

Commercial Surrogacy with Special Reference to Capabilities Approach

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Abstract

In Indian culture, 'motherhood' connotes a sine qua non of marriage. Surrogacy arrangements have seen an increased demand amongst childless couples in the recent years. Notwithstanding that, many countries still don't have specific legislations to deal with surrogacy arrangements. India is one such country which has failed to come up with a good legislation to regulate surrogacy. In the year 2019, a bill was passed to curb commercial surrogacy because it is believed that many impoverished women are exploited in the name of surrogacy. The legislature, instead of regulating commercial surrogacy, has banned it. The government is dictating its ownership over a woman's bodily autonomy and right to privacy. The writing enlightens how the rights of a person shouldn't be curtailed because the government has failed to regulate it. Rights become pointless if the 'environment' to exercise such rights is seized.

Key words: *Commercial Surrogacy, Bodily Integrity, Autonomy and Motherhood*

Introduction

For many centuries, surrogacy has been proved to be a boon to society and a ray of hope for many child-deprived couples. The first part of the writing essentially deals with the conceptualisation of surrogacy. In India, there is a stigma that revolves around 'procreation'. Infertility is "always associated" with women. This makes a woman subject to further marginalisation in society. Over years, law commission reports, bills and many laws have come up related to surrogacy. Recently, in 2019, the Surrogacy (Regulation) Bill was passed which was introduced by Dr. Harsh Vardhan in the Lok Sabha but hasn't been passed by Rajya Sabha yet.

This Bill aims to curb commercial surrogacy and permits only "altruistic surrogacy". The central theme of the paper revolves around the theory that the Bill is problematic and enigmatic. It facilitates the very exploitation it intended to curb. The second part draws a parallel between Surrogacy Bill and Martha Nussbaum's Capabilities Approach. The third part reflects how women are rational agents according to Immanuel Kant with a "prerogative" to decide for themselves.

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Then the fourth part emphasises the International treaties and conventions that support the notion of right to “choose” the employment. Women, like men, have the right to pursue any profession of their choice. Society and government shouldn’t play a role in deciding the same. The last part debunks the conundrums which are always associated with commercial surrogacy. Commercial surrogacy is often caught between the crosshairs of socio-legal issues which are eloquently discussed in this part of the writing. The researcher concludes by stating that the parliament should work for the welfare of the people and not themselves. It can be “only” by regulating commercial surrogacy and not outlawing it.

Conceptual Framework and Background

a. Conceptualisation of Surrogacy

The word ‘surrogacy’ has its roots in a Latin word ‘*surrogatus*’. Fundamentally, it means a substitute or an alternative; when a person is made to act on behalf of another.² The Black Law’s dictionary describes surrogacy as a process of carrying a child and then delivering the child for another person.³ The researcher feels it is imperative to comprehend the meaning of ‘mother’ because the growing practise of surrogacy has now started questioning the very definition of ‘mother’.

The Black Law’s dictionary defines mother as “a woman who has given birth to or legally adopted a child”. This raises a question of how, the woman who receives a child from the surrogate mother becomes a mother? In a case law of the United States, this definition of mother was moulded and broadened. It was held that “the woman who donates the ovum and the woman who intends to be the mother both are considered mothers. The definition in the Black Law’s dictionary isn’t necessarily definitive”.⁴

b. Historical Perception and Evolution

Most people have a misconception about surrogacy, that it is a modern solution to a modern problem. However, this is a mere fallacy. Surrogacy isn’t a modern solution to a modern problem. The problem of infertility is not new and has an ancient history. The Holy book ‘The Bible’ has references about the same.

²See Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* at ¶ 1.3 (Law Commission Report No. 228, 2009) at <https://lawcommissionofindia.nic.in/reports/report228.pdf>.

³ See R. S. Sharma, *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*, 140(Suppl 1) INDIAN J MED RES. 13, 13-16 (November, 2014).

⁴ See Pamela Laufer-Ukeles, *Gestation: Work for hire or the essence of motherhood? A comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL’Y 91, 91-134 (2002).

