

CONCEPT OF SURROGACY AND RIGHTS OF WOMEN IN THE GLOBAL ERA

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The Honourable Supreme Court of India has given the verdict that the citizenship of the child born through the process of surrogacy will have the citizenship of its surrogate mother. Thus, in 2013, legislation is introduced in India banning the surrogacy to unmarried couples, single persons and other groups. Under the bill, the banks that would handle the money being exchanged for surrogacy will have to be registered, and commissioning parents will have to go to the registered banks to identify surrogates. And the process of recruiting surrogates - currently a totally random event, with agents who work for private IVF clinics searching poor neighbourhoods for possible surrogates - will be rationalized. This bill also contains provisions for situations where the commissioning couple reject the baby. The bill would require commissioning couples to pay a bond so that if a baby is not accepted, there is least enough money to raise and educate the child. Isn't it insulting to surrogates, who are already victimized, to call them, as some do, "biological coolies."? But that is the depressing truth. They lease their wombs to raise money to care for their own families, or to escape their dirty slums. Particularly, poor Indian women have no voice or thump in the corridors of power. In this article, rights of women with regard to surrogacy in global era are being discussed. And some suggestions are also given which can be proved to be helpful in strengthening the law related to surrogacy.

Surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep.[1] Rather, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her.

INTRODUCTION AND HISTORICAL ASPECT OF SURROGACY:

Surrogacy is as old as human history itself. The first infertile couple in history is Abraham and Sarah and the first known surrogate mother is Hagar, their maid, who bore a child in about 1910 BC (Gen. 16.1-15). Although Abraham was 86 at the time, he was still able to conceive.

Ishmael was the first historically recorded child born as a result of a traditional surrogacy. The second and the third known surrogacy births occurred in Sumer-Mesopotamia in the middle of the eighteenth century BC in the family of Jacob, Abraham's grandson. In Sumer-Mesopotamia, surrogacy was arranged on legal grounds. The Code of Hammurabi (1780 BC), the first legal document that regulated and controlled surrogacy, was primarily used to advocate producing male offspring. Surrogacy was quite common in ancient Egypt. Many pharaohs used their concubines to produce male heirs. However, even though the children delivered by these maids were treated as the pharaoh's children, their rights were somewhat reduced. They could assume the throne only if there were no other nobler and more legitimate contenders. Traditional surrogacy was also common in ancient Greece and Rome. Although the in vitro fertilization (IVF) surrogacy is a successful treatment (Brinsden 2003), modern society's attitude toward this intervention is contradictory. It is allowed or tolerated in some countries and forbidden in others. The arguments against surrogacy are based on ethical issues - a misconception, as most arguments refer to traditional surrogacy and do not extend to the gestational type.

The right to procreate should not depend on gender, family, or sexuality. It is a natural, inalienable right of any of modern bioethics is that the interests and welfare of the individual should have priority over the sole interest of science or society (Universal Declaration on Bioethics and Human Rights 2005). Refusing to allow childless people to become parents (when they can have children through surrogacy) means refusing person to provide intergenerational continuity and the further evolution of Homo sapiens. One of the main principles to treat them equally and is a classic example of selective discrimination. People who desperately want to become parents are excluded from reproduction and deprived of existing reproductive technologies.

This refusal represents both *de facto* and *de jure* systems of censorship and an instrument of oppression. It entails the physical destruction of people who would otherwise be able to become parents through surrogacy and represents a sort of genocide. If something is wrong with surrogate children in their new families (just as in the case of children not born through surrogates), it is the job of society and social services to take care of them. This is not an appropriate reason to deny reproductive rights:

For everyone who asks, receives; and he who seeks, finds; and to him who knocks, it shall be opened.

The legal status of surrogacy in modern times varies greatly from one country to another, with two main types of regulation. In the first one, surrogacy is regulated by legislation. In the second one, it is not mentioned in laws and thus is not regulated.

DEFINITION OF SURROGACY:

Surrogacy can be defined as: "Bearing a child on request for another family or person". A child, in this case, is born not out of the maternal instinct of the surrogate but due to the commissioning couple's or individual's intention to become parents. There are two types of surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy has been practiced since ancient times and occurs when the surrogate's acolytes are used. Gestational surrogacy was introduced only after the first in vitro child was born. In this practice, there is no genetic link between the surrogate and the baby she carries. Thus, surrogacy is a method in which a woman bears a child for another woman. It can be for commercial purpose or for altruistic purpose. The word surrogate originates from Latin word surrogatus (substitution).

