

## **LEGAL CONCERN IN SURROGACY IN RELATION TO UNBORN CHILD**

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### **ABSTRACT**

Inventions in the area of human genetics and reproductive technologies were made with a noble mission to serve the humanities but these discoveries, due to lack of monitoring system lead to the destruction of life and rights of unborn child. The techniques like ZIFT, GIFT In vitro fertilisation and surrogacy etc. were originally devised by the medical fraternity as assisted methods of reproduction aiming at prevention of genetic chromosomal disorders of the child in the womb and also for detecting sex linked diseases, came to be misused for other extraneous purposes and led to the violation of rights of unborn child.

**Key words:** - Unborn, rights, violation, surrogacy.

### **INTRODUCTION**

Every human being has an innate desire to have a natural offspring. A large number of people due to various medical or psychological reasons cannot fulfil their desire of having natural offspring. Infertility is considered as main cause behind childlessness. The enthusiasm to have a biologically related child led to various researches and experiments in the field of human reproduction and enabled man kind to invent different methods such as artificial insemination, in-vitro fertilisation, surrogacy etc. These techniques inclusively are designated as Assisted Human Reproductive Technologies and are very much significant in overcoming infertility and other complex situations where couples cannot conceive due to various reasons.

<sup>i</sup> Surrogacy is one of the offshoot of the ART.

Surrogacy can be understood as an agreement or a contract where a surrogate agrees to procreate a child for some other person or persons. Surrogate is normally the birth mother whereas the persons who hire her are designated as intending parents. Mostly genetic material is

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<sup>i</sup> Dr. Aneesh V. Pillai, *Surrogate Motherhood and the Law* 4, (Regal Publication, New Delhi, 2015).

contributed by the intended parents and the child is borne by the surrogate, however under certain situations a surrogate may contribute the genetic material. There is also the possibility that under certain exceptional circumstances the whole genetic material taken from donors and transplanted to the surrogate. In nutshell it can be said that surrogate mother in lieu of some money or otherwise agrees to provide a kind of intimate services where she permits a doctor to artificially inseminate her, carries the child, delivers it. In some of the cases she sells her ovum, her ability to nurture a single cell into an infant, and all her future claims on that child.<sup>ii</sup> Thus it can be said that surrogacy is a contract for the services and is of highly personal in nature.

### Historical Backdrop

The avarice to have a biological child is not new, and in almost every religious system or society we have incidents and examples where in absence of the child the prevalent religious and legal system permitted begetting a child by other means. The Hindu religious system permitted *Niyoga* for preserving the progeny where as under Christian religious system we are having examples where wives asked their female servants to sleep with their husbands so that they can have a child for preserving their progeny. Under Muslim law a custom allows the wife to have pregnancy from a person other than husband on the command of husband is identical to the *niyoga*.<sup>iii</sup>

In epics like *Mahabhart*a and *Krishan Leela*, somewhat similar to the surrogacy have been enlisted. It has been mentioned in *Vishnu Purana* that when *Devaki* was pregnant the seventh time, *Yoganidra* sent by *Vishnu*, extricated the embryo from its maternal womb at midnight, and transfer it to that of *Rohini*. *Yognidra*, proud to execute the orders, removed the embryo to *Yasoda*, the wife of *Nanda* the cowherd.<sup>iv</sup> Another popular incident is related with the birth of Lord *Kartikeya* son of *Mahadev* and *Mata Parwati*. It is believed that all the Gods requested *Mahadev* for a person for the post of army commander. *Mahadev* gave a *bija* to be

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<sup>ii</sup> *Id.* at 173.

<sup>iii</sup> Syed Khalid Rashid, *Muslim Law* 51, (Eastern Book Company, Lucknow 2<sup>nd</sup> edn., 1973).

