

SURROGACY AND REPRODUCTIVE RIGHTS: AN ANALYSIS IN INDIAN AND INTERNATIONAL CONTEXT

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Surrogacy and reproductivity are burning issues of our society. Political actions, mobilizations, consent of surrogated mother, contraception, maternal mortality and caring of infertility for example ICD programme give rise to a debate over the aim and goals of surrogacy practices in India. This article will discuss in detail the Surrogacy, kinds of surrogacy, reproductive rights and related issues with the help of national and international laws, case studies of India and abroad.

Key words: Surrogacy, ART, Commercial, Reproductive Rights

Introduction

The most widespread and prevalent problem in India is infertility and motherhood. Women are expected to become mothers and carry forward the family lineage. Infertility is a general reproductive health problem. It creates sadness and despair. It lowers one's self esteem and creates tension within the marriage. Around 80 million people around the globe are infertile. It may be due to late marriage, hypertension, stressed life, other biological disorders, hormonal imbalances, etc. Women have to face trauma, stigmatization, discrimination in the family and society. A change was witnessed with a solution to overcome infertility problems through ART (Assisted Reproductive Technology) through surrogates and sperm or embryo donors. Surrogacy is a blessing in disguise for the childless couple as the intending parents can have their biological child. Many questions are being put on the use of Surrogacy through ART to have a child. Other problems being moral, legal, and ethical issues in surrogate motherhood and a baby born out of that Surrogacy. Historically, policies and laws in India related to women's health and hygiene are designed looking at the acknowledgment of women's rights and scenarios related to them. Rather,

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we find them more bent towards the poll targets like population control. This more or less snatches away women's autonomy on reproduction matters.¹

Surrogacy in Ancient India: Surrogacy was practiced in India since time immemorial. According to Bhagwad Gita, “Even Lord Krishna is understood to have born without a sexual union. This is in regard to the seventh pregnancy of Devaki, by the will of the Lord; this embryo was then transferred to the womb of Rohini, the 1st wife of Vasudev, to prevent the baby being killed by Kansa”.

Meaning: Surrogacy

Black's Law Dictionary defines surrogacy as a process where a woman carries and delivers the child for another couple, who because of some medical reasons fails to beget a child. Surrogacy can be broadly classified into two classes, i.e., Traditional and Gestational surrogacy. On the grounds that whether the surrogate mother has received any monetary compensation or not, surrogacy can further be classified into commercial or altruistic surrogacy.

The Apex Court of India has defined Surrogacy as:

“A method of reproduction, in which a woman agrees to become pregnant to gestate and give birth to a child whom she will not raise but hand over to a contracting party.”²

Meaning of Reproductive Rights

Black's Law Dictionary “Reproductive Rights are the rights of individuals to decide whether to reproduce and have good reproductive health. This may include rights like an individual's right to plan a family, terminating a pregnancy, using contraceptives, learning about sex education in public schools, and gain access to reproductive health services”.

As per Section 3 (65) of the General Clauses Act, 1897, 'reproducing' means 'producing again.' According to Dorland's Illustrated Medical Dictionary, Reproduction means “production of offspring by organized bodies; the creation of a similar object or situation, duplication, replication.”

In *Alka Sharma v. Abhinesh Chandra Sharma*,³ it was held by the court that 'procreation' means 'to produce an offspring' and 'procreate' means 'the capacity of a spouse to give birth as also rear up and bring up children.

1 Reproductive rights, available at; <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf> (visited on 9.7.2023).

2 *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84.

3 AIR 1991 MP 205

Hon'ble Supreme Court in *Devika Biswas v. Union of India and Ors.*,⁴ held unequivocally that Article-21 of the Constitution includes the 'reproductive rights of a person. It recognizes Personal Liberty and Health under Article- 21 of the Indian Constitution. The Supreme Court found "the freedom to exercise these reproductive rights would include the right to choose sterilization based on informed consent and free from any form of coercion."

Kinds of Surrogacy

Traditional Surrogacy: It can also be known as Natural or Straight Surrogacy, where a surrogate mother, through artificial insemination, by the intending father or by an anonymous donor, carries the baby for 9 months. The child is genetically associated with the surrogate mother, as she provides the egg, and the intending father or donor donates his sperm artificially via intrauterine insemination (IUI), intracervical insemination (ICI), or sexual intercourse.

