



SURROGACY – WOMEN'S RIGHT OF REPRODUCTIVE CHOICE

V.S Kairali

Research scholar of Vels university Department of law, Chennai.

ABSTRACT

In the recent landmark case (Puttasamy Vs Union of India) the Hon'ble Supreme Court of India dealt with two main reproductive rights, issues relating to surrogacy and reproductive freedom. The Supreme Court has held that Right to privacy is a fundamental right under Article 21 and to make her own reproductive choices of abortion within the fulfilment of the medical practitioners. As a result of this judgement, it will have an impact on women right of reproductive choice. In this paper I try to explore the validity of Medical Termination of Pregnancy Act in the light of Supreme Court's judgement in Puttasamy case and my suggestions with regard to women's right of reproductive choice with reference to surrogacy.

"The greatest good is what we do for one another" – Mother Teresa

KEYWORDS :**INTRODUCTION**

The nature has given us the beautiful capacity to procreate a life within woman and every woman cherishes the experience of motherhood. But unfortunately some woman due to certain biological conditions could not give birth to their own offspring. The urge of Motherhood leads them to seek alternative solutions like Artificial Reproductive Technology (ART). With Advances in Medical Sciences and technology particularly in assisted reproduction techniques which have come in with techniques like donor, insemination embryo, transfer methods etc revolutionizing the reproductive environment methods such as surrogacy are also gaining popularity.

The Supreme Court has held that right to privacy is a fundamental right under Article 21 and to make her own reproductive Choice. Reproductive rights are part of women's right to privacy under Article 21 of the Indian constitution but MTP Act 1971 places the option of abortion within the satisfaction of Medical Termination of pregnancy Act 1971, Places abortion within the scope of Medical practitioners. Hence the conflict arises even within 24 weeks period a women can only seek out in the law not on request so it fails to draw inspiration from the 2017 landmark Puttasamy judgement of Supreme court.

Concept of Privacy

The Concept of Privacy is found in the Indian constitution and there are various cases decided by the court that the right to privacy is not a fundamental right but later in 2017 Puttasamy Vs Union of India the judges have interpreted and widened the scope of the Article 21, so as to include privacy is not explicit in nature it is implicit and stated that like other rights mentioned in Part III Right to privacy is also not an absolute right .The Universal Declaration of Human Rights 1948, and the International Covenant on Civil and Political Rights (ICCPR) 1966, provides for the protection of the person against arbitrary interference with his or her privacy. According to Article 12 of the Universal Declaration of Human Rights, 1948 says "No one shall be subjected to arbitrary interference with his privacy, family, home and reputation". Everyone has the right to protection of the law against such interference or attacks. Further according to Article 17 of the International Covenant on Civil and Political Rights (ICCPR), 1966 "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence or to unlawful attacks on his honour and reputation".

Surrogacy meaning and definitions

The word surrogacy is rooted in the Latin word 'Surrogatus' which means to substitute. Substitute means a person appointed to act in the place of another. Black's Law Dictionary defines surrogacy as "the process of carrying and delivering a child for another person. A surrogate woman is a woman who bears a child on behalf of another in her womb of fertilized eggs from other women.

Evolution of Surrogacy

We can understand surrogacy in the mythological context. Surrogacy is not a new concept in the Indian Society. Instances of surrogacy can be traced to the mythological surrogate mothers such as Yasodha and Gandhari . The prime urge to have a biological child of one's own DNA with the help of the advanced technology coupled with the commercial aspect provided by the ART clinics and allied services has resulted in the 5000 million dollar reproductive tourism industry in India. So it can be assumed that surrogacy is there from the time immemorial but it is only recently that it has been commercialized and made in to billion dollar industry the famous case of baby M case was the very first reported case of commercial surrogacy. In India surrogacy heralded with the delivery of its first surrogate baby on 23 June 1994 but it took as many as eight year to draw the world's attention when an Indian woman in 2004 delivered a surrogate child for her daughter in the U.K In India commercial surrogacy was not legalized till 2002. The Pioneer in this field Dr.Nayana Patel had her first surrogacy process successfully conducted in the year 2004.

