



Commercial surrogacy vs. altruistic surrogacy: A socio-legal analysis and its implications

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Abstract

For continuation of human race, reproduction is the elementary essence. But infertility has caused strain among the married couples in their marital as well social life. Technological innovation and the innate desire in order to beget a genetically related child have led to the emergence of the concept of surrogacy. Thus, the infertile couples are prone in opting surrogacy but this concept gives rise to a numerous controversial issues *viz.*, emotional, social, ethical, commercial, psychological, medical and legal. Currently, in India there is a call for nationwide guidelines as this practise had given rise to a reportedly rampant exploitation of surrogates by paying them a meagre amount. It is seen that in the current proposed legislation, much prominence is given to altruistic surrogacy arrangements and, therefore, it is indispensable to identify the rights of a surrogate in order to safeguard their interests.

Thus, the aim of this comprehensive analysis is to substantiate in depth the problems of commercial surrogacy and altruistic surrogacy as well as to address the numerous controversies in light of current laws and proposed legislation, namely The Surrogacy (Regulation) Bill of 2020 and the Assisted Reproductive Technology (Regulation) Bill of 2020. Effort has been made in the ensuring sections to catalyze whether or not a ban on the practise of commercial surrogacy is within the constitutional mandate and to identify whether such restrictions on the practise of commercial surrogacy is in derogation to the regulations laid by international conventions. Furthermore, this research work may be taken into forethought by the legislative organ while enacting the legislation or while making amendments in the proposed legislation.

Keywords: altruistic surrogacy, assisted reproductive technique (regulation) bill, 2020, commercial surrogacy, human trafficking, monetary benefit, surrogacy (regulation) bill, 2020

Introduction

Since time immemorial, begetting a genetically related child is basically accomplished through the social institution of marriage and family (Kaur, 2015). With the enormous development of technology, the practice of surrogacy has rapidly expanded (Borah, Hazarika, & Kalita, 2020). The successful progression of the entire branch of medical tourism and the less restrictive laws and the uncodification of proposed legislation to regulate ART clinics has led India to be a popular hub for foreigners seeking low-cost infertility treatment (Bhattacharyya, 2016a, b; India, 2009) ^[5, 6]. The practise of surrogacy generates a yearly revenue of about USD 2.5 billion due to its easy access to a large number of impoverished Indian woman who acting as surrogates due to economic constraints by providing an invaluable service to the medically and socially infertile couples/individuals by assisting in begetting a child genetically related to them (Reddy, 2020) ^[21]. Surrogacy is described as a process in which a woman bears and gives birth to a child on behalf of an intended partner (The Surrogacy Regulation Bill, 2019). The woman who consents to become a surrogate shall carry the child for full term and shall renounce all her parental right and shall pass over the child to the intended parents when the child is born.

Surrogacy has been practised since the birth of the first test-tube baby, Louise Joy Brown, on July 25, 1978. (Hutchinson, BBC News, 2003). Following the birth of the first IVF baby of the world, Louise Brown, the second IVF baby of the world and India's first IVF baby, Kanupriya alias Durga in Calcutta was born on October 3, 1978

(Surrogacy Laws India: Legally Yours). Commercial surrogacy has been legalised in India since 2008 (Baby Manji vs. Union of India). The rising stipulation of the practice of surrogacy may lead to the bigotry and abuse of the surrogates. Surrogates, for example, are paid inadequate amounts ranging from INR 50,000 to INR 500,000, while clinics pocket millions of rupees (Ganapathy, 2019) ^[11]. In addition to being involved in illegal and harmful surrogacy activities, these so-called surrogacy clinics are also agents involved in women and child trafficking (Pande, 2014) ^[20]. Such unimpeded intensification, exponential growth of surrogacy and lack of codification to regulate the practice of surrogacy has become an intricate issue in India, endangering the rights of surrogates and intended parents in a variety of ways, leading to the introduction of several legislations pertaining to commercial surrogacy restrictions. However, the parliamentary agenda have often been subjugated by deliberation on their rights and interests of the surrogates with no avail and the issues pertaining to their personal liberty of lending their womb on rent remain vague (Watson, 2016) ^[40]. While this Bill is notable in its goals of ending "surrogacy for gains" in India, it falls short of resolving women's human rights as people have the freedom to choose their profession and therefore the right to lend her womb on rent. This analysis is an effort to determine whether the provision of a moratorium on commercial surrogacy in the proposed legislation is within constitutional mandate and whether such a ban in the proposed legislation is in violation of international conventions followed by a review of the likely effects of outlawing surrogacy in India