The first-ever recorded surrogacy was of 'Hager'. In the book of 'Genesis', Sarah who was the wife of Abraham was told by God that she will be the mother of nations.⁵ The couple was aged and childless, so they didn't believe she could ever be a mother because Abraham himself was eighty-six years old. The bareness of Sarah was troubling her, so she convinced her servant/ maid 'Hager' to bear a child for Abraham. Hager served as a surrogate and bore the child.⁶

Another biblical example of surrogacy would be of 'Rachel' and 'Jacob'. Jacob was married to her and also Leah⁷. Leah gave birth to four sons and Rachel wasn't able to give birth to even one. This made her furious and she asked her maid 'Bilhah' to be a surrogate for her and bear a child for her.⁸ The world's first baby through test-tube was 'Lousie Joy Brown' in 1978. It was a day to be engraved in the history of scientific technology; 25 July, 1978. She was born via IVF to Peter Brown and Lesley. Lesley had another baby after a few years via IVF as well.⁹

Surrogacy has been mentioned in Indian mythology as well. A practise of 'Niyog Pratha' was used in historic times to resolve the problem of infertility. Men who were impotent and women who were infertile took 'Niyog Pratha' as a means of surrogacy. It has been described in *Manusmriti*.¹⁰ India's first IVF and world's second successful IVF is 'Kanupriya alias Durga'.¹¹ It is evident that for years women have been trying to solve the problem of bareness and infertility through surrogacy.

Capabilities Approach: Martha Nussbaum

The researcher draws an analogy between commercial surrogacy and capabilities approach. Amartya Sen (*hereinafter* Sen) and Martha Nussbaum (*hereinafter* Nussbaum) have both developed their theories surrounding capabilities approach. This paper specifically deals with Nussbaum's approach. So, it is imperative to know what exactly are "capabilities"? It means the "real

⁵ Izabela Jargilo, *Regulating the Trade of Commercial Surrogacy in India*, 15(2) J INT'L BUS & L 339, 337-360 (January, 2016).

⁶ *Genesis* 16:2.

⁷ Leah was Rachel's sister.

⁸ See Nayana Hitesh Patel, *Insight into Different Aspects of Surrogacy Practices*, 11(3) J HUM REPROD SCI. 213, 212-218 (November, 2018).

⁹ Louise Brown and Martin Powell, *Louise Brown: my life as the world's first test-tube baby*, 3 REPROD BIOMED ONLINE 143, 142-144 (December, 2016).

¹⁰ See Manoshi Sinha, *Surrogacy and artificial insemination in Ancient India: An analysis*, MY INDIA MY GLORY (February 29, 2020), <https://www.myindiamyglory.com/2020/02/29/surrogacy-and-artificial-insemination-in-ancient-india-an-analysis/> (last visited on February 01, 2021).

¹¹ See Nozia Sayyed, *India's first test tube baby celebrates 40th birthday in Pune*, HINDUSTAN TIMES (October 08, 2018) <https://www.hindustantimes.com/pune-news/india-s-first-test-tube-baby-celebrates-40th-birthday-in-pune/story-gkuSp5nhdlrsmwxiJmCiK.html> (last visited February 01, 2021).

opportunities” a person gets.¹² What a person is “really” able to achieve? What are the resources available to an individual? Sen called these “substantive freedom”.¹³ Sen’s capabilities approach is a moral framework. It proposes that social arrangements should be primarily evaluated according to the extent of freedom people have to promote or achieve functioning they value.¹⁴ How the traditional notion of economic welfare is replaced by human welfare. Human welfare isn’t limited to wealth. It includes what the wealth helps us to buy and achieve. It includes the freedom of living a life and freedom of choices. Thus, removing the hindrances of exercising the freedom. For example; poverty and tyranny of majority reduce one’s capabilities etc.¹⁵

On the other hand, Nussbaum talks about the ‘Internal Capabilities’. It means the health, bodily integrity, personality traits of a person, emotions, skills etc. are included in internal capabilities of a person. Secondly, she substantiates “external conditions”. These external conditions either hamper or allow a person to exercise their capabilities. The social conditions, political conditions, economic conditions etc. surrounding a person are the external conditions. The second capability is the ‘combined capabilities’. Combined capabilities is the combination of the internal capabilities and the external environment provided to a person.¹⁶

The researcher keeps Nussbaum’s theory of capabilities approach parallel to commercial surrogacy. Nussbaum sought the “empowerment” of each person and not just the community as a whole. She called this “principle of each person as an end”.¹⁷ It implies each woman has autonomy over her body and has a right to bodily integrity (i.e. internal capabilities). The Surrogacy (Regulation) Bill, 2019¹⁸ outlawed commercial surrogacy. The ban on commercial surrogacy means government is dictating its ownership over a woman’s bodily autonomy and right to privacy. The government is telling women “what they can do with their body and what they cannot”. A woman has the sole prerogative to decide for her body.¹⁹

¹² Martha Nussbaum & Rosalind Dixon, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL LAW REVIEW, 549, 557 (2012).