<sup>iv</sup> *The Vishnu Purana* 351, ( Punthi Pustak Publishers & Antiquarian Book sellers, Calcutta.).

implanted in the *Mata Ganga*. In modern time the *bija* represents genetic material whereas *Mata Ganga* can be considered as surrogate mother as it was implanted into her. The incidence can be considered as the form of the surrogacy.<sup>v</sup>

Another well known incidence is from *Mahabharata*. According to it *Gandhari* the wife of the King *Dhritrashtra* conceived, but her pregnancy remained prolonged for nearly two years. At the end of this period as described by the *Rishi Vyasa* she delivered a mass of material that contained 101 normal cells which when put in a nutrient medium grew up full term as 100 male children the *Kaurvas* and one female child, called *Dussala*.<sup>vi</sup> In *Mahabharata* practice of *Niyoga* has been mentioned time and again. *Dhritrashtra* and *Pandu* were born of *Niyoga* only and after them all the *Pandvas* were born from the practice of the *Niyoga*. These examples show that rather than frowning upon surrogacy, Indian Mythology saw it as a way to protect or create a family in exceptional circumstances.<sup>vii</sup>

In the Bible it has been recorded that on the death of a childless married man his brothers or nearest relatives are duty bound to marry the widow and oldest son born from such wedlock to be named after the deceased, and if in any case the brother in law fails to fulfil his responsibility he has to go through embarrassing public ceremony because of his omission.<sup>viii</sup> We have example of *Ruth* in Book of Ruth,<sup>ix</sup> *Ruth* got married to a relative of her husband, so that a child can be reproduced in the name of deceased husband. Further we have example of *Abraham*<sup>x</sup> Where his wife *Sarai* commissioned her maid servant *Hagar* to have a child for her by inducing her husband Abraham to fornicate with her. In a similar incident *Rachel*, also commissioned her maid *Bilhah* to persuade her husband *Jacob* to sleep with her husband.<sup>xi</sup> However there is a difference between commissioning and being surrogate still these two are somewhat similar to

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<sup>v</sup> *Supra* note 1 at 81.

<sup>vi</sup> Dr. C.R. Jilova, "Surrogacy and Socio-Legal Challenges" 4 *CLJ* 153 (2011-2012).

<sup>vii</sup> Paula Gerber and Katie O' Byrne (eds.), *Surrogacy Law and Human Rights* 167, (Ashgate Publishing Limited, England, 2015)

<sup>viii</sup> *The Holy Bible* 221, (The Gideons International In India, Andhra Pradesh, 2016).

<sup>ix</sup> *Id.* at 294.

<sup>x</sup> *Id.* at 14.

<sup>xi</sup> *Id.* at 31.

the surrogacy and can be considered as earliest examples of surrogacy.<sup>xii</sup> Thus it can be said that the urge to have a biological child of one's own flesh, blood is not new, and instances of alternative methods of procreating a biological child can be seen in both mythology as well as in the religious books.

### **Meaning and definition of surrogacy**

Surrogacy is the most common method of reproduction where a woman in lieu of some consideration agrees to bear a child till delivery for intending parents. The word surrogate has been derived from the Latin word "subrogate" which means "appointed to act in the place of".<sup>xiii</sup>

### **Warnock Report, (1984)**

"Surrogacy is the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth."<sup>xiv</sup>

### **Surrogacy and legislative and ethical concerns in relation to unborn child**

The scientific developments in the field of reproduction have made it possible for a child to have multiple parents resulting into a situation where several people may raise claims over a child. Determining such disputes is not only a difficult task but also poses various legal and human rights challenges. These disputes are increasing day by day due to overly use of the ARTs and surrogacy. The major ethical concerns in relation to surrogacy are

### **Gender selection**

Sex selection means the ability to choose the gender of the offspring with the use of medical technique before birth or in this case before implantation. Gender selection of the child is not a recent phenomenon. Our society has witnessed it since time immemorial. The

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<sup>xii</sup> *Supra* note 1 at 80.

<sup>xiii</sup> Anil Malhotra and Ranjit Malhotra (eds.), *Surrogacy In India: A law in the Making* 73, (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2013).

