

# COMMERCIAL SURROGACY IN INDIA: VULNERABILITY CONTEXTUALISED

## *Abstract*

Commercial surrogacy has been growing rapidly in India. One of the many reasons for its unprecedented growth has been the availability of women who are willing to act as surrogate mothers. The legal scenario being murky, no protection is afforded to the poor, illiterate women. With no legal provision defining what is vulnerability, this paper attempts to look at the broad concept of commercial surrogacy and argue that why surrogate mothers and the children they give birth to may be considered as vulnerable persons. The discussion is then stepped up to analyse whether the presence of vulnerable persons in a population gives rise to corresponding responsibility of others within the said pool.

## **I Introduction**

COMMERCIAL SURROGACY in India is a big business. Surrogacy is just one of the many techniques that are available to infertile couples to achieve their dream of having a child.<sup>1</sup> Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry term and hand over the child to the genetic parents for whom she is acting as a surrogate.<sup>2</sup> Commercial surrogacy differs from altruistic surrogacy in terms of the amount of money paid to the surrogate mother. While in altruistic surrogacy, the payment is restricted only to the medical expenses incurred by the surrogate mother, in commercial surrogacy, the woman is paid something more than the mere expenses. It is this very amount of something more than the medical expenses that acts as a bait to lure women to act as surrogates for potential commissioning couples.

It is not just the monetary benefit that a surrogate mother receives that promotes and sustains the industry of commercial surrogacy.<sup>3</sup> The existing Indian laws do not specifically address the issue. The Indian Council of Medical Research provides for the National Guidelines for Accreditation, Supervision

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- <sup>1</sup> Diksha Munjal-Shankar, *Medical Tourism, Surrogacy & the Legal Overtones - The Indian Tale* 56 *JILI* 62 (2014).
  - <sup>2</sup> Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), available at: [[http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm)] (last visited on Aug.15, 2016).
  - <sup>3</sup> *Baby Manji Yamada v Union of India*, AIR 2009 SC 84. The Supreme Court of India referred to the area of commercial surrogacy as one reaching industrial proportions.

and Regulation of ART Clinics in India (ICMR Guidelines).<sup>4</sup> These unenforceable guidelines which were framed in 2005 were a result of the attempt by the authorities to bridge the gap between the surrogacy arrangements and their implementation. The guidelines also acted as the blueprint for the drafts of the Assisted Reproductive Technology (Regulation) Bill of the years 2008, 2010, 2013 and the latest being, 2014. However, the aforesaid draft legislations are simply bills, thus they do not have the force of law.<sup>5</sup> One can at best look towards the Constitution of India and the Indian Contract Act, 1872 to provide some guidance on the enforceability of such arrangements and contracts. However, they too do not address the delicate issue of surrogacy which involves conflicting interests. Such a scenario provides a fine breeding ground for all sorts of illegal practices to mushroom. With no laws governing the area, the infertility clinics are devising their own rules and regulations! Better technological know-how at cheaper prices and easy availability of poor, and uneducated who are ready to act as surrogate mothers, make India one of the most sought-after destinations in the world for commercial surrogacy.<sup>6</sup>

The existing situation which is already quite murky also holds the potential of creating larger problems. Since there is no law on the subject area including the aspects of citizenship of the children born of such arrangements, there is a high probability of the increase in the population of stateless people<sup>7</sup> in the world. It is therefore apt to state that it is not just the surrogate mothers but also the children born of such arrangements that are vulnerable.

The paper attempts to delve into various aspects of vulnerability of surrogate mothers and the children they give birth to through these arrangements. Part II of the paper endeavours to take a closer look at the concept of vulnerability

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4 ICMR Guidelines, *supra* note 2.

5 Diksha Munjal and Yashita Munjal, The Wanted Child - Identifying The Gaps And Challenges In Commercial Surrogacy In India 6 *Asian Bioethics Review* 67, 75 (2014).

6 Diksha Munjal-Shankar, Identifying the Real Mother in Commercial Surrogacy in India 18 *Gender, Technology And Development* 387, 388 (2014); T.M. Krim, Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother 5 *Annals Of Health Law* 193 (1996) [Krim addresses the issue of fertility tourism and the factors that contribute to it].

7 UNHCR, Convention Relating to the Status of Stateless Persons, 1954 art.1, *available at*: <http://www.unhcr.org/3bbb25729.html> [Article 1 of the Convention defines a stateless person as, a person who is not considered as a national by any State under the operation of its law last visited on May 10, 2015.

and examines the factors which make the surrogate mothers and the children born through surrogacy vulnerable. Part III engages with vulnerability and responsibility and part IV finally wraps up with concluding remarks.