¹³ *Ibid.*

¹⁴ Sabina Alkire, *Why the Capability Approach?*, 6(1) J. HUM. DEV. 122, 115-133 (March, 2005).

¹⁵ Shija Kuhumba and Shijja Kevin Kuhumab, *Amartya Sen’s capability approach as theoretical foundation of human development* 1(1) J. SOCIOL. DEV. 129, 127-145 (March, 2018).

¹⁶ MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH*, 22 (2011).

¹⁷ Martha Nussbaum & Rosalind Dixon, *Supra* note 12.

¹⁸ The bill hasn’t been passed in Rajya Sabha yet. It has been passed by Lok Sabha. The Bill intends to curb commercialisation of surrogacy and permit only altruistic surrogacy.

¹⁹ For instance, every woman has a right to abort upto 24 weeks. The desire to pursue or abort should patently be a woman's choice, as it may influence a woman's future life and affect her other human rights. Urging women to carry on unintended pregnancies would be a violation of their right to health and bodily

She has the “choice to choose any profession or employment”.²⁰ These are threshold capabilities²¹ that every human possesses. These are the bare minimum threshold. Anything below this would be social injustice.²² Women, on the other hand, are not afforded the opportunity to exercise these abilities. Society explicitly prohibits them from acting on their abilities and instead retaliates their dignity for choosing a profession like surrogacy. Society needs to provide a combination of political, social and economic environment for them to exercise their opportunities. Thus, combined capabilities aren’t promoted and augmented here. Only promoting internal capabilities and not providing adequate environment to exercise the capabilities, annihilates the capabilities anyway. For example, everyone has a right to freedom of speech and expression but political dissent ends up being labelled as either sedition

integrity. Thus, having access to abortion ensures “her bodily autonomy”. Similarly, commercial surrogacy empowers women to decide for “their” bodies.

²⁰ THE CONST. OF INDIA, art. 19(1)(g).

²¹ Nussbaum proposes a list of 10 central capabilities. 1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

2. *Bodily health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. *Bodily integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. *Senses, imagination, and thought*. Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety.

6. *Practical reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life.

7. *Affiliation*. (A) Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (B) Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. *Other species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. *Play*. Being able to laugh, to play, to enjoy recreational activities.

10. *Control over one’s environment*. (A) *Political*. Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association. (B) *Material*. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers. See, MARTHA C. NUSSBAUM, *Supra* note 16 at 33-34.

²² See, MARTHA C. NUSSBAUM, *Supra* note 16 at 40-42.

or anti-nationalist.²³ Although, one has a freedom of speech and expression, it becomes inefficacious because political dissent is unwelcomed (no external conditions provided).

In *B. K. Parthasarathi v. Government of Andhra Pradesh*,²⁴ the Andhra Pradesh HC observed “the right of reproductive autonomy” as a basic right. It is a facet of the right to privacy which is a fundamental right as held in *K.S. Puttaswamy v UOI*²⁵. In the United States SC case, *Jack T. Skinner v. State of Oklahoma*,²⁶ it was held that one of the basic civil rights of an individual is the right to reproduce. Therefore, the right to reproduction and right to bodily autonomy are basic rights of a human being and should be constitutionally protected by the State. Right to bodily integrity is a subset of right to privacy which is a fundamental right.²⁷

The Bill defines commercial surrogacy as “means commercialisation of surrogacy services or procedures or its component services or component procedures, including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and insurance coverage for the surrogate mother”.²⁸ The Bills puts a ban on commercial surrogacy and accommodates only altruistic surrogacy.²⁹ However, the researcher would suggest that the ban should be removed so that the impoverished women are paid for surrogacy to support their families and pay off their debts.³⁰

Furthermore, the Surrogacy Bill gives rise to manifold constitutional issues because it restricts women's ability to exercise their inherent rights. Many women will not choose surrogacy as a form of financing if it is no longer compensated. They will be vulnerable and marginalized in society, yet again. Altruistic surrogacy will

²³ *Id* at 21.