Due to the state of laws related to surrogacy in India, there is a very high rate of these women being exploited for the services provided by them. The rights of the surrogate mother and the child born from surrogacy are of utmost importance. Hence there is a need for concrete legal framework to protect the interest of the surrogate mothers and the children born through surrogacy. The only rules available for surrogacy in India are a set of guidelines prepared by Indian Council for Medical Research (ICMR) in the year 2005 to protect the right of the surrogate mother, the new born and the parents but it had its fair share of loopholes, the Guidelines prepared by Indian council for Medical Research. These guidelines do not hold any legal validity and lack enforceability. Although the ICMR do exist there is no central or state body to ensure that these regulations are followed strictly when it comes to surrogacy.

Baby Manji Yamada was a child born to 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 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 urged the Government of India to enact a law regulating surrogacy.

In August 2009, the law commission of India delivered the Report which stated that: The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy

arrangement and prohibited commercial ones.

The Puttasamy Judgement specifically recognized the Constitutional right of women to make reproductive choices as part of Personal Liberty under Article 21 of the Indian Constitution. The bench also reiterated the position adopted by three Judge bench in *Suchita Srivastava Vs Chandigarh Administration* which held that reproductive right include a woman's entitlement to carry a pregnancy to its full term, to give birth and to raise children and that these rights form part of a woman's right to privacy, dignity and bodily integrity should be respected.

Reproductive rights are rights of the individuals to decide whether to reproduce and have reproductive health. This include an individual right to plan a family termination pregnancy use of contraceptives, free of discrimination coercion and violence. The Courts have expanded, protected and promoted reproductive rights, because the Courts have an important role to ensure women's reproductive rights as guaranteed by their constitution and human rights.

The Government has formulated various draft Bills to regulate over the years in 2008,2010,2014,2016 and the latest draft is 2020.The Indian Council of Medical research guidelines regulate the practice of surrogacy in the absence of any codified law. The new bill proposes a complete ban on commercial surrogacy, and allowing altruistic surrogacy to infertile Indian couples only and who have been married for at least five years. A ban on the overseas Indian foreigners, unmarried couples, Single parents live in partners and gay couples from commissioning surrogacy.

This ban imposed and the restrictions and conditions violates the provision of the constitution under Article 14, which guarantees equality before law and equal protection of laws to all persons and Article 21 which guarantees protection of life and personal liberty of all persons. The right to procreation and reproductive autonomy is a Fundamental Rights which is guaranteed to every individual. Reproductive rights embraces a bundle of core human rights including the right to health, right to free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment the right to determine the number and spacing of one's children and the right to free from sexual violence.

It is an established principle in law that reproductive right of all persons is a basic human right. In *B.K Parthasarathy Vs Government of AP*, the Court up held that right of "reproductive autonomy" of an individual as a facet of his Right to Privacy which agreeing with the decision of the US Supreme court in *skinner Vs state of Oklahoma* which says right to reproduce as one of the basic civil rights of Man.In *Raja Gopal Vs State of TamilNadu*, The court held that Right to Privacy is implicit in Article 21. It is a right "to be let alone". A Citizen has a right to safeguard the privacy of his own his family marriage procreation, motherhood, Child bearing and education among other matters The personal decision of the individual about the birth of the Children is called "the right of reproductive autonomy". The right to life under Article 21 of the constitution of India includes "the right to motherhood" this was held in this *Vijay Menon Vs State of Maharashtra*, thus reproductive rights get constitutional protection. Reproductive rights include wide range of rights the right to abortion, right to Contraception , the right to have Children how an individual decide to use this right cannot be intruded upon by the Government unless there is interference with another individuals right.