## II Vulnerability

Vulnerability is a concept which does not fall into or follow any straight-jacket formula. The origin of the word vulnerable comes from the Latin word *vulnerare* which means to wound.<sup>8</sup> The dictionary meaning, accordingly states a person who is vulnerable to be one who is exposed to the possibility of being attacked or harmed, either physically or emotionally.<sup>9</sup> It also means that a person may be vulnerable who is in need of special care, support, or protection because of age, disability, or risk of abuse or neglect<sup>10</sup>. However, as the situations and contexts vary, so do the definitions of vulnerability.

There is no single approach to definition of vulnerability. In fact, there is no purposeful categorisation at all.<sup>11</sup> Vulnerability has been studied and accordingly defined under various disciplines such as economics,<sup>12</sup> poverty,<sup>13</sup> social work,<sup>14</sup> bioethics,<sup>15</sup> healthcare,<sup>16</sup> domestic violence,<sup>17</sup> medical research,<sup>18</sup>

8 Oxford Dictionary, <http://www.oxforddictionaries.com/definition/english/vulnerable>. Last visited on May 10, 2015.

9 *Ibid.*

10 *Ibid.*

11 H.E. Alexander Morawa, Vulnerability as a Concept in International Human Rights Law 6 *Journal of International Relations And Development* 139, 150 (2003).

12 A. Coudouel & J. Hentschel, *Poverty Data and Measurement - Preliminary Draft for A Sourcebook on Poverty Reduction Strategies*, The World Bank: Washington, D.C. April. (2000).

13 L. Pritchitt, A. Suryahadi, and S. Sumarto, *Quantifying Vulnerability to Poverty: A Proposed Measure, Applied to Indonesia*, Policy Research Working Paper #2437, The World Bank: Washington, D.C. (2000).

14 Robert E. Goodin, *Protecting The Vulnerable: A Reanalysis Of Our Social Responsibilities* (1985).

15 Ruth Macklin, Bioethics, Vulnerability and Protection 17 *Bioethics* 472 (2003).

16 Ada C. Rogers, Vulnerability, Health and Health Care 26 *Journal Of Advanced Nursing* 65 (1997).

17 Gail E. Wyatt, Julie Axelrod, Dorothy Chin, Jennifer V. Carmona, Tamra Burns Leob, Examining Patterns of Vulnerability to Domestic Violence Among African American Women 6 *Violence Against Women* 495 (2000).

18 Richard Nicholson, Who is Vulnerable in Clinical Research? 181 *Bulletin Of Medical Ethics* 19 (2002).

climate change,<sup>19</sup> commercial transactions such those over the internet<sup>20</sup> etc. Thus, even though the notion of vulnerability is simple, it continues to be complex in the sense of its definition.

There have been a number of people who have endeavoured to synchronise the various challenges that are posed to defining vulnerability, given the varying contexts it is defined in, and put forth their views. There exist three different, but overlapping, types of vulnerability - inherent vulnerability, situational vulnerability and the pathogenic vulnerability.<sup>21</sup> Inherent vulnerability refers to such sources of vulnerability which are natural and fundamental to humans such as our tangible physicality, deficiencies, reliance on others and the like.<sup>22</sup> Situational vulnerability according to them is context specific. It may stem from the personal, social, political, economic, or environmental situation of a person or social group<sup>23</sup> and in terms of its duration be short-term, intermittent or enduring.<sup>24</sup> They recognise pathogenic vulnerability to mean one that is generated essentially by power-dynamics in relationships.<sup>25</sup> Even though the types of vulnerabilities are compartmentalised (not quite tightly), the common component that runs through them is that they all stir up a sense of powerlessness, loss of control, or loss of agency.<sup>26</sup>

Schroder and Gefenas<sup>27</sup> in their attempt to streamline the broad and vague concept of vulnerability refer to two factors which, according to them, hold the key in deciding which people may be referred to as vulnerable people - the external and internal elements. They refer to the external elements as

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19 Charles J. Vorosmarty, Pamela Green, Joseph Salisbury, and Richard B. Lammers, Global Water Resources: Vulnerability from Climate Change and Population Growth 289 *Science* 284 (2000).

20 Michael D. Reisig, Travis C. Pratt and Kristy Holtfreter, Perceived Risk of Internet Theft Victimization : Examining the Effects of Social Vulnerability and Financial Impulsivity 38 *Criminal Justice And Behaviour* 369 (2009).

