

Constitutional Aspect of Surrogacy in India

Abstract

One such right which makes a man's life meaningful in society is the right of reproductive autonomy under Article 21 of the Indian constitution, right of reproductive autonomy gets its flow from the right to privacy. The right to reproduction under article 21 has two fold dimensions, one aspect of this right is relating to the married couple's right to reproductive autonomy. which include the right to contract with the consenting collaboration for the purpose of Bering the child commissioning couple have the right to have the family of their own and the right to procreation. They could adopt any kind of procreation to beget the child. On the other hand the surrogates also have right to use her own body in the way she desires for reproduction.

Keywords: Fundamental Rights, Contraceptive, Surrogacy, Reproductive Autonomy, Right To Privacy, Personal Liberty

Introduction

One of the important aspects of relationship between state and its citizens is that, state guaranteed certain fundamental rights to its citizens. Fundamental rights are an extension of human rights which are presumed to be inherent in every human being. No government can abolish it either by taking legislative or executive action. Fundamental rights are not absolute in nature and they can be curtailed. Fundamental rights not only gives security and confidence to the people but also played an important role in development of their social and democratic life. One such fundamental right given under Indian constitution in Article 21. Article says about the protection of life and personal liberty. Article 21 gives positive extension to the term life which means something more than mere survival and animal existence. Right to reproductive autonomy is one such right which make human social and personal life more meaningful. However it is not expressly provided under fundamental rights but it gets its flow from the right to privacy. In the present research paper, researcher is tried to examine the extent up to which surrogacy arrangements comes under the purview of constitution of India.

Review of Literature

M P Jain in his book, "Indian Constitutional Law" (2012) says that a significance aspect of the relationship between the government and the people is the guaranteeing of certain fundamental rights of the people. Morden constitution laid a good deal of emphasis on people's fundamental rights. The underlying idea is that there are certain basic rights which are inherent in human being and which no government should seek to take away either by the legislature or by executive action. Further he said that there is no rule that unless a right is expressly stated as fundamental right it cannot be treated as one. Political, social and economic changes occurring in the country may entail the recognition of new rights and the law in its eternal youth grown to meet social demands.

B K Akil in his article, "Critical Analysis of Surrogacy from Human Rights Perspective" elaborately described that the right to reproduction under Article 21 has two fold dimensions. One aspect of this right is relating to the married couple's right to reproductive autonomy, which include the right to contract with the consenting collaboration for the purpose of bearing the child.

B S Chauhan in his article, "Law, Morality and Surrogacy- with Special reference to Assisted Reproductive Technology" elaborately deals with the various dimensions of surrogacy in India.

Anees V Pillai in his article, "Surrogate Mother and Its Challenges to the Indian Legal System" (2011) writes about the right of reproductive autonomy of an individual in context of surrogacy in India. He also tried to examine the various challenges poses by the surrogacy toward the Indian legal system.



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Suhrith Parathasarty in his article, "Republic of Unreason" (2016) writes that, the argument of fundamental right to privacy of a right to use ART fails for the reason that surrogacy involved using another person's body. He condemns the practise of commercial surrogacy to raise one family.

Anil Malhotra in his article, "Draft Surrogacy Bill Violate Fundamental Rights of People to Choose Modes of Parenthood" (2016) writes that the new bill on surrogacy namely the surrogacy (regulation) bill, 2016 violates the article 14 and 21 of the constitution of India by banning commercial surrogacy in India. He further writes that, the it is not the state to decide the modes of parenthood. Constitutionally, the state cannot interfere in the prerogative of a person(s) to have children, naturally or through surrogacy.

Aim of the Study

The aim of study of present research paper is to examine the constitutionality of surrogacy arrangements under the purview of constitution of India.

A significant aspect of the relationship between the government and the people is the guaranteeing of certain fundamental rights of the people. Modern constitution laid a good deal of emphasis on people's fundamental rights. The underlying idea is that there are certain basic rights which are inherent in a human being and which no government should seek to take away either by the legislature or by executive action.¹ since the 17th century, if not earlier, human thinking has been veering round to the theory that man has certain essential basic natural and inalienable rights or freedoms and it is function of the states, in order that human liberty may be preserved, human personality developed and an effective social and democratic life promoted, to recognise these rights and freedoms and allow as free play.²

The nature of fundamental rights in the USA has been described, thus, "The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the court." In modern times, the concept of the people's basic rights has been given a more concrete and universal texture by the charter of human rights enacted by the UNO, and the European convention on human rights. The preamble to the universal declaration of human rights inter alia declares:- "whereas recognition of the inherent dignity and equal and inalienable rights of all members of the human family is foundation of freedom, justice and peace in the world." The concept of fundamental rights thus represents a trend in the Modern democratic thinking.³

Part III of the Indian constitution has provided certain fundamental rights. These are those rights which are treated as basic, or natural and inalienable rights which every person deserves. It gives a sense of security and confidence to the people. These are essential not only for human personality development but also for promotion of social and democratic life. However, they are not

absolute in nature and constitution itself provides the circumstances when dimension of fundamental rights can be curtail.