²⁴ *B. K. Parthasarathi v. Government of Andhra Pradesh*, AIR 2000 A. P. 156.

²⁵ *K.S. Puttaswamy v UOI*, (2017) 10 SCC 1.

²⁶ *Jack T. Skinner v. State of Oklahoma*, 316 US 535.

²⁷ THE CONST. OF INDIA, art. 21.

²⁸ The Surrogacy Regulation Bill, 2019, § 2(f).

²⁹ Neetu Chandra Sharma, *Lok Sabha gives nod to legislation that bans commercial surrogacy*, LIVEMINT (05 Aug 2019) <https://www.livemint.com/politics/policy/lok-sabha-gives-nod-to-legislation-that-bans-commercial-surrogacy-1565028271347.html> (last visited on February 07, 2021). See also The Surrogacy Regulation Bill, 2019, § 35.

³⁰ B. Asvini and C. Renuga, *Legality of Surrogacy with Special Reference to Surrogacy Bill 2019*, 8(12) INT. J. INNOV. TECHNOL. EXPLORING ENG. 2306, 2302-2306 (October, 2019).

exacerbate family conflicts.³¹ The bill definitely suggests strategies to secure and safeguard women from exploitation, but it also inadvertently stimulates it. It causes more harm than good. This bill encourages commercial surrogacy “away” from the “public eye”. It means more sexual objectification of women, which was ultimately the goal of prohibiting commercial surrogacy. Now, if the surrogate mother is exploited and extorted, she cannot approach a legal system for redressal of her grievances. There is no “legal remedy” for her.

Nussbaum says it is the obligation of the government to fulfil the bare minimum capabilities (providing women, conditions to exercise their bodily integrity) which assists in leading a dignified life. The capabilities become inefficacious if they are merely on paper and not exercised in “real” sense.

Kantian Notion of Rational Agent

Immanuel Kant (*hereinafter* Kant) said “humans” are very valuable because they have an intrinsic worth which makes them “above all price”.³² Kant substantiates, people have an intrinsic worth called dignity because people are “moral and rational agents”. As rational agents, one is capable of making decisions for themselves. They don’t need someone else to decide for them. They possess the ability to set their own priorities, and guide their behaviour through reason.³³ Thus, as rational agents, surrogate mothers have the sole prerogative to decide what she wants to do with her body, not the government.³⁴ The autonomy of a person is “infringed” when people are coerced into doing things they do not want to do.³⁵

International Response to Procreation as a Profession

There are various countries in the world who are against surrogacy like Nepal, Germany, Spain, Switzerland, Thailand, Italy, and Portugal, etc. They have outlawed surrogacy agreements³⁶. There are countries that merely allow altruistic

³¹ According to the Surrogacy Bill, only relatives can be surrogate mothers. This can lead to family discord because the surrogate mother has undue influence over the intended parents. They can use the child as a pawn and leverage.

³² JAMES RACHELS AND STUART RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 136 (McGraw-Hill, 2012) (*hereinafter* Rachels)

³³ *Id* at 137.

³⁴ Rachels says “[t]reating people as ends, and respecting their rational capacities, has other implications. We should not force adults to do things against their will; instead, we should let them make their own decisions”. *See, Id* at 139.

³⁵ Thus, a woman’s autonomy is violated when the government dictates its ownership over her body and tells her something she doesn’t want to do by banning commercial surrogacy.

³⁶ That is, both commercial and altruistic surrogacy are banned.

surrogacy like Ireland, Denmark, Australia, and Netherlands etc.³⁷ Russia is a country that allows commercial surrogacy. The right to profession is supported by the following international covenants, treaties, and conventions. They support the researcher's claim that women have the right to choose their profession in accordance with international standards.

a. The International Covenant on Economic Social and Cultural Rights

It clearly mentions that the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.³⁸ It further mentions that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.³⁹

Moreover, the covenant further implies that:

The States Parties to the present Covenant recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”.⁴⁰

The covenant doesn't expressly prohibit surrogacy but rather it says that women have the right to have a decent living for themselves. They can engage in professions that they feel are right for them. Each and every human being must have a 'freedom of choice'. The freedom to choose what is best for them and what is not best for them. The idea is to have an inclusive society where people of different

³⁷ See Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers*, 48(2) GOLDEN GATE U. L. REV. 168, 162-184 (May, 2018).