21 Wendy Rogers, Catriona Mackenzie, and Susan Dodds, Why Bioethics Needs a Concept of Vulnerability 5 *The International Journal Of Feminist Approaches To Bioethics* 11 (2012).

22 *Id.* at 24.

23 *Ibid.*

24 *Ibid.*

25 *Id.* at 25.

26 *Ibid.*

27 Doris Schroder and Eugenijus Gefenas, Vulnerability: Too Vague and Too Broad? 18 *Cambridge Quarterly Of Healthcare Ethics* 113 (2009).

ones in which the people are placed, *i.e.* the set of circumstances. On the other hand, internal element refers to their potential inability to protect [themselves].<sup>28</sup> However, despite their noteworthy effort to define the concept, they fail to take into account what are or possibly could be the internal factors which make one unable to fight the circumstances. Schroder and Gefenas also fall short on account of understanding that it is not always the over-simplified internal or external factors that play the key role in determining vulnerability.

To be able to actually decipher vulnerable people, it is not important to only examine their external conditions/situations. It is important to understand that people's inner inability stems from various factors. For example, there is an accused who is a poor man and is alleged to have committed a crime which warrants his arrest. The person faces the external factor of arrest which fetters his ability to gather evidence in person to prove the allegations to be false. Not only this, his inner incapacities make him vulnerable. These could be the mental torture that he may be undergoing, being in a position subordinate to that of the police or simply the knowledge of the legal rights of a person arrested, such as that of right to legal aid. The list of internal incapacities, just as the situations which may cause mental harassment to a person, cannot be exhaustive in nature. However, these inner incapacities would largely fall into the often overlapping frailties of age, gender, physical being, mental health, emotional wellbeing, material means, asymmetrical power position and lack of knowledge.

Persons who are in a risky situation, condition or circumstances and are unable to challenge and fight back such conditions on account of either their external conditions or their own inability whether physical, mental, emotional, position of authority, material means, age, gender or lack of awareness may be referred to as vulnerable people. Be that as it may, to be able to sift vulnerable people from those who are not, as Schroder and Gefenas<sup>29</sup> point out. There must be (i) a genuine danger for vulnerability to materialize and (ii) the person at hand [must] be substantially unable to protect oneself. Thus, simply because there are people who are facing a set of hostile circumstances, it does not make them vulnerable.

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28 *Id.* at 116.

29 *Ibid.*

A novel approach is offered by Luna who suggests that vulnerability be looked through a unique lens of layers rather than as a sub-population,<sup>30</sup> which traditionally has been the case. She contextualises the concept in the niche area of medical research wherein the subpopulation of women is generally labelled as vulnerable.<sup>31</sup> Luna argues, and rightly so, that vulnerability is a dynamic and relational concept.<sup>32</sup> According to her, there are different vulnerabilities which operate in the form of different layers.<sup>33</sup> If there is a change brought about in a particular situation, a person who was previously placed in the situation may no longer be said to be vulnerable, even though she may be a part of the subpopulation which has otherwise been categorised to be vulnerable.<sup>34</sup> The layer approach allows for an unfolding of a variety of problems related to the circumstances under analysis.<sup>35</sup> She points out that there lies a danger of jeopardising one's autonomy if one who can protect her own interests through the tool of legally valid consent is prevented from doing so simply on account of her being a part of the subpopulation.<sup>36</sup>

To gather the true essence of vulnerability, it is, therefore, not sufficient to simply define it. It must further be contextualised. In line with the aim of the paper, to understand what vulnerability means in the contextual setting of commercial surrogacy, it is imperative to cull out and appreciate the conditions, both external and internal, which make the surrogate mothers and the children born from them vulnerable. Even though, as according to Luna, vulnerability is a result of and operates as different layers, it is befitting to state that these layers are constituted of nothing but the aforementioned external and internal elements.

In an empirical study, applying the case study method and employing the snowball sampling technique, conducted by the author in January 2014 on commercial surrogacy in India, a number of factors surfaced which acted as a catalyst in making the surrogate mothers more vulnerable than ordinarily

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30 Florencia Luna, *Elucidating the Concept of Vulnerability: Layers Not Labels* 2 *The International Journal Of Feminist Approaches To Bioethics* 121 (2009).

