiveness of information and communication technologies have enhanced cross-border surrogacy. It has become a global process and it encompasses different individuals and countries as its participants. The evolution of surrogacy from a national level process to an international phenomenon reflects the extent of globalisation. The use of reproductive technologies has become an act of consumption in a global market as it offers a way out to the privileged who can implement their plans on the global stage.[39]

The abundance or the lack of regulations concerning surrogacy is a matter that needs to be addressed on an international scale. With the growing instances of transnational surrogacy, the need for a model system of rules governing such arrangements is pertinent. In order to ensure that the participants of transnational surrogacy arrangements are not caught up in a legal tangle in their own countries, appropriate agreements should be effected among nations to protect the interests of the intended parents, the surrogate mother and the surrogate child. There is a need to grant recognition to the right of an individual or a couple to make reproductive choices, unbound by state intervention. State intervention should ideally be allowed only to the extent of protection of interests of the participants and to prevent the commission of grave human rights violations. As stated earlier, transnational surrogacy is a logical derivate of globalization where border-less trade exchange has eventually given way to border-less biological exchanges.

[39] Supra note34

Our Contributors

Dr. A.K. Pandey
Dean & Head, School of Law, SRT Campus, Badshahi Thaul, H.N.B. Garhwal University, Tehri Garhwal, Uttarakhand

Rajesh Kumar Dube
Assistant Professor, DAV (PG) College, Dehra Dun & Research Scholar, School of Law, H.N.B. Garhwal University, SRT Campus, Badshahi Thaul, Tehri Garhwal, Uttarakhand

Deborisha Dutta
Assistant Professor, North Cap University, Gurgaon

Madhulika Bhatnagar
Student, Amity Law School, Indraprastha University, Delhi

Aastha Saxena
Student, Amity Law School, Indraprastha University, Delhi

Haramrit Kaur
Advocate, Punjab and High Court, Chandigarh

Tanvi Sharda
Student, LLM, University Institute of Legal Studies, Panjab University

Falguni Pokhriyal
Research Scholar, IMS Unison University, Dehradun

Palak Kaushal
Student, National Law Institute University, Bhopal

Ishaan Chopra
Student, National Law Institute University, Bhopal

Mahak Paliwal
Student, Symbiosis Law School, Pune

Deepanshi Mehrotra
Student, Symbiosis Law School, Pune

Hamda Akhtarul Arfeen
Student, Aligarh Muslim University, Aligarh

Arbeena
Student, Aligarh Muslim University, Aligarh

Anubha Gangal
Student, Amity Law School, Guru Gobind Singh Indraprastha University, Delhi

Aditi Lal
Student, Amity Law School, Guru Gobind Singh Indraprastha University, Delhi

CALL FOR PAPERS

PRAGYAAN: JOURNAL OF LAW

Volume 7 Issue 2 (December 2017)

EDITORIAL POLICY

PRELUDE

Pragyaan: Journal of Law is a flagship law journal of School of Law, IMS Unison University and has recently been enlisted in the UGC List of Journals in the category of Social Science. Pragyaan Journal of law (JOL), a bi- annual peer-reviewed journal, was first published in 2011 and seeks to promote original and diverse legal scholarship in a global context. It is a multi- disciplinary journal aiming to communicate high quality original research work, reviews, short communications and case report that contribute significantly to further the knowledge related to the field of Law. The Editorial Board of the Pragyaan: Journal of Law (ISSN: 2278-8093) solicits submissions for its Volume 7 Issue 2 (December 2017). While there are no rigid thematic constraints, the contributions are expected to be largely within the rubric of legal studies and allied interdisciplinary scholarship.

We seek contributions in the form of:

1. Articles (Maximum 8,000 words inclusive of footnotes andAbstract)
2. Essays (Maximum 4,000 words inclusive offootnotes)
3. Case Comment/Legislative Critique & Notes (Maximum 3,000 words inclusive offootnotes)
4. Book Review (Maximum 2,000 words inclusive of footnotes) besides other forms of scholarly writing.