³⁸The International Covenant on Economic Social and Cultural Rights, 1966, art. 3.

³⁹ The International Covenant on Economic Social and Cultural Rights, 1966, art. 7.

⁴⁰ The International Covenant on Economic Social and Cultural Rights, 1966, art. 11 (1).

professions can co-exist in harmony. This covenant also ensures that the surrogate mother's rights are not abused and that she has her rights.

b. Universal Declaration of Human Rights

The UDHR manifestly remarks “that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection”.⁴¹

As long as the conditions are just, each person has the freedom to choose what they want to do to get remuneration. Again, it emphasises that everyone has the right to have the adequate means to have a well-being and good health.⁴²

c. Convention on Elimination of all Forms of Discrimination against Women

The convention has defined the discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁴³

The convention then evidently states that the States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment ⁴⁴

According to the researcher, this convention is critical for bolstering women's rights as surrogate mothers. Women are sometimes exploited in the name of surrogacy, and this convention would be an ideal instrument for keeping a check and balance on the predicament. The convention will protect women's rights while also promoting surrogacy as a viable practice. In this growing age of surrogacy, all countries must adopt it. It will serve as a tool to prohibit all forms of exploitation

⁴¹ Universal Declaration of Human Rights, 1948, art. 23.

⁴² Universal Declaration of Human Rights, 1948, art. 25.

⁴³ Convention on Elimination of all Forms of Discrimination against Women, 1979, art 1.

⁴⁴ Convention on Elimination of all Forms of Discrimination against Women, 1979, art. 11.

and trafficking of women, as well as all forms of gender discrimination. In a country like India, poor women are carefully chosen for surrogacy. It will give them more negotiating power and less subjugation. These conventions don't exclusively and selectively prohibit surrogacy but rather buttress the idea that the rights of women need to be protected and secured. This can be done 'without banning' surrogacy as well.

Debunking the Conundrum Associated With Commercial Surrogacy

a. Commoditization of the Child and Mother

Anti-surrogacy groups often equate surrogacy as a process of "commoditization of mother and child". The infamous case of *K.S. Puttaswamy*⁴⁵ has made it manifest that 'right to privacy is a fundamental right'. The bench stated unequivocally that the right to privacy includes the ability to control one's own body and mind. Every human being has the right to choose what they want to do with their bodies. It is entirely up to them. It is their choice because their body is theirs. This is not the end of it; they also have the right to make their own "sexual and reproductive decisions".

In India, there have been severe debates around this and they have called surrogacy as a 'baby factory'.⁴⁶ The ban on commercial surrogacy is a regressive move and not progressive move. Each woman has autonomy over her body and whether or not she wants to be a surrogate is her choice. The woman provides her services to the intending parents and they make sure that she delivers the baby safe and healthy. Thus, the surrogate mother is provided with extra medical facilities and care. It is also the obligation of the surrogate to not violate the contract by consuming liquor/alcohol. It is just like a job wherein people are hired to offer their services and receive salary or remuneration in return. If they aren't termed as 'commodities', then why are women who wish to be a surrogate mother seen/treated so differently?

A woman's ability to take decisions regarding her body is an indispensable part of human dignity and is often neglected. The act of being a surrogate mother is often considered 'unnatural' because it goes against the natural order of giving birth to a child. India is a country which typically admires the patriarchal norms. In a country, where if a man donates a sperm. It is considered normal and rational. India

⁴⁵ *K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1.

⁴⁶ See Arijeet Ghosh and Nitika Khaitan, *A Womb of One's Own: Privacy and Reproductive Rights*, 52(42-43) VIDHI CENTRE FOR LEGAL POLICY (October 28, 2017) <https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights> (last visited on February 08, 2021).

is a country, where the humorous movie 'Vicky Donor' was directed to normalise the notion of sperm donation, but commercial surrogacy was banned because it is considered immoral for a woman to carry someone else's child.