Gestational Surrogacy (Host Method): In Gestational Surrogacy, the surrogate mother acts only as the baby's carrier and isn't biologically or genetically related. In this process, an egg is hereby removed from intended mother or the donor and fertilized with the sperm of the intending father or unknown donor. The fertilized embryo, or egg, is then transferred in the surrogate mother who will carry the baby. The child belongs genetically to the woman who donated the egg along with the intended father or sperm donor, but not the surrogate women". In the abovementioned type of surrogacy, the surrogate mother is often referred as the gestational carrier.

Commercial Surrogacy: Under this Surrogacy process, the female acting as Surrogate is being paid to bear a child and is then required to hand over the baby after the delivery to the contracting parents. This is usually reported by the financially sound couples, who are infertile and can afford the expenses of fulfilling their dreams of becoming parents. Commercial Surrogacy is often referred to by some potentially and sensitive offensive terms like "wombs for rent," "outsourced pregnancies," or even "baby farms." The surrogate mother in Commercial Surrogacy is provided with benefit (monetary) or rewards (Cash/Kind) in addition to the basic medical expenses and insurance.

Altruistic Surrogacy: Surrogate conceives or carries a child with no financial transactions other than pregnancy and birth costs.⁵ Altruistic surrogacy can be generally referred as an arrangement between the surrogate mother and the intended parents, in which the surrogate mother out of compassion and in order to help the intended parents carries and delivers the child for them in return of no compensatory benefits except the medical expenses, clothing, maternity and other related expenses.

Right to Procreate with the Surrogacy Route: Reproductive right of an infertile couple and surrogate mother

Over the period of time, surrogacy has become a recognized and well-known method / procedure for reproducing a child with the help of the surrogate mother. It can be defined as a process whereby the woman agrees to carry the child and after delivery hand over the child to the intended parents. Intending parents may arrange for a surrogate as the woman who intends to become a parent is either not willing to be pregnant or is infertile. Surrogacy arrangement can also be about fulfilling the parental needs of a same-sex couple (gays or lesbians) through the various kinds of Surrogacy discussed above. In addition, the question is, do infertile couples have a right to have children? The Judiciary has also documented the fact that reproductive right of humans is their Basic Right. If an individual has a reproductive right that can be constitutionally protected, then Surrogacy acts as a ray of hope for the infertile couple which enables them to exercise their reproductive right endowed upon the individuals by the Constitution. If the fruitlessness is the reason for marital discord, then the introduction of posterity unites a couple. In the present situation, where Live in Relationships are legal, and Same-Sex relationships are given legitimate acknowledgment, the right to multiply must additionally be reached out to Gays, Lesbians, single men, or ladies. Accordingly, the idea of "lease a uterus" might be promptly acknowledged in a more logical temper with the contention "at any rate the infant is made with our gametes, even though sustained in a leased body". As propagation is one of the fundamental points of marriage and the kid is the primary and nostalgic interest of a couple, surrogacy goes about as a facilitator, not a destructor. On one hand, an infertile couple has a fundamental right to have a family under various articles and conventions nationally and internationally, and on the other hand, what about the rights of the women who have agreed to carry the baby for the intending couple, i.e., the Surrogate Mother. The

5 Dennis P. Hollinger, *The Meaning of Sex: Christian Ethics and the Moral Life*. Michigan, USA: Baker Academic 2009.

Surrogate mother too has a right to make and take decisions with respect to her body, including carrying a pregnancy to full term, conceiving an offspring, and raising children subsequently. A woman has the right to procreate, then what's the harm if she produces and delivers the baby to somebody else. Why such hypocrisy on our fundamental Human rights? To give birth to a child and handing it over to the intending parents is a 'win-win' situation for both of them. It is the dire need of the hour to balance the rights of the Surrogate mother and also the Infertile couple. It is evident from various national and international laws that Reproductive rights are inherent to human rights. Some of them are stated as follows:

1. Right to Life, Security, and Liberty
2. The fundamental right to health, reproductive health, and family planning.
3. The right to choose upon the number, spacing of children.
4. The right to consent and equality in marriage.
5. Right to Privacy.
6. Right to be safe from practice that harms women and girls.

