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## **SURROGACY: A LEGAL STUDY IN INDIAN PERSPECTIVE**

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Prof. (Dr.) Anil Kumar Dixit & Neha Chandeliya (Student), Law College of Dehradun, Uttarakhand University

### **ABSTRACT**

Surrogacy law is a growing jurisprudence. Such a growth essentially speaks volumes about a nation's social and economic ethos, India has witnessed several laws and Regulations in this subject, but none of them have been up to the mark and so they have been changed time and again. We have witnessed different ART Legislations from the year 2008 to 2014, and ICMR Regulations also. The advancement of medical science and technology has proven to be the gospel of mankind. At the same time, they pose many challenges to the world's new legal system. One of the advances is the new line of assisted human reproductive technology, especially surrogacy, which gives new meaning to the new concept of reproduction. The present paper analyses the Surrogacy (Regulation) Bill of year 2020 which has been the topic of debate for various stakeholders including, doctors, clinics, gynaecologists and general public as well.

Keywords: Commercial Surrogacy, Altruistic, Surrogacy, Surrogacy Regulation Bill

*“Learn to see the gift in the adversity, by doing this you will begin to find true peace in your struggle.”*

## **INTRODUCTION:**

Surrogacy is the practice of a woman agreeing to become pregnant with the goal of permanently surrendering the child born from that pregnancy to another person or couple with the understanding that the person or couple would raise the child. The 'surrogate' or 'birth mother' is the woman who carries the child. The person or people to whom the child is to be relinquished are referred to as the 'commissioning' or 'intended' parent(s)/person (s).

## **DEFINITIONS:**

**I.** Section 2(zb) of the *Surrogacy (Regulation) Bill, 2016* defined Surrogacy as "a practice in which one woman bears and gives birth to a child for an intending couple with the purpose of handing the child over to the intending couple after birth."<sup>1</sup>

**II.** The word surrogate literally means "to substitute." Surrogacy, according to Black's Law Dictionary, is the procedure of bearing and delivering a child for someone else.<sup>2</sup>

## **KINDS OF SURROGACY**

- Natural Surrogacy

In this form of surrogacy, the embryo is genetically related to the surrogate and is carried out using her own ovum. The commissioning father can give sperm and become the child's genetic father. In this Surrogacy, the sperm can also be extracted from a third male individual if two female commissioning couples or single women commission the kid. Women can become pregnant by sexual contact, intrauterine insemination (IUI), or in vitro fertilization (IVF).

- Gestational Surrogacy

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<sup>1</sup> Section 2(zb) of the *Surrogacy (Regulation) Bill, 2016*,

<sup>2</sup> 8 BLACK'S LAW DICTIONARY 1036 (2004).

In this case, the surrogate mother serves as a carrier of an embryo that is genetically unrelated to her. IVF is used, and the fertilized embryo is implanted in the surrogate uterus. In this case, the embryo is fertilized by the commissioning parents or by an unidentified third party.<sup>3</sup>

- Commercial Surrogacy

In this type of surrogate motherhood, the surrogate mother receives monetary compensation for her uterus, which is given to her in exchange for rent, this is legal in India and is also known as baby-rearing or surrogacy.

- Altruistic Surrogacy

Surrogates receive no financial compensation in Altruistic Surrogacy. Only monetary medical expenditures are provided as compensation by commissioning parents.<sup>4</sup>

## HISTORY OF SURROGACY

Indian culture is generally not open about the possibility of surrogacy, but it has been cleaned up even at older events. In Mahabharata, the improvement of Dhritarashtra, which was thought to give little brain to pregnancy, basically lasted for two years, after which it passed through a semi-solid mass. Bhagwan Vyasa found 101 cells of standard mass. He placed these cells in nutrient medium and filled them in vitro for the entire period. Of these, 100 were divided into young men (Duryodhana, Dushasana, and other Kaurava), and one became a girl named Dusila. The story related to the presentations of Dhrishtadyumna and Draupadi also refers to the presentations of energetic adults who do not have the opportunity for proper treatment outside the mother's intestines. Master Drupada argued with Dronacharya and demanded a pleasant and energetic preparation for killing Drona. He accumulated his seeds, guided him, and was given a prescription by Rishi, who started from there and placed it on Yajinakunda (offerings), where they were considered Dhrishtadyumna and Draupadi. During the seventh pregnancy of Lord Krishna's mother, Devaki, the anomalous substance was shifted to the size of Rohini,

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<sup>3</sup> Aditya Mishra, *Surrogacy in Indian legal context. A bliss or curse*, 2015, Unpublished Online off Campus Random Research Program. Prof. Ranbir Singh Legal Research Centre, Shajapur (India)PP 1-2.