31 *Ibid.*

32 *Id.* at 128, 129.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

pregnant women. The study was conducted at a renowned infertility clinic in Anand district in the state of Gujarat. There were a total of eight surrogate mothers who had been interviewed and also, two commissioning mothers. Due to the language barrier and sensitivity of the issue, most women were reluctant to give simple interviews which were to be conducted without any photography or videography. The handful of women who did respond to the requests were extremely wary about the interviews being taken for some sort of media coverage of either the clinic or the issue. Be that as it may, informed consent of the participants was obtained after assuring them that the interviews would be used strictly for academic purpose and that the confidentiality of their identities would be maintained throughout the study.

The surrogate mothers, by and large, could only understand and converse in their native language Gujarati and in addition to that, Hindi. Only one of the eight surrogate mothers could understand little English. They had a very basic level of education and most of them had not studied beyond class eighth at school. With such elementary education, these women go on to sign surrogacy agreements, the content of which they little understand. All surrogate mothers belonged to small villages either in the district or in the surrounding areas. While some of the surrogates were working in small establishments drawing meagre salaries of up to Rs. 3000/month (about US\$45/month approx.), the men of the house earned the larger chunk making the household income go up to Rs. 15000/month (US\$200/month approx.) (the highest household income from amongst the surrogate mothers interviewed). Commercial surrogacy, for people with such a weak financial position, often seems like striking a pot of gold. From earning Rs. 3000 a month, the woman would now be earning Rs. 41,500 (approx.) if we are to divide the lump sum into 9 months. It results in them fetching more than 10 times the money they used to earn each month. With the women earning up to Rs.3,75,000 from the surrogacy arrangement, many even saw themselves having a greater say in the home affairs, which would otherwise, culturally, not be the case,<sup>37</sup> for most of the women either acquiring a proper house or their child(ren)'s education was of top priority in terms of spending the earning from the surrogacy arrangement. The arrangement not only makes the surrogate mothers but also the children they give birth to vulnerable in a number of ways as a result of the agreement between them and the commissioning parents.

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37 See generally Steve Darn , Hindu Men Talk about Controlling Women: Cultural Ideas as a Tool of the Powerful 37 *Sociological Perspectives* 203 (1994).

**Debilitated surrogate mothers**

The situation in which the surrogate mothers are is appalling. The women who choose to be surrogates are motivated only due to one sole factor: money! None of the surrogates interviewed stated that they were there out of purely altruistic motives.

The surrogate mothers are housed in a small surrogate house or hostel so to say. They are confined there and not allowed to go out of the premises. This also means that they cannot go out for something as simple as a stroll on the street. They are forbidden to even take the staircase that goes down to the open area of the complex where the clinic is located.

There are usually 5-6 women in a rather small room in the surrogate hostel. The room has single iron beds lined next to one another with barely a spacing of about 2.5-3 feet separating these. The women keep their belongings in their own little bags under their beds as there are no lockers/cupboards to place these. They are often visited by their husbands and children, but this too is a luxury for some who belong to villages which are not so close to the clinic.

The food for the women is delivered by a caterer who is appointed by the clinic for such purpose. Most women complained about the food. There exists no mechanism for these women, who due to their biological condition may have cravings for specific foods to make any special requests for certain foods to their liking. Some women, as a survival technique, ask their husbands to carry some savoury or other snacks when they come to visit them which they can consume as a fresh change from the monotonous food.

Additionally, these women are not encouraged to maintain any contact with the commissioning couples. The couples, who could potentially positively uplift the spirits of the surrogate women, are completely missing from the environment of the surrogate mother. No meetings, no phone calls with them. All that the surrogates can do is simply watch television, which is common to all the surrogates accommodated in the surrogate house. There are other activities in which they are involved, such as embroidery, chocolate-making, henna application and the like. Though these may keep the surrogates busy there are no other concrete recreational activities for them. Against this backdrop, one can assess that the external conditions of the surrogate mothers limited access to the outside world and limited freedom and resources within the confines of the surrogate house. These layers of power and control added by the external agencies go on to make the surrogates helpless and they experience a loss of agency.



In addition, there are internal conditions of the surrogate mothers which expose them more to the already existing grim external conditions. The internal overlapping conditions which fuel their vulnerable position include their poverty, their physical state during pregnancy, their delicate mental and emotional health owing to their physical state of affairs, lack of awareness, as well as being in a position that is subordinate to the clinic staff as well as the commissioning couples. These internal conditions act as different layers and hinder the ability of the surrogate mothers to fight back certain situations. If the layers of illiteracy and unawareness are removed say, one can reasonably believe that the surrogate would be more informed. Since she is educated, she would be aware of the fact that the agreement which is structured around the pregnancy would also include her right to abort the child as and when she pleases, provided it is not medically dangerous to do so.<sup>38</sup> This is a provision that the otherwise uneducated or little educated surrogate mothers would not even be aware of, leave alone enforcing it. The educated surrogate mother in contrast to the usual uneducated one would understand that poor living conditions would weaken her mental health and overall well-being of herself as well as the child she is carrying.

