

## Legal Issues on Surrogacy

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### Introduction :

Nature has given the beautiful capacity to procreate a life within woman and every woman appreciates the experience of motherhood. But, unfortunately some women due to certain Physiological situations could not give birth to their own off-spring. Today's democratic country in case of any dispute for property, rights or interest. Then these things can be separated by the legal system or various quasi-judicial and judicial bodies. But till date we don't have any mechanism for assessment of separation of living human body. Here I would like to share one story with respect to measurement of human relationship. Once upon a time, there was a dispute between two women (mothers) for a child. As per their submissions they both were calming over childlike, 'He is my son'; 'No he is mine'. After hearing both the woman(mothers), the king delivered his judgement "Dived the living the child in to two pieces and give half to one woman and reaming half to the other<sup>2</sup>. This was the order given by the wise king soloman in order to identify who is the real claimant or who is the real mother of that child. Before king's order they were fighting with each other and claiming against each other over rights of child. On hearing of the king's decision, the real mother of that child stated crying and requested to the king, not to cut the child but give it to the other woman. Now picture was clear who was real mother and whose claim was flase. The king gave the child to the woman who was crying and requesting to the king that no to cut the child. As she was real mother of the child. I think in today's era too King Solomon's wisdom; such disputes cannot be rare because of the concept of surrogacy. Science and technology is increasing day by day, hence in the field of human reproduction can be made possible for a child to

have two or three parents. Now a day's king's soloman may be replaced by various judicial and quasi-judicial bodies. In that king's order there were only two claimants (mothers). But in present time several people may claim over a child. In this planateeverybody wants to love and to be loved, hence to become parent is one of the sweet achievements of human being, unfortunately who cannot become father and mother, for their The urge of motherhood leads them to seek alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF), Intra-Uterine Injections (IUI), etc. infusing hope into many infertile couples, who long to have a child of their own. With advances in medical sciences and technology, particularly in assisted reproductive techniques which have come in with techniques like donor insemination, embryo transfer methods, etc. revolutionizing the reproductive environment such methods such as 'surrogacy' are also gaining popularity for varied reasons. As commonly understood, a surrogate mother is one who is hired to bear a child that she turns over at birth to her employer. The word 'surrogate' means 'substitute'<sup>3</sup>. Besides surrogacy arrangements taking place within the family, the community, the state and within the country because cheap medical facilities coupled with advance reproductive tech<sup>4</sup>nological know-how, slowly but steadily India is becoming a popular destination for surrogacy arrangements to many foreigners' notably rich westerners. With the entry of financial arrangements in exchange of the surrogate child, where the child becomes a 'saleable commodity' complications arise and issues got involved such as the rights of the surrogate mother, the child and the commissioning parents. To address and to regulate surrogacy arrangements the Government of India has taken certain steps such as introduction

and implementation of National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India, 2005 by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India<sup>5</sup>. But, till now there is no such legal provisions directly dealing with surrogacy laws to protect the rights and interests of the surrogate mother, the child or the commissioning parents. Hence, the risk and the disadvantages involved in this type of arrangements many a times prove detrimental to the interest of the surrogate mother and the child in particular. At times the commissioning parents also face legal hassles like the case of Japanese couple and the child born to them out of surrogacy arrangements in the recent days<sup>6</sup>. In 1984 the world saw the first successful birth through gestational surrogacy. Ten years later, in Chennai, this happened for the first time in India. Three years after that, in 1997, an Indian acted as a gestational carrier, and got paid for it, in order to obtain medical treatment for her paralyzed husband. In the past couple of years, the number of births through surrogacy doubled with estimates ranging from 200 up to 350 in 2008 alone (Lal, 2008).

### **Concept of Surrogacy:**

It is an arrangement by which a woman agrees to become pregnant by AI or through implantation of embryo and then carry the child for full term and after birth of child relinquishes all her parental right over the child and hand it over to another couple or individual<sup>7</sup>. These techniques offer the advantage to couples or individuals to beget a genetically related child. However AI and IVF are techniques mainly assisting medically infertile couples to beget a child. But in case where the wife is unable to carry the child for a full term due to any medical or other reasons then surrogacy is the best option for such couples. Surrogacy can be opted not only by medically infertile couples but also by socially

infertile couples and individuals<sup>8</sup>. According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents<sup>9</sup>.”

### **Rights and duties in relation to surrogacy<sup>10</sup>:**

Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.