There is no rule that unless a right is expressly stated as fundamental right it cannot be treated as one. Over time, the Supreme Court has been able to imply by its interpretative process, several fundamental rights, such as freedom of press, right to privacy, out of the expressly stated fundamental rights. In *Unni Krishnan, J.P v State of Andhra Pradesh*, the Supreme Court has even enunciated the doctrine of implied fundamental rights. The court has asserted that in order to treat a right as fundamental right it is not necessary that it should be expressly stated in the constitution as a fundamental right. Political, social and economical changes occurring in the country may entail the recognition of new rights and the law in its eternal youth grows to meet social demands⁴. One of the most important fundamental rights which are provided under Indian constitution is Article 21, which is related to protection of life and personal liberty of a person. Article 21 stated, "no person shall be deprived except according to procedure established by law." A very fascinating development in the constitutional jurisprudence is the extended dimension given to article 21 by the Supreme Court in the post menaka case. Since menaka Gandhi, article 21 has proved to be multi dimensional. The aspect of article 21 is brought out by the following judicial pronouncement. This extension in the dimension of article 21 has been made possibly by giving an extended meaning to the word 'life' and 'liberty' in article 21. These are the organic terms which are to be constructed meaningfully. The right to life enshrined in article 21 has been liberally interpreted so as to mean something than mere survival and mere existence or animal existence. It therefore includes all those aspects of the life which make a man's life meaningful, Complete and worth living.⁵ In *CERC v UOI*,⁶ the Supreme Court observed, "the right to life with human dignity encompassed within its fold, some of the finer facet of human civilization which makes life worth living. The expanded connotation of life means the tradition and cultural heritage of the persons concerned." The right of life connotes not merely animal existence but includes finer graces of human dignity, culture and civilization. The right to life with human dignity encompasses within its purview some of the finer facets of human civilization which makes life worth living⁷.

One such right which makes a man's life meaningful in society is the right of reproductive autonomy. Under article 21 of the Indian constitution, right of reproductive autonomy gets its flow from the right to privacy. The right to reproduction under Article 21 has two fold dimensions. One aspect of the right is relating to the married couple's right to reproductive autonomy, which include the right to contract with the consenting collaboration for the purpose of bearing the child. Commissioning couple have the right to have the family of their own and the right to procreation. They could adopt any kind of procreation to beget the child. On the other hand the surrogates

also have rights to use her own body in the way she desires for reproduction.⁸ In *District Registrar and Collector v Canara Bank*⁹, Supreme Court has defined privacy as “the state of being free from intrusion or disturbance in one’s private life or affairs. Right to privacy is an integral part of life, a cherished constitutional value¹⁰”.

The constitution does not grant in specific and express terms, any rights to privacy as such. Right to privacy is not enumerated as a fundamental right in the constitution. However, such a right has been culled by the Supreme Court from article 21¹¹ and several other provisions of the constitution. In *Kharak Singh*¹² case a question was raised whether the right to privacy could be implied from the existing fundamental right. In *Govind v. State of Madhya Pradesh*¹³ the Supreme Court undertook a more elaborated appraisal of the right to privacy. Court held that the right to privacy is not, however absolute, reasonable restriction can be placed thereon in public interest. In *Sharda v Dharmpal*¹⁴ Supreme Court held that if there is conflict between fundamental rights of two parties, then the right which promoted public morality would prevail. In *R Rajgopal v State of Tamil Nadu*¹⁵ the supreme court has asserted that in recent times the right to privacy has acquired constitutional status, it is implicit in the right to life and liberty guaranteed to the citizen “by the 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 matter.”¹⁶

The Supreme Court in India has taken into consideration the US position on *Jane Roe v Henry Wade* as well as Article 8 of the European convention on human rights which defines the rights to privacy. In *T Skinner v Oklahoma*, the US Supreme Court has characterized the right to reproductive as “one of the basic civil rights of man.” In *People’s Union of Civil Liberties v UOI*¹⁷ the Supreme Court held, “we have therefore; no hesitation in holding that right to privacy is a part of the right to “life” and “personal liberty” enshrined under article 21 of the constitution. Once the facts in a given case constituted a right to privacy article 21 is attracted. The said right cannot be curtailed except according to procedure established by law.” The right to privacy has several aspects. One such aspect is the right to procreate. This is also known as “the right to reproductive autonomy” the right to use condoms, the right of a woman to abort; all these fall within the ambit of the right to privacy.¹⁸