For a surrogate mother to understand that she possesses certain rights, she must be educated. If a layer by layer approach is adopted and illiteracy being one of the layers is removed, it can turn around the entire scenario. Basic rights instituted and established under the right to life<sup>39</sup> such as that of right to privacy, right to freedom of movement, right to reproductive autonomy and the like<sup>40</sup> cannot be wielded by someone who has had little education and further due to the layer of poor socio-economic factors, has inconsiderable general awareness.

The agreements signed between the commissioning parents and the surrogate mothers are in English language. This further cripples the position of the surrogate mothers who are only well versed with their native language. During the research, the women were asked if they had a Gujarati version of the agreement to read and understand. Sadly, and quite predictably so, they had no such opportunity where they could have actually read and understood the contents. The women just simply saw the agreement, had not read it. Hence, it is reasonable to infer that none of the surrogate mothers interviewed

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38 The Medical Termination of Pregnancy Act, 1971, s.3.

39 Constitution of India, art. 21

40 *Supra* note 5 at 68-71.

had read through the agreement. Most cited that they had faith in what madam (referring to the doctor heading the clinic) did and others asked their husbands to glance through it. It is, however, not out of place to mention that the husbands too were not always well educated. On questioning the surrogate mothers, it was gathered that not a single one of them knew that they had the right to abort the child and not go ahead with the arrangement. When they were made aware about such a provision that did exist in the contract that they had signed, they were quick to say that this would hurt madam and that they cannot do this. They all said that they were told beforehand that on signing the agreement, they were now committed to take this to the very end, *i.e.* delivering the baby. It can well be imagined how the consent of such women may be taken at the time of multifetal pregnancy reduction,<sup>41</sup> a very common procedure that takes place in pregnancies achieved through the IVF process.<sup>42</sup>

The clinics, which enjoy the dominant position, add the layer of power dynamics and often use this position to brainwash these poor, uneducated women through what they refer to as counselling sessions to carry on with the pregnancies and that is something of the nature of a pious deed. All women interviewed repeated the rhetoric of to gain something, you have to lose something. The deal between them and the commissioning couples and these surrogates is more of inconspicuous loss and less of conspicuous gain. The money they earn would no doubt help the women secure a better future of the children or build a *pukka* house (a house made of concrete) for

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41 Multifetal pregnancy reduction refers to the process by which the number of embryos developing in the womb are selectively reduced. It usually takes place where the number of embryos developing is greater than two in number. See generally P.V.V. Murthi, It's Double Delight, Thanks to IVF *The Hindu*, July 2, 2013, available at: <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/its-double-delight-thanks-to-ivf/article4872117.ece>. (last visited on May 17, 2015). The article states that by undergoing IVF, the chances of having more than one child are 20 to 40 per cent, depending on how many embryos are placed in the womb. ;P Naveen and Amarjeet Singh, Woman Gives Birth To 10 Dead Babies In Madhya Pradesh *The Times of India*, Dec. 16, 2013, available at: <http://timesofindia.indiatimes.com/city/bhopal/Woman-gives-birth-to-10-dead-babies-in-Madhya-Pradesh/articleshow/27465751.cms>. (last visited on May 17, 2015).

42 Claire Newell, Abortions to Reduce Multiple Births on the Rise *The Telegraph*, Dec. 28, 2011, available at: <http://www.telegraph.co.uk/news/health/8981504/Abortions-to-reduce-multiple-births-on-the-rise.html>. (last visited on May 17, 2015); Liza Mundy, Too Much to Carry? *The Washington Post*, May 20, 2007, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051501730.html>. (last visited on May 17, 2015).

the family, but what she sacrifices in those nine months and jeopardises for the future is invaluable.

Surrogate mothers, due to their physical state of being pregnant, naturally develop a bonding with the foetus. On being questioned on this aspect, majority of the women said that they did have some feelings towards the child(ren) that they were bearing. However, as per the agreement the women have to give up the child after birth. The clinics, exploiting their superiority in terms of power and know-how, do not even let the surrogate mother have a look at the child. The buck does not stop here. For the purposes of nursing and lactating, apparatuses are used to pump out the mother's milk for the child that is born. There is absolutely no contact permitted between the surrogate mother and the child she gives birth to. There is no window period allowed for by the ICMR Guidelines or the ART bills for the surrogate mother to reconsider her decision of handing over the child, as is provided in some developed countries. This lack of teeth in the guidelines and proposals in the ART bills add layers of lack of legislative protection.