- (1) All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.
- (2) Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.
- (3) A surrogate mother shall relinquish all parental rights over the child.
- (4) No woman less than twenty one years of age and over thirty five years of age shall be

eligible to act as a surrogate mother under this Act, provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.

In this way in surrogacy, the individuals who wish to have a child are required only to contribute genetic material and the process of carrying the fetus to full term in the Womb and delivering the child is performed by another woman known as surrogate woman<sup>11</sup>. Surrogacy is generally defined as an arrangement in which the surrogate or birth mother agrees to bear a child and permanently hand over the responsibility for the rearing of that child to another person or couple, referred to as the intending parents<sup>12</sup>. In most of the surrogacy arrangements the intended parents contribute the genetic material and the child is carried by the surrogate<sup>13</sup>. In certain cases the surrogate woman may contribute the genetic material<sup>14</sup>. And in very rare situations both the egg and sperm may be taken from donors and the resultant embryo is implanted in the surrogate<sup>15</sup>.

#### **Legal issues :**

Now a days the supporters of surrogacy argue that the surrogacy agreements are beneficial for all parties involved as the requirements of two worried and distressed women are met. It is often said that in the surrogacy arrangement '*the barren gets a baby, the broke gets a bonus*'. The surrogate mothers often really utilize the money they get. The first reported surrogacy in India, took place in 1994 in Chennai<sup>16</sup>. In 1997, an Indian woman acted as a surrogate for money and this is considered as the first reported instance of commercial surrogacy in India<sup>17</sup>. During the past one decade the number of children born through surrogacy in India has increased enormously<sup>18</sup>. According to Kembrell (1988) the practice of surrogacy exploits women economically, emotionally and physically. An important factor is that most women who get involved as surrogates do so because they are in desperate need of the money to maintain their

family. In addition, agents are often involved and arrange contracts of questionable legality. Those contracts require the women to undergo all the rigors of childbearing, and eventually they have to give the child away (Kembrell, 1988). The surrogate mothers are often unaware of their legal rights and due to their financial situation they cannot afford the services of attorneys. Once the surrogate mother has signed the contract, it is impossible for them to escape. Hence there are some legal issues on surrogacy:

#### **Children and Caste, and Religion :**

Children are wealth of the nation; they are the future of the world and give hope to the society for a better tomorrow. The desire and need to have a child has been recognized since the dawn of human life on earth. The importance of having children has been emphasized since time immemorial in all cultures and all societies of the world. All the major religions of the world also highlight this importance and need of a child. Now the position of child is different in various religion caste and community and they are getting legal status in inheritance or society as per their religion and caste.

#### **Children in Hindu Religion :**

The significance and need of a child for the parents, society and family. Hindus believe that children are gifts from God and are products of the previous Karma of an individual. It is presumed that children are related to an individual in their past lives or are their close friends. In Hindu dharma child should be Hindu by birth. Childlessness causes great pain and hardship to the married couples in Hindu families and women particularly have to face various problems like prohibition of participation in certain religious rituals<sup>19</sup>.

#### **Child in Islamic Religion :**

As per the Islamic teachings, children are a gift and a blessing from Allah the almighty. Some of the gifts that Allah has bestowed upon

mankind are mentioned in the following verse, —And Allah has made for you spouses of your own kind and has made for you, from your wives, sons and grandsons, and has bestowed upon you good provisions. Allah also said, —Wealth and children are the adornment of the life of this world<sup>20</sup>.

### **Child in Christian Religion:**

Christian religion has given utmost importance to children and considers them as symbol of God. It is believed that one day Jesus took a young child on His lap and said —Whoever humbles him like this child is the greatest in the kingdom of Heaven. And whoever welcomes a little child like this in my name welcomes me<sup>21</sup>. Hence the major religions of the world thus emphasize on the need and significance of having a child. However it is necessary to mention here that significance and need of a child is not only due to religious beliefs but is also due to various interrelated and interdependent factors.

In addition to the religious motives, the following are the other major issues:

### **Legal Motive:**

Children inherit the rights and liabilities of their parents<sup>22</sup>. The property rights are often an issue of the inheritance by the children of their ancestral property. In the absence of a legitimate child, the law relating to inheritance of property is very complex and contentious. Hence every individual desires to have a natural offspring so that his property can be passed safely to his child

### **Right to Procreation:**

Procreation means a biological process by which women gives birth to a child<sup>23</sup>. Procreative rights are rights relating to reproduction and reproductive health and include access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making. These rights are human rights and are universal, indivisible, and undeniable. These rights are founded upon principles of human dignity and

equality, and have been enshrined in international human rights documents. Reproductive rights embrace a bundle of core human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of one's children, and the right to be free from sexual violence. Reproductive rights also include the right to the highest standards of sexual and reproductive healthcare<sup>24</sup>.