KINDS OF SURROGACY:

There are two types of surrogacy:

- IVF/ Gestational surrogacy; and
- Traditional/ Natural surrogacy.

IVF/ Gestational surrogacy:

Gestational surrogacy is one in which a woman has her uterus removed but still has ovaries. She can provide the egg to make a baby, but has no womb to carry it. The egg of the wife is fertilized in vitro of the husband's sperms by IVF/ICSI procedure, and then the embryo is transferred into the uterus of surrogate mother which she carries it for nine months.

Traditional/ Natural surrogacy: In Natural surrogacy the surrogate is inseminated with the sperm of male partner of an infertile couple. The child thus produced is genetically related to the surrogate and the male but not to the commissioning female partner.

SURROGACY AND HUMAN RIGHTS:

Women's rights advocates claim that the lack of a clear law on surrogacy and the commercialization of an unregulated sector have left room for unethical medical practices and the exploitation of both surrogates and infertile couples. It may lead to violation of human rights in one way or the other.

INDIAN PERSPECTIVE:

Surrogacy Laws in India:

Commercial surrogacy is legal in India. Surrogacy in India is unregulated as they yet don't have legislation controlling surrogacy although the Indian Council of Medical Research (ICMR) has set "national guidelines" to regulate surrogacy, these are simply guidelines. All that this means is that surrogate mothers need to sign a "contract" with the childless couple. There are no stipulations as to what will happen if this "contract" is violated. It was in Manji's case^[2] in 2002 that Supreme Court of India held that commercial surrogacy was legal in India.

In Jan Balaz v Union of India,^[3] the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district. Commercial surrogacy remains controversial and is banned in many countries. But in India, a socially conservative society, surrogacy has thrived since the Supreme Court legalized the practice in 2002. A report by the Confederation of Indian Industry estimated that this practice generated \$2.3 billion a year in 2012.

Partly due to pressure from campaigners, the government set out a draft bill last year to limit the age of surrogate mothers to 35, set a maximum of five pregnancies—including their own children and to make medical insurance mandatory. A further proposal would make it compulsory for prospective parents to show that a child born to a surrogate mother will have automatic citizenship in their home country. The bill also aims to stop clinics sourcing, supplying, and taking care of the surrogate mothers themselves.

Indian Council for Medical Research guidelines: The Indian Council for Medical Research has given Guidelines in the year 2005 regulating Assisted

Reproductive Technology procedures. The Law Commission of India submitted the 228th report on Assisted Reproductive Technology procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements. The following observations had been made by the Law Commission:

- Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.
- A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.

- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

INTERNATIONAL PERSPECTIVE:

Reproductive Rights:

Reproductive rights are relatively new in international law. The basic concept first appeared in the final document approved by the Teheran conference on human rights in 1968, which recognized the “rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights.”[4] It was not until the world conference on population in 1994 (Cairo conference) that reproductive rights were clearly articulated.[5].

Although convened to address population issues, the participants in the Cairo conference recognized that:

1. Family-planning programs should not involve any form of coercion;
2. Governmentally-sponsored economic incentives and disincentives were only marginally effective; and
3. Governmental goals should be defined in terms of unmet needs for information and services rather than quotas or targets imposed on service providers.
4. The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.

The Cairo Conference recognized that reproductive rights include both the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health. This broad formulation reflects the participating states’ disparate approaches to reproductive rights as well as the failure of many states to address these rights at all.[6] Reproductive rights are increasingly recognized in international human rights law.[7] These rights, including education about family planning and access to contraception, are now widely recognized throughout the world, often in connection with the right to

health. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.[8] Surrogacy was not on the agenda at Cairo; it was neither supported nor condemned. To the extent surrogacy enables those otherwise unable to “achieve their reproductive goals and have children by choice,” Cairo arguably supports surrogacy. At the very least, it would weigh against an outright government ban of the practice.[9] The counterweight, of course, would be the impact on the gestational surrogate and the resulting baby. CEDAW assures the rights of pregnant women. Article 11.2, for example, sets out the measures to be taken by states to “prevent discrimination on the grounds of marriage or maternity and to ensure women’s effective right to work.” These measures include the prohibition of dismissal for pregnancy or maternity leave,[10] maternity leave with pay or “comparable social benefits, and the “necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment of childcare facilities.” Article 12 requires the state to “ensure access to healthcare services, including those related to family planning” and, more specifically, to “ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.”[11] Article 14 reiterates the right to family planning services for rural women in particular.[12] Finally, Article 16 requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”[13] In addition to these specific guarantees, Article 5 more broadly demands recognition of maternity as “a social function,” rather than a commercial function.[14] To the extent CEDAW focuses on the health of the pregnant woman, it is not inconsistent with gestational surrogacy.[15] Rather, it confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. To the extent CEDAW focuses on maternity as a “social function,” however, it is difficult to reconcile with commercial surrogacy, or at least those forms of commercial surrogacy in which the intending parents and the surrogate remain strangers.[16]

Right to Parent for Gay Men:

For gay men who want to parent a genetically-related child, surrogacy may be their only hope.[17] Just as surrogacy was not on the agenda at Cairo, neither was parenting by same-sex couples or gay or lesbian individuals. But LGBT&Q- Lesbian, Gay, Bisexual, Transsexual and Queer or Lesbian, Gay, Bisexual, Transsexual and Questioning-rights have achieved widespread recognition since 1994. Since reproductive rights, including the right to parent, are human rights, like other human rights, they should be universally assured.[18]

As Justice Albie Sachs explained in *Minister of Home Affairs v. Fourie*,[19] extending the benefits of marriage to same-sex partners is fundamentally a matter of equality: Our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. A democratic, universalistic, caring and inspirationally egalitarian society embraces everyone and accepts people for who they are. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. This issue is a need to affirm the very character of our society as one based on tolerance and mutual respect.[20]

On the international level, too, the trend is clearly toward the recognition of rights for same-sex couples. In *Toonen v. Australia*, for example, the Human Rights Committee determined that the provisions of the Tasmanian Criminal Code, which criminalized private same-gender sexual conduct between consenting adults, constituted an arbitrary interference with the author’s privacy, in violation of Article 17 of the International Covenant on Civil and Political Rights.[21] Nor could the provisions be upheld for the purpose of preventing the spread of AIDS. The Committee also held, however, that the rights of same-sex couples to marry cannot be grounded in the Civil Covenant because of its specific language.[22]

On December 12, 2008, sixty-six nations at the UN General Assembly supported a groundbreaking Statement confirming that international human rights protections apply to sexual orientation and gender identity.[23] The Statement was read by Argentina, and

a Counterstatement, signed by fifty-nine states, was read by the Syrian Arab Republic.[24] The states opposing human rights for same-sex couples do not seek to ground their arguments in international law, however. Rather, they claim that the Statement endorsing these rights “lacked legal grounds and inquire into the matters which fall essentially within the domestic jurisdiction of States.”[25] This is belied by the exhaustive research supporting the Yogyakarta Principles.[26] While there is no state consensus on the issue, there is a clear trend toward recognizing the rights of same-sex couples. Thus, although homosexuality remains a crime in seventy-six countries and is still punishable by death in five, a growing body of international equality jurisprudence increasingly supports these rights.[27]

The Child’s Rights:

Surrogacy implicates several rights of the child under the CRC. First, the child’s rights are to be respected and ensured without discrimination of any kind including birth or other status.[28] While this provision was originally intended to protect illegitimate children, its inclusiveness suggests a generous and expansive application, including children born of surrogacy.[29]

Article 7 is the most problematic which is required to be discussed here. Article 7.1 provides in pertinent part that “the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.”[30] There are two difficulties with this provision, both grounded in its presumptive incorporation of national law. If that law provides that a mother is the person giving birth, the child’s status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation. Either problem can be rectified by reforming domestic law or as proposed in the pending Indian legislation on surrogacy, by requiring the intending parents to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship in the state where her intending parents live, and that they, in fact, will be legally recognized as her parents in that state.[31]

ISSUES RELATED TO SURROGACY:

In short, following are some of the ethical issues as to the commercial surrogacy:

- What is the degree of stress on the couple and especially on the surrogate mother?
- Can true informed consent ever be given by the surrogate, and can anyone predict the emotions associated with relinquishing a child?
- What are the possible adverse psychological effects on the child? What identity crisis might ensue, and will there be a desire on the part of the child to know his/her gestational mother?
- Will surrogate arrangements be used not only by infertile couples but also for the sake of convenience, or by single men or women? Should the surrogate be paid?
- Would this lead to commercialization of surrogacy and expose the surrogate mother to possible exploitation?
- What happens when no one wants a handicapped newborn?
- Should the couple and surrogate remain unknown to each other?
- Should the child be told? What kinds of records should be kept, and should the child have access to them?
- What kind of medical and psychological screening should be provided to all parties?