<sup>4</sup> Ibid

Vasudeva's core companion, to prevent it from being killed by Kansa<sup>5</sup>. Surrogacy has existed since biblical events.

- Biblical Age: The records of Sarah, Abraham and Hagar have been proposed in the Book of Genesis as an important sign of surrogacy. Sarah and Abraham couldn't think of their own great alternatives from their curls. This sent Sarah to her strongest servant, Hagar. She referred to Hagar as the mother of Abraham's son. This case was called standard surrogacy. In such an alliance, the surrogate mother uses her own eggs among the young adults she inherits for the expected guards. Both Sarah and Abraham testified with euphoria that their children were their own.
- 1975: The first wise move of the creature that launches IVF was approached ethically.
- 1976: Lawyer Noel Keane was instrumental in implementing the essential legal strategy of surrogacy during the existence of surrogacy. However, it was a standard surrogacy and the sponsor was not compensated for the pregnancy. This was treated as the first leap forward in the United States, as it helped create a place of vanity to ensure that many alternative pregnancies were planned.
- 1978: It took a long time for the first organisms to transform into a child's imagination through in vitro fertilization, and an important young adult was imagined.<sup>6</sup>
- 1980: The term "salary" related to surrogacy was introduced and this year we worked on understanding surrogacy for surrogacy with basic reimbursement. Elizabeth Kane (renamed) was an important person who earned \$ 10,000 to imagine a child for another couple.<sup>7</sup> She subsequently outlined a book titled "Birth Mother" in which she wept at her choice to share her experiences of hers and change instead. Kane hinted that she was surprised by the restless and impending variables of surrogacy and the difficulties she seemed to be experiencing in taking control of the young.
- 1984: Positioning blocks were prepared for future ground impregnation. In any case, the greater precious collaborative fertilization of women has not reached ethically, even if it has been refined for this year.
- 1984–1986: In 1984, a childless couple, William and Elizabeth Stern, used Mary Beth Whitehead as a referee's mother. The couple agreed to change \$ 10,000 to complete a manual sperm transplant measurement using whitehead eggs. Whitehead transformed into an ordinary

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<sup>5</sup> Lany I. Palmer, —*The Legal Significance of Gestation*, 20 Cornell Law Forum (Faculty ed.) 9 (1993-1994)

<sup>6</sup> Danielle Preiss & Pragati Shahi, *Dwindling Options for Surrogacy Abroad*, available at: <https://www.theatlantic.com/health/archive> (Visited on April 1<sup>st</sup>, 2021)

<sup>7</sup> Dr. S.K. Kapoor. *International law & Human Rights* 56 (Central Law Agency, Allahabad.16<sup>th</sup>edn.,2012).

mother of the baby as she approached her birthday, but Whitehead decided to revoke the deal and became the guardian of young Melissa Stern ("Baby M."). This was seen from the battle of ideas long ago in 1986, and the court eventually predicted that there would be an investigation between surrogacy plans and the state's official methods. Eventually she allowed conscious surrogacy and made it possible to create a strategy with little attention, but nevertheless she cannot remain truly conscious. In "Teenager M". In that case, Stearns was allowed to retain the young man's authority, but Whitehead stopped pretending to be her in the interest of her visit. With this process, a single surrogacy expert has initiated a steady transition to surrogacy to avoid legal problems.<sup>8</sup>

- 1985: In 1985, the most useful pregnancy surrogacy has been perfected for this year, so the pregnancy surrogacy has further clarified that relationship. Standard surrogacy and surrogacy, as a rule, were generally held in the state after 30 years. The law and the leaders have essentially shifted towards ways of dealing with supervision to ensure parental rights in coordinated parental surrogacy through the interests of the parents before or after childbirth. It is reaching a variety of clear surrogacy spaces and experienced surrogacy topic specialists, supporting both organized guards and surrogacy for affiliations.