*** International provisions on the Right to Reproduce (Right to Procreate)**

The World Health Organizations (WHO) Preamble to the Constitution states that: Every human being has the fundamental right to enjoy the uppermost attainable standard of health. The term 'health,' here, encompasses within its ambit right of women to reproductive health. The health right carries significant importance concerning women, more particularly, keeping in view their biological structure and child-bearing capacity. Following provisions are relevant:

- **Article 16 (1) of the Universal Declaration of Human Rights, 1948;**⁶
- **Article 25 of the Universal Declaration of Human Rights, 1948** lays down that without any discrimination, every person is entitled to have a right to standard of living, which encompasses the right to health and well-being of the person himself and his family;

⁶ It states that 'Men and women of full age, without limitation due to race, nationality or religion, have found to marry and found a family. They are entitled to all rights equally as to marriage, during the wedding, and at its dissolution. The Universal Declaration of Human Rights, available at; <https://www.un.org/en/universal-declaration-human-rights/index.html> (visited on 03.07.2024).

- **Article-11, Article-12, and Article-14 of “Convention on the Elimination of All Forms of Discrimination against Women, 1979”;**⁷
- **Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966;**⁸
- **The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 under Article 12;**⁹

The **Cairo’s Programme of Action 1994** categorically states, in regards to the right to procreate, as follows: *“Reproductive rights embrace a certain number of human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on recognizing the basic right of all couples and individuals to decide freely and responsibly the number, the spacing, and timing of giving birth to their children and to have the information and means to do so, and the rights to attain the highest standard of sexual and reproductive health. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.”*¹⁰;

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- 7 “The States shall take necessary measures to eliminate discrimination against women in the field of health-care, to ensure that access to information, counseling, and services qua family planning is available to all women on equal terms, in parity with men.” Available at; The Convention on the Elimination of All Forms of Discrimination against Women, 1979, <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (visited on 03.07.2025).
- 8 Sec.12(1) Member States have agreed to recognize everyone’s right to the enjoyment of the highest attainable standard of physical and mental health. S.12(2) The Protocol provides that the steps to achieve this right, in particular in regards to the right to reproductive health, shall include those stated in, Article 12 (2)(a), that is, the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; and Article 12 (2)(d), that is, the creation of conditions, which will assure to all medical service and medical attention in the event of sickness. Available at; The International Covenant on Economic, Social and Cultural Rights <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (visited on 03.07.2020).
- 9 “Men and women of marriageable age have the right to marry and to have a family, according to the national laws which govern the exercise of this right.” Available at; The Convention for the Protection of Human Rights and Fundamental Freedoms, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> (visited on 03.07.2020).
- 10 The **Cairo’s Programme of Action 1994**, Available at; https://www.un.org/en/development/desa/population/events/pdf/expert/27/SupportingDocuments/A_CONF.171_13_Rev.1.pdf (visited on 3.7.2020).

Principle 24 of the Yogyakarta Principles¹¹

* The Legality of Surrogacy in India

In India, Surrogacy was itself legalized in 2002 to boost the medical industry, and soon India became the most opted centre of Surrogacy. According to the 2002 **"Indian Council of Medical Research" (ICMR)** guidelines for Surrogacy, which researched Surrogacy legally but did not give it any legislative backing, commercial and philanthropic Surrogacy were considered lawful. However, in the 228th Report "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a surrogacy," the Law Commission of India (LCI) has strongly recommended against Commercial Surrogacy. According to **Assisted Reproductive Technology (ART) Regulation Bill, 2010**.¹² The followings are the characteristics of the 2010 Bill:

1. Heterosexual couples, heterosexual individuals, and closet homosexuals with closet partners are eligible to commission surrogacy.
2. For Surrogacy commissioning infertility marks out the sole reason.
3. The surrogate mother should have less than 5 children including her own and age should be between 21 to 35 years.
4. Permission to act as a Surrogate will be granted only to Indian citizens, and no ART banks or clinics shall get or send an Indian for Surrogacy out of the country. The ART Clinics have to keep a database at central level having confidential records of clients, donors, and surrogates.
5. The choice recognizing with the amount to be paid for the Surrogacy is exclusively inside the watchfulness of the appointing parents and also the substitute mother.

