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QUICK LOOK...

SUPREME COURT UPHOLDS RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT

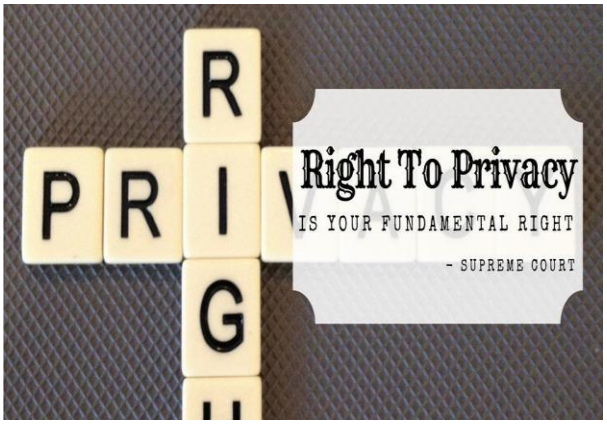
The Supreme Court's verdict of declaring Right to Privacy as an intrinsic part of the right to life and personal liberty had been hailed as a landmark ruling. The ruling has another significant impact on garning the support of the masses more importantly as it being delivered at a time when the judiciary was under fire on grounds of judicial overreach; stepping outside its contours of judicial powers. The nine-judge Constitution bench while delivering the judgment overturned the previous two judgments to the extent to which they were in contradiction to the same.

The right to Privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

Privacy can be termed as a claim of an individual to decide the limit to which he desires to expose his or her life to others, as interaction in a social order is inevitable there arises in light of the recognized power of the State to work towards public good, the threat of intrusions into personal privacy. The judgment is in cue with this understanding of privacy as to restrict the government for intruding into the personal space; and more importantly the same ruling will have significant implication on the Aadhar project.

BODY OF JUDGMENT

The judgment was a rather a long one providing detailed reasonsoning behind the verdict which includes opinions from six (6) judges, and which creates a legal framework for Privacy protection in India. The opinions cover a wide range of issues in clarifying that Privacy is a fundamental inalienable right, intrinsic to human dignity and liberty. The decision is especially timely given the rapid roll-out of AADHAR scheme. Ambiguity on the nature and scope of Privacy as a right in India allowed the government to collect and compile both demographic and and biometric data of residents; which posed a question on the security and privacy of the citizens.



Although the rationale behind the introducing AADHAR scheme was to ensure government benefits and schemes reached to deserving and intended recipients; the same could have other implications affecting individual rights.

TWO PREVIOUS JUDGMENTS

During the hearings, the Central Government opposed the classification of Privacy as a fundamental right. The government's opposition to the right relied on two early decisions, MP Sharma v. Satish Chandra in 1954, and Kharak Singh v. State of Uttar Pradesh in 1962 which had held that Privacy was not a fundamental right.

"In MP Sharma v. Satish Chandra 1954, the bench held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right of Privacy. They argued that the Indian Constitution does not include any language similar to the Fourth Amendment of the US Constitution, and therefore, questioned the existence of a protected right to Privacy. The Supreme Court made clear that M.P Sharma did not decide other questions,,such as "whether a constitutional right to Privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty under Article 21."

It was contented by the government that as the larger bench of previous two judgments have held that Right to Privacy should not be a Fundamental Right; so the decision should be upheld and should not be open to discussion again.

JUDGEMENT

The judgment says:

"Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian constitution".

The nine-judge bench of the Supreme Court delivered its verdict in Justice K.S. Puttaswamy v. Union of India, unanimously affirming that the right to Privacy as a fundamental right under the Indian Constitution. Apart from affirming the existence of the fundamental right to Privacy under the Indian Constitution for which each of the nine judges must be unreservedly applauded, Puttaswamy will have a profound impact upon our legal and constitutional landscape for years to come. It will impact the interplay between Privacy and transparency and between Privacy and free speech; it will impact State surveillance, data collection, and data protection, LGBT rights, the legality of food banks, the legal framework for regulating artificial intelligence, as well as many other issues that we cannot now be foreseen or anticipated. For this reason, the judgment(s) deserve to be studied carefully, and debated rigorously. This judgment has been divided into sections to facilitate analysis. They are the reference, Decision in M P Sharma, Decision in Kharak Singh, Gopalan doctrine: fundamental rights as isolated silos, Cooper and Maneka: Interrelationship between rights and Origins of Privacy etc.