- 2004-2008: In the United States about 5,000 young people were joined by surrogacy. The new year saw the creation and destruction of various surrogacy registries. In 2011, even the most stable mother at the age of 61 lost her grandson alone. Episodes of science have always been associated with long cycles of surrogacy since they began before the second half of the 20th century. By using such a high-level surrogacy strategy, the mother of a typical caretaker and intermediary can allow the proposed caretaker to complete the family, and the intermediary will be himself until the cow returns home. You can choose this which can help you to change clearly. The surrogacy settings and exits recorded so far show a clear expectation of a much clearer motive for surrogacy later<sup>9</sup>.

## LEGISLATIVE DEVELOPMENTS OF SURROGACY IN INDIA

The Indian government has taken many attempts to address the issue of surrogacy on numerous occasions, however there is currently no law that addresses the subject. Several legislations have been passed, however there are loopholes in them. The first surrogate baby was born in

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<sup>8</sup> M. Cooper and M. Heida, *Current Issues and Immerging Trends in Medical Tourism* 89 (Oxford University, USA, 1<sup>st</sup> edn., 2015).

<sup>9</sup> Kusum Jain, *Surrogate Motherhood: Some Legal and Moral Problems in Bio Ethics* 558 (Sage Publications, New Delhi, 4<sup>th</sup> edn., 1983)

India in 1994, but it quickly gained international acclaim, and India became a surrogacy hotspot due to its low cost and simple availability of surrogate mothers.

#### ❖ **INDIAN COUNCIL OF MEDICAL RESEARCH GUIDELINES 2005**

India is known as the Surrogacy capital of the world. Before 2008, commercial surrogacy was practiced in India in a great number but government had made no efforts to make any legislation which can regulate the surrogacy law in India. First time in 2005 the Indian Council for Medical Research (ICMR) formulated some guidelines to regulate the surrogacy. Some of the guidelines given by ICMR are as follows-

- Determination of the sex of the fetus is banned in all circumstances, including fertilization and embryo abortion;
- The spouse's permission is required in order to get ART;
- The family member or couple's friend can not act as a surrogate mother in any circumstance;
- The family or the friend of either Husband or Wife are not allowed to donate the sperms;
- Only those couple can adopt the procedure of surrogacy who are unable to conceive naturally;
- Commissioning /genetics parents will have to adopt the child legally born out of surrogacy;
- Sale/transfer of human embryos or gametes to outside India is completely prohibited;

#### ❖ **THE ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REGULATION BILL, 2008**

There were many loopholes in the ICMR Regulations and to overcome these loopholes, a Draft of ART Bill in 2008 was passed on the guidelines given by the Indian Council for Medical Research expert group. The most important aspect of this Bill was that it legalizes the surrogacy arrangements as contracts under the Indian Contract Act 1872 and also make mandatory for commissioning parents to fund all the surrogate mother's medical expenditure and insurance coverages. The bill makes surrogacy provable and prohibits the acquisition of alternative mother's eggs to carry the pregnancy to maturity. This suggests that non-beneficial pairs need to look for alternatives as well as egg support. In addition, women with a powerful regeneration system (central individual) are aware of confusing, dangerous and costly strategies such as in vitro treatment compared to less designed strategies such as intrauterine insemination (IUI). If the traditional couple is an NRI or a Dalit, the approval allows the teens to take real

responsibility for managing the center's individuals during the time frame before being placed in the care of a stranger or distant couple. to be outsourced to the keeper. The bill says a woman could replace three viable births in her life range, including three commercial impediments during pregnancy for a particular couple. This poses the challenge of physical and energetic success as the number of events that can go through the IVF cycle increases to a higher number.<sup>10</sup> The Bill is vulnerable to the real utilitarian factors of the cycle it is trying to set, denying several points. The bill has been disapproved since it makes no mention of the surrogate mother's or her child's welfare; rather, it shields the clinic from complications such as determining who is the true parent. The focus is completely on regulating commercial surrogacy only.