along with suggestions that can be made to improve upon the existing legal framework. As such, the ensuing sections in this study aims to probe into the status of the latest proposed legislative structure on surrogacy. It further aims at critically analysing the provisions of the Surrogacy (Regulation) Bill, 2020 and Artificial Reproductive Technology (Regulation) Bill 2020 in relation to a woman's right to lend a womb on rent in order to gain monetary benefit from the scientific progress and the efficacy of the Bills in preventing exploitation of assisted reproductive technology including promotion of harmless and moral exercise of assisted reproductive technologies without hampering the rights of the surrogates. Lastly, it is to suggest policy recommendations so that improvement can be made upon the existing legal framework.

Materials and Methods

The focal point of this research is an assessment of the concept of altruistic surrogacy as incorporated in the proposed Bill and, therefore, to swot up the topic under consideration, doctrinal method has been adopted. Under this, the lacunas of the proposed legislation relating to the provision of altruistic surrogacy in India are touched upon. With regard to the subject under consideration, the provisions enshrined under National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics 2005, and the 228th Report of Law Commission of India, the 102nd Report on Surrogacy Regulation Bill, 2016 as well as 129th Report on the Assisted Reproductive Technology (Regulation) Bill, 2020 is catalysed with the help of a few decided reported cases. The study will further focus on various U.N. Conventions and U.N. Declarations dealing with the debate regarding the ban of commercial surrogacy *viz.* Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights, 1966, just to name a few.

Results and Discussion Indian Legal Framework on Surrogacy

It is a sensitive topic to determine the right to rent womb. A slew of legal and moral issues can emerge by the dint of the indiscriminate use of the right by the woman who acts as a surrogate. In 2005, the ICMR published the National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India, the first national guidelines for establishing codes of conduct for surrogacy in India and released a draft Bill called the Assisted Reproductive Technology (Regulation) Bill and Rules, 2008. The Bill aspired to make commercial surrogacy legal. The Department of Health Research, Ministry of Health & Family Welfare, Government of India, reconsidered the said Bill. Meanwhile, the Surrogacy (Regulation) Bill, 2016 was passed in the Lok Sabha on 21st November, 2016. Later, on 12th January, 2017, the Chairman of the Rajya Sabha referred the Surrogacy (Regulation) Bill, 2016 to the Parliamentary Standing Committee on Health and Family Welfare for review, headed by Prof. Ram Gopal Yadav, the chairperson of the said committee, to deliver the report on its behalf. As a result, the Committee released a Press Release asking individuals and other parties to provide memoranda/ points of view. The oral testimony as well as written comments from different institutes/ bodies/ associations/ organizations/ experts, as well as responses

from the Ministry on the memoranda were reviewed and considered by the Committee. As a result the draft Report was approved on 8th August, 2017 and published the One Hundred Second Report (102nd Report, 2017) on the Surrogacy (Regulation) Bill, 2016 after holding ten sittings during the course of the review of the said Bill.