The researcher would like to shed some light on J.S. Mill's harm principle. J.S. Mill (*hereinafter* Mill) is an infamous British philosopher. He said, if someone's action inflicts harm on others, he must be impeded. If not, he has the liberty to do what they want.⁴⁷ A surrogate mother inflicts absolutely no "harm" to others. So, she can be a surrogate mother as long as she doesn't inflict harm on others. In Mill's work 'On Liberty', he said and the researcher quotes

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. ... In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁴⁸

The Declaration of the Rights of Man, 1789 states in its article that "liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."⁴⁹

It is a constitutional right of a person to have a family and by banning commercial surrogacy, one gets deprived of their basic rights. The researcher attempts to highlight that constitutional morality is the bigger picture to strive for and not popular morality. To be a progressive society the needs and demands of everyone must be addressed so that there is an inclusive society. The majority's

⁴⁷ STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available on <https://plato.stanford.edu/entries/mill-moral-political/#HarPri> (last accessed on 17 November 2020).

⁴⁸ ONLINE LIBRARY OF LIBERTY, available on <https://oll.libertyfund.org/quotes/81> (last accessed on 17 November 2020).

⁴⁹ LILLIAN GOLDMAN LAW LIBRARY, available on https://avalon.law.yale.edu/18th_century/rightsof.asp (last accessed on 17 November 2020).

tyranny shouldn't hamper and suppress the living of the minority people.

b. Exploitation of the Surrogate Mother: Coerced and Uninformed Consent?

It is infeasible to say that commercial surrogacy is without inconsistencies. Surrogates are frequently undervalued, extorted, manipulated, or blackmailed, and they lack legal protections as well as an "adequate" health insurance.⁵⁰ All the chilling effect of commercial surrogacy is the result of unregulated practices. Prohibiting commercial surrogacy and instituting penalties would not prevent the exploitation of women who want to be surrogate mothers. This would instead ignite the illegal market of commercial surrogacy, wherein women have no safety and security.

The majority of women choose commercial surrogacy because it pays well. Because of gender disparities, the other low-paying jobs are equally bad. Most are underpaid simply because they are a 'woman.' It places them between a rock and a hard place. Carrying a baby is certainly frightening but it is still preferable to the back-breaking work they do. Because the surrogate is carrying someone else's child, they will make sure that she does not engage in physical labour and receives adequate care. It is critical for the mother's health. Abigail Haworth, reporting for Marie Claire, told the story of Sofia Vohra, a surrogate who previously earned U.S. \$25 a month as a glass-crusher; Vohra said, "This is not exploitation. Crushing glass for fifteen hours a day is exploitation. The baby's parents have given me a chance to make good marriages for my daughters. That's a big weight off my mind".⁵¹

The Surrogacy Bill clearly states that (1) No person shall seek or conduct surrogacy procedures unless he has—

(i) Explained all known side effects and after effects of such procedures to the surrogate mother concerned; and

(ii) Obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.

(2) Notwithstanding anything contained in sub-section (1), the surrogate mother shall have an option to withdraw her consent for surrogacy before the implantation of human embryo in her womb.⁵² This is an attempt to make sure that the exploitation which claims to ensure the process of surrogacy can be reduced as much as possible. If the society compels a person to do something that they wouldn't have otherwise done, and that opportunity is taken away from them,

⁵⁰ See Shonotra Kumar, *India's Proposed Commercial Surrogacy Ban Is an Assault on Women's Rights*, THE WIRE (November 09, 2019) <https://thewire.in/law/surrogacy-ban-assault> (last visited on February 08, 2021).

⁵¹ See DAISY DEOMAMPO, *TRANSNATIONAL REPRODUCTION: RACE, KINSHIP, AND COMMERCIAL SURROGACY IN INDIA*, 241 (2016) (ebook).