❖ **ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) REGULATION BILL, 2010**

Surrogacy in India continues to grow steadily, and the legislation proposed to regulate it continues to grow in the early stages. The pre- and post-development rules are a delay in the results spread from the beginning by the Indian Medical Research Council (ICMR). In any case, these do not have guaranteed splendor and are not limiting. The current Assisted Reproductive Technology Act (Regulation) of 2010 has not yet been presented as an authoritative tool in a truly important position and has undergone dialogue between various organizations. As the bill was drafted in response to the demands of the business standard for surrogacy and incredibly four years after the draft, it is unusual to postpone the start of approval to address an industry that has affected nearly a decade. From the impression that it is not a sign of establishment. Further exacerbating the condition is that each time the bill is sent for dissemination and attempts to examine existing escape specifications, multiple current shifts occur.<sup>11</sup>

❖ **ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) REGULATION BILL, 2013**

At a very basic level, ART Bill 2013 promises to reevaluate the past ART Bill 2010 with new methodologies and control equipment. ART Bill 2013 is currently ahead of the Master for review. As evidence, the law appears to have changed from government support from the Ministry of Health and Family to a valuable relationship between the Ministry of Justice and

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<sup>10</sup> Paras Diwan, —*Technological Niyoga and Nirodh and Social Engineering Through Law* 22 J.I.L.I. 445 (1980)

<sup>11</sup> Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* 138 Cambridge University Press, U.K. (2006)

India, as well as concerns regarding the law appear to have changed as a result. proposed since 2013. By minimizing the risk and nastiness of the gathering and relaxing the interests of the entire population, we propose better rules for surrogacy for restorative and socially ethically useful purposes<sup>12</sup>.

In the new ART law 2013, there have been small changes in the meaning of understanding surrogacy. For example, although ART Bill 2010 describes an approach to surrogacy, the term surrogacy technology is described as an identification between an individual receiving ART treatment and the center's individual mother. As a perception between individuals benefiting from ART treatment and surrogate mothers, the 2013 draft distinguishes need, so we use a model for the term rather than the strategy used in Model 1. The term contract in the solid discussions illustrated suggests a compelling understanding under the law and is also a legally definitive system. Using the term understanding the game plan appears to be clearly boring in the 2013 draft, and appears to be the term's basic ability to consider the requirements for surrogacy procedures and certified effects. At ART Bill 2013, the number of events that women can lay eggs in their normal presence time has been reduced from the previous reasonable limit of six commitments under the 2010 draft to just three commitments. This is a valuable and prosperous game plan. By reducing eggs, they gain the conceptual strength of egg support, and regardless of the normal course, egg suppliers prefer to prevent high births and repeated doses of hormonal agents that control egg production. Such hormonal agents can induce insignificant movements that affect dangerous conditions. As a problem of ovarian hyperstimulation (OHSS), which puts an end to certain situations among the potential for success<sup>13</sup>. Both the ART Bill 2013 and the ART Bill 2010 are required to obtain the consent of the parties benefiting from surrogacy and pay little attention to the donations used in both drafts. While the new 2013 draft requires a targeted "agreement" from parties seeking to make a profit from surrogacy, the 2010 best representation draft requires "showing consent." Here, "informed consent" is a typical biomedical spectacle, the Universal Declaration of Human Rights and Human Rights and the ethical guidelines for biomedical research on human participants proposed by the ICMR. Using the term "extended consent", ART Bill 2013 is separate from bio clinical ethics<sup>14</sup>.

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<sup>12</sup> Gehna Vaishnavi, Navneet Tatkhar *Surrogacy Medico Legal Issues*, 1 JAYPEE MEDICAL HEALTH PUBLISHER, NEW DELHI, 68(2015).

<sup>13</sup> William J. Locke, *The Morals of Marcus Ordeyne*, THE ECHO LIBRARY, MIDDLESEX, U.K.18 (2009).

