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REPRODUCTIVE RIGHTS OF WOMEN AND SURROGACY

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ABSTRACT

When the base of a relationship involves men and women in families or society, social change automatically becomes a difficult job. In order to provide a better life to women as well as men in this eon of urbanization and globalization, societies require their endemic solutions, assimilated with a view of gender equality and justice, along with the persistent culture and surroundings.

“Over the last ten years, several important decisions have been issued by the Indian courts through which the reproductive rights of the women have been recognized as a part of an 'inalienable rights for survival,' which are necessarily protected under the fundamental rights to life.”² There have been few-ground breaking judgments given by the courts where reproductive rights have been considered to be an essential right for women's equality—further calling for women's right to decision-making concerning pregnancy respect for women's right to autonomy also being essential for women's equality.

In earlier times, the society strongly opposed the practice of abortion and claimed it to be a murder of the fetus. Termination of pregnancy by a woman was considered to be a crime. Later in the landmark case of “Roe Vs. Wade”³, that was decided by the US Supreme Court, paved the way for abortion to be legally sanctioned in most of the nations, making it an act that is to be accepted lawfully. Despite such rights even after being lawfully accepted, there still exist people who are in opposition to such practices and believe it to be legally prohibited.

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² Women reproductive rights in India: prospective future. University of Wollongong. (Online Journal of Health and Allied Sciences) Publ. April 15, 2011, pg.1.

³ Roe v. Wade, 410 U.S. 113 (1973).

INTRODUCTION

There are many questions that can arise in one's mind when talking about the right of women in case of reproduction, abortion, pregnancy, etc. to throw some light on a few of such questions like whether the woman who is bearing the child has the right to decide when to give birth? To choose how many children to have? Moreover, the answer to all these questions would be NO. The most significant difference between a man and a woman is the ability to reproduce. Furthermore, thus, the woman is the one to be blessed with this gift of reproducing, making them different from a man.

Over the few decades, the government came up with various international conference agreements as well as human rights treaties influenced by the global movement for women's rights. The central focus of these agreements is to assert equal rights to men and women and also with a motive to constrain the states to take resolute actions against such gender-based discriminatory practices.

To name a few of these agreements, they are as follows:

❑ **The Vienna Declaration and Program of Action:**

“The world conference on human rights adopted this declaration on the 25th of June in the year 1993, in Vienna.”⁴ The central focus of the declaration was concentrated on the protection and promotion of human rights for the international community as a matter of superiority and carrying out a comprehensive analysis of the international human rights system and machinery.

❑ **The Program of Action of the International Conference on Population and Development (ICPD):**

“Adopted in the year 1994 and lays out a plan for the human-wellbeing of individuals rather than numerical population targets.”⁵

❑ **Fourth World Conference on Women (FWCW):**

“Where the platform for action was adopted in September 1995 in Beijing, China.”

⁶Few of the main objectives of the action was:

- Women and poverty
- Women and health
- The girl child
- Women in power and decision-making.

⁴ Accessed at: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>

⁵ Accessed at: <https://www.unfpa.org/icpd>

⁶ Accessed at: <https://www.un.org/womenwatch/daw/beijing/>

These are the few international consensus agreements that not only is in a strong support of gender equality but also the empowerment of women. To understand a better picture of sexual rights and reproductive rights of women, the ICPD and FWCW in particularly articulate such concepts.

“Thus, in other words, it can also be understood in a manner that reproductive rights were established as a subset of human rights.”⁷

The **W.H.O** definition of reproductive rights is:

“Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information to do so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.”⁸

Regardless of the religion, socio-economic level or culture of the mass, issues regarding reproductive rights of women have and still are vigorously being contested throughout the society. Also talking about the case of surrogacy, this field is developing in our country gradually as people are getting aware of such field in the medical area. Today it can be understood via various surveys present on the print as well as the online media about the development of the medical field. Basically this concept of surrogacy has is considered to be a blessing for all those couples who are unable to conceive due to various reasons but apart from this there are a lot of other areas that has to be looked upon too which will be discussed in detail further in my paper.

CHAPTER I: UNDERSTANDING OF REPRODUCTIVE RIGHTS IN THE CONTEXT OF INDIA

Women's reproductive rights in the context of India are not only infused with reproductive freedom but goes beyond. The difficulties and struggles faced by the women in the context of reproduction/ reproductive rights can not only be discussed with the perspective of physical health but also with the attraction of mental health influenced by the surroundings and environment the woman is present. India is a

⁷ Freedman, Lynn P, Isaacs SL. Human rights and reproductive choice. Studies in family planning, Jan-Feb 1993;24(1):18-30.

⁸ Gender and Reproductive rights home page. Available at: <http://who.int/reproductive-health/gender/index.html>. Accessed on 24-07-20.

country far behind significant countries in the area of granting reproductive rights to women. In India, women tend to witness situations where they have no say or right to decide the reproduction process. India is a country where women are not even granted some fundamental rights and other rights, and which is still determined by the male member or the male counterpart of the family in an unchanged evolutionary patriarchal society. Such a community where the women cannot even decide when to get married? Who to get married? At what age to get married? When to get pregnant? When to abort a child? When to have sterilization? What kind of contraceptive or birth control is to be used? Then it should be understood that there is a dire need of taking things further than only restricting it to reproductive freedom and making it inclusive of arenas of political, social, as well as economic rights.