The Committee observed that the Assisted Reproductive Technologies (Regulation) Bill that was drafted in 2008 was subjected to periodic scrutiny and redrafting, first in 2010, and again in 2014. The Bill aimed to ensure proper control and oversight of Assisted Reproductive Technology (ART) clinics and banks in the region, as well as to avoid the abuse of such technology together with surrogacy, and to guarantee the secured and moral practise of ART services. The Department of Health Research, Ministry of Health & Family Welfare, Government of India, is considering the ART (Regulation) Bill. On being asked as to why the Surrogacy (Regulation) Bill, 2016 was initiated too quickly, the Department claimed that the Artificial Reproductive Technology (Regulation) Bill would be introduced shortly after the Surrogacy Bill. As mentioned in the 102nd Report, the stakeholders have also pointed out that the Surrogacy Bill does not address different aspects of Artificial Reproductive Technology, such as surrogacy agreements, gamete donors, documents, foetal reduction, the set up of a National Registry of Artificial Reproductive Technology Banks and Clinics, the responsibilities of Artificial Reproductive Technology clinics, and so on. Furthermore, certain provisions of the Artificial Reproductive Technology (Regulation) Bill, 2008 have been written with greater lucidity and accuracy as compared with the Surrogacy (Regulation) Bill, 2016, such as concepts of surrogacy, surrogate mother, and infertility, organisational structure, powers and duties of regulatory bodies etc. The Committee is convinced that, with the rapid development of science and technology in all areas of life, there is an urgent requirement to control the use of modern techniques, especially assisted reproduction and the use of ART for surrogacy. As a result, the Committee firmly suggests that the ART Bill be introduced before the Surrogacy (Regulation) Bill, 2016. Meanwhile, in 2017, the ART Bill was redrafted.

The Surrogacy (Regulation) Bill, 2018 was redrafted and again passed by the Lok Sabha on 19th December, 2018. Dr. Harsh Vardhan, Minister of Health and Family Welfare, reintroduced the Surrogacy (Regulation) Bill, 2019 in the Lok Sabha of the Indian Parliament on July 15, 2019 and the said Bill was passed on 05 August 2019, and then referred to the Select Committee, comprising of 23 Rajya Sabha Members chaired by Mr. Bhupender Yadav, on a motion adopted by the House on 21st November, 2019, for review and study. A report was compiled by the Select Committee on the Surrogacy (Regulation) Bill, 2019 submit its final report on 5th February, 2020. According to the report of the Select Committee, the Surrogacy (Regulation) Bill, 2020 was redrafted and approved by the Union Cabinet on February 26th, 2020, and now awaits to be passed by Rajya Sabha before receiving presidential assent and serving its function.

With regard to Assisted Reproductive Technology (Regulation) Bill, 2020, it was mentioned in the 102nd report on Surrogacy Regulation Bill, 2016 that along with the regulation of the practise of surrogacy, there is an instant requirement to control ART clinics. Surrogacy operations cannot be carried out without the use of assisted

reproduction techniques as these are not different entities; thus, simply passing the Surrogacy (Regulation) Bill, 2020 does not serve the function of regulating the commercialization of surrogacy facilities. When reviewing the Bill, the Committee proposed enacting substantive regulations to first restrict clinics and banks that provide multiple reproductive facilities, such as ART and surrogacy. Besides, the Select Committee on the Surrogacy (Regulation) Bill, 2019, has proposed that the ART Bill be introduced prior to the Surrogacy (Regulation) Bill, 2019, in order to better resolve all of the extremely technological and medical issues of the Surrogacy (Regulation) Bill, 2019 (102nd Report).

As issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi, the 18th Law Commission was formed for a three-year term beginning on 1st September, 2006, by Order No. A.45012/1/2006-Admn.III (LA) dated 16th October, 2006. Initiative was taken up for study by the Law Commission under the Chairmanship of Dr. Justice AR. Lakshmanan on its own motion and prepared the 228th Report in 2009 emphasising on an active legislative action to encourage proper usage of digital technologies, such as Artificial Reproductive Technology and legalization and regulation of the practise of surrogacy legalisation. On the basis of the recommendations of the Law Commission of India in its 228th Report to restrict the practise of commercial surrogacy and to legalise the practise of altruistic surrogacy by the former Minister of Health and Family Welfare, Mr. J. P. Nadda, the Assisted Reproductive Technology (Regulation) Bill, 2020 was passed in the Lok Sabha on 14th September, 2020, and on October 3, 2020, the Bill was referred to the Standing Committee on Health and Family Welfare, and the Standing Committee. The Committee deliberated on the draft Report and approved it on 17th March, 2021 (129th Report, 2020).