<sup>14</sup> PARAS DIWAN, MODERN HINDU LAW, ALLAHABAD LAW AGENCY, ALLAHABAD 222 (2005)



### ❖ **SURROGACY (REGULATION), BILL, 2016**

On November 21, 2016 Surrogacy Regulation Bill was come in Lok Sabha and was passed on December 19, 2018. The Surrogacy Regulation Bill made the following changes:

1. Commercial surrogacy is completely prohibited and only altruistic surrogacy is allowed.
2. Commercial surrogacy is made punishable by imprisonment for up to ten years and a fine of up to ten lakh rupees. At least one of the intended parents must be infertile.
3. Applicants should not have any living biological or adoptive children.
4. Intending parents can seek surrogacy after at least five years of marriage. The intended father should be between the ages of 26 and 55, while the intended mother should be between the ages of 23 and 50.
5. One of the intended parents is no longer gonna be one of the donors.
6. The surrogate mother should be a close relative of intended couple(ii) married, (iii) should have a child of her own, (iv) between the ages of 25 and 35, (v) undergoing surrogacy for the first time, and (vi) have a medical fitness clearance certificate.
7. Both the surrogate mother and the intended partner must apply for certification, and surrogacy can begin only when the certifications are obtained.
8. Embryo or gamete storage is forbidden.

### ❖ **SURROGACY REGULATION BILL 2021**

The Surrogacy (Regulatory) Bill, 2021 (Surrogacy Bill), is a good, satisfying and particularly organized way to achieve both the abuse of typical mothers and the benefits of young people brought into the world through surrogacy. One of the most striking features of the bill is the ongoing restrictions on surrogacy. The bill is an unbelievable liberal amount that many can think of to place non-beneficial Indian couples aged 23-50 for women and 26-55 for men. The couple must be an Indian resident, or a non-resident Indian, an Indian individual, or an Indian expatriate. Although some Indians are starting to choose surrogacy, they are getting closer. They are suffering, standard or obtained, unless there are young people with mental or genuine imperfections, or when they encounter dangerous problems without permanent correction. You cannot have children. This terrible position should be secured by the relevant authorities with legitimate clinical claims from the district medical committee.<sup>15</sup>

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<sup>15</sup> William J. Locke, *The Morals of Marcus Ordeyne* 18 The Echo Library, Middlesex, U.K. (2009)

Below are suggestions on basic conditions in the solicitation of Chapter III, section 4 (ii) (a), and pages 43-45 on the regulation of surrogacy and surrogacy procedures in the 2021 bill.

Section 4(ii) Surrogacy or surrogacy methods do not explicitly promote, endeavor, perform or benefit in a targeted manner.

(A) Two or three have clinical signs that require surrogacy.

Some start-up or engineering Indian women intending to benefit from surrogacy have proposed the individual's application to the Board in the ways and arrangements suggested.

(B) If it is only for the purpose of liberal surrogacy.

(C) When starting and ending, except for commercial purposes or marketing of surrogacy or surrogacy systems.

A systematic couple or woman indicating [as explicitly defined in Section 4 (1) of the 2021 Bill on page 44 of the above report] agrees that they are likely to go as alternative mothers. Considering going to rational authority with a voluntary woman,

- By donating a gamete, a woman will undoubtedly not become the mother of a central individual.
- Undoubtedly, a woman will never go on behalf of her mother more than once in her lifetime.

Surrogacy has a really big psychological impact. Giving "guaranteed clinical signs" can be incredibly stigmatized and guarantee mismanagement in every respect. The benefits of the various prosperity of the social issues inherent in surrogacy planning certainly arise for both the embracing guardian and the surrogate mother when there is an opportunity for further openness to other unconsensual third parties, especially the real thing. A point expert and ally and conference assistant who can certainly fight to be abused.