Since time immemorial, women tend to face a lot of inequalities in probably whatever context it may be. They have always been considered the weaker section of society and looked up to like something that should always be under a man's thumb. Despite India being a member of various signatory indexes and committed to the professional and ethical standards of family planning, Indian laws, if not practically, then at least seem to reflect on the papers. "The national population policy, 2000, affirms the right to voluntary and informed choice in contraception matters."⁹

India's family planning method reflects a significant gap in the process of development due to various reasons. One of the primary reasons for it is keeping the woman out of the decision-making process, which is equally essential for her as she plays a significant and vital role in childbearing and childbirth.

As also articulated at the 1994 international conference on population and development (ICPD) in the Cairo Agenda that there exists a keen struggle for not only the national but also the global stakeholders in bringing out a meaningful interpretation to some of the essential concepts of women rights, choices, and empowerment due to which "the issue of right to reproductive health especially abortion, takes on special significance in the context of India."¹⁰

⁹ National Commission on Population, government of India: National Population Policy, 2000. Available at <http://mohfw.nic.in/natpp.pdf>. Accessed on 20-08- 2020 09:40 p.m.

¹⁰ Reproductive Rights and choice: The role of abortion in India. Published by International center for research on women (ICRW), Information Bulletin, pages 1-4, November 2001. SEP

There are several other contradictions of the society, such as cultural values, caste, and religion, which additionally sums up to various other inequalities of the traditional feudal society in granting of reproductive freedom and rights to the women.

Other factors such as the sharp class contradictions, which directly impact the women health causing, heightened inequality results into adverse health conditions. In this recent epoch of economic liberalization one of the structures of exploitation of the Indian markets contributed into by the multinational pharmaceutical companies tends to develop between resources, planning, development, and most importantly the opportunities in the healing and health systems. It is imperative to analyze the root cause of such issues being faced by the women in every second household, and the policymakers need to be more firm and regulative in not only implementing and granting rights to women but also to make them aware of such rights and policies being present and worked upon exclusively for them.

CHAPTER II: THE ROLE PLAYED BY INDIA IN THE IMPLEMENTATION OF REPRODUCTIVE RIGHTS

Numerous policies and programs address reproductive and sexual health. To name a few:

1. Ayushman Bharat (Health India Initiative Of 2018)¹¹

Its key strategies were to strengthen out the services, expand access essential drugs and diagnostics, transforming the existing health, centers and upgrade the skills of the health care providers.

2. The National Health Mission (2013)¹²

Amalgamating national, rural and urban health mission

The policy's main goal was to achieve universal access to affordable, equitable, and quality health care services in accordance with and responsive to people's needs.

The fundamental strategy was to strengthen child, reproductive, newborn, and maternal health and, most importantly, the introduction of social protection schemes.

¹¹ MOHFW (Ministry of Health and Family Welfare). (n.d.a). [Ayushman Bharat Health and wellness Center](#). New Delhi, India: MOHFW, Government of India. Accessed on 22-08-20 at 10: 15 am.

¹² MOHFW (Ministry of Health and Family Welfare). (n.d.b). [National Health Mission \(NHM\)](#). New Delhi, India: MOHFW, Government of India. Accessed on 22-08-20 at 10: 30 am.

3. National Policy On Women (Draft) (2016) (Ministry Of Women And Child Development)¹³

The policy's main objective was to help women attain their full potential and participation in all spheres of life as equal partners.

4. The Assisted Reproductive Technology (ART) Bill, (2017)¹⁴

The purpose was to prevent misuse of ART, ensuring its ethical and safer services by establishing national and state boards to regulate the concerned services. Followed by the development, regulations, and guidelines on its clinical services.

- Services and policies

When the need for **Services And Policies** enters, there can exist many of them, but it tends to get accompanied by various kinds of issues and doesn't choose to come alone. Since the time being, there have been multiple surveys that have been conducted on family planning. And to no bigger surprise, the analysis shows varied approach in the implementation of targets. If we also look at the field-level assessment, the indication of the approach shows many factors. The service providers and policymakers very well know that the government has left the option open to the women to make a free choice on family planning due to which it becomes very difficult to change the entrenched attitudes of these workers which further is clashed by the views of various physicians who believe that there is no harm in putting pressure on the women who lack knowledge, or is unaware, or belongs to a low-income family.

Data also shows that the factor of availability of spacing methods continues to bring significant challenges in providing more effective and better options in the family planning methods. Even women living in rural areas live through a lot of challenges and complications relating to reproductive health. There exist minimal health care centers where contraceptive options are available for making a choice. If available, these choices do not exceed more than the number two, which is why women are forced to accept only from the options being available, curtailing the reproductive

¹³ Sexual and Reproductive Health in India - Oxford Research Encyclopedia of Global Public Health <https://oxfordre.com/publichealth/view/10.1093/acrefore/9780190632366.001.0001/acrefore-9780190632366-e-225> accessed on 21-08-20 at 00: 21 am.

¹⁴ MOHFW (Ministry of Health and Family Welfare). (2017b). [The assisted reproductive technology \(regulation\) bill, 2017](#). Accessed on 22-08-20 at 11: 16 am.

rights of women indirectly. Even if the goal is to provide better and more excellent options, it majorly fails in providing desired options to the women. Women, mostly living in highly urbanized places, only experience it.

