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Human Rights Perspectives of Surrogacy

P. S. Munawar Hussain*

Abstract

There are several Human Rights issues involved in surrogacy. The Universal Declaration of Human Rights 1948 provides the individuals of full age shall have right to marry and found a family. It would be difficult for an infertile couple to construct a family. Surrogacy could be an alternative. But surrogacy encompasses delicate social, ethical, and legal issues. Safety, security and health of the surrogate mother and the child could be at stake. The responsibilities of the Surrogacy Clinics, the rights and duties of the commissioning parents and the genetic parents etc., shall be exhaustively interpreted. The Law shall be comprehensive enough to deal with such issues.

Keywords: Human rights, gestational surrogacy, traditional surrogacy, commercial surrogacy, altruistic surrogacy, wombs for rent, outsourced pregnancies, baby farms

INTRODUCTION

Research in Medical Science has developed Assisted Reproductive Techniques which enable the infertile couple to bear children. The first achievement in Assisted Reproductive Technology was accomplished when Prof. John Rock of Harvard Medical School achieved a breakthrough by fertilizing human ova outside the uterus in 1944. Subsequently the second half of the 20th century witnessed remarkable success in Assisted Reproductive Technology. In July 1978 Louis Brown the first Test Tube baby was born in England. India was not far behind in Assisted Reproductive Technology. In the same year India gave the second child to be born in the world through In Vitro Fertilisation (IVF) methods and India's first child through (In Vitro Fertilization) Baby Kaunpriya alias Durga was born on 3rd October 1978. Research went on adding surprises. In 1986 the first baby Melissa Stern known as baby 'M' was born in the United States through Surrogacy. These Techniques further paved a way for a woman to bear a child for the intending couple which is referred to as Surrogacy.

The word surrogacy is a derivative of the Latin word "*Surrogatus*", which means substitute or an alternative. A surrogate is a person who offers to act as an alternative or a substitute for another. Surrogacy is referred to a process of human reproduction through a substitute woman who agrees to host Pregnancy and give birth to a child for the contracted parties or the commissioning parents for financial considerations or otherwise. The woman who agrees to carry such pregnancy is called a Surrogate Mother. Encyclopaedia Britannica describes surrogate mother as "a women who carries a child on behalf of another woman, who will become the child's social mother. The social mother will also be the child's genetic mother if she donates the ovum [1]."

***Author for Correspondence**
P. S. Munawar Hussain
E-mail: psmunawarhussain@gmail.com

Joint Registrar, Maulana Azad National Urdu University, Hyderabad, Telangana, India

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KINDS OF SURROGACY

Surrogacy is broadly categorised as Gestational Surrogacy, Traditional Surrogacy, Commercial Surrogacy, Altruistic Surrogacy etc.

Gestational Surrogacy

In this type of Surrogacy a surrogate woman is implanted with borrowed embryo which is carried by her till the birth of a child to be handed over to

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the commissioning parents. In this type of surrogacy the surrogate woman is also called a gestational carrier. The surrogate woman is not the biologically mother or genetically related to the child born through surrogacy as the embryo is barrowed and not her own.

Traditional Surrogacy

In Traditional Surrogacy a surrogate mother is impregnated with her own Biological child conceived through Home/Artificial Insemination or conceived through Intra Uterine Insemination or Intra- Cervical Insemination which is performed at a fertility clinic. The sperm of the male partner of the commissioning couple or donated sperm may be used in this type of surrogacy. In this case the surrogate woman happens to be the biological mother of the child.

Commercial Surrogacy

In Commercial Surrogacy a surrogate woman agrees to carry pregnancy for the commissioning parent until the delivery of the child for financial gains. In this kind of surrogacy the surrogate mother is paid for hosting the pregnancy and for medical and other related expenses. Commercial Surrogacy is legally recognised in several countries. Commercial surrogacy is also called as '*wombs for rent'*, '*outsourced pregnancies'* or '*baby farms'*.

Altruistic Surrogacy

Altruistic Surrogacy is against the concept of *wombs for rent'.* The surrogate mother agrees to carry the pregnancy for the prospective or commissioning parent without any financial considerations. She relinquishes the child in favour of the commissioning parent. But all the expenses related to the pregnancy and birth such as medical expenses towards maternity, clothing, accommodation, diet and other related expenses may be borned by the commissioning parents. This type of surrogacy is considered to be an ethical one.