Therefore, *KS Puttaswamy v. Union of India*<sup>16</sup>(2017) 10 SCC1 refers to a new acclaimed ruling issued by the Honorable Supreme Court of India. The basics are more than stigmatizing in themselves. Both sides may encounter legitimate business problems / obstacles from the board, and the possible postponement of great communications adds to the sadness of the meeting. The decisive improvement in evoking council space can never claim an actual degree of influence in the overall coordinated effort. In this regard, the conference is plausible and they will go looking for a standard, intense administrative quality away from the council's morale. Essential passage par. Page 4.18 24 of the reports actually mentioned are categorized as follows: 4.18 Clause 2 (p), read along with Clause 2 (r), 4 (ii) (a), and 4 (iii) (a) (I), provides boundary rules for profitable surrogacy systems. Some members hinted at a reaction regarding the

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<sup>16</sup> (2017) 10 SCC 1

meaning of the clarification of "abandoning." For example, a lack of consideration after five years of unprotected sex because the couple is too long to organize things for their baby or some people need to get infertility approval from the district medical council because such confirmations are absolutely negligent and annoying and they should seek such confirmations. 4.21 When setting the last reference, the Committee recommends that Clause 2 (p) be revoked and then the conditions may be renumbered or changed as needed." Inexorably, this is a mind-boggling deal: social, as the previous clarification of "insignificance" used in the 2019 bill has now been subjugated by the relentless "clinical signs". two actors, especially for the surrogacy approach, for the advancement to vanity. Likewise, you can fight when the limits remain murky. Perhaps there is no difference in the perspectives associated with this part of a compelling investment.<sup>17</sup>

By managing the 2021 surrogacy bill scheme, all singles / unmarried people have generally been barred from naming surrogacy plans. Likewise, people in the unmarried "line" also see someone being pardoned, and apparently unmarried couples are legal under the plans of the 2005 Indian Domestic Violence Act. Single women cannot opt for surrogacy, even if exceptional cases have been arranged to supervise the widow and have been separated from the individual. Additionally, the 2021 surrogacy bill states that keeping isolated in grown-up places in places around 35 and 45 should be a choice to become a particular advocate. January 21, 2021, after undergoing an absurd assessment of past procedures that prevented intermediaries from "clearly cooperating with relationships", as required by the 2019 surrogacy bill. The "neighborhood" strategy should be abandoned and "motivated" women should be allowed to switch to surrogacy, provided additional needs are met and surrogacy is eliminated. The Commission's report never proposed to observers to broaden the implications of the entanglement between a single male or female. Following the social meeting of the 2021 surrogacy bill, the central government, along with the coalition government supporting relevant associations, has shifted the spotlight to various types of supported conceptual development norms. The Assisted Reproductive Technology Act of 2021 provides a public vault for the accreditation, rules and oversight of national advisory committees, state advisory committees, and all supported regenerative workplaces and approved concept motion banks. After a quick look at the Selection Committee's report on the Surrogacy (Regulatory) Motherhood Bill 2019 submitted in Rajasaba on February 5, 2021, despite such huge deals and assessments, it is now

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<sup>17</sup> Nihil Obstat, *The New American Bible* 281 Oxford University Press, London (2010)

moving forward. There was a special plan to be made, and even the inadequacy of the opposition was resolved to take on the important basic foundation that was denied.<sup>18</sup>

## CONCLUSION

In modern times surrogacy has been emerged as a boon for the humanity. It gave viable option to those infertile couples who are not able to produce children in normal way. It offers those childless hopeful parents the opportunity to have a genetically related child, if they so choose. Now a days Medical Science through ART in the various form assists to infertile and same sex couples as well as fertile couples to have a child genetically related to them. With the advancement in medical science, changes had occurred in the process of procreation, now a days procreation does not remain as a natural act. Presently it can be done in artificial way with the help of various techniques. If it is not possible to procreate in natural way. Surrogacy is also criticized on many moral grounds and considered to be repugnant to human dignity. Exploitation of women's reproductive capacities is considered as commodities, available for sale in the market like other goods. Surrogacy also attracts some legal issue which makes this practice more controversial legalities of surrogacy contracts, legality of the status of surrogate child, legality of commissioning parents are the issues which will have to be resolved. Existing surrogacy laws are conflicting to deal with the cases of surrogacy, that is why surrogacy in practice is so controversial, otherwise surrogacy results as a boon under the proper regulation.

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<sup>18</sup> S. L. Joshi and P.C. Jain, *Rural Sociology*, Rawat Publication, Jaipur (2002), pp.188-193.