? Place tables/figures/images in text as close to the reference as possible. Table caption should be above the table.

Figure caption should be below the figure. These captions should follow Times New Roman 11point.

? Deadline: The deadline for submissions of Vol. 7, Issue 2: November 13, 2017.

SUBMISSION GUIDELINES

1. Submissions must be in MS Word. The whole document should be in Times New Roman, single column, 1.5 line spacing. A soft copy of the document formatted in MS Word 97 or higher versions should be sent as submission for acceptance.
2. Main Text: Title of the paper should be bold 16 point, and all paragraph headings should be Bold, 12point.
3. Cover Letter: First page: It should include (i) Title of the Paper; (ii) Name of the Author/s ;Co-authored papers should give full details about all the authors; Maximum two author permitted (iii) Designation; (iv) Institutional affiliation; (v) Correspondence address. In case of co-authored papers First author will be considered for all communication purposes. Second page: Abstract with Key words (not exceeding 300 words)
4. The following pages should contain the text of the paper including: Introduction, Subject Matter, and Conclusion & References. Name (s) of author(s) should not appear on this page to facilitate blind review. 5. Plagiarism Disclaimer: Article should contain a disclaimer to the effect that the submitted paper is original and is not been published or under consideration for publication elsewhere. (Annexure I) The signed document must be e- mailed/ posted to The Editor along with manuscript.
6. Citations: All citations shall be placed in footnotes and shall be in accordance with format available at http://www.iuu.ac/download-pdf/Pragyaan_JOL.pdf. The potential contributors are encouraged to strictly adhere to the citation style.
7. Peer Review: All submissions will go through an initial round of review by the editorial board and the selected pieces will subsequently be sent for peer-review before finalization for publication.

All Correspondence /manuscripts should be addressed to:

The Editor- Pragyaan :
Journal of Law IMS Unison University,
Dehradun Makkawala Greens, Mussoorie Diversion Road
Dehradun - 248009 Uttarakhand (India)
Phone: 0135-3000600, 3000650
E-mail: pragyaan.law@iuu.ac
Website: www.iuu.ac

Plagiarism Disclaimer

The Editor
Pragyaan : Journal of Law
IMS Unison University, Dehradun
Makkawala Greens, Mussoorie- Diversion Road,
Dehradun, Pin- 248009, Uttarakhand
Phone: 0135-3000600, 3000650
E-mail: pragyaan.law@iuu.ac
Website: www.iuu.ac

Sir / Madam,

Sub: Assignment of Copyright

I / We (Ms. /Mr./Dr./Prof/)_____,author(s) of the article titled_____

do hereby authorize to publish the above said article in PRAGYAAN: JOURNAL OF LAW.

I/We further state that:

1) The Article is my/our original contribution. It does not infringe on the rights of others and does not contain any libelous or unlawful statements.
2) Wherever required I/We have taken permission and acknowledged the source.
3) The work has been submitted only to this journal PRAGYAAN: JOURNAL OF LAW and that it has notbeen previously published or submitted elsewhere for publication neither assigned any kind of rightsof the above said Article to any other person/Publications.

I/We hereby authorize, you to edit, alter, modify and make changes in the Article in the process of preparing the manuscript to make it suitable for publication.

I/We hereby assign all the copyrights relating to the said Article to the IMS Unison University, Dehradun.

I/We agree to indemnify the IMS Unison University, Dehradun, against any claim or action alleging facts which, if true, constitute a breach of the foregoing warranties.