“Data from national family health survey (NFHS 2) indicate only 40 % of women remember ever discussing family planning with a health worker, only 10 % had ever discussed the pill, and even fewer have other temporary methods. Only 15% of those who use modern contraceptive were informed about an alternative method.”¹⁵

Abortion was made legal in India through the MTP (medical termination of pregnancy) act in 1972. Women having poor understanding regarding their legal rights make a significant difference in delivering the correct process of tasks. “The official records indicate that somewhere between 550,000-600,000 induced abortions take place in the country per year, recent publications suggest estimates close to 7 million induced abortions per year.”¹⁶

- Fertility and demography

If we look into India's **Demography And Fertility** rate in the last to last decade, declining fertility rates were experienced by India. “Between the year of 1992 and 1998, the total fertility rate fell from 3.4 to 2.9.”¹⁷

The use of spacing methods and high demand for contraceptives and sterilization were the methods adopted by the women, out of which few of them also faced the problem of infertility. “Along with the fertility level slight decrease in the mean ideal number of children was also felt from 2.9 to 2.7.”¹⁸

All this is also accompanied due to the reason of the unmet family planning including women who do not will to have children or want a gap of several years between the births of another child. The unmet needs of family planning tend to pull back many couples and restrain them from having children thinking about the inappropriate situation of life majorly focused on financial conditions.

- Social context

¹⁵ National Family Health survey (NFHS-2), 1998-99: Mumbai, India. International Institute for population Sciences (IIPS) and ORC Macro 2000. Accessed on 26-08-20 at 04:43 pm.

¹⁶ Stanley KH, Susheela S, Taylor H. The incidence of abortion worldwide. International family planning perspectives Jan1999;25 (Suppl):S30-S38. Accessed on 26-08-20 at 04:46 pm.

¹⁷ *Supra*14.

¹⁸ *Supra* 14.

In India, there persists the idea of a joint family rather than a nuclear family comprising just the husband, wife, and the children. This system still prevails in a few urban families or households as well but mostly can be seen to be practiced in rural areas. In a rural area, people tend to live together in a joint family where decisions are taken tentatively and collectively. Even though reproductive choices are very much specific and private to couples, as per the Indian families, it is a collective decision taken by the whole family or by the family's main head, either male or female. India has so far showcased a strong presence of grass root-level NGOs and numerous women's movements with the vision of granting rights and free choices to the women. So it is to be understood that **Social Context** plays a significant role among the Indian families. A woman's ability to formulate and act on reproductive decisions is generally limited due to family and societal pressure and constraints. Even after going through several pregnancies, women continue to be pregnant in the want of having a son. Even the documents indicate the higher preferences of women wanting to have sons over daughters or at least one son. Therefore, a very careful and keen examination is required to extrapolate such rights to the Indian social context.

- Permission of the male counterpart (spouse) for abortion and sterilization

Another critical aspect of putting into the light is the spouse's role in matters related to reproductive rights or, in other words, the **Spouse's Consent For Abortion/ Sterilization.**

“Article 12 and 16 on the convention of the elimination of all forms of discrimination against women (CEDAW) 1978, gives the rights to make free and informed decisions about medical treatment and health care, including decisions about one's fertility and sexuality.”¹⁹

The famous divorce case of Ghosh vs. Ghosh²⁰ (Samar Ghosh v. Jaya Ghosh) “The Supreme Court has held that mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of others for a long time may lead to mental cruelty.”²¹ The supreme court after hearing the case gave the ruling stating that " whenever either the husband or the wife undergoes any of the operations, it is either sterilization, women vasectomy or abortion without a

¹⁹ Accessed at: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

²⁰ Samar Ghosh vs Jaya Ghosh on 26 March, 2007 (Appeal (civil) 151 of 2004).

Available at: <https://indiankanoon.org/doc/766894/> Accessed on 26-08-20 at 11: 03 pm.

²¹ <http://roundup.manupatra.in/asp/displayart.aspx?itemid=11289#:~:text=In%20the%20case%20of%20Samar,may%20lead%20to%20mental%20cruelty.> Accessed on 26-08-20 at 11: 08 pm.

legitimate medical reason, or consent or knowledge of either spouse then, in that case, the act is said to lead to medical cruelty.

The case also covered the clause of the ruling, where it was said that if either of the spouses refuses to have sex or takes an individual decision not to have a child that is not mutually agreed upon, it would also amount to mental cruelty. Also, the ruling of the case even made it a reason to seek a divorce in case of mental cruelty due to either of the spouse's unilateral decision. With this particular judgment the very core of the reproductive rights was hit hard as this started to build a fear of legal entanglement in the mind of the clinics, health care centers, hospitals as well as the service providers due to which before undergoing any such action a declaration is required to be filled along with the consent or to say the signatures of both the partners. And this somehow started to break marriages too.

CHAPTER III: REPRODUCTIVE RIGHTS FOR THE MENTALLY RETARTED WOMEN

When we talk about persons with a mental disability, a special kind of care and understanding needs to be bestowed upon such people. Rather than regarding such people as mentally disabled after several decisions now, such people are considered specially-abled. When we talk about a mentally disabled girl child, it is a well-known fact that women and girls have always been that marginalized section or class of the society, and conditions tend to get even worse and harsh when it narrows down to a mentally disabled girl or woman. These women experience denial of their rights continuously.

This is a case of a nineteen year old mentally challenged orphan girl child residing in Chandigarh in one of the government institution for destitute women named Nari Niketan. In the year 2009 she was raped sometime in March by the institution's security guards. After two months the pregnancy was detected. "Four-doctor Multi-Disciplinary Medical Board, which included a psychiatrist, recommended that woman "have the adequate physical capacity to bear and raise the child but that her mental health can be further affected by the stress of bearing and raising her child."²² Based on these recommendations, Punjab and Haryana's high courts jointly delivered a landmark decision by allowing the girl to continue with the pregnancy, which resulted

²² Kamayani Bali Mahabal. Women/choice, Abortion law's grey zone: retarded mothers. Published in India -Together 14 Aug 2009. Available at: <http://www.in-diatgether.org/2009/aug/wom-mtcase.htm>. Accessed on Oct 13th 2020 at 12:04 pm.

from a sexual assault. This further raised several questions regarding the aspect of 'consent' as a fundamental issue. For the fact per se, this case did not remain just a case of sexual assault. But it was developed into the question of whether the law of the country grants and protects the woman's agency to make free decisions regarding her own life, especially in the case where a woman is a person with mental retardation.