In *Suchita srivastava v Chandigarh Admn.*¹⁹ SC upheld the woman’s right to make a reproductive choice is also a dimension of “personal liberty” the SC stated that, “There is no doubt that a woman’s right to make reproductive choice is also a dimension of “personal liberty” as understood under article 21 of the constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected.²⁰ In *B K Partasarthi v State of Andhra Pradesh*²¹ high court observed that “the right of

reproductive autonomy” of an individual is an important aspect of his “right to privacy”. Court held, “the right to make a decision about reproduction is essentially a very personal decision either on the part of man or woman. Necessarily, such right include the right not to produce. The intrusion of the state into such a decision making process of the individual is scrutinized by the constitutional courts both in this country and in America with great care.²² Further in *Javed v State of Haryana*,²³ through the SC upheld the two living children norm to debar a person from contesting a panchayati raj election it abstained from stating that the right to procreation is not a basic human right. Article 21 guaranteed fundamental right to privacy that could be invoked to protect the right of individuals to reproductive health care information, education and service to a degree of privacy, and to confidentially with regard to personal information given to service provider. However, it is essential to know that how the right to rent womb can be exercised and to what extent it can be controlled by the Indian legal system²⁴.”

The argument of fundamental right to privacy of a right to use assisted reproductive technology fails for the reason that surrogacy involved using another person’s body, albeit with their ostensible consent. As the Harvard law school professor Marha A Field explained, “A personal right to do something does not necessarily carry over to a right to enlist the assistance of another.” That surrogacy has not been previously regulated also does not now give a person a specific constitutional right to procreate. After all, every practise tolerated by the state does not emanate out of a pre-existing nature or positive right. What’s more in any event given that an infertile couple could take recourse to adopting a child, a ban on commercial surrogacy does not necessary affect one’s right to raise a family²⁵.”

Further it is possible that a court find a surrogacy contract unenforceable on public policy ground or unconstitutional under Article 23 of the constitution of India, which prohibit forced labour and trafficking in human beings. In *people’s union for democratic rights v U.O.*²⁶ the court explained that forced or compulsion under Article 23(1) might either be the result of physical force or legal provisions or of want or hunger and poverty²⁷. However, till today, no India court has declared a surrogacy contract unenforceable.

The right to privacy has now become established in India but as a part of Article 21 and not as an independent right in itself, has not been identified under the constitution. The court has however refused to defined privacy saying, “As a concept it may too board and moralistic to define it judicially whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case.” This mean that whether in the right to privacy can be claimed or has been infringed in a given situation would depend on the facts of the said case, and the view the court taken of the matter.²⁸

Recently, the government of India presented a new bill on surrogacy, namely The Surrogacy

(Regulation) Bill, 2016 in which commercial surrogacy is totally ban and altruistic surrogacy would be allowed with certain conditions. After the enforcement of bill only the India married heterosexual couples would be able to avail the facility of altruistic surrogacy. Some scholar's see these conditions unreasonable and watch it as the violation of fundamental rights of people. As in an article Anil Malhotra claims that, "the cabinet's decision does not appear to be in consonance with constitutional provisions. Article 14 of the Indian constitution guarantees, "Equality before law and equal protection of law of all persons." Article 21 guarantees, "Protection of life and personal liberty of all people." Restricting conditional surrogacy to married Indian couple and disqualified other on the basis of nationality, marital status, sexual orientation or age, does not appear to qualify the list of equality and has no connection with the intended objectives of the proposed legislation. Further the right to life include the right to reproductive autonomy that include the right to procreation and parenthood. It is not for the state to decide the modes of parenthood. Constitutionally, the state cannot interfere in the prerogative of a person(s) to have children, naturally or through surrogacy²⁹. Further he added that "the proposed ban on it violate the fundamental rights of stakeholders. Foreign and single parents who commission the service of surrogate enjoy protection under Article 14 and 21 of the constitution equality under law and the right to life. Right to reproductive autonomy and parenthood as a part of right to life of a single or foreign person, cannot be circumvented especially when the law already permit parenthood through inter country adoption from India by the single person or foreign couples. The draft bill bars medicinal professional from offering their services in surrogacy procedures (except for altruistic surrogacy) is also deprived surrogate mother of their right to livelihood.³⁰

Conclusion and Suggestions

After examine the above cited cases and facts it can be said that right to life include the right to reproductive autonomy which also include in it surrogacy. Right to reproductive autonomy is a facet of right to privacy. However, right to privacy itself not explicitly expressed in constitution of India but Supreme Court has culled it from article 21 and several other provisions of the constitution. In several cases SC of India itself said that it is not necessary that every fundamental right should be expressly written in constitution. Right to reproductive autonomy which included in it surrogacy is comes under the doctrine of implied fundamental rights. In order to meet the challenges occurring in the society, the law has to grown to meet social demand. Today surrogacy is an need of society. In some cases surrogacy is an last hope for those infertile couple, who are unable to beget their own biological child. The role of child would not undertake in a society. Childlessness effect the social and psychological aspect of a family and ultimately the society. Having a child makes a couples life more meaningful and complete and the object of fundamental right is to

make life more meaningful, complete and worth living. Therefore surrogacy very well comes under the purview of fundamental rights.

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