According to Justice Dr. D.Y. CHANDRACHUD,

"Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality."[1]

Over the next 40 years, the interpretation and scope of Privacy as a right expanded, and was accepted as being constitutional in subsequent judgments. During the hearings of the AADHAR scheme challenge, the Attorney-General (AG) representing the Union of India questioned the foundations of the right to Privacy. The AG argued that the Constitution's framers never intended to incorporate a right to Privacy, and therefore, to read such a right as intrinsic to the right to life and personal liberty under Article 21, would amount to rewriting the Constitution. The government also pleaded that Privacy was "too amorphous" for a precise definition and an elitist concept which should not be elevated to that of a fundamental right. But the decision is decided in favour of Right to Privacy as a Fundamental Right. The judgment, therefore, will also have positive effects, saving the individual from on the ever growing digital world affecting fundamental right such as of privacy.

There are other outcomes related to Right to Privacy Judgement which are in its own self positive. The judgement cites women's abortion rights and the execrable Section 377 to note that sexual orientation, gender identity and women's bodily autonomy are bound with human dignity and the right to Privacy. This has profound implications for women and the LGBT (lesbian, gay, bisexual and transgender) community. And then there are the truly intriguing questions such as the judgement argues for a living Constitution and against the concept of originality of the Grundnorm.

The Path breaking decision of Right to Privacy will make a profound impact on the Indian society as well as Indian Democracy. The apex court has set the stage for the introduction of a new privacy law by the government. Senior advocate Indira Jaising was quoted by an agency as saying that "it is a day to celebrate" and indeed it was the day to celebrate and rejoice the fruits of this judgement at its best in future.

FACTS

- Thomas Jefferson argued that because no generation has a right to bind subsequent generations, the Constitution should expire every 19 years.

- In Islamic law, a woman has the right to annul her marriage, if her husband is away for too long because her right to intimacy is paramount.

- According to the Guinness Book of Records 'The Universal Declaration of Human Rights' (UDHR) is the "Most Translated Document" in the world.

- Machines are becoming increasingly intelligent, storing and using data about us and our lives. They even have the potential to infringe our cognitive liberty – our ability to control our own minds. Probably, in the near future we will need human rights to protect ourselves from artificial intelligence we ourselves created.

TRIPLE TALAQ

INTRODUCTION

On August 22, 2017 the Supreme Court of India held that the practice of *talaq-e-biddat* or instant triple talaq is legally invalid. By putting an end to this medieval practice, in the landmark judgement of *Shayara Bano v. Union of India*, the Court has taken a step towards gender justice and equality. Shayara Bano, a 35 year old woman from Uttarakhand, filed a petition in the Court, after her 15 year long marriage ended abruptly in October 2015, challenging the constitutional validity of the practices of t*alaq-e-biddat*, polygamy and *nikah halala*, under Articles 14, 15 and 21.

The question before the Supreme Court was whether the practice of *talaq-e-biddat* or instantaneous triple talaq was constitutionally valid or if it violated the fundamental rights guaranteed by the Constitution. The outcome of the case was a narrow 3:2 split, with Justices Nariman, Lalit and Joseph in the majority and former Chief Justice Khehar and Justice Nazeer dissenting. Despite the majority on the outcome, there is no majority on the rationale as Justices Nariman and Joseph use different arguments to reach the conclusion.

JUDGEMENT ANALYSIS

JUSTICE ROHINTON NARIMAN & JUSTICE U.U. LALIT

Justice Nariman authored this opinion. The concurrent opinion of Justices Nariman and Lalit held that after the enactment of the Muslim Personal Law (Shariat) Application Act, 1937, Shariat was accorded statutory sanction in India. As a result, it was held that triple talaq is a part of codified law and hence, its constitutionality can be tested. He then went on to examine the constitutionality of the practice. He examined the instantaneous and irrevocable nature of the practice and held that, since it does not allow any chance of reconciliation, it allows a Muslim man to behave whimsically and break off the marital tie without any reason. Justice Nariman then held the practice to be constitutionally invalid on the grounds of arbitrariness, under Article 14 of the Constitution.

Overall, this opinion has many merits, the greatest being its declaration of the unconstitutionality of the practice, but it can be criticized on the point that the unconstitutionality of the practice is based on its arbitrary nature, instead of its discriminatory aspect.