If we see from the point of Fundamental Rights every individual shall have a right to his privacy which includes confidentiality of communication made to, or, by him

including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; The Apex Court in *K.S.Puttaswamy* case held that right to privacy includes personal freedom relating to the body , mind and to making choices, as well as which includes informational privacy. The personal freedom relating to the body, mind and to make their own choices essentially which involves women's rights to make their sexual and reproductive decision making. In *Saritha Vs Venkata subiah* when it held that "the Right to privacy belongs to an individual" and is not lost by marital association. In Puttasamy's case the Supreme Court held that individuals have a Right to Privacy which grants them complete autonomy over their body. And the point that had to be noted that in case of making of choices which essentially includes the rights of the women to have their own decision making to sex and the reproduction which falls under the purview of right to privacy.

So Reproductive rights are part of women's Rights to privacy in the manner of dignity and bodily integrity reproductive autonomy of woman can be exercised to procreate as well as to abstain from procreating Supreme Court held that women's reproductive choices is her right under Article 21 but MTP Act 1971 places the option of abortion within the satisfaction of medical practitioners. Hence the conflict arises.

Abortion laws in India

A Critical aspect of Women's reproductive freedom is abortion. Before 1971, Voluntary termination of pregnancies in India was a criminal offence (except when done in order to save a woman's life) under 312 to 316 of IPC 1860. This Criminal status of the practice pushed it to be carried out in secrecy. The illegal termination of pregnancy by untrained professionals put the health of women at risk. By this, death rate was high and finally the shah committee in 1964 gave an estimation of the abortions that is expected every year. This led to the enactment of Medical Termination of pregnancy Act 1971.

MTP Act 1971 gave a new era giving larger reproductive rights to women, in terms of wide categories of women. But it failed to satisfy the needs of the women to have autonomy or control over their bodies. It suited well to the family planning needs of the country and not the rights of women to choose whether or not to continue pregnancy. It placed autonomy in the hands of the state and Medical practitioners and made woman mere beneficiaries rather than primary stakeholders in the matter of abortion. The Act views the right of women to abortion from a public health perspective and not from that of providing access to safe and legal abortion as matter of right. It is to be noted that Abortion is not a norm but an exception to the provisions of IPC as it strictly specifies the conditions as to when and how women can exercise these rights.

MTP Act 1971 Section 3, a women can seek the MTP if the continuance of pregnancy would pose a risk to the life of the Mother or cause grave injury to her physical or mental health or there is a substantial risk that if the Child is born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. For foetuses that are aged up to 12 weeks, only one medical practitioner's opinion is required. But if foetus is aged between 12 weeks and 20 weeks the opinion of at least two medical practitioners is required.

Medical Termination of pregnancy (Amendment) Bill 2021, the Major highlight of the bill is the amendment to the provision to allow termination up to the 24th week of pregnancy. The new amendment allows abortion until 20 weeks with the opinion of one registered medical practitioner. The new amendment also permits state governments to decide if pregnancy may be terminated post 24 weeks due to fatal abnormalities. Despite the

Government intention to ensure safe, affordable and accessible services the proposed amendments are inadequate. It is not a right based legislation the bill hands over decision making power to the health care provider instead of pregnant person. So the Bill is Doctor centric and not a right based legislation. If pregnant women depend on the Doctor to approve the termination of an unwanted pregnancy then it violates the right to reproductive autonomy. Medical boards are a panel of specialist who are given the authority to decide whether the pregnancy should be terminated post 20 weeks. Medical boards are a form of third party authorisation and are violative pregnant persons right to autonomy and bodily integrity.