11 Right to find a Family. This principle states that all States should take necessary legislative, administrative, and other measures to ensure the right to see a family, including access to adoption or **assisted procreation (including donor insemination)**, without discrimination based on sexual orientation or gender identity. The Yogyakarta Principles, available at; <https://yogyakartaprinciples.org/principle-24/> (visited on 3.7.2020).

12 The Central Government themselves was not clear on the provision that should be in the legislation to regulate Surrogacy. At the same time, the Ministry of Home Affairs considers that gay couples and single foreigners not eligible to have a child via Surrogacy in India, the Ministry of Health and Family welfare and the Women and Child Development ministry have put forward their opinion that Surrogacy should be allowed for everyone without discrimination. Available at; <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/> (visited on 6.07.2024).

The Surrogacy (Regulation) Bill, 2016¹³ - The Ministry of Health and Family Welfare in Lok Sabha on July 15, 2019 introduced The **Surrogacy (Regulation) Bill, 2019** which was passed on August 5, 2019.

Study of the Surrogacy (Regulation) Bill, 2019 is as follows:

1. The Bill allows altruistic Surrogacy and puts a ban on commercial Surrogacy. It can be opted by one who is suffering from infertility. The bill adopts some stringent measures in order to restrain activities relating to sale, prostitution, or any other mode of exploitation of the children.
2. The appropriate authority must have issued the following for the intending couple:
 - 2(a) **“Certificate of Essentiality**-A certificate of infertility for one or both of the intending parents from a District Medical Board; Magistrate Court must pass an order of parentage and custody of the surrogate child; Insurance cover for sixteen months that cover post-delivery complications for the surrogate”.
 - 2(b) **“Certificate of Eligibility**- The couple should be Indians and married for minimum five years; the age of wife should be between 23 and 50 years, and the husband should be between 26 and 55 years. The couples should not have any surviving child (either natural, adopted, or surrogate); this does not include a mentally retarded or physically affected child or suffers from dreadful disorder or illness;”
3. In order to meet the eligibility criteria, the surrogate mother should be a close relative of the intending parents, she should be married with her own biological child; age of the surrogate mother should be between 25 to 35 years; A woman can become a surrogate mother only once in her lifetime; she should possess medical certificate and mental fitness certificate.
4. Various offences according to the Bill are as follows: (i) to practice or advertise commercial Surrogacy in any form; (ii) exploitation of the surrogate mother; (iii) abandoning, exploiting, or not owning a

13 “It regulates Surrogacy by establishing National Surrogacy Board at the Central level, State Surrogacy Boards, and Appropriate Authorities in States and Union Territories. The proposed legislation ensures effective Surrogacy regulation, prohibits commercial Surrogacy, and allows ethical Surrogacy to needy infertile couples.”

surrogate child (iv) selling or importing human embryo or gametes for Surrogacy, the fine for such offenses is imprisonment upto ten years and a fine upto ten lakh rupees.

Another recent legislation to protect and safeguard women's reproductive rights are as follows:

- a) Assisted Reproductive Technology Regulation Bill 2020
- b) **Surrogacy Regulation Bill 2020**
- c) **Medical Termination of Pregnancy Amendment Bill 2020**

The aforementioned bill has been proposed to expand the horizons of access to safe and lawful abortion. This bill has been approved by the Union Cabinet.

The Assisted Reproductive Technology Regulation Bill 2020 along with the Surrogacy Regulation Bill 2020 and the approval of the Medical Termination of Pregnancy Amendment Bill 2020 have provided a robust system for the protection of reproductive rights of women. The Bill establishes the National board, The State Boards, and the National Registry to control and monitor Assisted Reproductive Technology (ART) clinics. The National Board will set down implicit rules to be followed by persons working at clinics and set the principles for basic infrastructure, equipment under the laboratories, and other human resources expertise hired by either ART clinics or banks. The Registration Authority at National level shall also maintain a Central Database to assist National Board in its work. The Bill makes provisions for the safe practice of ART services across the country by regulating and supervising ART Clinics and Banks. The Bill also proposes harsh punishment for those who attempt to control the sex of the offspring, sell embryos or gametes. The Assisted Reproductive Technology Bill, 2020 is being considered Government's best input to culminate exploitation in the required area.