JUSTICE KURIEN JOSEPH

Justice Joseph in a separate opinion used a different rationale to arrive at the outcome of *talaq-e-biddat* being constitutionally invalid. He disagreed with Justice Nariman on the question of the question of the 1937 Act giving statutory sanction to triple talaq. He instead relied on the Quranic tenets that talked about talaq, and thus used the primary authoritative source. He examined the tenets and held that Islamic law requires an attempt at reconciliation before the finality of the divorce and since *talaq-e-biddat* fails to provide this opportunity, it goes against the tenets of the Quran. He also held that the practice is not integral to the religion and supported this view by citing the Supreme Court decision in *Shamim Ara v. State of UP*, in which the Court held that the practice lacks legal sanctity. In conclusion, he held that

"What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well."

While Justice Joseph's opinion can be applauded on its declaration of unconstitutionality of the practice, a key aspect of the opinion which must be highlighted is the fact that he relied on religious scriptures like the Quran and the Shariat, instead of the Constitution. This reliance seems absurd as interpretation of religious scriptures should be left to the *maulvis* and other religious scholars; this task should not be taken up by the judiciary.

CHIEF JUSTICE J.S. KHEHAR AND JUSTICE ABDUL NAZEER

The dissenting opinion of former Chief Justice Khehar and Justice Nazeer answered both the questions of statutory sanction of *talaq-e-biddat* and the constitutional scrutiny of personal laws, whereas the majority opinions did not answer the latter. Justice Khehar held that the Shariat Act of 1937 did not codify triple talaq, furthermore; he held that triple talaq is an essential part of Islam and part of uncodified personal law and finally, that uncodified personal law is exempted from constitutional scrutiny. The logic behind the ruling that *talaq-e-biddat* forms an essential part of Islam was based on the fact that it has been followed by the Hanafi School, to which ninety percent of Indian Sunnis belong, since time immemorial. Justice Khehar was of the view that the practice had religious sanction, and hence it formed an integral part of the religion. He then held that personal law has constitutional protection under Article 25 of the Constitution and accorded it the status of a fundamental right.

"It needs to be kept in mind, that the stature of 'personal law' is that of a fundamental right."

Lastly, he reiterated the commitment of the Constitution to allow all citizens to follow their own religion and faith, and using this, stated that it is not for the Court to decide on such matters and directed the Parliament to formulate a law to

reform Islamic personal law. This opinion placed a six month injunction on the practice, during which if the legislative process of reforming the practice or doing away with it begins it would continue till the enactment of legislation; if however, this does not occur, the injunction will no longer be applicable.

This opinion can be criticised on several counts, starting with its lack of explanation as to why the practice does not affect morality, despite the inequality faced by women due to the practice. However, the most significant criticism of this opinion is the fact that it accorded the status of a fundamental right to personal law, a proposition that has not been substantiated by any authority, in the judgement. Article 25 of the Constitution protects individual religious freedom, not religion.

CONCLUSION

The Court has, with this landmark ruling, liberated Muslim women, but some questions remain unanswered. The judgment is a landmark in the progressive development of law in our society, aiming to free Muslim women from the clutches of arbitrary divorce by Muslim men. Furthermore, the writ petitions filed before the court also asked the Court to invalidate the practices of polygamy and *nikah halala*, however, the Court has chosen to deal with one issue at a time and hasn't ruled on these issues. A crucial aspect of this judgement is that the concurrence in the majority opinion was only regarding the outcome, and not the reasoning which brings us to a 2:1:2 split on the rationale. This creates some confusion as, in essence, there is no majority on the rationale behind the ruling.

The decision of the Court rests on a thin thread and is open to challenges in future as, there isn't unanimity in the decision of the Court.

However, the most significant aspect of this ruling is that five courageous Muslim women fought for changes in the law and for a change in patriarchal mindsets, and this battle has resulted in the beginning of a new age of equality and self respect for India's 90 million Muslim women. The judgment serves as a ray of hope for establishing gender equality in our society.

Dr. Noorjehan Safia Niaz And Anr v. State Of Maharashtra And Ors (manu/mh/1532/2016)

Introduction

The Fundamental Rights of one section of society being pitted against the Fundamental Rights of another section is not a new phenomenon. It is but natural for it to occur in cases where people have contradicting rights. In the present case, however, the rights of Muslim Women and the Haji Ali Dargah Trust (hereinafter referred to as the 'Trust') were at odds. They both wished to practice their religion but following different interpretations of the same tenet. The Bombay High Court (later upheld by the Supreme Court) gave a courageous judgement allowing Muslim Women to enter the inner Sanctum Sanctorum of the Haji Ali Dargah in Mumbai, Maharashtra. This has set precedent for various other states to follow suit and provide equal access to all in consonance with our Constitutional and Fundamental Rights

Facts

In the instant case, the Petitioners, office bearers of the `Bharatiya Muslim Mahila Andolan' (Hereafter referred to as 'BMMA') had been allowed entry into the inner Sanctum Sanctorum of the Haji Ali Dargah until 2011, but upon visiting the Dargah in June 2012, they found the entry banned for women.