Though the Supreme Court's decision to continue with the pregnancy was provided, it failed to take into consideration the support mechanism along with reliable support system that needed to be provided by the state under article 12 of the UN Rights Of Persons With Disabilities Convention and for which the government was primarily accountable.

This case further proved that the Indian system legal framework requires a great deal of strength to overcome their setbacks regarding granting rights to persons and coming with a par to the international legislation. As a result, raising one of the most critical questions about whether the government institutions are safe and capable enough to protect developmentally disabled women and women with other disabilities.

CHAPTER IV: EXIGENCY TO EMPOWER WOMEN'S RIGHTS TO REPRODUCTIVE HEALTH

As read by the topic above, it says the need and importance of empowering women's rights to reproductive health. But before going into the women's section, I would like to draw the attention towards the participation, involvement, and the role of men in the context of reproductive health. A woman indeed has a majority of the role in childbearing and childbirth. Still, it is equally important to understand men's reproductive health needs as an essential part of protecting women's reproductive health through the involvement of men. Their involvement would ultimately help them better understand the needs of women's health, which would further result in a healthy mother and child.

Inadequate reproductive health leads to many complications in a woman's life, from unwanted pregnancy to unsafe abortions. This not only leads to poor health but sometimes may also lead to infertility or even death, which is why as a woman and as a primary user of the reproductive health service, their social participation equally makes a difference. There also exists a very keen relationship between the

policymakers and, as well as the service providers as well as the clients. Here, the gender-sensitive-oriented programs play a vital role in providing the dynamics of knowledge between the patients or the health care providers and reach such awareness between the citizens and the community leaders. Also, the impact of violence on women tends to make a lot more difference by promoting inequality and greater health and reproductive health risks in women like female genocide. In the case of policies in this context, the policymakers need to shed light on one of the most critical aspects in making the policies that are the impact of such policies on the women but both men and women.

“Providing quality reproductive health services enables women to balance safe childbearing with other aspects of their lives. It also helps protect them from health risks, facilitates their social participation, including employment.”²³

With this, it becomes essential to talk about a few of the **Elements/ Components Of Reproductive Health Care:**

- **Safe-Motherhood Program-** involves various factors in its ambit, starting from treatment to trained health care providers, proper health care, Counsel on breastfeeding, etc. Access to multiple kinds of care and treatments would help women get over with complexities during their labor period and even before an after. Providing proper training to the service providers would further help them deliver their task more finely and adequately along with well-equipped hospitals and health care, immunizations, the right method of breastfeeding, and the key to maintain good health.
- **Family Planning -** it comprises of the adequate amount of health that is to be provided by the government, the participation of well-trained service providers. This also tends to include the counseling sessions regarding reproductive health, which should take place in complete confidential, private, and comfortable space. Also, where the women do not feel awkward, uncomfortable, or shy to share their issues openly. And the most essential point is the affordability and availability of one's own choice of contraceptive so that women would not be forced to chose only from the unwanted limited options.

²³ Women Reproductive Rights in India: Prospective Future OJHAS Vol. 10, Issue 1: (Jan-Mar 2011). Accessed on 27-07-20 at 01: 38 am. Available at: <https://www.ojhas.org/issue37/2011-1-9.html>.

- Prevention And Treatment Of Sexually Transmitted Diseases (STDs And HIV/ AIDS) – “because of culture and biology, it has been observed that women are more prone and vulnerable to STDs rather than men.”²⁴ As these diseases are still considered taboo in society's eyes, but above that taboo, the more important thing to understand is to take care of is its prevention, cause, and treatment. Providing correct information and counseling can help fight with such diseases to a great extent. It is imperative to be aware of such health risks and, if caused, should immediately approach to a health care center. Also, speaking and discussing it openly and without shame can also contribute to making a lot more different and providing a safer environment for its treatment. The awareness of the proper use of contraceptives, condoms, precautions, and birth controls should also be looked upon with equal attention.
- Abortion And Post-Abortion Care - to reduce the maternal mortality rate, it's vital to have safe abortions with proper care and precaution. The right way of family planning can also help reduce the risk of unwanted pregnancy; thus, prevent women from abortions. Post-abortion maintenance and care are also essential and sensitive for women who should be taken care of by reducing unwanted complexities.
- The Importance Of Involvement Of Men In Reproductive Health Programs - The involvement of men can seal a great deal in the welfare of reproductive health. As being considered the dominant member, it is either in a relationship or in a family, if he tends to use their dominance in the right way, men can bring many evolutionary changes. Men can give more power to women and advance gender equality by supporting women in reproductive health care and all together in all the spheres of life. Protecting and supporting their partner's health decisions would improve family planning methods and reduce health risks. Also, men can prove to be a great help once they start to adopt and consider and implement the male forms of contraception. Getting involved in the social platform to understand STDs and other sexually transmitted diseases

²⁴ Murray CJL, Lopez AD. Editors. The Global Burden of Sexually Transmitted Diseases, HIV, Maternal Conditions, Prenatal Disorders, and Congenital Abnormalities. Global Burden of Disease Series Vol. III ^(SEP)1998 Boston, Massachusetts: Harvard University Press.

would also reduce the risk factor, even by Being aware of practicing responsible fatherhood and taking responsibility as a man equally taken by the woman in reproductive health. This would be none other than the only result in promoting gender equality and having a better understanding of health care.