Recognising the Right to Rent a Womb

There is no expressed and explicit mention in any international and national legal documents regarding the liberty of a woman to be a surrogate yet, a wide range of issues associated with surrogacy are considered in these documents. As India is a hub for being indulged in the practise of surrogacy, this question pertaining to the liberty of a woman to be a surrogate bears a great significance because an escalating number of poor Indian women are adding up to rent out their womb (Bhattacharyya, 2016a, b) ^[5, 6]. This makes it significant to ascertain the prime issue of the necessity for making provision with regard to the liberty of a woman to lend their womb on rent and regarding the legal groundwork of such a right in devoid of explicit legislation. This may make it obligatory to reconsider a State's right to impede in human rights and curb these rights on the grounds of public interest and morality. In certain cases, begetting a child can be accomplished only by means of Assisted Reproductive Technologies (ART) or by surrogacy. The imperative issue that is required to be ascertained is whether the right to propagate can be extended to propagate for another.

The scope of the term 'personal liberty' was broadened by the Supreme Court (*Maneka Gandhi v. Union of India*) stating that numerous rights come within the purview of personal liberty of an individual as mentioned under Article 21 of the Constitution of India (Sehgal, 1995). Thus, in the

light of the welfare of the society, it is logical to state that the liberty of a woman to be a surrogate can be considered as an essential and imperative right and included within the ambit of personal liberty. Conversely, to validate total deprivation of liberty, social interest must never be dominated (*Km. Hema Mishra vs State of UP & Ors*). As a result, the equilibrium between the contradictory interests of the society and the liberty to procreate for another, that is, to be a surrogate has to be duly maintained.

The right of a woman to procreate for another can further be vindicated on the foundation that it is the liberty of each individual to gain profit from the benefits of scientific advancement which has been expressly incorporated in a numerous international and regional instruments. This was recognised for the first time in 1948 in Article 13 of the American Declaration of the Rights and Duties of Man, which gave everybody the right to profit from scientific advancement (Buergethal, 1975) ^[8]. Article 27 of the Universal Declaration of Human Rights (UNGA, 1948) and clause (1) (b) of Article 15 of the International Covenant on Economic, Social, and Cultural Rights bolstered this right (UNGA, 1966). Furthermore, Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, 1975 elaborated on the freedom to benefit from scientific advancement and obligated state parties to take apposite steps to guarantee this right. Article 15 of Universal Declaration on Bioethics and Human Rights, 2005 reiterates this right. The ICMR Guidelines, Rule 3.5.4, expressly acknowledges this privilege as well, stating that the surrogate is allowed to pecuniary reimbursement from the intending parents for acting as a surrogate; the reward is to be determined between the intending parent/parents and the woman who consents to be a surrogate (ICMR, 2005). Thus, it is reasonable to conclude that everybody has the right to benefit from scientific advancement and its implementations. In 1999, the Andhra Pradesh High Court appeared to rule that the right to make reproductive decisions is basically a personal matter (*B. K. Parthasarthy v. State of Andhra Pradesh*). Article 21 of the Indian Constitution guarantees an individual's right to life and personal liberty (Bakshi, 2016) ^[3]. According to the said Article, an individual's right to control her or his body is ancillary, and such liberty is shielded from unlawful intervention. As a result, it can be deduced that individuals possesses a right over their own bodies and has the right to profit from technological advancement and its implementations, granting a woman the right to rent her womb, i.e., to be a surrogate mother. It should be remembered, however, that the property right over the human body is not absolute and, like any other property right, may be subject to fair restrictions. In light of these interpretations, it is reasonable to conclude that such liberty requires the right to decide to beget or not to beget a child, and that this right should also include the right to rent a womb.