Issues Raised

The Petitioners alleged gender discrimination and arbitrary denial of access to women in the sanctum sanctorum at the Haji Ali Dargah as it violates rights of Petitioners under Articles 14 and 15.

Judgement

The Hon'ble Court held in the instant case that the ban contravenes Articles 14, 15 and 25 of the Constitution, permitting women to enter the sanctum sanctorum. The Court also clarified that the right to manage the Trust under Article 26 cannot override the right to practice religion itself.

Creative Corner

From Fighting Child Marriage to Acid Attacks: Meet Inspiring Human Rights Activists from India.

KIRTI BHARTI

This 29-year-old activist has stopped 900 child marriages in the last four years and annulled 150 marriages involving underage boys and girls. A resident of Rajasthan, Kirti Bharti has dedicated her life to protecting helpless children whose families force them into marriage at a young age.

LAKSHMI AGGARWAL

An acid attack survivor, Lakshmi Agarwal became an activist after she was attacked with acid by a group of men in 2005 because she had rejected one of the men's advances.

She gained widespread appreciation for campaigning against acid attacks and gathering 27,000 signatures for Public Interest Litigation (PIL) to curb the sale of acid, which led the Supreme Court to order central and state governments to regulate the sale of acid and the Parliament to make justice more accessible for acid attack victims.

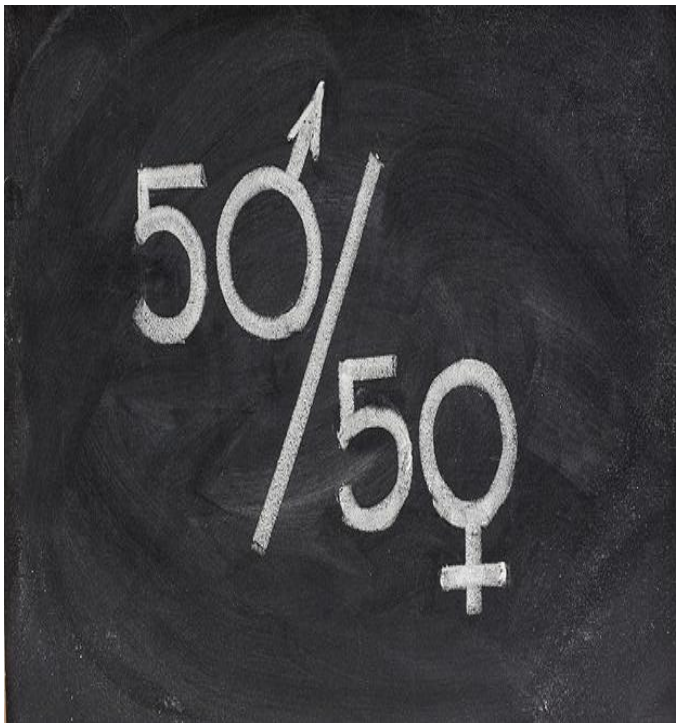
ANALYSIS

The Bombay High Court in the instant case has been successful in upholding the Fundamental rights of equality, non-discrimination, and right to practice religion of the women. The judgment delivered by the High Court had many aspects to it; essentially involving the tenets of constitutional rights of the women vis-a-vis the Dargah Trust. But what has been commendable is the handling of the affairs without interference in the subject matter or interpretation of Islamic laws as to the equality of women. Women rights have been a bone of contention since independence and the restriction of entry into the Sanctum Sanctorum or *Mazar* of the Dargah has been another example of the patriarchal mindset of the communities especially in the matters concerning religion. The reasons provided by the trust as the misreading of the religious text; and the sudden ban when the entry was allowed till 2012 further points to the same. Another important fact based on the usage of a place is that the Dargah is akin to a 'Public Space' and therefore access can be denied based on discriminatory grounds.

The fundamental right of equality and non-discrimination is at the core of this judgment given that religious rights which are not essential to the religion is used as a means to dilute these rights. An important factor on which the case rests upon is the 'Essential Function Test' as established by the 7 Judges Bench of the Hon'ble Supreme Court in the *Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Math* case[1]. It directs that all those elements "integral to the faith" may get exemption from state intervention. This Test implies that it would be within the power of the Court to interpret the religious texts and tenets and derive from them what truly is essential to a religion and what is not. Since religion has always been a sensitive subject and the handling of these matters by the Judiciary has its implications, as it creates a very thin line of distinction between secularism and an interventionist stance. In 2004, the Supreme Court had shown a leaning toward the latter by holding that the public performance of the Tandava dance was not an essential part of the religion of the Ananda Marga sect, even though it had been specifically set down as such in their holy book in the case of *Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Anr.*[2] The Hon'ble Court was prudent enough to keep within the purview of legal arguments, in this case.