CHAPTER V: JUDICIAL RECOGNITION OF REPRODUCTIVE RIGHTS IN FORM OF HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

Maternal Health

In the year 2008, an enormous amount of petitions and other related complaints were being filed in the court demanding and seeking accountability for injuries and death caused to women concerning pregnancy. Human Rights Law Network came out to be one of the most potent winds that shook the judiciary. It resulted in a few of the groundbreaking recognition pushing women's rights to survive childbirth and pregnancy as a fundamental right.

In the year 2011 a joint landmark decisions were issued by the Delhi high court in two of the cases:

- “Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.”²⁵
- “Jaitun V. Maternity Home, MCD, Jangpura & Ors.”²⁶

This was concerning the denial to provide some of the basic maternal health care to two of the women's who were living below the poverty line. It was further stated in the court in the above cases that “these petitions focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and, in particular, the reproductive rights of the mother.” Citing CEDAW and ICESCR, the decision held that “no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background...This is where the inalienable right to health, which is so inherent in the right to life gets enforced.”²⁷

Similarly in the year of 2012, the Delhi's high court judgment was reiterated by the Madhya Pradesh high court in the substantive case of Sandesh Bansal v. Union Of

²⁵ Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853/2008.

²⁶ Jaitun v. Maternity Home MCD, Jangpura & Others, W.P. (C) 8853/2008 & 10700/2009.

²⁷ Consolidated Decision, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853/2008; Jaitun v. Maternity Home MCD, Jangpura & Others, W.P. (C) 8853/2008 & 10700/2009, Delhi High Court (2010).

India²⁸, for which a PIL was filed probing liability for eternal deaths later only to recognize that “the inability of women to survive pregnancy and childbirth violates her fundamental right to life as guaranteed under Article 21 of the Constitution of India” and “it is the primary duty of the government to ensure that every woman survives pregnancy and childbirth.”

After this, the government struck down the condition of financial stability, imposing a constraint and as a reason for denying primary health care, further stating it to be violative of Article 21. Which also established government obligation to provide maternal health care access with immediate implementation guaranteeing maternal health in the National Rural Health Mission. This included those specific basic amenities in the health facilities such as access to blood, necessary infrastructure, and access to electricity and water inclusive of skilled personnel, and timely maternal health services. Further, the provision of grievance redressal and effective referral mechanisms was also made available to the women if any maternal health care is being denied.

Access To Contraceptive

“In 2016, the Supreme Court issued a judgment in the case of Devika Biswas v. Union of India & Others that moved beyond the reproductive health framework also recognizes women’s autonomy and gender equality as core elements of women’s constitutionally protected reproductive rights.”²⁹

“Claims of violations of reproductive rights arising from coercive and substandard sterilization and the lack of access to the full range of contraceptive methods has been brought before the Supreme Court of India and high courts for over a decade.”³⁰

“In Devika Biswas, the Supreme Court established that state policies and programs leading to sterilization abuse violate women’s fundamental and human rights.”³¹

“This decision marks a significant step forward from past Supreme Court cases, which have justified reproductive autonomy violations due to concerns about population growth.”³²

²⁸ Sandesh Bansal v. Union of India W.P. (C) 9061/2008.

²⁹ Devika Biswas v. Union of India & Others, W.P. (C) 81/2012.

³⁰ Ramakant Rai v. Union of India, W.P (C) 209/2003; Himmat Mahila Samooh v. Haryana, W.P. (C) 12623/2014.

³¹ *Supra* 28.

³² Javed and Others v. State of Haryana, A.I.R. 2003 S.C. 3057; State of Haryana and Others v. Smt. Santra, (2000) 5 S.C.C. 186.

The Supreme Court decided that article 21 includes the reproductive rights of a person. It is recognized to be an aspect of personal liberty under article 21 and the right to health. Also, to enable individuals to make responsible, informed, and free decisions regarding reproductive health, the Supreme Court demanded such rights to access variants of health information, services, facilities, and goods.

It was found by the Supreme Court that “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.”³³ Policies on female sterilization was linked to violations of women’s equality. “The Supreme Court emphasized the obligation to ensure the reproductive freedoms of economically- and socially- marginalized groups, expressing concern that informal targets and incentives have deprived them of any meaningful choice.”³⁴

Forced Pregnancy And Abortion

During recent times India has witnessed progressive evolution in women’s reproductive rights, and the recent jurisprudence related to abortion stands as one firm proof. In the year 2004, the Supreme Court held that “a woman’s decision to undergo either sterilization or abortion without the husband's consent would amount to mental cruelty, further undermining women’s reproductive autonomy.”³⁵

This women’s reproductive autonomy was then recognized as a fundamental right by the supreme court of India in the year 2009, stating “There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21.”³⁶ The high court of Haryana and Punjab jointly recapitulated this autonomy in the year 2011 by dismissing a suit which was filed by a husband against a doctor who performed abortion on his wife without him even knowing or consenting to it saying “it is a personal right of a woman to give birth to a child...No body can interfere in the personal decision of the wife to carry on or abort her pregnancy...unwanted pregnancy would naturally affect the mental health of the pregnant women.”³⁷

³³ *Supra* 28.

³⁴ *Supra* 32.

³⁵ Ghosh v. Ghosh (2007) 2004 S.C. 151.