### **Surrogacy Contracts:**

A surrogacy arrangement between an intended parent/parents and the surrogate woman requires clear understanding between them regarding their rights and duties towards each other. Such an agreement may or may not be reduced into writing. When the arrangement between the parties is reduced formally into writing, to give effect to the intention of the parties, it may be termed as a contract. Generally every contract exists to enforce promises and protect the parties' expectations in a transaction<sup>25</sup>. The most common way of making a contract is through a proposal by one party and its acceptance by another party. A contract creates rights and obligations between the parties entering into a contract. Refusal by any one party to a contract to honor a contracted obligation gives a right of action to another party<sup>26</sup>. A surrogacy contract can be defined as a private contract based on which a woman (single or married), acts as a surrogate, agrees to become pregnant through artificial reproductive techniques, carry the fetus to term, give birth to the baby, and relinquish her rights over the baby and hand it over to his/her intended parent/parents<sup>27</sup>. In a surrogacy contract the parties to the contract are the intended parents/parent, the surrogate woman and in certain case the husband of the surrogate woman.

### **Possibility of Performance:**

An essential ingredient of a valid contract is

that the obligations created through the contract are not impossible to perform. The Indian Contract Act, 1872 provides that, an agreement to do an impossible act is void<sup>28</sup>. It is submitted that the agreement in a surrogacy arrangement is not impossible to perform and therefore a surrogacy contract cannot be held to be void on ground of impossibility of performance. A surrogacy contract thus fulfills all the essential ingredients of a valid contract as per the provisions of the Indian Contract Act 1872.

### **Trafficking in Women and Children:**

One of the objections against the legality of surrogacy contracts is that it is similar to trafficking in women and children<sup>29</sup>. Trafficking in women and children is an offence both at international<sup>30</sup>. And domestic levels<sup>31</sup>. Trafficking is defined as a trade in something that should not be traded in for various social, economic or political reasons. The concept of human trafficking refers to the criminal practice of exploiting human beings by treating them like commodities for profit<sup>32</sup>.

### **Prostitution:**

One of the serious objections to a surrogacy contract is that, such agreements are similar to prostitution<sup>33</sup>. The critics claim that because prostitution is morally wrong and often illegal, therefore surrogacy is also morally wrong and illegal<sup>34</sup>.

### **Immoral and Opposed to Public Policy:**

All types of surrogacy contracts are generally criticized on the ground that they are immoral and opposed to public policy and hence void and unenforceable. A contract which is immoral and opposed to public policy is considered as void and unenforceable in India. In this context it is necessary to examine the meaning of the terms „immoral“ and „public policy<sup>35</sup>“. Recently in Hyderabad the local police on Sunday busted an active surrogacy racket running at a hospital in Banjara Hills round 46 surrogate mothers were rescued. The women who have fallen prey are

atives of Delhi, Andhra Pradesh, Darjeeling, Nagaland and Telangana. They were housed in an apartment complex. The incident came to light only after the police received a complaint from Hyderabad and Delhi. The hospital does not even registered as a fertility center. They are only registered under Pre-Conception and Pre-Natal diagnostic Techniques Act. In that hospital the management is not even permitting the surrogate pregnant women to go out; they are illegally forcing them to be in the hospital for nine months<sup>36</sup>.”

### **Breach of Surrogacy Contracts and its Remedies:**

It has already been stated above that a surrogacy contract can be considered as a valid and enforceable contract under the Indian Contract Act 1872. Similar to any other contract, there are chances of breach in a surrogacy contract also. Thus any nonfulfillment of promise on the part of either the surrogate mother or the intended parents would amount to a breach of such contract and the other party would be entitled to take action for remedies under the law. However, due to the peculiar nature of surrogacy arrangements it is very difficult to identify an appropriate remedy for any breach in such contract.

Hence surrogacy rises various legal issues such as those relating to 1) the surrogate Mothers; 2) women generally (by spillover effects of surrogacy; 3) the children born out of the transaction; 4) the siblings who see or later hear of the transfer of the child; 5) the hiring parents; 6) children available for adoption who might be adopted but for surrogacy transactions 7) other parties involved or keenly interested in the transaction, such as grandparents and other relatives, brokers, lawyers and counselors.