CONCLUSION

The Hon'ble Court in this Landmark Judgement has been able to successfully decide on a conflict between contradictory Fundamental Rights of two different groups. By holding that the Trust has no right to discriminate entry of women into a public place of worship under the guise of 'managing the affairs of religion' as per Article 26, the Court has shown its commitment to upholding the Fundamental Rights and interpreting the provisions of the Constitution by applying the ideals of the Preamble – "Equality of Opportunity" and "Social Justice".



[1] 1954 SCR 1005.

[2] 2004 (12) SCC 770.

SURROGACY (REGULATION) BILL, 2016

Ever since the birth of the first test tube baby in 1986[3], Assisted Reproductive Technology has progressed leaps and bounds, proving to be an increasingly viable option for those longing for a child. Such clear demand led to a gradual mushrooming of In-Vitro fertilisation clinics across the country and in due course, several issues arose regarding the questionable and at times, perverse services being offered. The most sought after of these services, surrogacy, also happens to be the most controversial. The lack of regulation of surrogacy clinics both by the government, through legislation, and medical bodies, through accreditation and supervision, eventually became all too apparent. This was not the case of yet another nascent industry being left to its own devices under the watchful eyes of free market capitalism. Here was an issue so sensitive in nature that some sort of regulatory framework was urgently required.

It is in this context that the Indian Council of Medical Research developed the Draft National Guidelines for the Accreditation, Supervision and Regulation of Assisted Reproductive Technique Clinics in 2002.[4] It is widely accepted that this was the moment where surrogacy obtained mainstream legitimacy in India. Subsequently, the draft regulation, after much discussion and public consultation, was published as the National Guidelines of the Government of India by the Ministry of Health and Family Welfare.[5] It must be noted here that these guidelines do not possess legislative backing and, as such, cannot be enforced in a manner similar to legislative enactments. Later on, in 2008, Surrogacy was recognised by the Supreme Court of India and, since then, has grown, mostly unregulated, into a $2 billion industry.[6]

In this context, any effort to bring such a sensitive and lucrative practice under the ambit of law and policy must surely be seen as a step in the right direction. Sadly, in this case, the remedy may be ultimately worse than the illness.

SURROGACY - A CONCEPTUAL ANALYSIS

Surrogacy is a process through which couples or single adults, known as 'intended parents', contract with a third party, known as a 'surrogate', to provide gestational care for and to give birth to a child for them. As such, this procedure acts as an enabling mechanism for parties who had previously been unable to have children. The prime motivation behind any decision to avail surrogacy services is to have genetically related offspring and in this respect, two distinct modes of surrogacy procedures are available for potential suitors.

- *Traditional or Genetic Surrogacy*

In this procedure, the surrogate's own egg(s) and the sperm of the intended father or a predetermined male donor are used.[7] It typically involves artificial insemination of the surrogate. Because this process uses the surrogate's own eggs, it creates a biological relationship between the surrogate and the child. Such a relationship may pose a few challenges on a legal and ethical front later on.

- *Gestational Surrogacy*

In gestational surrogacy, eggs are collected from the intended mother or a predetermined female donor and are then fertilised with sperm from the intended father or a predetermined male donor. The embryos are then grown and implanted into the uterus of the surrogate.[8] A surrogate whose eggs are not used in the surrogacy arrangement is often referred to as a 'gestational carrier'.

[3] Anand Kumar TC, Hinduja I, Joshi S, Kelkar MD, Gaitonde S, Puri CP, et al. *In-vitro* fertilization and embryo transfer in India. ICMR Bull. 1986;16:41–3.
[4] Sharma RS, Bhargava PM, Chandhiok N, Saxena NC. New Delhi: Indian Council of Medical Research; 2002. Draft National guidelines for accreditation, supervision & regulation of ART clinics in India.
[5] Sharma RS, Bhargava PM, Chandhiok N, Saxena NC. New Delhi: Indian Council of Medical Research-Ministry of Health & Family Welfare, Government of India; 2005. National guidelines for accreditation, supervision & regulation of ART clinics in India.
[6] *Baby Manji Yamada* v *Union of India,* (2008) 13 SCC 518.
[7] Joseph F. Morrissey, Surrogacy: The Process, the Law, and the Contracts, 51 WILLAMETTE L. REV. 459, 470 (2015).
[8] *ibid.*