A BRIEF SKETCH OF SURROGACY IN INDIA

Due to lack of appropriate measures to regulate surrogacy, India has been emerging as the global capital of Surrogacy. India is attracting to the intending couples from all over the world for Surrogacy Tourism. The absence of regulatory mechanism, availability of needy and healthy surrogate woman in India comparatively on lesser cost, better clinical and diagnostic centres specialised in Reproductive Techniques attracting the commissioning parents to embark for Surrogacy Tourism to India. According to an estimate in the year 2012, this industry is flourishing in to a Rupees 20 billion business [2]. On this date this shall have been doubled. The exact volume of business under surrogacy is not known however a study backed by United Nations carried in the year 2012 estimated it to be more than $400 million a year with 3000 Assisted Reproductive Techniques (ART) in Fertility Clinics.

The Ministry of Home Affairs government of India has issued an order stating that couples belonging to the category of persons of Indian origin or overseas citizens of India, having married for two years, do not require visa for visiting India for commissioning surrogacy. Permission in this regard from foreign regional registration office or foreigner registration office shall be sufficient. However they must carry a letter from their country issued by its foreign office or its embassy in India to the effect that surrogacy is permitted in their country. The regulations of Government of India in this regard are diluted by encouraging persons of Indian origin and overseas citizens of India to opt India as surrogacy destination.

The foreign national were permitted to visit India on tourist visa for commissioning surrogacy, but in July 2012 the Ministry of Home Affairs government of India issued the guidelines stating that foreign nationals while visiting India for commissioning surrogacy shall obtain a medical visa and a certificate from the foreign office of their country or their embassy in India to the effect that surrogacy in their country is legally permitted and the children born out of surrogacy would be granted their

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citizenship. These clinics were engaging the foreign nationals who are visiting India on tourist visa for surrogacy arrangement. In April 2014 the special branch police of Mumbai and the foreign regional registration office Mumbai issued notices to three such clinics in Mumbai who are alleged to have violated the required terms and conditions [3].

The Indian Council of Medical Research (ICMR), the medical research body of Government of India formulated Guidelines for Accreditation, Supervision and Regulation of ART Clinics in the year 2005. These guidelines endeavour to regulate the functioning of Assisted Reproductive Technology (ART) Clinics and Fertility Clinics engaged in Surrogacy. These guidelines are merely a code of conduct for the ART clinics and diagnostic centres. The birth certificate of the child is prepared in the name of the genetic parents as per these guidelines. The above aspects make India a fertile country to attract clients for surrogacy from around the world.

Easy availability of surrogate women and comparatively on lesser cost involved in commissioning surrogacy in India are known facts. Exploitation of surrogate mothers has been reported time and again. It has been felt necessary to curb the malfeasance and malpractices involved in commercial surrogacy in India. The Law Commission of India in its 228th report submitted to the government of India in August 2009 strongly recommended legislation of law to regulate surrogacy and ART clinics and to protect the rights of the stake holders in a surrogacy. But it does not contain the necessary legalities to be incorporated in the legislation. In March 2014 there have been consultative meeting of the concerned Ministries and Departments of government of India on several aspects of Assisted Reproductive Technology. It was proposed to restrict surrogacy to infertile Indian couples, overseas citizens of India, Persons of Indian Origin and NRI Couples, married for two years. The government of India drafted Assisted Reproductive Techniques (Regulation) Bill in the year 2010. This draft Bill was placed in public domain for suggestions. After wider consultations the Assisted Reproductive Techniques (Regulation) Bill 2013 was formulated. But this bill could not be in placed the Parliament. Again in the year 2016 a Bill called Surrogacy (Regulation) Bill was drafted and presented before the Lower House of Parliament (*LOKSABHA*) on 21st November 2016. After a debate it was referred to the Standing Committee on 12th January 2017 and the Standing Committee submitted its report to the Parliament on 10th August, 2017. The Lower House of the Indian Parliament (*Loksabha)* passed the bill on 19th December, 2018. But before the Upper House of the Parliament *Rajyasahba* could pass this Bill, the Lower House of the Parliament is dissolved. Again the Surrogacy Regulation Bill is presented in the Parliament for legislation. This Bill prohibits all kinds of surrogacy except Altruistic Surrogacy. This law among other issues shall address the human rights perspectives of surrogacy.

HUMAN RIGHTS PERSPECTIVES

Any Law for regulating the entire gamut of surrogacy shall hinge on the following human rights perspectives.

- Accreditation and maintenance of standards by ART Clinics
- Rights and duties of surrogate mothers.
- Rights and Duties of the parents commissioning surrogacy
- Rights and duties of the donors and patients.
- Rights of the child born out of surrogacy.
- Commissioning Surrogacy by single parent, same sex couple, live-in couple, etc.
- Commissioning surrogacy by foreigners.
- Miscellaneous issues.