The Surrogacy Regulation Bill, 2020- The Bill proposes to set up National Board, State Boards, and Appropriate Authorities in the States and Union Territories of India to direct and regulate Surrogacy in India. Some of the noticeable features of the bill is that it will regulate the surrogacy administrations across the country. The bill seeks to put a blanket ban on commercial surrogacy and opt for measures to curb the practice of sale and purchase of embryos and gametes. The bill also incorporates provision which will not only allow the Indian married couple but also the Indian single woman (only widow or divorcee) to opt for surrogacy upon

fulfilment of certain conditions. The bill also adopts provisions to prevent the exploitation of the surrogate mother and the child born through the process of surrogacy.

Medical Termination of Pregnancy Amendment Bill, 2020- The Medical Termination of Pregnancy Act, 1971 was enacted with a view to recognize the importance of safe & affordable termination or abortion services under certain specified circumstances by the registered medical practitioners. Other than this, few Writ Petitions are documented in the Apex Court and different High Courts of states for authorization of termination of pregnancies on the grounds of fetal abnormalities or pregnancies. Taken together, all the three proposed enactments establish a protecting environment for women's conceptive rights, tending to change social settings and mechanical development.

Together, the ART Regulation Bill, the Surrogacy Bill, and the amendment to the Medical Termination of Pregnancy Act, and also Pre-Conception and Pre-Natal Diagnostic Techniques Act will positively impact the reproductive choices and rights of females in India. Over the past one-decade, Indian courts have given important and substantial verdicts representing women's reproductive choices and rights for their equality and respect in their autonomous decisions concerning pregnancy along with the "inalienable survival rights" implicitly given protection under the fundamental Right to Life. The fact that court verdicts are not fixed and there are several rulings that have been recognized under **Article 21** of India's Constitution in which women's reproductive rights are a fundamental Right to Life and also embody 'Right to have a family and offspring.'

The legal scenario on Surrogacy and Reproductive rights of women in India is being thrown light upon through the following case laws: -

Baby Louise Joy Brown Case (1st IVF Baby)¹⁴

The first-ever successful 'test-tube baby of Lesley and John Brown named "Louise Joy Brown" was born on July 25, 1978, in Great Britain by two British doctors who performed this In-Vitro Fertilization. They created history and eventually won Nobel Prizes in 2010 for the development of human IVF therapy.

¹⁴ July 25, 1978.

Baby Durga alias Kanu Priya Agarwal (Indian 1st IVF Baby)- Dr. Subhash Mukhopadhyay was the 1st Indian Physician to create history for performing IVF, resulting in the first test-tube baby DURGA (and world's second after British physicians Patrick Steptoe and Robert Edwards) on October 3, 1978.

Jan Balaz vs. UOI¹⁵

This case talks about Twin Children's Right, wherein a German couple agreed with Marthaben Immanuel Khrishti (Surrogate Mother). The German couple place of work was United Kingdom. As their citizenship was litigated in U.S. courts, they required passports to travel to India which was seized by the passport authorities. The Supreme Court clearly denied to grant the visas but granted an exit permit to the kids. The German authorities allowed the couple to adopt the children and take legal actions for their rights through the court as Germany did not recognize Surrogacy.

Baby Dev Case¹⁶

In this case, through Surrogacy, two twins were born at the instance of an Australian couple. However, the Australian couple took back only one child, i.e., baby girl, amongst the twins, and left-back the baby boy 'Dev' behind in India. The birth of Dev had been registered, and the commissioning parents allegedly gave him up in adoption to somebody known to them. The documentary made by Ms. Aarti Betigeri reveals the sad plight of 'Dev' who could not be traced so far. In India, the infants' rights are nowhere placed above the rights of parents; but many political briefs allow cases, such as Dev case, to fall between the cracks.