⁵² The Surrogacy (Regulation) Bill, 2019, § 6.

wouldn't it worsen the situation? They will remain marginalised and vulnerable all their life and get trapped in this vicious circle of poverty.

c. Bonding Theory

Another problem often associated with surrogacy is that it breaks the 'bond between the unborn child and mother'. The researcher refutes all such claims and believes that every surrogate mother is different. The statement that every woman develops a bond with the child is nothing more than a fallacy. The surrogate mother already signs a contract wherein they are required to give up the baby in their womb. They 'intend' to give up and 'desire' to do so. According to multiple studies, most surrogates reported experiencing less of a maternal bond with the babies they deliver and having very little hardship delivering the child to the commissioning couple.⁵³ There is usually a moral repulsion to the idea of relinquishment of the child voluntarily because of the societal stigma attached to it. It is considered mandatory to have a "maternal instinct" with the baby.⁵⁴ So, if a surrogate doesn't feel the bond and maternal instinct, her profession is attacked. Her dignity is spearheaded because she wants to do something "unnatural" which is against the order of nature.⁵⁵

It is important to comprehend that these results can't be generalised and some mothers might have difficulty giving up the children, but over the course of time they understand what they signed up for. Sometimes, it is reversed in order. It is the relationship between the intended mother and the surrogate that is the strongest⁵⁶ because they pay for her services. They make sure she gets everything she needs. This makes her emotionally connected to them. Some surveys proved that relinquishing a child led to little or no difficulty at all in giving the child to the intended parents.⁵⁷

Coda and Recommendations

In India, it is 'expected' of a woman to procreate children. The society shuns her, disrespects and excludes her, if she is infertile. Infertility is a curse that surrogacy has attempted to alleviate for many years. All the religions in its ancient

⁵³ See Noelia Igareda González, *Regulating surrogacy in Europe: Common problems, diverse national laws*, EUR. J. WOMEN'S STUD. 5, 1-12 (March, 2019).

⁵⁴ *Id* at 4.

⁵⁵ *Ibid*.

⁵⁶ See Richard F. Storrow, *New Thinking on Commercial Surrogacy*, 88(4) IND. L. J., 1283, 1281-1288 (August, 2013)

⁵⁷ Noelia Igareda González, *Supra* note 42. Noelia then puts forward an illustration of Israel. She says "[I]n Israel, where altruistic surrogacy is permitted, most surrogates report they are highly satisfied with the arrangement and that relinquishment has not caused psychological problems".

scriptures and holy books have references about it. Surrogacy has conclusively demonstrated to be a boon to the world while also being one of the most contentious procedures in both the medical and legal fields. The Surrogacy (Regulation) Bill, 2019, is the most recent surrogacy legislation, but it has yet to be passed in Rajya Sabha. It has outlawed commercial surrogacy. The prohibition is a gross violation of Article 21 of the Indian Constitution. It infringes on the right to enter into contracts. It was a revenue stream for many women, but the government has now taken it away from them. The bill will have a detrimental impact on the poor. Surrogacy was viewed by women as a source of hope and an empowerment mechanism. They will no longer be motivated to be a surrogate mother. Surrogacy has both upsides and downsides. The beneficial effects of this procedure outweighs the drawbacks. Surrogacy contracts are valid and should be enforced, despite their ethical and social issues. Commercial surrogacy is legal in some countries even today. It is a multibillion-dollar industry that provides employment to a significant number of people. The researcher is adamant that commercial surrogacy should not be prohibited. The researcher concludes by saying that banning commercial surrogacy isn't the solution, rather fixing the challenges in it by regulating it, is.

The following is the list of recommendations and suggestions which can be used to regulate commercial surrogacy more effectively and efficiently:

- i. The policy-makers and law-makers should have up laws covering all the aspects of surrogacy. There are many latent problems that can arise in surrogacy like the citizenship, custodial rights, child rights, right to know the origins, etc. which needs to be addressed lucidly to avoid conflicts and legal battles. This can have adverse impact on the child.

- ii. The government's obligation isn't limited and circumscribed by law-making and policy-making. It includes implementation of the textual law. Rights and duties are purposeless if they are merely on paper and there aren't arrangements done to implement it.

- iii. If there is exploitation of poor women, then it doesn't mean one should ban surrogacy. Banning isn't the solution. The state must take action on the same. Rights can't be curtailed merely because there is a possibility of exploitation.

The government should make sure that only ART clinics duly registered and having the licence are allowed to run. There should be a database for the same to keep things in check and to monitor everything.