### **Conclusion:**

The right to reproduction is one of the basic and fundamental rights of an individual and is a

means to fulfill the innate wish of an individual to beget a child. However a large section of the people is unable to satisfy this right due to infertility caused by various medical and social reasons and as a result they remain unproductive. The childlessness has a severe impact on the individual's personal, family as well as social life. Hence Surrogacy in itself is not a treatment for infertility but a method which allows individuals/couples to produce a child genetically related to them. Surrogacy is an arrangement which enables couples or individuals who wish to beget a child but are unable or unwilling to sustain a pregnancy due to various reasons, to become parents of a genetically related child with the help of another. In India, though surrogacy has developed as a thousandrupees business, there are no specific legislations for the regulation and control of surrogacy. The two draft Bills introduced by the Government of India in 2008 as well as in 2010, for regulating the practices of assisted reproductive technologies including surrogacy in India have not yet been enacted as law. In the absence of a specific legislation, it is very difficult to resolve these issues. It is necessary to address these issues urgently because of the fact that India is fast becoming a hot-spot destination for surrogacy. Moreover, there are no reliable statistics on how many surrogacies have been arranged in India.

### (Endnotes)

- 1 \* Assistant Professor, Rajgurunagar Law College, Pune
- 2 University of Richmond Law Review : Volume 30 | Issue 1
- 3 Indian Journal of Medical Science (IJME), Oct.- Dec. 1997
- 4
- 5 National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy, National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy
- 6 Hindustan Times, dated 7th August 2008.
- 7 Oxford University Press, U.K. (4th edn. -2012), p.384.
- 8 CameliaSoo, —Babies for the Socially Infertile: How Conceivable is it?||, 12 The New Zealand Medical Student Journal 27 (2010).
- 9 The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4
- 10 ART (Regulation) Bill, 2010
- 11 Surrogate Motherhood, Women's Rights, & the Working Class, Pathfinder Press, U.S.A. (1988)
- 12 Queensland Lawyer, 78-83 (2008).
- 13 Gestational Surrogacy, Human Reproduction Update, Vol.9, No.5, 483 (2003).
- 14 The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions, 3 Alb. L.J. Sci. & Tech. 39 (1993),
- 15 A Socio-Legal Analysis, Hart Publishing, Oxford, U.K. (1999)
- 16 Hope in the Test Tube, The Hindu, Jan. 19, 2006.
- 17 Surrogacy Comes Out of the Closet, Sunday Times of India, July 6, 1997.
- 18 [www.womenleadership.in/Csr/SurrogacyReport.pdf](http://www.womenleadership.in/Csr/SurrogacyReport.pdf)
- 19 <http://www.hinduwebsite.com>
- 20 The Meaning and Explanation of the Glorious Qur'an, Vol 5 (2nd edn.- 2009),
- 21 The Importance of a Child, Mennonite Brethren Herald Volume 40, No. 12 (2001)
- 22 Section 125 of Criminal Procedure Code, 1973
- 23 The Webster's Dictionary defines the term "procreate"
- 24 Protection of Women from Domestic Violence, Universal Law Publishing Co. Pvt. Ltd. New Delhi (4th edn. -2011)
- 25 Murray on Contracts, Lexis/Michie, U.S.A. (3rd edn. - 1990)
- 26 [www.theseoguru.com/SearchMania/2009/02/meaning-and-definition-ofcontract](http://www.theseoguru.com/SearchMania/2009/02/meaning-and-definition-ofcontract)
- 27 Journal of Family and Reproductive Health, Vol. 5, 41, June (2011)
- 28 Bare Act The Indian Contract Act, 1872
- 29 [ssrn.com/sol3/papers.cfm?abstract\\_id=997923](http://ssrn.com/sol3/papers.cfm?abstract_id=997923)
- 30 The Convention on the Rights of the Child, 1989
- 31 Indian Penal Code, 1860 (Sections 359-373); Juvenile Justice (Care and Protection of Children) Act, 2000
- 32 <http://www.azadindia.org/social-issues/WomenTrafficking-i-India.html>
- 33 Kathryn Venturatos Lorio, "Alternative Means of Reproduction: Virgin Territory for Legislation", 44 Louisiana Law Review, 1641 (1984),
- 34 Mc George Law Review, 673 (2000),
- 35 Bare Act, Indian Contract Act, 1872
- 36 <http://www.oneindia.com/india/hyderabad> published on Sunday, June 18, 2017, 10:47 [IST]