Baby Gammy Case¹⁷

It is a controversial case that was set to rest by Justice Thackeray. In the present case, David Farnell along with wife Wendy had abandoned the baby Gammy as the baby was diagnosed with Downsyndrome and took away his sister Pipah to Australia. Further, it was also alleged that they were trying to lay their hands on the unclaimed money deposited by Thailand's people for baby Gammy.

15 AIR 2010 Guj 21

16 Aarti Betigeri, Where is Dev, The child born through Surrogacy but left behind by his parents? Available at; 12.7.2020, from <https://scroll.in/pulse/817116/where-is-dev-the-child-born-through-surrogacy-but-left-behind-by-his-parents> (visited on 12.02.24).

17 FLC 93-700(2016)

Justice Thackray held that *“the Farnells did not abandon Gammy, and they did want to keep him. However, at some unspecified time during the pregnancy, it was clear that Mrs. Chanbua (surrogate mother) had fallen in love with the pair of twins she was carrying and had decided that she was going to keep the male child.”* Justice Thackray also made a remarkable observation that *“surrogate mothers are not baby-growing machines or ‘gestational carriers.’ They are flesh and blood of the women who can develop bonds with their unborn children”*.

Dan Goldberg Case¹⁸

In this case, the Jerusalem Judge prevented a Gay Israeli restaurateur from taking his twins Itai and Liron back to their hometown, born with the help of a Surrogate in Mumbai. In this case, family court judge of Jerusalem, Phillip Marcus, refused to allow Paternity Test, which was to be done to prove their parenthood and acquire citizenship for their infants. On an appeal being filed against the family court's decision, the Jerusalem District Court decided that the family court had the jurisdiction to settle the case and be the one to rule in the case. It was a grand victory for the gay couple as the twins were issued passports and were allowed to return with them after struggling in Mumbai for around three months.

K.S Puttaswamy v. Union of India¹⁹

On August 24, 2017, nine-judge bench of India's top most Court collectively held: Privacy as a fundamental right mentioned under the Indian Constitution. Though the judges gave the different conceptions of privacy, the bench still had included personal autonomy relating to our body and mind. A very essential and critical aspect of this personal autonomy is human reproductive rights, that gives the liberty to an individual to make sexual and reproductive decisions, as also recognized by the United Nations International Conference on Population and Development. These rights have been explained to include access to contraception, the right to abort, the right to take decisions regarding discrimination, coercion, reproduction free from violence, and the right not to be subject to infants' coerced bearing. The judgment explicitly perceived women's sacred right to settle on conceptive decisions as a piece of individual freedom under Article 21 of the Constitution.

Skinner v. Oklahoma²⁰

“The Supreme Court of The United Kingdom characterized the right to reproduce as one of the basic civil rights of man.”

¹⁸ February 2010.

¹⁹ On August 24, 2017

²⁰ 316 U.S. 535

B.K. Parthasarathi v. Government of Andhra Pradesh²¹

The High Court of Andhra Pradesh in this case held that “the right to decide about reproduction is essentially a very personal decision which can be made by the man or the woman; necessarily, such a right even includes the right not to reproduce.”

Bandhua Mukti Morcha v. Union of India²²

The Apex Court of India, relying on **Francis Coralie v. Union Territory of Delhi²³** has held that Article 21 has within its sweep the right of women to maternity relief.

Suchita Srivastava & Anr v. Chandigarh Administration²⁴

The Hon’ble Supreme Court in this case reiterated the fact that a woman’s right to make reproductive choices is a part of Article 21 of the Constitution. It is also very important to note that reproductive choices can be exercised to procreate as well as abstain from procreating. While giving effect to the reproductive rights, it is of utmost priority to respect the dignity, privacy and bodily integrity of every woman. This means that nothing should act as a hindrance for woman to make a choice either to abstain from a sexual activity, to use any contraceptive means, or undergoing sterilization methods i.e. full reproductive choice should be given. To conclude logically, reproductive rights would include a women's entitlement to carry a pregnancy, give birth to a child, and subsequently raise them. However, in cases involving pregnant women, there is also duty of the State to protect the prospective child's life. Hence, the pregnancy can be terminated keeping in mind the legal constraints and the conditions which have to be fulfilled for the same. Hence, the provision of the Medical Termination of Pregnancy Act of 1971 can also be considered as constraint upon the exercise of reproductive choices. The abovementioned judicial pronouncements illustrate the major role played by judiciary in recognizing and eliminating the barriers which has been acting as a hindrance for the women and girls to make their reproductive choices on their own. Over the period of time there has been a significant shift from the ideas and mechanism for population control towards the need to protect the reproductive rights of women including the right to dignity, autonomy and other related rights.