Actually, the entire idea of a child created in a test tube and carried by an unrelated woman is enough to drive fear into the hearts of many while questioning the ethics of surrogacy. The reason behind this is that so far the practical scenario is concerned; it is clear like crystal that reproductive scientists are able to accurately tell if a created embryo might carry a specific disease, or even to tell its gender. Soon we may also have the technology to determine hair and eye color, or even skills or hobbies of our potential children. Even we may see in our lifetimes that scientists are able to successfully clone a human being.

LEGAL ASPECTS OF COMMERCIAL SURROGACY IN INDIA:

The above discussion is about the ethical issues on commercial surrogacy. But it is pertinent to highlight legal aspects of commercial surrogacy in India.

Commercial surrogacy has been legal in India since 2002. India is emerging as a leader in international surrogacy. So far the Indian perspective is concerned; it has left no doubt with the room that Indian surrogates have been increasingly popular with fertile couples in industrialized nations due to the relatively low cost. At the same time, Indian clinics are becoming more competitive, not only in the matter of pricing, but also in the hiring and retention of Indian females as surrogates. Actually, surrogacy in India is much simpler as well as less costly. So, people from western countries are gathering to India get a baby of their own genes. While in some countries (e.g., Australia, Canada, Greece, Israel, South Africa, and the United Kingdom), surrogacy is allowed on a noncommercial basis only.

CONCLUSION:

This Article has described transnational surrogacy and indicated a few of the many issues the subject raises under international human rights law. It has addressed that surrogacy, these days is becoming a business.[32] Although gender equality seems to improve for women of higher status that are able to afford surrogate mothers, the fear is that surrogacy will exploit the poor. It is unclear that poorer women will voluntarily lease their bodies for reproductive ends. One primary concern is that “contract pregnancy commodifies both women’s labor and children in such ways that undermine the autonomy and dignity of women and the love parents owe their children.”[33]

But Opponents of surrogacy argue that the practice is equivalent to prostitution, and by virtue of that similarity, should be disallowed on moral grounds. Contract pregnancy transforms what is “specifically women’s labour into a commodity,” an exchange of monetary compensation for the use of women’s bodies.[34] They believe that surrogacy contracts are “dehumanizing and alienating since they deny the legitimacy of the surrogate’s perspective on her pregnancy.[35] The surrogate mother tries to avoid developing a special bond with the child in her and views the pregnancy as merely a way to earn the much-needed money. Surrogacy demeans the unique mother-child bond as women can now solely be used as “breeder machines.” The subjectivity of women is enhanced by creating more opportunities for them to participate in reproductive relationships rather than opportunities equal to those available to men. The Honourable Supreme Court of

India has given the verdict that the citizenship of the child born through this process will have the citizenship of its surrogate mother. Thus, in 2013, legislation is introduced in India banning the surrogacy to unmarried couples, single persons and other groups. Recent statistics reveal that the number of children registered after being born to a surrogate has risen by 255% in the past seven years: in 2007 only 47 parental orders were filed over children born via surrogacy, rising to 167 in 2013 and a staggering 24 in January 2014 alone.[36]

SUGGESTIONS:

No law is static. There remains always place for improvement. Thus, there is a need to reform the law related to surrogacy also, so that this law should be properly used, not misused. Certain important aspects of surrogacy laws are needed to be focused, which are as follows:

- Establishment of an effective and reliable agency to act as a reservoir of all documents and as a grievance redressal mechanism.
- All concerned parties are in need to have a regulation which proves to be more effective.
- There should be a translucent contract, which must be in the vernacular language, with a copy for the surrogate mother.
- Counselling of all parties involved in legal/ financial/ medical / social / emotional / aspects must be compulsory.

I believe enforceable surrogacy agreements are a desirable, practical and useful solution which can be helpful:

- To protect and promote the welfare of the child;
- To respect the reproductive rights and autonomy of the individuals involved; and
- To reduce the risk of exploitation.

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- [22] *Ibid.*

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