Accreditation and Maintenance of Standards by ART Clinics

The Assisted Reproductive Technology (ART) Centres, Diagnostic Centres and Fertility Clinics shall be registered with the appropriate authority. They should also be equipped with required infrastructure and equipments. No ART centres or Fertility Clinic shall be allowed to function without

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compliance of the required and specifically required infrastructure. The centre shall be opened to inspection and verification by the designated government officials.

All the ART Clinics shall be subjected to maintenance of standards and equipped with required men and material. In case of any deviation the ART Clinic or the ART Centres or Fertility Clinics shall be derecognized and shall not be allowed to function. Maintenance of Standards, confidentiality of the commissioning parents and surrogate mothers, health of the surrogate mothers, health of the child born, or to be born out of surrogacy etc., arrangement for the medical insurance of the surrogate mothers shall be prioritised.

Rights and Duties of Surrogate Mothers

The surrogate mother shall be entitled for best possible treatment during the commissioning of the surrogacy as well as to deal with the side effects/adverse effects if any of the ovulation or for the doses of hormones. The surrogate mother shall also be entitled for medical insurance at least for a period of 5 years after the birth of the child. Because the fertility/ART centres may decline to treat her after surrogacy agreement is over. In the year 2010 it was reported in the media that an under aged surrogate mother died due to complications. Hence the Law must provide the age group, the number of pregnancies, the gap between pregnancies etc., for the prospective surrogate mothers.

Rights and Duties of the Parents Commissioning Surrogacy

The parents seeking to commission surrogacy in India shall submit the proof that they are married for more than two years and that they cannot bear children due to infertility or other medical and clinical reasons. They should adopt and accept even if more than one child is born out of surrogacy commissioned by them and they should also accept the children born with genetic disorders or any deformities and they should also be prepared to provide all possible medical facilities to them. The financial condition of the intending parents shall also be ascertained to determine their economic and financial condition to rear and to take care of the medical expenses of the children born out of surrogacy.

The High Court of Andhra Pradesh in B.K Parthasarthy vs. Government of A.P [4] while concurring with the U.S. Supreme Court judgement in Jack T. Skinner vs. State of Oklahoma which characterized the right to reproduce as one of the basic civil rights of a man, upheld the right of reproductive autonomy of an individual as a facet of his right to privacy. This denotes that an individual should have a choice to opt for surrogacy.

Rights and Duties of the Donors and Patients

The identity of the donors of sperm and ova shall be kept confidential. Their identities shall not be revealed either to the surrogate mothers or to the commissioning parents except under a core decree or directive. However the concerned officials of the state/central governments shall be entitled to check and verify the records.

Rights of the Child Born Out of Surrogacy

The bill introduced in the parliament of India envisages legal right to the child born out of surrogacy as accorded to naturally born children. The child is entitled for parentage, inheritance etc. But the law or the guidelines of Indian Council of Medical Research are silent on the fate of more than one child born out of surrogacy arrangements. The commissioning parents or the intending parents shall be made to adopt even if more than one child are born out of surrogacy arrangement. The surrogate women are discouraged from lactating the infant after birth. It is also reported that in many cases the surrogate mothers are given anti-lactation injection to prevent them from feeding the child through lactation. Lactation is the right of the infant which shall be reasonably accommodated with precautions.

There is an argument that the birth certificate of the child born out of surrogacy shall be issued in the name of the genetic parents. Sometimes the genetic parents may be different from the

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commissioning parents. Apart from the ART and the surrogacy clinics there may be 5 players involved in surrogacy- a genetic father who donates sperm, a genetic mother who donates ova/eggs, a surrogate mother who offers her womb to host pregnancy, the intending father and the intending mother. Therefore since the child is required for the commissioning parents it would be advisable to have the names of the commissioning parents on the birth certificate.

Surrogacy often raises peculiar socio-ethical and legal issues. Recently Australian couple commissioned surrogacy in Thailand. A 21 year old woman Ms. Pattaramon opted to be a surrogate mother. She delivered twins and one child was suffering from Down syndrome. The Australian couple adopted the healthy child and abandoned the disabled baby. The law shall fix up the responsibility of adopting the children born out of surrogacy arrangements by the commissioning parents and they shall be responsible for bringing them up as natural parents do. It is time that the United Nations and its organs shall take up the issues of International jurisprudence to regulate surrogacy internationally.