Provision in the Proposed Bills vis-à-vis Right to lend a womb for surrogacy

The biggest points of concern for lawmakers and scholars have been the ban of industrial surrogacy. When a woman is paid to be a surrogate, this is referred to as commercial surrogacy. On the contrary, it is referred to as altruistic surrogacy where a woman earns no benefits other than her

medical and other pregnancy-related costs, as well as health coverage. But according to current literature, the absence of reimbursement would result in coercion and exploitation thereby impeding healthy surrogacy facilities (Bhattacharyya, 2016) ^[5, 6]. According to Gupta & Prasad (Gupta & Prasad, 2019: 299), the Bill fails to resolve the “physiological and emotional cost that surrogates bear,” but it is “empowering in a narrow way” (Bhattacharyya, 2016a, b) ^[5, 6]. They advocate industrial surrogacy because it “offers women economic opportunities of a scale otherwise denied to them, enabling them to fight a life of poverty” (Gupta & Prasad, 2019: 299).

According to Rule 3.5.4 of Chapter III of the ICMR Guidelines, the couple pursuing surrogacy is responsible for all costs incurred by the surrogate mother during conception and post-natal treatment related to pregnancy. Surrogate would also be considered to receive pecuniary reward from the intending parent/ parents in exchange for agreeing to serve as a surrogate; the precise amount of this compensation would be determined between the intending parent/ parents and the prospective surrogate mother. Furthermore, according to Rule 3.10.3 of the ICMR Guidelines, fees to surrogate mothers shall cover all legitimate maternity expenses. According to Clause 34(3) of the Assisted Reproductive Technology (Regulation) Bill, 2008, if a woman decides to be a surrogate, the intending couple or person may pay the surrogate mother monetary compensation (The Assisted Reproductive Technology (Regulation) Bill, 2008). Similar provisions are being sought under clause 34(3) of the Assisted Reproductive Technologies (Regulation) Bill, 2010 and clause 60(3) (a) of the Assisted Reproductive Technology (Regulation) Bill, 2014. But no such provisions are seen in Assisted Reproductive Technology (Regulation) Bill, 2017 and Assisted Reproductive Technology (Regulation) Bill, 2020. On the contrary, The Surrogacy (Regulation) Bill, 2020, bans industrial surrogacy while permitting altruistic surrogacy by virtue of Clause 3(ii) (The Surrogacy (Regulation) Bill, 2020). Although this is intended for the surrogate mothers' health and safety, yet it violates Article 21 of the Constitution of Constitution (Bakshi, 2016) ^[3] as well as gender rights and civil liberties conferred by the conventions. Such a limit imposed by Clause 3(ii) of the Surrogacy Regulation Bill, 2020 is incompatible with Article 13 of the American Declaration of the Rights and Duties of Man, 1948 (Buergenthal, 1975) ^[8]; Article 27 of the Universal Declaration of Human Rights, 1948 (UNGA, 1948); Article 15 (1)(b) of the International Covenant on Economic, Social and Cultural Rights, 1966 (UNGA, 1966); Article 15 of the Universal Declaration on Bioethics and Human Rights, 2005 (UNGA, 1998) as well as the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, 1975 (UNGA, 1975).

The statement and object of the Assisted Reproductive Technology (Regulation) Bill, 2020 reflects the legislative intention of the requirement to regulate the Assisted Reproductive Technology Services. The motto of this proposed Bill is primarily to shield the affected women and children from exploitation by providing them with an insurance cover. Section 33(1) (d) of the Surrogacy Regulation Bill, 2020 puts restrictions on any medical geneticist, gynaecologist, registered medical practitioner or any person from exploiting woman in any form (The

Surrogacy Regulation Bill, 2020). It also contains provision regarding punishment to those who indulge in contravening the provisions by exploiting women. It is also pertinent to mention that the The Surrogacy (Regulation) Bill, 2020 under Section 36(1)(d) restrains any individual, organization, surrogacy clinic, laboratory, or medicinal institution of any sort from exploiting or cause to exploit the surrogate mother or child born via surrogacy in any way. Section 36 (2) provides for punishment with imprisonment for a term which may extend up to ten years and a fine of up to ten lakhs rupees if any of the provisions mentioned under Section 36(1) are violated. Furthermore, Section 37(1) stipulates penalty with imprisonment for a term of up to five years and a fine of up to ten lakhs rupees if any of the provisions of this Act (other than those referred to in Section 36) and rules and regulations are violated (The Surrogacy (Regulation) Bill, 2020). On the contrary, most of the time, a woman acts as a surrogate for financial reasons, necessitating the recognition of a woman's right to lend her womb for financial gain using advances in assisted human reproductive technologies. Thus, putting a ban on commercial surrogacy is itself exploitative in nature on the ground that such a ban on commercial surrogacy will be an immoral, unethical and anti-social practice on the ground that it would lead to exploitation of poor women who may act as a surrogate because of economic necessity, illiteracy and unawareness of their legal rights.