Be that as it may, the existing law of evidence in India, however, would recognise the surrogate mother and her husband as the legal parents of the child, and not the commissioning couple.<sup>43</sup> However, given the fact that the surrogate and her husband are not well educated and resultantly unaware of such a right that they could potentially enforce, they are yet again left in a situation where they can do nothing much about it. In a related vein, say if the commissioning couple commits a breach of contract, in that scenario too, she would not be able to do much due to her inner inability to fight the situation, whether the layers are of the nature of physical being, mental state, emotional state, or the financial position. Being on a footing that is inferior to that of the commissioning couples who are quite well off in terms of money, power, influence and even education, the surrogate mothers stand in a vulnerable position. There would be no legal aid available to the surrogate mother no matter what the situation may be whether she decides to breach the contract and keep the child or the commissioning couple breaches the contract in some form such as refusing to take the custody of a child<sup>44</sup> born

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43 Munjal-Shankar, *supra* note 6 at 399.

44 See generally, Aussie Couple Abandoned Surrogate Baby in India *The Times Of India*, Oct. 10, 2014, available at: <http://timesofindia.indiatimes.com/india/Aussie-couple-abandoned-surrogate-baby-in-India/articleshow/44766805.cms>. (last visited on May 18, 2015).

with some defect.<sup>45</sup> A similar situation did arise in the case of Baby Manji Yamada whose commissioning mother refused to take custody after the commissioning couple divorced following the surrogacy agreement and the baby was virtually left as an orphan and finally stateless.<sup>46</sup> The surrogate mother who was commissioned in this case must have never even thought of filing a suit for breach of contract. Again, as these surrogate mothers do what they do for money, they often concoct stories about their pregnancy fearing odd reactions from people.<sup>47</sup> Living in secrecy, whether by their own choice, by making up stories, or by forced means when the clinics scurry them into the surrogate hostel rooms, they tend to not tap into their potential of fighting back their situation. The layer of fear of social stigma and thus the concerns about what people and the society at large would say about them should they make their identities known incapacitates the surrogate mothers even more.

It is, therefore, not a single, independent and isolated factor but an amalgamation of various imbricated layers of internal elements compounded with the external elements that leave the surrogate mothers debilitated.

### **Insecure children**

The children commissioned and born through surrogacy just as the surrogate mothers who give birth to them are vulnerable. In today's date, they are born in a jurisdiction<sup>48</sup> which has no law which assures to them a secure future. They therefore, often run into the contentious area of conflict of laws.

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45 Couple Abandon Ill Baby With Surrogate *The Times Of India*, Aug. 3, 2014, available at: <http://timesofindia.indiatimes.com/world/rest-of-world/Couple-abandon-ill-baby-with-surrogate/articleshow/39514159.cms>. (last visited on May 18, 2015). An Australian commissioning couple in this case had abandoned the child commissioned through surrogacy in Thailand who was born with Down's Syndrome to a Thai surrogate mother.

46 *Supra* note 3; Special Correspondent, Japan Gate-Pass For Baby Manji *The Telegraph*, Oct. 18, 2008, available at: [http://www.telegraphindia.com/1081018/jsp/nation/story\\_9984517.jsp](http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp). (last visited on May 18, 2015). The newspaper reports that Baby Manji was issued a certificate of identity as is done in cases where the people are stateless, *i.e.* they are not considered to be the nationals of any country.

47 Most women interviewed stated that they had told their close relatives and neighbours that they were going out of town for a job and would be back after about a year.

48 This is with reference to India.

As stated above, there is no law which regulates surrogacy in particular. It is quite a strange thing for a country which has otherwise emerged as one of the most popular destinations for having babies born through such procedures. The external element of lack of any specific law and the presence of unenforceable ICMR Guidelines<sup>49</sup> serve as an unfortunate and lamentable cradle for a baby to be born and nurtured.

A baby born from surrogacy has a number of potential women who could be referred to as her/his mother.<sup>50</sup> The legal mother of the child could either be the surrogate mother, or the commissioning mother who may also be the adoptive mother or the anonymous lady (in cases where the gametes of the commissioning mother are not used) who provided the gametes for such an arrangement to take place.<sup>51</sup> However, who finally ends up being the mother is a question that is left unanswered. In the case of Baby Manji, who was marooned, had no name written in the column for name of the mother in the identity certificate.<sup>52</sup> Thus, say if there is a medical emergency post the birth of the child, which requires the consent of the parents before it is acted upon, it is beyond the shadow of doubt what a disorganised situation it would be.