<sup>xiv</sup> Report of the committee of Inquiry Into Human Fertilisation and Human Embryology 42, *Available at* [https://www.bioeticacs.org/iceb/documentos/Warnock\\_Report\\_of\\_the\\_Committee\\_of\\_Inquiry\\_into\\_Human\\_Fertilisation\\_and\\_Embryology\\_1984.pdf](https://www.bioeticacs.org/iceb/documentos/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf) (last accessed on January 24,2022).

advancement in science and technology has resulted into the discovery of the techniques enabling gender selection even before birth. The development in reproductive technologies has given an advantage to the intended parents to choose the gender of their offspring. The possibility of its misuse for begetting a child of a particular gender cannot be denied. Selecting gender of a child is violative of the basic human rights of the child particularly girl child, because in most of the circumstances a boy is clearly preferred over a girl child. Thus selection of gender of a child is discrimination against the girl child resulting into gender imbalance in the society.<sup>xv</sup>

### **Designer babies**

No doubt that the vast revolution in the field of Assisted Reproductive Technologies, has emerged out as the best solution for childless couples. But the negative impact on the rights of the child and possibility of the designer babies cannot be overruled. The expression designer babies means a genetically modified baby whose genetic material and traits has been artificially selected by the use of genetic engineering resulting into presence or absence of a particular trait. The technique involves modification in the genes of the offspring as per the desires of the intended parents. In the process doctors remove the unwanted characteristics and add desired characteristics.<sup>xvi</sup>

The practice of IVF confers the ability to pre select embryos before implantation. The argument against designer babies is that if the foetus failed to show the desired traits the possibility of their termination cannot be denied. Further it will bridge a gap between privileged and pauper.<sup>xvii</sup> Another criticism involves the possible risk to the offspring as the procedure involves manipulation to the genes, and the unforeseen consequences in the form of mutations and variations to the coming generation cannot be turned down.<sup>xviii</sup>

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<sup>xv</sup> *Supra note 1* at 296.

<sup>xvi</sup> *Id.* at 299.

<sup>xvii</sup> Sarah Ly, "Ethics of Designer Babies" *Embryo Project Encyclopaedia* (2011) Available at <https://embryo.asu.edu/pages/ethics-designer-babies>. (last visited on July 16, 2022).

<sup>xviii</sup> A Cecile JW Janssens, The Genetic Case against Designer Babies, Available at <https://psmag.com/social-justice/designer-babies-are-not-likely-to-happen> (last visited on July 16, 2022).

Hence the process cannot be permitted to create genetically modified offspring's as per the whims and fancies of the intended parents, and genetic modifications can only be permitted only to the extent of avoiding genetic diseases.

### **Eugenics**

Another objection to surrogacy is that it will ultimately lead to the positive eugenics. Eugenics is a movement that is aimed at improving the genetic composition of the human race with good hereditary traits. Concern against eugenics emerge out from the fear that to have some particular traits the intended parents will choose the surrogate on the basis of some specified attributes like height, eye colour, race, intelligence and athletic ability, etc. possibility cannot be ruled out that if the baby does not have the desired traits it may results in to termination of the pregnancy. Which cannot be permitted hence appropriate laws should be enacted to prevent such practice.<sup>xix</sup>

### **Legal status of the surrogate child**

Another controversial issue in surrogacy is the question regarding the legitimacy of the child. Since various rights such as maintenance, inheritance, and custody are dependent upon the status of the child, it is necessary to determine whether such child will be legitimate child or illegitimate child. Legitimacy is the outcome of marriage. A child born within marriage is considered as legitimate whereas a child born out of wedlock is considered as illegitimate. But in case of surrogacy child may or may not born out of wedlock. Where genetic material is contributed by more than two parents it will render the child illegitimate. Or the question about the legitimacy of the child may arise.<sup>xx</sup> Further where the surrogate is also married the application of Section 112 of the Indian Evidence Act makes it difficult to determine whether the child is legitimate or illegitimate, adversely affecting the interest of the child as well as the

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<sup>xix</sup> Supra Note 1 at 238.

