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कला एवं धर्म शोध संस्थान,  
लोक कल्याणकारी ट्रस्ट, वाराणसी

कला

सरोवर

KALA

SAROVAR

(भारतीय कला एवं संस्कृति  
की विशिष्ट शोध पत्रिका)



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# कला सरोवर (त्रैमासिक)

भारतीय कला एवं संस्कृति की विशिष्ट शोध पत्रिका

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समर्पण



आद्याशक्ति 'माँ दुर्गा'

के

चरण कमलों में सादर समर्पित

सर्वदेवमयी देवी, सर्वदेवीमयम् जगत् ।

अतोऽहं विश्वरूपा त्वां नमामि परमेश्वरीम् ॥



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'कला सरोवर' शोध-पत्रिका में प्रस्तुत सभी लेखों, छायाचित्रों और रेखाचित्रों का अत्यंत उपयोग प्रधान संपादक की पूर्व लिखित अनुमति से ही किया जायेगा। रचनाओं में व्यक्त विचार लेखक के अपने हैं। शोध-संपादक परिवार का उन प्रकाशित लेखों से उनका सहमत होना आवश्यक नहीं है। विवाद की स्थिति में लेखक/शोधार्थी स्वयं जिम्मेदार होगा।

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# An Analysis of Human and Legal Rights of the Surrogate Child

★ MeghaYadav ★★ Archana Vashishth

## ABSTRACT

The desire to beget and rear a child can be so overwhelming as to cause people to go to great lengths to achieve such a goal. Thus in cases where the couples or individuals are unable to have a child of their own through natural biological process, they may take the help of assisted reproductive technologies for begetting a child. The child is the most vulnerable among all the stake holders involved in surrogacy arrangement. It is a fact that the child is unable to express its own will regarding its birth into this world. Therefore, the welfare of the child must be considered to the maximum extent possible in any surrogacy arrangement. In this paper we are going to study the various legal and human rights of the surrogate child.

**Key Words:** Surrogacy, rights, legal, human, child

## INTRODUCTION

Children are precious to every country and are the future citizens and pillars of the nation. In every society children are considered as necessary and desirable. Though there is no duty to reproduce, the desire to do so is strong in human beings due to religious, cultural, social, family, personal and legal motives. The desire to beget and rear a child can be so overwhelming as to cause people to go to great lengths to achieve such a goal.<sup>1</sup> Thus in cases where the couples or individuals are unable to have a child of their own through natural biological process, they may take the help of assisted reproductive technologies for begetting a child. Surrogacy has emerged as the best option for begetting a child, and every year, more and more children are born to surrogate mothers. This increased use of surrogacy has received worldwide attention in recent years and has generated huge debate regarding the protection of rights and welfare of the various stakeholders involved in surrogacy.

## ORIGIN OF SURROGACY

Commercialization in the field of surrogacy has made it a billion-dollar industry in a huge portion of the underdeveloped nations and one of these nations is the great democratic nation called India. Surrogacy has undoubtedly, generated a way of earning for a major portion of below Poverty Line (BPL) families in India and has allowed them to accomplish the essential necessities of life – food, shelter, education, etc. But along with it comes quite many deficiencies which can't be overlooked further as it influences a large number of innocent lives, including the ones which are yet to take their first breath in this world. What started as an act of selfless love by a grandmother for her daughter wherein, she agreed to carry her daughter's baby in her womb, has undergone a lot of change in the last ten years and taken the form of a business activity which can be termed as 'womb for hire'. The roots of surrogacy can be traced back to the ancient Babylonian legal code of Hammurabi (18th century BC) which recognized the practice of surrogacy and actually laid down detailed guidelines specifying when it would be permitted and the respective rights of both wife and surrogate mother<sup>2</sup>. It is again mentioned in the great Indian epic Mahabharata, that all the hundred sons of the king of Hastinapur, Dhritrashtra were born through IVF process. "Vyasa took the piece of flesh and divided into

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100 parts. He then put them into 100 pots and tied their mouths and buried them in the earth a year<sup>3</sup>.”

From this it can be assumed that surrogacy is there from the time immemorial, but it is only recently that it has been commercialized and made into a billion dollar industry. The famous case of Baby Manji Yamada<sup>4</sup>, was the very first reported case of commercial surrogacy and the contract for which was drafted by Late Noel Keane provided the basic idea about the ambiguities present in the field of commercial surrogacy regarding the rights of the surrogate mother, the child who is yet to be born and the parent.

### **SURROGATE CHILD: CONCEPT AND MEANING**

Child usually refers to the status of a person in a relationship as parent and child, and it includes a person of that status even after the person has reached the age of full legal capacity. It is generally a known natural fact that a child is born as a result of sexual union between an adult male and female. However, due to the development of medical science and technology, a child can take birth even without sexual intercourse, i.e. the child can be born with the help of assisted human reproduction which requires only the genetic material from the male and female. One of the commonly practiced methods of ART is surrogacy in which a woman agrees to bear the child for another and relinquishes parental rights on its birth and hand it over to the intended parents. Such a child is known as a surrogate child. Thus a surrogate child is the result of a surrogacy arrangement in which a woman agrees to be impregnated by assisted conception, carries the resulting foetus and delivers it after the full term<sup>6</sup>. They are the children who come into the world through the arrangements between specific persons, i.e. intended parents, surrogate woman and in certain cases egg or sperm donors and with the assistance of technology.