First author: Name Signature

Second author: Name Signature

First author	Second author
1. Name:	2. Name:
Signature	Signature

IMS Unison University

SUBSCRIPTION/ADVERTISEMENT RATES

The Subscription rates for each of our three journals, viz., Pragyaan: Journal of Law, Pragyaan: Journal of Management, and Pragyaan: Journal of Mass Communication are as follows:

Category	1 Year		3 Years		5 Years	
	Domestic Rates (`)	Foreign Rates (US $)	Domestic Rates (`)	Foreign Rates (US $)	Domestic Rates (`)	Foreign Rates (US $)
Academic Institutions	500	30	1200	75	2000	120
Corporate	1000	60	2500	150	4000	240
Individual Members	400	25	1000	60	1600	100
Students	300	20	700	40	1200	75

Rates For Single Issue of Pragyaan: Journal of Law, June & December, 2017

Academic Institutions	INR 300 (15 US $)
Corporate	INR 600 (30 US $)
Individual Members	INR 250 (15 US $)
Students	INR 200 (10 US $)

Note: Back Volumes of Pragyaan: Journal of Law upto June 2016 are available at the Rate Rs. 100/- per issue, subject to the availability of the stock.

Advertisement Rates (Rs.)

Location/Period	1 Year	2 Years	3 Years
B/W (Inside Page)	10,000/- (2 Issues)	18,000/- (4 Issues)	25,000/- (6 Issues)
Colour (Inside Back Cover)	17,000/- (2 Issues)	30,000/- (4 Issues)	45,000/- (6 Issues)
Single Insertion (1 Issues)(Inside B/W Page)- Rs. 5000/-			

SUBSCRIPTION FORM

I wish to subscribe to the following journal(s) of IMS Unison University, Dehradun:

Name of Journal	No. of Years	Amount
Pragyaan: Journal of Law		
Pragyaan: Journal of Management		
Pragyaan: Journal of Mass Communication		
	Total	

A bank draft/cheque bearing no. _____ dated _____for Rs._____ Drawn in favour of IMS Unison University, Dehradun towards the subscription is enclosed. Please register me/us for the subscription with the following particulars:

Name:_____ (Indiviual /Organisation)

Address_____

_____

Phone _____ Fax _____E- mail: _____

Date: Signature (individual/authorized signatory)

Please send the amount by DD/Local Cheque favouring IMS Unison University, Dehradun, for timely receipt of the journal.

Please cut out the above and mail along with your cheque /DD to: The Registrar, IMS Unison University, Makkawala Greens, Mussoorie Diversion Road, Dehradun 248009. Uttarakhand, India,

Phone No. -0135-3000600

IMS Unison University at a glance

IMS Unison University, a constituent of Unison Group is a premier educational and research University nestled amidst beautiful and serene surroundings offering an environment that fosters learning and stimulates creativity.

It was established as IMS Dehradun in 1996, as a non- profit organization by a group of visionaries dedicated to the cause of changing the face of professional education in Northern India.

The University today provides a platform for excellence in teaching, learning, and administration. Its State-of-the-art Infrastructure facilitates in developing well trained graduate, post- graduate and doctorate professionals to meet the ever changing needs of the corporate world.

IMS Unison University aspires to become a world-renowned center for creation & dissemination of knowledge. It aims to provide a holistic career-oriented education that develops intellectual, moral and physical capabilities of the students.

University presently offers under-graduate, post-graduate and doctorate programs in several streams of Management, Law and Mass Communication under the following three schools:

1. School of Management
2. School of Law
3. School of Mass Communication

The University is committed towards delivering quality education, developing strong industry interface and providing placement opportunities to its students.

The University brings out three Journals, one each in the three disciplines of Law, Management and Mass Communication, in an effort to fulfill our objective of facilitating and promoting quality research work:

- Pragyaan: Journal of Law
- Pragyaan: Journal of Management
- Pragyaan: Journal of Mass Communication

Makkawala Greens, Mussoorie Diversion Road, Dehradun- 248009,
Uttarakhand, INDIA, T: 0135- 3000600
E: info@iuu.ac, W: www.iuu.ac
Established under Uttarakhand Act No. 13 of 2013,
Recognized by UGC under section 2(f) of UGC Act, 1956

IMS UNISON
UNIVERSITY
Nurturing Knowledge. Empowering Minds.