Impact of Outlawing Commercial Surrogacy

Most of the time, a woman acts as a surrogate for financial reasons, necessitating the recognition of a woman's right to be a surrogate for financial gain using advances in assisted human reproductive technologies. The right of a surrogate to be compensated for her services is a contentious subject as during the procedures of surrogacy, a surrogate mother undergoes physical examinations, all appropriate testing, and medical procedures whenever needed before the child is born so as to beget a child genetically identical to the intended parent/ parents. According to one point of view, every right comes with a corresponding obligation, which obligates a surrogate to take good care of her health and sufficient nourishment to ensure the safety of the infant in her womb. As a result, any costs associated with the surrogate pregnancy process must be paid by the intended parent/ parents. Yet, the emotional anguish that an altruistic mother experiences after the child is handed over to the commissioned parents would be similar to that of a commercial surrogate but the provision for transaction costs may compensate such mental trauma to some degree. Apart from receiving all the medical cost, it is inevitable to provide insurance protection to the health and life of the surrogate woman as surrogate pregnancy also involves various risk factors like any other pregnancy. In a surrogacy procedure, the risk factors may be high due to the fact that it involves a technological interference. Therefore, it is necessary to provide insurance protection to the health and life of the surrogate woman.

While it is everyone's privilege to profit from science and technical advancements, and a woman's right to serve as a surrogate is a part of her liberty and privacy as well as an assertion of her property right over her body. It is always thought that a woman's integrity is lowered when money is paid to the surrogate for her services and it is often protested on the grounds that it lowers the value of the child. As a

result, the requirement of the different parties must be considered, and the surrogates must be paid compensation for her services. A woman should not be judged for participating in surrogacy by receiving monetary compensation because she gives her informed consent to serve as a surrogate of her own volition. The main intention of the intended parent/ parents behind hiring a surrogate is to beget a child that is biologically linked to one of them. The surrogate woman provides an invaluable asset to the intending parents by rendering their valuable labour. A surrogate is entitled to financial benefits due to physical changes in their bodies, dietary changes, the work of bearing the foetus and the inconvenience and medical risk of labour. It is also justified on the basis that any human being has the right to enter into contracts with others and be compensated for their services. Conversely, there may be abuse of vulnerable and illiterate women who may be coerced to serve as surrogates. Thus, prohibiting payment in surrogacy will lead to a situation in which women may decline to act as surrogates, thereby affecting the inherent desire of the infertile couples to beget a child genetically related to them. In order to safeguard surrogate women's privacy, the state should not enact any legislation arbitrarily by putting a restraint on commercial surrogacy and shall not prohibit the surrogates from being paid in lieu of their valuable service provided.

India was the first country in the global south to establish a robust national and international surrogacy industry (Pande, 2011) ^[19]. Total altruistic surrogacy would be an unethical, and anti-social activity because it might lead to manipulation of vulnerable women who could serve as surrogates for monetary reasons. Altruism may drive this economic activity underground, contributing to illicit surrogacy and prostitution networks and bolstering the black market economy (Bhattacharyya, 2016a, b) ^[5, 6] and may be threatened and forced to be a surrogate by their relatives, traffickers, and intended parent/ parents. It should be remembered that the imposition of utter altruistic surrogacy can force these women into less financially lucrative (Reddy, 2020) ^[21], poorly supervised, and potentially dangerous forms of employment compared to altruistic surrogacy and can thus be classified as a kind of modern slave labour without free consent, as the surrogate woman would be obliged to abide by the terms and conditions put on her by the intended parent/ parents and the physician as outlined in the surrogacy contract agreement. The expanded usage of surrogacy has sparked a massive debate and controversy within society in addition to the legal fraternity due to its probability to affect various human rights. The ratio decidendi of cases such as *Baby Manji vs. Union of India* has addressed legal and human rights questions. Such cases raised questions relating to legitimacy of surrogacy procedures, fairness of contractual surrogacy, the compliance of surrogacy contracts, surrogate child parentage, the rights of surrogate mothers, the rights and obligations of the commissioned parents and the entitlement of the surrogate child. The Surrogacy (Regulation) Bill, 2019, takes a negative stance on the myriad of transaction cost (Verma, 2019) ^[39] problems that emerge in this economic operation. In terms of contract law, the state's partial participation can result in market distortion and arbitrariness of contractual obligations (Torres *et al.*, 2019) ^[34]. Thus, Thus, it can be stated that commercial surrogacy has more advantages as compared to surrogacy as goodwill