Surrogacy Bill 2020

The amended bill (surrogacy regulation bill 2020) is a reformed version of draft legislation which was passed by lokshaba in August 2019. The Major benefits of the Bill would be that it will regulate the surrogacy services in the country commercial surrogacy will be prohibited including sale and purchase of human embryos and gametes, ethical surrogacy to the Indian married couple. Indian origin married couple and single women will be allowed a fulfilment of certain conditions. So it will control the unethical practices in surrogacy, prevent commercialisation of surrogacy and will prohibit exploitation of surrogate mothers and Children born through surrogacy. Clause 4 of the Bill prohibits all forms of commercial surrogacy thus permitting only Altruistic surrogacy only married women between 25 and 35 years of age who have at least one biological child can be surrogates The bill also restricts the number of times a women may act as a surrogate to only once in her life time. The intended parents must be "proven infertile" and obtain an 'eligibility certificate' issued by the appropriate authority only then as per the law we can call them as intending couples only Indian Couples who have been legally married for at least 5 years would be allowed to opt for surrogacy and having no surviving child whether biological or adopted or otherwise this would not include child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness and other conditions that may be specified by regulation . This bill specifies age for Indian married couples for male it must be between 26 and 55 years of age and the female between 23 and 50 years. This bill also mandates that only a "close relative" of the intended parents can be the surrogate mother of their child. But the term close relative has not been defined.

Whether this bill violates Privacy or not

Really speaking, the strict eligibility for surrogates and intended parents mentioned in the bill shows excessive state interference in the private life of Individuals. Article 21 of the constitution of India guarantees the right to life and personal liberty and in *K.S Puttasamy Vs Union of India* the Supreme Court has upheld an individual RTP as intrusive to Article 21, recognising that privacy is a reliable constitutional right to make reproductive Choices. Further in *Devika Biswas Vs Union India* the Supreme Court recognized that the right to reproduction as an important component of Right to life under Article 21, thus restricting ART and surrogacy only to heterosexual relationships with in a certain age group and denying reproductive choices to LGBT, Single person and older couples would be a violation of Article 21. This is also against the concept of right to equality under Article 14. In *B.K Parthasarathy Vs Government of Andrapradesh* the right to make a decision about reproduction is essentially a very personal decision and the intrusion of the state in to such a decision making process has to be scrutinized. It is thus submitted that requiring couples or persons to procure such certificates is a gross violation of their Right to privacy.

Judicial precedent are therefore, abundantly clear that the constitution protects and safeguards reproductive choices as part of the individual's inalienable right of personal liberty. In

this context the eligibility criteria mentioned in the bill encroaches upon the private lives of both surrogates and intended parents and violates the individuals' reproductive autonomy.

Analysis of the bill

1. This bill states about close relative to be a surrogate mother, if intending parents who is infertile and do not have a close relative. If women want to help a needy couple by providing a child of his own, then the state cannot interfere with this humanisation act and such acts should be appreciated .We should respect the surrogate and the Children born out of the surrogate.

2. The Age limit should be reconsidered because 50 year is almost an age of menopause.

3. LGBT community is completely banned the law recognizes only natural born male and female spouses. In 2018 *Navtej Johar Vs Union of India* wherein consensual same sex relationships were decriminalized this has to be looked into. In *Puttasamy* the Supreme Court had elucidated that sexual orientation is deeply offensive to the dignity and self-worth of an individuals. The court further stated that protection of individuals Right to privacy and sexual orientation lay at the heart of fundamental rights guaranteed by Articles 14, 15, 21 of the constitution. Similarly in *National legal services Authority Vs Union of India* the court recognized transgender community as the "third gender" and observed that discrimination on account of gender identity and sexual orientation undermines and violates Article 14 of the Indian constitution. This ban of same sex partners is in contravention of their fundamental rights and the law laid by India Supreme Court in notable judicial pronouncement.

The bill also prohibits couples who "live in relationship" is not legally married from opting for surrogacy. It is to be noted that parliament has previously gave statutory sanctity to such relationship in the nature of marriage. An individual's choice to marry or not has been held by the Supreme court to be beyond the legitimate concerns of the state and these prohibiting singles and cohabiting couples from opting to parenthood through surrogacy just because they are not married is an encroachment on their privacy and an unwarranted of the infringement of their right to equality.