Commissioning Surrogacy by Single Parent, same Sex Couple, Live-in Couple, etc.

The government of India guidelines as on date do not prohibit single or unmarried woman from taking recourse to have a child through surrogacy. The Supreme Court of India recognized transgender as a third gender, while emphasising the constitutional guarantee against discrimination on the basis of sexual orientation or gender identity. Hence the transgender may also claim the right to have a child through surrogacy. In 2008 an Israeli Gay couple Yonatan and Omer Gher got a child Baby Evyatar conceived through surrogacy in India, since Israeli Laws do not allow same sex couples to adopt a child or to have a child through surrogacy.

The Law shall be clear about the legality and eligibility of single parents, transgender, gay parents, unwed couples for commissioning surrogacy. The concerns of abuse of child shall be adequately addressed. It is vehemently argued that when a single parent can adopt a child why he/she can't have a child through surrogacy arrangements. The legislation may permit a single parent to have a child through surrogacy arrangements if he/she happens to be a donor/genetic parent.

Requirements in Case of Foreign Parents Commissioning Surrogacy

As decided by the Home Ministry, government of India the foreign parents commissioning surrogacy in India shall be required to obtain medical visa. They should be required to submit a certificate to the effect that commercial surrogacy is legally permitted in their country and the children born through means of surrogacy would be conferred with their nationality and citizenship. While leaving the country after commissioning the surrogacy they should be required to obtain exit permission from the foreign regional registration office before leaving India.

In a curious case in recent years a Japanese couple Dr Yuki Yamada and Dr Ikufumi Yamada commissioned surrogacy in Anand Gujarat state. But by the time the surrogate child was born they were out of wedlock and divorced. Legal hurdles cropped in this International surrogacy case. Ultimately the grandmother pursued the matter and approached the Supreme Court of India. In September 2008 the Supreme Court of India in this case of Baby Manji Yamada vs. Union of India [5] (WRIT PETITION (C) NO. 369 OF 2008) observed that '*commercial surrogacy is reaching industrial proportions because of the availability of poor surrogates and wanted the government to take necessary steps to regulate the surrogacy industry'.*

The High Court of Gujarat in November 2009, while dealing a case in Jan Balaz v Anand Municipality and others [6] granted Indian citizenship to the twin babies born out of International Commercial Surrogacy commissioned by German National. While delivering the judgement the court observed that *"We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance."*

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Miscellaneous Issues

The Law shall prescribe age limit for the commissioning parents, the surrogate mother, the donors etc. Appropriate steps shall be in place for the medical and life insurance of the surrogate mother. A surrogate mother shall be entitled for medical facilities through medical insurance at least for 5 years after the birth of the child. The commissioning parents shall also bear the expenses towards adverse affects of evolution, doses of hormones etc., at least for a period of 5 years or the surrogate mother shall be ensured for the reimbursement of medical expenses if any. The government employees may be entitled for medical reimbursement for having a child through surrogacy, limited to 1 or 2 surrogacies.

CONCLUSION

There are laws pertaining to adoption, wards and guardianship etc. The proposed law on alternate reproductive technology which is often referred to as surrogacy shall be in harmony with the Guardian and the Wards Act 1890, Hindu Minority and Guardianship Act 1956; Juvenile Justice Act, 2000; Protection of Child Rights Act, 2005. The Supreme Court of India in Stephanie Joan Becker vs. State in 2013 permitted a 53 year old American lady to adopt a 10 year old female orphan by relaxing the legalities embedded in the guidelines of Central Adoption Research Authority (CARA). When the Supreme Court permitted the 53 year old foreigner to adopt a child then why can't a single parent take recourse to surrogacy to have a child?

A specific department either of the Central Government or State Government shall be entrusted with the responsibility of registration of ART clinics, fertility clinics, surrogacy centres and their standards of maintenance. Any agency which is directly or indirectly involved with commissioning of the surrogacy such as intending parents, prospective surrogate mothers, surrogacy home operators, surrogacy agents etc., shall be registered with this department and the department shall monitor their activities.

The surrogacy arrangement is basically a contract between and among various players such as the intending parent/s, the surrogacy clinics, the surrogate mother etc. The court presided by district judge or the additional district judge shall be designated as the competent court to try the disputes pertaining to surrogacy. The High Court shall be the Appellate Court.

The proposed legislation shall incorporate the penalties to be levied in case of deviations, malpractices, malfeasance and misuse by the ART clinics, in the interest of Human Rights.

The Parents construct the Child biologically, while the Child constructs the Parents socially.

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