21 Para 15, MANU/AP/0043/2000

22 (1984) 3 SCC 161: AIR 1984 SC 802 42

23 (1981) 1 SCC 608: AIR 1981 SC 746

24 (2009) 9 SCC 1

Conclusion

As reproduction is one of the fundamental points of marriage, the child is an imperative and sentimental need. The rights endowed by the constitution upon the woman in respect of their reproductive health provides liberty to a woman to make free choice to beget a child. These rights are intrinsic part of a woman's right to privacy, dignity, and bodily integrity.²⁵ It is guaranteed by various international human rights laws and policies and is also recognized under Article 21 of India's Constitution. Procreation is an indispensable part of one's life, and everyone has a right to procreate one's own biological child. All people are not lucky to fulfil their dream of parenthood because of infertility issues. Recent scientific and technological development provides a platform for infertile couples to have their biological child under Assisted Reproductive Technology (ART) and Surrogacy. Globally, India has been the largest centers of the fertility trade, with procreative medical tourism becoming a notable activity. Assisted reproductive technology (ART) has developed recently which has given hope to millions of people who are not fertile but at the same time, it has also announced a plethora of ethical, social, and other legal issues.²⁶ Instead of criticizing the demerits of ART's, there should be a check on technology so that it cannot be misused. It is asserted that the practice of Surrogacy is mind-boggling in nature and includes different issues like social, ethical, legal, emotional, and moral issues relating to the commercialization of Surrogacy, baby commoditization, etc.; still, it is the hard fact that the Reproductive Rights and Surrogacy complement and supplement each other. The misuse can be minimized by having a proper check on the government's technology, policies, and guidelines. The Researchers believes that asserting the Reproductive Right of an infertile and surrogate mother will act as a facilitator and not destructor in our society. Reproductive Rights have to be protected without any unfairness. In the modern era, where S.377 of IPC has been abolished where gay and lesbian marriages are allowed, where artificial medical technology like Pace Maker etc. is being used, adoption is permitted the right to appreciate the advantages of science and innovation using ART techniques and helping a childless couple is also one of the critical reproductive rights of every citizen. Problems faced because of Surrogacy determined by factors such as less cost, no legislation, and other policies became a booming business in the country. Corrupt practices, exploitation of surrogate

25 *Supra* note 13

26 Path Breaking measures to be taken to Protect Women's Reproductive Rights. Available at; <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1603649> (visited on 6.7.2025).

mothers and abandonment of children prompt the need for a stringent law on Surrogacy. Amongst Asian countries India's ART market comes at third position. The Reproductive Right of a surrogate mother to conceive a child for intending parents, as it is her body, her choice. The creation of a balance between the both is a win-win situation for both the surrogate and the infertile couple. It's also a question of every woman's reproductive autonomy as she has the right to have control over her body and has a right to use her body as she likes. However, despite so much of misuse in India, there is no standardization of protocols, with inadequate reporting of the cases. The oocyte donor needs to be protected by an insurance cover and from multiple embryo implantations. Equal rights should be conferred to the children born through Assisted Reproductive Technology or born Biologically. The cryopreservation of sperm, oocytes and incipient organism by the ART Banks should be directed and monitored. The Bill means making pre-Genetic Implantation Testing required to serve the child brought into the world through ART. The researcher is of the view that ART clinics must be regulated and their misuse should be prevented; surrogacy contract should be drafted with the utmost caution, and proper legislation for ensuring equal protection to rights of the surrogate and child should be drafted at the National, and international level, provision for penalty and compensation clause in the agreement and it should be included as the social service scheme of the government. So, it is correct to say that the Reproductive Right is the Fundamental Human Right of each individual.