³⁶ Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 11 S.C.C. 409.

³⁷ Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others, C.R. 6337/2011; Ajay Kumar Pasricha & Others. v. Anil Kumar Mahotra & Others, C.R. 6017/2011; H.C. Punjab and Haryana at Chandigarh (2011).

Further in the case of “Halo Bi V. State Of Madhya Pradesh & Others”³⁸ where the woman was a victim of rape in the year 2013 the Madhya Pradesh high court ruled out affirming the importance of providing abortion access to victims of rape without any judicial authorization, stating “We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation the petitioner is suffering daily will undoubtedly cause a grave injury to her mental health.”³⁹

Also, there have been several cases reported where the access to abortion was provided to a woman past 20-24 weeks in pregnancy due to the high risk of collapse, which could be caused to the woman bearing the child due to various complications to save the life of the mother who is already present and living a life in the outside world. Section 5 of the MTP Act provides for such provision of abortion if there is a grave threat to the woman's life, further saving a pregnant woman's life past 20 weeks of pregnancy.

Child Marriage

Growing recognition regarding child marriage has gradually tended to improve the situation slowly in the country. The courts have also started to accept that marriage at a very young age is naturally and physically wrong and exposes the girl child to certain unwanted and unacceptable circumstances, further exposing them to cruelty by violating their right to live with freedom and dignity. This implicates the violation of fundamental rights and promotes the violation of human rights. “The Delhi High Court expressed concern that child marriage typically involves young, vulnerable girls and exposes them to domestic violence, sexual abuse, and social isolation, underscoring that child marriage is a violation of the right to lead a life of freedom and dignity.”⁴⁰

The courts have also noted that the lack of education in such a married girl child limits their ability to gain knowledge and exposes them to sexual abuse due to a lack of knowledge concerning sexual abuse and sexual relations. The cultural silence tends to deny them the ability to make responsible and accurate decisions about overall

³⁸ Halo Bi v. State of Madhya Pradesh, 2013 Cri.L.J. 2868 (MP).

³⁹ Human Rights Law Network (HRLN), The High Court of Madhya Pradesh allowed a pregnant female prisoner to exercise her reproductive rights under the Medical Termination of Pregnancy Act (2013).

⁴⁰ Association for Social Justice & Research v. Union of India & Others, W.P. (CRL) No. 535/2010, Delhi H.C. (2010); Court on Its Own Motion Lajja Devi v. State, W.P. (CRL) No. 338 (2008) (High Court of Delhi).

health, including sexual health and family planning. "Finally, the court has recognized that child marriage results in an unrelenting cycle of gender inequality, sickness, and poverty."⁴¹

"Child marriage was similarly recognize to be a violation of human rights by the Madras high court in the year 2011."⁴² Later in the year 2015 the same court "issued an important decision establishing child marriage to be violative of girls fundamental rights under article 14 and 15 of the Indian constitution. "The Prohibition Of Child Marriage Act (PMCA) established the minimum legal age for a girl to marry to eighteen years."⁴³ The court also stated in the context of PMCA that "is in favor of all the girl children getting proper education and empowerment and equal status as that of men in the Society, as guaranteed under Articles 14, 15, 16 and 21 of the Constitution."⁴⁴

CHAPTER VI: SURROGACY

The word surrogacy has been derived from the Latin word 'Subrogate,' which means to substitute. "Surrogate parenting is where the commissioning parents make the legal agreement with a woman to give birth to a child for them and give all the parenting rights to the intending parents. It is also called as contract pregnancy."⁴⁵ "Thus, a surrogate mother is a mother who bears the child in her womb for the other person, which can be from her egg or by the implantation of the womb of another woman."⁴⁶

Mainly the procedure of surrogacy occurs when a parent cannot reproduce a baby with the help of the normal process. The other aspect of the story can also be in a situation where the mother is not capable or healthy enough to carry a baby, and if she does, it can impose danger to her life.

Surrogacy and its types:

- Traditional/Natural/Partial Surrogacy

⁴¹ *Supra* 39.

⁴² T. Sivakumar v. The Inspector of Police, H.C.P. 907/2011, para. 1, Madras H.C.

⁴³ <http://legislative.gov.in/sites/default/files/A2007-06.pdf>

⁴⁴ Mohammed Abbas v. Chief Secretary, W.P. (MD) No.3133 of 2015, Madras H.C.

⁴⁵ Tong, R. (1995). Surrogate Parenting. Moral Arguments against Surrogacy vs. Moral Arguments for Surrogacy. Internet Encyclopedia of Philosophy. Accessed on 15-10-20 at 04:56 pm. Available at: <https://iep.utm.edu/surr-par/#H4>

⁴⁶ Prakash, S. (2010). Surrogacy a problem both socially and legally. Assisted Reproductive Technology and Surrogacy. Accessed on 15-10-20 at 08:44 pm.

This type of surrogacy primarily involves genetic relations in a correlative manner. This is basically because of the genetic relation that gets built with that of the embryo with the surrogate as the process tends involving her own ovum. Also in such cases there is an open option for the commissioning father to become a donor by donating his own sperm for the process, which in turn involves the genetic features making the genetic father of the child. In cases where the couple is a lesbian (both woman) they can approach a third party for the infusion of the sperm in order to produce the child. Other ways through which a surrogate woman can get pregnant includes IUI (Intrauterine Insemination), sexual intercourse or IVF (In Vitro Fertilization).