### **SURROGATE CHILD: LEGAL AND HUMAN RIGHTS ISSUES**

The child is the most vulnerable among all the stake holders involved in surrogacy arrangement. It is a fact that the child is unable to express its own will regarding its birth into this world, or speak of its own wishes or interests before it is born and even after birth till attaining maturity. Therefore, the welfare of the child must be considered to the maximum extent possible in any surrogacy arrangement. In such an arrangement, once the child is born and handed over by the surrogate mother to the intended parents, the surrogacy contract ends. However the interest of the child begins right from the inception and continues even after birth and transfer of the child from surrogate mother to intended parents. Therefore, it is the responsibility of all the stake holders in surrogacy arrangements to ensure that the child being born as a result of surrogacy is not adversely affected. As a welfare state it is the duty of the government to ensure that the actions of an individual would not cause harm to the interests of the child.

#### **Right to Know his Origin**

The right to know one's genetic origins is a basic human right<sup>125</sup>. The Hague Conference of the UNICEF highlights the right of a child to know his/her parents and to be cared for by them<sup>7</sup>. Similarly, Article 7 (1) of the CRC implies, on the one hand, the right to information to a child about his/her origins, and, on the other hand, the need for authorities to preserve this information and to enable the child's access thereto. So every child born out of surrogacy is also entitled to know the details of his origin.

#### **Right to Maintenance**

The wants and vulnerability of children render it necessary that some person maintains them, and nature has ordained the parents as the most fit and proper persons to carry out this obligation. From time immemorial, the laws and customs of all societies have enforced this basic rule as a universal law. The obligation on the part of the parent to maintain the child continues

until the child is able to maintain himself/herself.<sup>8</sup> In India the issue relating to maintenance is mainly dealt under section 125 of Criminal Procedure Code, 1973. It says that a minor child, if unable to maintain itself is entitled to claim maintenance from its parents. It is immaterial that whether such child is legitimate or illegitimate or whether born out of marriage or otherwise.<sup>9</sup> Therefore, a surrogate child can also claim maintenance from his parents as per this provision. The *ICMR Guidelines* in India also establishes the right to support and maintenance of surrogate child. It states that, child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse<sup>10</sup>

#### **Right to Inheritance**

The right to inheritance is the right by virtue of which movable and immovable properties of every kind are transmitted, after the death of those who possessed them, to their legal heirs or descendants<sup>11</sup>. In most of the societies and legal systems of the world, the children have a right to inherit from their biological parents. In India, the *ICMR Guidelines* expressly recognizes this right. It provides that, a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to couples through sexual intercourse<sup>12</sup>. The Draft ART Bill, 2010 also recognizes this right. Under section 35, it states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse.<sup>13</sup>

#### **A Child's Right to Preserve Identity and Right Not to be Separated from Parents**

For every human being, identity is a very important aspect of life. In fact without identity a person cannot exist. The identity of a person is derived from his parents. The right to identity of a child is recognized under international law. The *Convention on the Rights of Child*, 1989 under Article 8.1 provides that, state parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Another important right of a child is his/her right not to be separated from parents. This right is recognized by CRC under Article 9.1, which provides that, States parties shall ensure that a child shall not be separated from his or her parents against child's will, except when competent authorities subject to judicial review, determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

#### **Right to Citizenship**

The right to citizenship is a very important right of an individual as it is the basis of his civil and political rights. Citizenship is generally understood as referring to the relationship between the individual and the state.<sup>14</sup>

#### **CONCLUSION**

The welfare and interests of the surrogate child must be given prime consideration in a surrogacy arrangement. The interests of the child depends on various issues like legal status of the child, parentage, custody, citizenship as well as various other rights such as right to know his or her genetic origin, right to maintenance, right to inheritance, right to preserve his or her identity and right not to be separated from parents. All these issues arise only after the birth of the surrogate child. For example, though the intended parents entered into agreement with the surrogate woman, the surrogate woman may refuse to hand over the child to the intended surrogate woman.

parents; or the intended parents may after the birth of the child refuse to accept the child due to their separation or divorce or if the child born is defective. The protection of the interests of the surrogate child lies in the hands of the other stakeholders involved in surrogacy arrangements i.e. the intended parents and surrogate woman. Hence it is essential to have a proper legal framework to regulate surrogacy arrangements. Any dispute in surrogacy would adversely affect the rights and interests of the surrogate child. Hence such laws should clearly address the various issues which affect the rights and interests of the surrogate child. In this context it is the duty of the State to make adequate regulations for ensuring that every surrogacy arrangement considers the future issues relating to surrogate child and its welfare. Such an action on part of the State is essential in order to protect the innocent surrogate child and prevent the child from becoming a victim of surrogacy arrangement.

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