The Ministry of Home Affairs in its attempt to somewhat streamline the practice, brought out a set of new visa rules. The ministry through these rules made it compulsory for the commissioning couples to obtain a medical visa if they intended to visit India for the purposes of commercial surrogacy. This was a radical change from the earlier practice wherein the couples would obtain a regular tourist visa and come to India to have a child through surrogacy.<sup>53</sup> The new visa guidelines framed in the year 2012 came into effect from November 1, 2013 and that too, retrospectively.<sup>54</sup> Of the many provisions provided therein, one of the provision states that only those couples can

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49 ICMR Guidelines, *supra* note 2.

50 Munjal-Shankar, *supra* note 6 at 395-401.

51 *Ibid.*

52 Special Correspondent, *supra* note 33.

53 PTI, No More Tourist Visa For Commissioning Surrogacy In India *The Times Of India*, Oct. 30, 2013, available at: <http://timesofindia.indiatimes.com/india/No-more-tourist-visa-for-commissioning-surrogacy-in-India/articleshow/24930064.cms>. (last visited on May 19, 2015).

54 Ministry of Home Affairs, Government of India, Instructions Relating to Foreign Nationals Intending to Visit India for Commissioning Surrogacy, (hereinafter referred to as MHA Visa Rules), available at: <http://mha1.nic.in/pdfs/Surrogacy-111013.pdf>. (last visited on May 19, 2015).

commission surrogacy in India, in whose respective countries commercial surrogacy is also legally recognised.<sup>55</sup> This is because, in such cases, the child would at least be able to secure for her/him self a definite citizenship. While these latest visa rules do make it an improvised scenario, it must however not be overlooked that this is only an administrative action and acts as a stop gap arrangement.

The multiple layers of external elements that fortify the vulnerability of the children born through surrogacy coupled with the innate internal inabilities of an infant makes it a heart wrenching scene. It can be deduced that in case of the infants born through surrogate mothers, it is the external elements which play a greater role than the inner elements. This is however not to say that the inner elements are in any way of lesser importance than the external elements. It is only naive to point to the inabilities of a new-born child and hence, the vulnerability in such a case can be attributed more to the external elements.

### **III Vulnerability and responsibility: Two sides of the same coin?**

The vulnerable often remain vulnerable due to the lack of a support system that would cater to their needs and be responsible for them. However, the question that then arises is that whether vulnerability warrants any moral obligations or legal duties that are directed as justice.

The legislations in India do not define expressly the people who may be considered to be vulnerable. It, however, tacitly provides for protection of certain people. Reflections of such protection can be seen in a number of legislations that include but are not limited to the Constitution of India,<sup>56</sup> the Legal Services Authorities Act, 1987,<sup>57</sup> the Indian Contract Act, 1872, the Juvenile Justice (Care and Protection of Children) Act, 2000, the Protection of Women from Domestic Violence Act, 2005, the Mental Health Act, 1987, the Hindu Minority and Guardianship Act, 1956 and the Guardians and Wards Act, 1890. There is therefore recognition, though softly and silently, of people who may be vulnerable. However, through these legislations, people are labelled as vulnerable with little or no consideration of the layers that keep falling one

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55 *Ibid.*

56 The Constitution of India provides special provisions for various classes of people including the scheduled caste, the scheduled tribe, other backward classes, religious minorities, women, children, aged and disabled persons.

57 The Legal Services Authority Act, 1987, s.12. The provision lists out eight extremely broad categories of people who may be entitled to legal services.

over another making them vulnerable. The legislations meant for their protection can antagonistically end up harming them for these people may be incapacitated in terms of exercising their right to self-determination.

Nickel put forth the idea that the ground on which a group of people may be referred to as vulnerable may be based on the reasons that are either consent-based or fairness-based.<sup>58</sup> According to him, generally, people are capable of protecting their own interests. However, it is when that they are unable to do so, do they become entitled to special protection.<sup>59</sup> This is true when we refer to either children or people of unsound mind.<sup>60</sup> Nickel goes on to support the premise that the lack of fairness is a reason for protecting the groups of vulnerable people.<sup>61</sup> Luna seconds this and states that the lack of power or rights can be associated with the craving for fairness and justice.<sup>62</sup> She acknowledges that in the event of absence of justice and lack of rights, there may appear situations laden with the possibility of exploitation.<sup>63</sup>