The choice between the aforementioned and other related details is all contained in the surrogacy agreement, which is the most important document in such transactions. A surrogacy agreement is an agreement between the intended parents and a surrogate that the surrogate will carry a child to term and will relinquish parental rights to the intended parents thereafter. The agreement also typically involves intermediaries such as matching entities, those who coordinate agreements between surrogates and intended parents, medical practitioners, who perform the required medical procedures and render necessary advise, and lawyers, who make sure that all the legal requirements are met. There are primarily two types of surrogacy agreements, with the choice of surrogate and mode of compensation being the deciding factors.

- *Commercial Surrogacy*

A commercial surrogacy agreement includes a predetermined monetary compensation to the surrogate, in addition to covering medical costs. Under such agreements, intended parents are free to select a surrogate of their choice. Further, international surrogacy agreements are almost always commercial in nature.

- *Altruistic Surrogacy*

In agreements of this nature, the surrogate does not receive any monetary compensation and is only relieved of bearing her medical expenses. In most cases, the surrogate is a close relation to the intended parents. Such agreements are widely followed in european countries as it is believed to prevent the misuse of surrogacy and abuse of surrogates.

WHY IS REGULATION NECESSARY

In India, the question of surrogacy and its almost nonexistent regulatory framework gained prominence in the case of *Baby Manji Yamada* v. *Union of India*[9]. Here, a Japanese couple who had arranged to have a baby with an Indian surrogate subsequently filed for divorce and the intended mother refused to accept the baby. This case was further complicated by surrogacy being of gestational nature, wherein the intended father's sperm was fertilised with an anonymous Indian woman's egg. With the surrogate being a mere gestational carrier, a number of legal questions arose regarding guardianship of the child. Further, unregulated commercial surrogacy has also led to large scale exploitation of vulnerable women. For instance, there have been multiple media reports of 'baby farms' operating in Gujarat wherein underprivileged women are rounded up in scores and given out as surrogates to potential clients.[10] In such cases, there is no meaningful consent by the surrogates as they are often in too weak a position to be fully aware of the contractual agreement they are entering.

MAJOR PROVISIONS OF THE BILL

Given below are the main features of the bill:

- The bill seeks to ban commercial surrogacy.
- Only heterosexual couples who have been married for five years and have proven infertility may apply for surrogacy. This prohibits homosexuals, live in partners and single parents from having children through surrogacy.
- All those who do not hold Indian passports are prohibited from seeking surrogacy in India
- It is necessary that the married couple must adhere to the age criteria where the woman is between 23-50 and the man is 26-55.
- The intended couple may only seek surrogacy from a close relative who freely consents to the procedure. Such a surrogate cannot be part of more than one procedure.
- Couples already having a child cannot seek surrogacy
- National Surrogacy Board and State Surrogacy Boards are to be established to regulate all such cases in the country.

CRITICAL ANALYSIS

In essence, this bill has completely banned commercial surrogacy and has limited altruistic surrogacy to heterosexual couples that have been legally married for five years or more, have no

[9] AIR (2008) 13 SCC 518.

[10] Pande, Amrita (2015): "Women and Labour," *Indian Express*, 18 November, viewed on 25 October, http://indianexpress.com/article/opinion/columns/women-and-labour/.

children and have a close female relative willing to act as a gestational carrier. As such, several features stand out as particularly arbitrary in nature. The idea of altruistic surrogacy, as expressed through the bill, greatly limits both potential surrogates and intended parents. Restricting any possible choice of surrogate to that of a close female relative is problematic on several counts. *Firstly,* if it were the case that the intended parents had few female relatives and none were willing to consent, the couple is effectively denied the choice of surrogacy. *Secondly*, in the same case, the couple, along with other family members may pressure a female relative to agree, thus throwing up the question of meaningful consent.[11] *Thirdly*, it denies a woman, not related to the intended couple, the choice of being a surrogate in pursuance of legitimate monetary compensation.[12] If a woman willingly consents to being a surrogate mother by way of a contract, and is assured of safe medical facilities, why should she be excluded as a choice of surrogate? No suitable reasons are provided in the bill.