CONCLUSION

Passing of this bill in the parliament is not likely to be smooth. The 102nd parliamentary standing committee report on surrogacy has stated that surrogacy bill is contrary to the constitution of India. It violates Article 14, Article 15 and Article 21 of the constitution. The bill must satisfy intelligible differentia and rational nexus when the classification is not on the basis of intelligible differentia and has no nexus with the object sought to be achieved then the differentiation is deemed to be invalid. Article 21 of the constitution of India is sacred and cherished to life and personal liberty. It contains the principle of Right to life, personal liberty and right to livelihood. In *Consumer Education and Research Centre and others Vs Union of India* the Supreme Court stated that the expression 'life' assured in Article 21 of the constitution has a much wider meaning and includes Right to livelihood. This Principle was recognized in *Olgatellis Vs Bombay Municipal Corporation*. This right to livelihood is violated in surrogacy bill as it completely bans commercial surrogacy.

A complete bans on commercial surrogacy deprive a person of a form of livelihood. They potentially lose their income and make their condition more vulnerable. We have to take into account the livelihood matters of poor woman who are involved in Surrogacy business. This bill does not provide any justice to them. Therefore considering the fact that reproduction or procreation is a very personal and private decision and must be respected Bill must ensure only

minimum interference by the state in such a decision making process. The purpose of law in a society is to protect the liberty of individuals and law is used as an instrument to fulfil its obligations. Law must keep pace with the emerging technologies so that the benefits can reach the needy. It is important to ask whether the state has anything to do with the business in regulating the reproductive choices of Society. If a woman wants to help a needy couple by providing the child of his own then the state cannot interfere with this humanitarian act and such act should be appreciated. We should try to respect the couples, respect the surrogate and respect the Children born out of surrogate. So the Government should enact laws that are in compliance with fundamental rights of the citizens. If the new bill becomes a law only ethical altruistic surrogacy will be allowed. So the new bill falls short of protecting bodily autonomy and guaranteeing reproductive liberty.

REFERENCES

1. (2017) 10 Sec 1
2. Article 12 of UDHR 1948
3. Article 17 of International covenant on Civil and Political Rights
4. In Lexilifeeditor.com
5. Black law Dictionary BRYAN A GARNER 8th Edition 2004 Page 4529
6. Ibid 4
7. (2008) 13 Sec 518
8. Indian Law officers, Available at www.indialawofficers.com
9. Dr.Nayana Patel(Medical Director of Akanksha hospital and research institute)
10. Indian Council for medical research 2015
11. Ibid 7
12. The Law commission of India 2028th report on need for legislation to regulate A R T clinics as well as rights and obligations of parties to a surrogacy, August 2009
13. Article 21 of Indian Constitution
14. (2009) 14 SCR 989
15. Anil Malhotra and Ranjith Malhotra , Surrogacy in India, 'Law in the making' Universal Law Publishing 2016 Page 52
16. Indian Council of Medical Research accreditation supervision and regulation of ART 2005
17. (1999) SC online AP 5 and 4, AIR 2000 AP 156
18. (194) Sec online USSC 125
19. AIR 1995 SC 264
20. (2015) Sec online Bombay 6127
21. ART Bill of 2016
22. Definition of Right to Privacy under the privacy bill 2011
23. AIR 1983 AP 356
24. Sec 312 to 316 of Indian Penal court 1860
25. MTP Act 1971 Sec 3
26. Medical Termination of pregnancy(Amendment) Bill 2021
27. ALK Barua(2020) the MTP amendment bill anti rights subjectivity, sexual and reproductive health volume 21 issue 1
28. Surrogacy regulation Bill Sec blog online
29. Article 21 of the Indian Constitution
30. Supra 1
31. (2016) 10 sec 726
32. 2000(1) ALD 199
33. (2018) 10 Sec 1
34. AIR 2014 SC 1863
35. AIR 1986 SC 180