- Commercial Surrogacy

“It is also known to be ‘outsourced pregnancy’ or ‘baby farming’.”⁴⁷ These terms generally finds its place in this type of surrogacy id mainly because of its procedure that technically involves the woman or the surrogate mother to rent her womb in order to receive compensation in monetary terms for the renting.

- Full/Gestational Surrogacy

The pregnancy in this type of surrogacy is obtained through IVF. Here the surrogate does not have any genetic relations with the embryo and performs her function merely as a carrier of the embryo. The IVF calls for the implantation of the already fertilized embryo simply in the surrogate’s uterus. Here both an anonymous third party and the commissioning parents can be involved for the fertilization process.

- Altruistic Surrogacy

This type of surrogacy only commissions and covers the medical expenses for the purpose of surrogacy, which is then received by the surrogate in monetary terms. Also no financial benefits are listed to the surrogate in this particular method of surrogacy.

Motherhood And Infertility

In India, infertility is regarded as one of the critical medical concerns of today’s women. The issue does not date back to a long time but has gradually multiplied with

⁴⁷ *Supra* 45.

each passing day. Also, the one essential point derogated by the researchers for the problem is recorded to be the delay or postponing in childbearing. Not only in India but also in several other countries, the social expectation having from a woman is motherhood, which is also in some or the other manner regarded as one of the essentials for embracing womanhood. "Motherhood is central to the social construction of womanhood in India."⁴⁸ All the other roles including her independency is regarded to be subordinate tasks.

In Indian culture, a great deal of importance is vested in a pure bloodline, ultimately promoted by the mother. Due to such cultural stigmas, all the other methods adopted by couples, such as adoption and other alternative directives, cause marital instability. Here the woman in any or the other way tends to suffer a lot if the problem of infertility persists in her instead of her male counterpart, causing the inability to reproduce. This imposes social constraints on the women driving various kinds of harassments and emotional and mental trauma into low-self esteem.

Gradually this problem of infertility has also boosted the lucrative market and businesses in the medical field. There also exist variations in the provision of facilities in the government healthcare center/programs compared to the private services rendered by the private clinics. This draws a significant line between the affluent, privileged couples, and the couples from lower socio-economic backgrounds. The richer spend fortunes and similarly has no limit in want of a baby, whereas the poor class is not even offered adequate counseling and curative services. With this, the ART Industry (Assisted Reproductive Technology) has also grown ridiculously either through rendering genuine services or in the hope of manipulation for a baby's desire. Due to several reasons, India is counted as the **International Leader** for surrogacy. India has comparatively lower cost procedures than various other countries, including well-educated doctors qualifying from some of the finest medical schools of India and the United Kingdom. People from different countries also come to India to avail of better and cheaper services and comparatively better access to ART facilities with a key point of low expenditure.

Absence/Unavailability Of Law In Context Of Surrogacy

As part of the legal policy in Assisted Reproductive Technology (ART), the Indian Council Of Medical Research (ICMR) has drafted various policies, regulations, legislation, laws, guidelines, and structures in the context of surrogacy. The only

⁴⁸ Sama-Resource group for women and health, 2008, p. 320.

challenge that persists here is that the finalized draft has already been presented to the government but has not yet been approved. Therefore, there is no definite structure or policy and is only present as mere guidelines with the absence of any obligation or authority. The judgment and ethics followed and given by the private/government clinics and physicians are considered to be final and conclusive.

“Commercialized surrogacy has been permitted in India since 2002. The last ART Bill defined who can be a surrogate: a woman aged between 21 and 35, having her children, with no more than five live babies (successful live births) throughout her life, including her children. It also defines the conditions of an agreement between intended parents, surrogacy clinic, and surrogate: traditional surrogacy (when the surrogate is also the oocyte donor) is no longer accepted; surrogates are to remain anonymous, i.e., their identity will never be advertised; and no more than three embryos shall be transferred.”⁴⁹

The Process Of Being A Surrogate

The first step in being a surrogate mother starts from the counseling session between both the parties, i.e., the commissioning/intended parents and the surrogate mother. During the counseling session, all the details and clauses are discussed with the parties, including all the provisions. This takes up to the second step: the sealing of the agreement, also known as the "surrogacy agreement," further finalizing the contract. Thus, the commissioning parent provide all the surrogate mother's requirements such as proper care, nourishment, and nurturing, financial aids during gestation, and after the baby is born till some time. The after care is necessary, as specific medical requirements are needed by the mother who has just given birth involving her health and other factors. At the time of the contract, monetary compensation is also agreed upon to be given to the surrogate. "All the different perspectives like a failure of pregnancy, multiple pregnancies, and handicapped child etc. are well explained to the commissioning parents and to the surrogate mother."⁵⁰

There are various other factors included in the journey of becoming a surrogate. The general dogma of the society has always been stuck to the understanding that 'men are the breadwinners' of a family, but today this has evolved to change. In many

⁴⁹ Virginie Rozée Gomez, Sayeed Unisa (2014). Surrogacy and reproductive rights in India. No existing law pg.169. Accessed on: 17-10-20 at 07:01 pm, available at: https://www.researchgate.net/publication/275521390_Surrogacy_from_a_reproductive_rights_perspective_the_case_of_India.

⁵⁰ *Supra* 48.

households, women earn bread for the family, whereas the husband or the men is either into some low-income job or has no job. As per the records, it was also analyzed that generally, these surrogates hail from the poor background to meet up their household's basic needs. In many cases, women also hail from good families with prior existing jobs but tend to leave such low-income jobs to be a surrogate to be paid with the hefty fee. Therefore, the Indian women's primary motivation to do such jobs emerges from the strategy of survival.