The sentiment behind this move towards altruistic surrogacy seems to be that of preventing the exploitation of women for their bodies. And while that is, no doubt, a pertinent issue and a legitimate matter of state interest, what cannot be ignored is the fact that surrogacy is big business in India. And those business interests are not suddenly going to vanish upon the passage of this bill. It should also be acknowledged that wherever a gaping hole in demand and legal supply for any product or service emerges, black markets have been known to operate and thrive. The fact that the Transplantation of Human Organs and Tissues Act, 2011, which bans the sale of one's own organs for profit, has not had much of an effect on India's position as a leading human organ market is testament to this line of thought. Here, the legislative intent seems to be to almost completely take away the agency of women in matters of surrogacy rather than regulating and optimising the current regime. The bill remains silent on the issue of maternity benefits both to the surrogate and the intended mother. Though at least five High Courts have held that both the parties are entitled to maternity benefits[13], an express provision in the bill would have left no room for ambiguity and unnecessary litigation in the future.

Another aspect of the bill that comes off as arbitrary, is its blatant ban on the surrogacy rights of homosexual couples. Indeed, a prominent government minister went so far as to claim that granting such rights to homosexuals was against 'Indian ethos.[14] This exclusion has been made even more controversial by a recent observation of the Supreme Court in *Puttaswamy* v. *Union of India* [15] wherein a prior decision regarding the criminalisation of homosexuality was called into question. However, even if homosexuality is decriminalised, the fact remains that none of the country's marriage statutes talk of anything other than heterosexual unions. And with five years of marriage being essential requirement for surrogacy, the future looks bleak for homosexual couples wanting surrogacy rights in India. While the decision to prohibit surrogacy rights for foreign couples and those engaged in live-in relationships may be justified under the ambit of government policy, one cannot help but feel that the prohibition on homosexuals is rather discriminatory and unjustly so.

CONCLUSION

What this bill proposes to do is outrightly ban a multi-billion dollar industry whilst not accounting for the void the demand for it will leave behind. Altruistic surrogacy, for all its benefits, does not make up for what is being taken away. When pursuing such a step, it would be wise to acknowledge the fact demand for commercial surrogacy will not suddenly vanish. And rather than regulation which seeks to facilitate a smooth transition from the legal provisions available now to what the bill envisages, the government jumps in with both feet with legislation that is not only inadequate to address current institutional inadequacies but also not very helpful to the individuals and families involved.

[11] Gupta, Nidhi (2016): "What's Wrong with the Surrogacy Bill," *Hindu*, 9 September, viewed on 25 october 2017, http://www.thehindu.com/thread/politics-and-policy/article9090866.ece.
[12] Kalpana, K (2016): "Feminizing Responsibility? Women's 'Invisible' Labor and Sub-Contracted Production in South India," *Journal of International Women's Studies*, Vol 18, No 1, pp 33–51.
[13] Kumar, Alok Prasanna (2017): "Surrogacy and the Laws on Maternity Benefits," *Economic & Political Weekly*, Vol 52, No 3, pp 10–11.
[14] *Supra* Note 9.
[15] *Justice Puttaswamy* v. *Union of India,* Writ Petition (Civil) No. 494 OF 2012.

AROUND THE GLOBE...

Human Rights Tribunal Rules In Favour Of Gay: Alberta

A gay man who was turned down for a job at an autobody shop east of Edmonton has been awarded $56,000 in damages and lost wages by a human rights tribunal. Myron Hayduk — a co-owner of the shop who was Vegreville's mayor at the time — conducted a 75-minute interview with Landry(the victim), the tribunal heard. Landry testified that Hayduk spent an estimated 80 per cent of that time discussing religion, marriage, race, sexual orientation and other matters unrelated to the job."I find that Mr. Landry's race, sexual orientation and marital status were factors in the respondent's decision not to hire him," tribunal chair Karen Scott wrote in the Oct. 17 decision.

Saudi Arabia Agrees To Let Women Drive

Saudi Arabia announced that it would allow women to drive, ending a longstanding policy that has become a global symbol of the oppression of women in the ultraconservative kingdom. The change will take effect in June 2018. Saudi leaders also hope the new policy will help the economy by increasing women's participation in the workplace.

Some said that it was inappropriate in Saudi culture for women to drive, or that male drivers would not know how to handle having women in cars next to them. Others argued that allowing women to drive would lead to promiscuity and the collapse of the Saudi family. One cleric claimed — with no evidence — that driving harmed women's ovaries. Rights groups and Saudi activists have long campaigned for the ban to be overturned, and some women have been arrested and jailed for defying the prohibition and taking the wheel. All these efforts proved fruitful and today the women in Saudi Arabia have the right to drive.