and to govern the practise of surrogacy in India, there is a critical need for substantive legislation by taking into account the competing interests of different parties engaged in surrogacy and to strike a bargain between their interests and the interests of society.

Conclusion

The decision of a woman to lend her womb on rent is included within the scope of personal liberty and is incidental to the premise of broadening the word 'personal liberty' by the Supreme Court (*Maneka Gandhi v. Union of India*, 1978) which held that a diverse range of rights elicit to personal liberty of a person as it is in close proximity to Article 21 of the Constitution of India (Sehgal, 1995). Part III of the Indian Constitution states that "the State is prohibited from making any law which takes away or abridges any of the rights conferred by part III" (Bakshi, 2016: 19) ^[3]. Furthermore, Article 13(2) specifically states that in the event of a conflict between State laws and Fundamental Rights, the latter would take precedence. From this correlation, it can be accredited that in the pursuit of the society, the right to be a surrogate i.e. to rent a womb and vice versa should be duly recognised. By virtue of the said Article, the right of an individual over her/his body is auxiliary and such the right to such liberty is to be sheltered against unlawful interference. Meanwhile, the factor of social interest must not be domineering in order to validate total deprivation of individual liberty (*Km. Hema Mishra vs State of UP & Ors*). Seemingly, in 1999, Andhra Pradesh High Court held that it is a personal matter appertaining to the right to make decisions about reproduction (*B. K. Parthasarthy v. State of Andhra Pradesh*). Thus, it is an implicit presumption that every individual have a right over their own body, which endows a woman the right to rent her womb. Restraining commercial surrogacy will be an immoral, unethical and anti-social practice on account of the fact that it would lead to exploitation of poor women who may be a surrogate because of economic necessity, illiteracy and unawareness of their legal rights. However, it should be noted that the property right over the human body is not an absolute right, and may be subject to reasonable restrictions keeping in consideration about the physical and mental health of the surrogate.

With advances in Assisted Reproductive Technology, new prospects for a woman to be a surrogate for another in exchange for cash compensation have emerged. Conversely, a ban on commercial surrogacy cannot be justified as a fair restriction. The Artificial Reproductive Technology (Regulation) Bill, 2008 was found to strictly follow the ICMR Guidelines, while the Surrogacy (Regulation) Bill, 2020 does not. On making a comparison between the Artificial Reproductive Technology (Regulation) Bill, 2008 to the Surrogacy (Regulation) Bill 2020, one can contend that the former upholds the rules of the Constitution of India. The Surrogacy (Regulation) Bill, 2020 violates Article 21 as well as Article 19(1)(g) of the Constitution of India by banning commercial surrogacy on arbitrary grounds (Bakshi, 2016) ^[3]. Furthermore, failure in addressing the rising transaction costs of altruistic surrogacy would jeopardise not only a surrogate's right to a living, but also their right to life and personal liberty and thus, these prohibitions cannot be enforced randomly. As a result, the proposed Surrogacy Bill, 2020, should be consistent with the ICMR requirements in order to successfully resolve the

right to be a surrogate. This freedom must be made available to any woman, with fair limits enforced to ensure that such liberty is not exercised unfairly by a woman.

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