<sup>xx</sup>Dr. Sandeep Kulshrestha , “Artificial Insemination And Presumption Of Paternity In India”<sup>4</sup> (2018)

Available at

[http://ijariie.com/AdminUploadPdf/ARTIFICIAL\\_INSEMINATION\\_AND PRESUMPTION\\_OF PATERNITY\\_IN\\_INDIA\\_ijariie8378.pdf](http://ijariie.com/AdminUploadPdf/ARTIFICIAL_INSEMINATION_AND PRESUMPTION_OF PATERNITY_IN_INDIA_ijariie8378.pdf) (last accessed on July 16, 2022).

intended parents Gujrat High Court in *Jan Balaz v. Anand municipality and others*<sup>xxi</sup> held that, presumption cannot be drawn under Indian Evidence Act that a child born out of a surrogate mother, is the legitimate child of the intended parents, and have a legal right to parental support, inheritance and other privileges of a child like a natural born child. It will ultimately affect rights of the child and such difficulties will make it almost impossible to raise such surrogate child.

### **Parentage of surrogate child**

Another major issue is the parentage of the child. It is well known fact that today with technology it is possible for a female to conceive a child without coitus, and further development in reproductive technology has made it possible for a child to have multiple parents. It is also possible that a child may have five parents.<sup>xxii</sup> Ultimately resulting into a complex situation due to which it is almost impossible to determine the parentage of the child.

### **Custody of the surrogate child**

Normally parents being the natural guardian have the custody of the child. But due to the involvement of multiple people in the process of conception it is really difficult to determine the actual parentage for the purpose of determining the custody of the child. Though it is undisputed fact that intended parents are the legal parents of the child and as per the law have the right to have the custody of the child. It is admitted fact that custody disputes may arise in case of surrogacy and it is really a herculean task to determine these disputes. A clash for custody may arise between intended parents or the surrogate mother, or between both the intended parents on their separation. Such disputes are harmful for the growth of the child and affect the interest of the child adversely.<sup>xxiii</sup> In *Soos v. Superior court of the State of the Arizona*<sup>xxiv</sup> surrogate conceived triplets with the help of fertilised genetic material from both the parents but before the delivery both the parents got separated and intended mother filed for the shared custody of the

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<sup>xxi</sup> AIR 2010 Guj. 21

<sup>xxii</sup> *Supra* note 1 at 276.

<sup>xxiii</sup> *Id.* at 283.

<sup>xxiv</sup> 182 Ariz. 470 (1995).

unborn triplets along with the intended father. The intended father contended that the intended mother have no right to file for the custody of the child as she is not the legal mother as per the statute of their country. The Court upheld the intended mother's right to custody and found the statute unconstitutional.

### **Citizenship issues**

Certain countries do not recognise overseas surrogacy as surrogacy is banned in these countries. These conflicting approaches result into a chaos. We have the example of *Jan Balaz v. Anand Municipality* (2009) Where the nationality of a surrogate child was under question who was born to an Indian surrogate mother and German father. who was seeking rights over the child. After the birth of the child, Germany refused to give nationality to the child. Further they were born to an Indian national, and hence were citizens of India within the meaning of [Section 3\(1\) \(c\)\(ii\)](#) of the Citizenship Act. Hence at the end the parents had to complete the inter-country adoption process supervised by the Central Adoption Resources Agency.<sup>xxv</sup>

It is really ironical that there are various ethical issues involved in surrogacy, but in India, there is yet no strong law governing the field of surrogacy.

### **Conclusion**

No doubt that the surrogacy is a boon capable of giving the gift of life, but the shift from the humanitarian values to the business and money making is resulting into gross violation of the rights of unborn child. The desires which intended parents are trying to achieve through surrogacy like eugenics, designer babies, or gender selection are also violative of right to equality. Vested commercial interest, lack of comprehensive laws, and increased use of these techniques makes it a booming business. What researcher thinks is that the pitfalls in the development of the law should not turn into a graveyard for the surrogacy law which is still developing. Hence surrogacy needs to be checked and regulated by a proper mechanism.

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<sup>xxv</sup> Rights of surrogate mothers, Available at <https://blog.ipleaders.in/rights-of-a-surrogate-mother/> (last visited on July 16,2022).