Life Inside A North Korea Camp: Stark Violation Of Human Rights

A man who survived one of North Korea's most notorious forced labour camps has spoken about the 10 years he spent in captivity. Kang Cheol-hwan, a North Korean defector, was confined at the Yodok concentration camp, otherwise known as Camp 15, used to imprison so-called enemies of the state. It is hidden in a mountainous region around 110km from the capital, Pyongyang. Describing a scene of a man being hanged, he said, "It was not only the hanging itself, but the fact that the guards forced prisoners to throw rocks at the body and left it hanging there for a week until the birds had pecked at it so much it was beyond recognition." They were forced to sit for extended periods in cold muddy water. Children there are forced to carry out hard labour, which involved pulling heavy wood for several kilometres.Such an inhumane treatment is something which needs to be addressed.

Australia should bring Manus and Nauru refugees to immediate safety, UN says

Australia remains responsible for the people held in its offshore detention regimes on Manus Island and Nauru, and should immediately close the centres and bring refugees and asylum seekers to Australia or another safe country, the United Nations human rights committee has told the government.

In an excoriating report, the expert committee said it was concerned about the conditions in the offshore immigration processing facilities in Manus Island and Nauru, which also holds children, "including inadequate mental health services, serious safety concerns and instances of assault, sexual abuse, self-harm and suspicious deaths; and about reports that harsh conditions compelled some asylum seekers to return to their country of origin despite the risks that they face there".

National News…

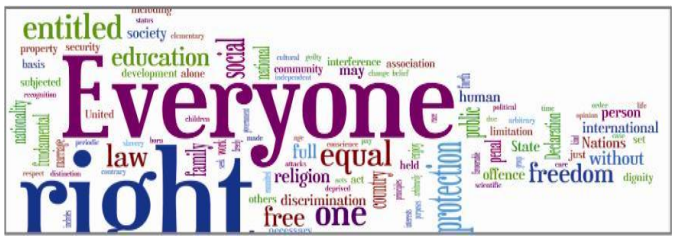
Inmates In Jails Despite Recommendations For Release

The Supreme Court expressed shock at the large number of people languishing in jails in "complete violation" of their rights despite recommendations for their release by the legal services authority, saying such a situation was unacceptable. There are thousands of prisoners who are not released from jails by the states even after being granted bail or completing their sentences. All this is in strict violation of Article 21 of the Indian Constitution.

Denial Of Regular Job Not Violation Of Human Rights Act: Hc

Kaliben Mori, who worked as a daily-wage field labourer at Kitak ShashtraVibhag of Junagadh Agriculture University since 1993, claimed that she had worked for more than 240 days a year for more than a decade and was hence entitled to be made a regular employee and was eligible for all benefits. She filed a criminal complaint against the university registrar and the principal of her department in 2011. Acting on Mori's complaint, for violation of Section 30 of the Human Rights Act, the district court summoned the registrar and the principal. The university officials rushed to the high court against this criminal complaint and argued that the court could not have taken cognizance of the case without an inquiry by the human rights commission and its findings.

The honorable HC now, in this regard observed, "Claiming regularization in service de-hors Recruitment Rules would not constitute any offence of 'equality' under the Act. No such direct complaint is maintainable before the court."



Key Un Rights Recommendations Ignored By India

India's government responded on September 21 to the recommendations made by other UN member countries on May 4 during India's third periodic review. At the May 4 session, 112 countries made a total of 250 recommendations. On September 21, the government accepted 152, including commitments made toward sustainable development goals aimed at alleviating poverty, improving access to safe drinking water and sanitation, and strengthening protections for children and women and refused to accept few like greater accountability of its security forces, ensuring freedom of expression and peaceful assembly, repealing the law criminalizing consensual adult same-sex relations, and abolishing the death penalty.

Big Boss In Legal Soup Over 'Human Rights Violations'

The popular reality show Bigg Boss has come under the scanner of Human Rights Commission after a petition was filed accusing the show of violating human rights ingling out the "harsh punishments" being handed out to the participants as being potentially life threatening, city-based child rights activist, Achyuta Rao, who filed the appeal, says, "Firstly, except the court no authority, not even the police has the right to punish anyone, according to the law. Recently, Prince was made to take 50 dips in the pool and participants areroutinely made to wear stickers on their mouth for five hours at a stretch as punishment. It can prove fatal. The show cannot violate basic human rights to eat and breathe air in the name of competition."

The Human Rights Commission of Telangana & Andhra Pradesh is due to pass a verdict on the petition.

Contributions are invited for the February issue of the CASIHR newsletter. The last date of submission is 30th January and it can be mailed on casihr@rgnul.ac.in