Financial And Gender Constraints

The one question that regulates such constraints is whether it is the free reproductive choice of the woman to become a surrogate or not. As discussed in the above paragraphs we came across knowing that the women have adopted it in order to fulfill the gaps of debts, money and family. Moreover the feeling of the women to indulge into such procedure comes from the thoughts of doing something rather than being unemployed. Prostitution and surrogacy are the two very frequent options chosen by the less educated/qualified, poor, or earning low income women but at what cost? Whether such choices come from some kind of pressure or violence or is the free choice given to the women.

Generally, couples mostly from the United States and other countries chose India if wanting a baby through surrogacy. The reason behind it is the cheaper facilities, which help them undergo several attempts in case of failure. The difference here is that in one particular amount of money invested in India can give them several attempts. In contrast, the same amount of money would only provide them with the option of only once back in their own country. It was also estimated that the cost for the process sums up to 25,000 to 35,000 USD in India, whereas in the United States, it is about 70,000-10,0,000 USD.

The subject of gender constraints that are related in the context of surrogacy is due to the stereotypical gender biases faced by women since the time immemorial. Women who cannot reproduce offspring face a lot of challenges and stigmas of childlessness, making their life difficult to live due to the tortures inflicted upon them. Thus, surrogacy tends to be an escape for such women, which ultimately helps them keep away from such societal dilemmas. This surrogacy situation can also be seen as a fulfillment of the desperation of two women wanting something out of a mutual choice. The intended mother's anguish ought to be the baby, and the surrogate ought to be big money paid, which will help her live her life in a better possible manner.

But, according to associations, “the freedom of the surrogate mother is an illusion as the supposed benefits of surrogacy is created by a capitalist patriarchal society.”⁵¹

Therefore, being a surrogate is accompanied by various factors behind the women, and the choice is made as a mother rather than an emancipated woman.

Surrogacy From The Perspective Of Religion

In India, the primary religion to be followed by the people is Hinduism. Similarly, surrogacy is accepted in the Hindu culture but is opposed and rejected by Islam and Catholics. Even Buddhism permits surrogacy, for that matter. The one primary reason behind such opposition is that people believe in many religions and compare surrogacy with prostitution. The misconception even arises to the verge where people think of it as adultery because people tend to think of surrogacy as a practice where the woman indulges in sexual intercourse or relation with some other man than her husband. The fuel to the fire is added when some of the feminists start to compare surrogacy with prostitution and states “surrogates sell reproductive capacities while prostitutes sell sexual capacities.”⁵²

Due to such reasons, just like prostitution is also not openly allowed in the Indian workspace. Also, both are regarded as non- professional activities.

The Decision Making Power Of A Surrogate Influenced Through A Closed And Monitored Environment

In India, when an agreement occurs between a surrogate and intended parents, the surrogate has no right to say in the contract. Everything is either decided by the physicians in charge or by the intended parents. The surrogate can neither negotiate nor discuss any possible clause of the agreement. In most cases, the intended parents do not even include the surrogate mother's name on the child's birth certificate. Moreover, a copy of the agreement is also not provided to the surrogate.

In case a surrogate has agreed upon all the clauses, terms, and conditions indirectly, her right to live freely is taken away for those nine months. This is because the intended parents and the doctors, to prevent any kind of medical failure, start to control every aspect of the surrogate's life, even restricting her from the right to move freely.

⁵¹ Virginie Rozée Gomez, Sayeed Unisa (2014). Surrogacy and reproductive rights in India. Financial and gender constraints. pg.173. Accessed on: 17-10-20 at 11:04 pm

⁵² *Supra* 50.

In this manner, life becomes extremely difficult for the surrogate mother. Once the gestation period starts, she is shifted to a place away from her home that the other party rented, where she is bound to leave everything and live in the space provided to her. Not only this, the woman is kept under regular medical supervision and is being monitored continuously by the medical team. This clearly highlights a clear bio-power not only over the woman but also over her body.

The separate stay in a particular space has been managed so that the baby can grow better and without any complications. But is it entirely justifiable to restrict one's space of movement by altogether ignoring the woman's existence for what she is about to bring into this world? In this manner, the woman somehow starts to become a commodity or a property of the medical system having complete authority over her body. In the process, the surrogate begins to develop into a reproductive/productive machine.

In some cases, the surrogate's are blessed with a bonus amount or extra money if the baby is healthy and has a good weight, and this precisely builds up the pressure of performance over the woman by feeding more amount of unwanted and undesired food to her body in the want to earn that extra money.

Due to the entire prior exercised precautions and measures, it would help minimize the medical risk, which is very prone to take place in such conditions. But the way to do it can be very unjust and irrelevant for the woman because she has no other option but to live her life on someone else's demands and conditions, completely ignoring one's individuality and freedom of life.

CONCLUSION/SUGGESTION

The judiciary here has a very crucial and significant role to play in order to address both practical and legal hurdles that abstains women and girls their reproductive rights. The option and procedure of litigation comes with its own challenges and barriers, which can be such as extended or delayed time period and adversity in the application of decisions. One of the expected fundamental roles to be performed by the judiciary is supervising the implementation of existing decisions. Also, in the future years, Indian courts may formulate long term pending cases probing intensifying interpretations. If observed with a slightly different aspect of reproductive health or rights, it not only restricts to the women or the girl but also spreads to the family health at large, including social issues. The well being of the

women and the entire family is the ultimate aim to achieve in addition to the government's responsibility to give quality reproductive health care rights. To promote this issue, the involvement of men (spouse) in active community participation and women will be the idealistic goal to achieve.