Kittay proposes that justice provides the fair terms of social life given our mutual and inevitable dependency and our inextricable interdependency.<sup>64</sup> According to her, no matter what social arrangements we enter into on a voluntaristic basis, the fact is that we must be engaged in *some* social arrangements, some forms of dependence.<sup>65</sup> She articulates interdependence as something that is not a matter of voluntarism.<sup>66</sup> While on one hand the voluntarist or self-assumed model of obligations provides that a person has only such limited liability and accountability to another person that one voluntarily assumes,<sup>67</sup> Goodin argues that the vulnerability model goes a step

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58 Philip J. Nickel, Vulnerable Populations in Research: The Case of the Seriously Ill 27 *Theoretical Medicine And Bioethics* 245 (2006).

59 *Ibid.*

60 Example of this can be found in a number of legislations where the court usually appoints a guardian to act on behalf of and in the best interests of children or people of unsound mind.

61 *Supra* note 58 at 247.

62 *Supra* note 30 at 126.

63 *Ibid.*

64 Eva Feder Kittay, Centering Justice on Dependency and Recovering Freedom 30 *Hypatia* 285, 286 (2015).

65 *Ibid.*

66 *Id.* at 287.

67 Robert E. Goodin, Vulnerabilities and Responsibilities: An Ethical Defense of the Welfare State 79 *The American Political Science Review* 775,779 (1985).

further.<sup>68</sup> According to Goodin, within the framework of the model of self-assumed obligations, a person has the moral liberty to thrust her bargaining advantage to the very end and thereby, exploit the weakness of the other party.<sup>69</sup> In doing so, there is no violation of moral responsibilities.<sup>70</sup> In distinction, according to the vulnerability model, it is highly immoral to abuse and capitalise upon the weakness of other party.<sup>71</sup> In other words, what would constitute a legitimate use of the position by the powerful one over the weakness of the other under the model of self-assumed responsibility would, according to the vulnerability model, institute heavy arduous responsibility on the stronger one to take care of the weaker other.<sup>72</sup> This model of vulnerability is not devoid of criticism. Even though there arises a moral obligation under such a model to protect the vulnerable, it again runs into the murky area of diminishing one's autonomy.

The essential debate then perhaps is between the bioethical principles of autonomy and beneficence, with beneficence here intended to protect the interests of the vulnerable. Contextually, the issue remains whether the vulnerable surrogate mothers and the children they give birth to through surrogacy have the right to self-determination in exercise of their right to autonomy and hence, are fit to make a reasoned decision or whether such people are entitled to be protected through the blanket provisions under the legal system. The answer to such a complex situation cannot be a simplistic one. The key, however, remains in adopting the dual approach - the layers of vulnerability as expounded by Luna alongside the concept of relational autonomy. A relational approach endorses that the obligations that stem from vulnerability go a step further from the notion of protection from harm to the extension of social support which is vital to promote the autonomy of such vulnerable people.<sup>73</sup>

It is relational autonomy which would help understand the socially constituted capacity of the individual while the layers approach would aid in understanding the situation in a holistic manner and thereby open doors for the case-by-case approach.

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68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Supra* note 21 at 24.



#### IV Conclusion

Commercial surrogacy is an area which is rife with conflicting interests. Though its aim is to secure two families – one financially and the other in terms of an offspring; it ends up jeopardising the position of the two key members of the arrangement – the surrogate and the child commissioned and born through her. There is a greater responsibility that thus falls up the courts and the legislature, for as those whose interests are most in need of protection are those least able to come to the table.<sup>74</sup> While the Constitution in its preamble guarantees to all its citizens Justice – social, economic and political, it is time that other two organs of the government stood up and did their bit (for the executive has taken a stand, even though one that is provisional and open for consideration). In doing so, the legislators as well as the courts must scrutinise the situations which make the surrogate mothers and the children born through them vulnerable.

A sound system of education would go a long way in helping the surrogate mothers overcome their inner inabilities to deal with their situations and thus deal with the thick and harmful layer of illiteracy. While the education system becomes more widespread and accepted by people, each infertility clinic which offers surrogacy must have a NGO as well as a legal-aid team to help the surrogates, as and when required. These external measures can provide robust support to the women. Additionally, in case of the children born through surrogacy, India must come up with a legislation that has been well debated and deliberated upon. The courts too, while deciding cases involving this sensitive issue, must look to the best interests of the children.

The path ahead will be full of challenges for the industry and the nation as a whole but with correct measures in place, it can surely secure the final aim – justice.

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74 *Supra* note 64 at 288.

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