



## LEGAL AND HUMAN RIGHTS PERSPECTIVE OF COMMERCIALIZATION OF MOTHERHOOD IN INDIA

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### Abstract :-

*Surrogacy is an arrangement in which a woman agrees to bear a child of another and to transfer the custody of the child to the intended parents after the birth of the child. It is a practice generally deemed as a good practice which fills the emptiness of the lives of the infertile couples. But behind this good moral practice, it also has a dark side of it. This system leads to commercialization of motherhood which also causes violation of human rights of people. This practice is very popular in India but in absence of law it has become very difficult to regulate this practice and to prevent violation of human rights of people.*

**Keyword** – Surrogacy, Human Right.

### Introduction :-

Marriage is an institution of social order through which a married couple wish to beget a child. Motherhood is a blessing of God for every woman in the world. But for an infertile woman, this desire remains unfulfilled. But now this problem of infertile couple has been solved by science and technology. It has given new techniques of having a child. These techniques are called as Assisted Reproductive Techniques i.e. ART. In this several methods are involved through which a child could be born without going through natural process and such child is genetically related to both or any one of the parents. Some techniques used in clinical ART includes : Artificial Insemination, In Vitro Fertilization ( IVF ), Cloning, Surrogate mothering, etc. Surrogate motherhood is a boon for all those couples who suffer from the emptiness of having a child. Surrogate motherhood describes an arrangement where a woman agrees to become pregnant and bear a child will be transferred directly after birth to the intended parents of the child. Surrogacy is a good practice but if we look deeply in it we would find its bitter truth. The practice of Surrogate Motherhood has become a commercial practice for gaining money. This practice leads to violation of human rights of several persons including surrogate mother, intended parents, child, etc. to study about it in detail we would study the following heads.

### **Definition and Meaning of Surrogate Motherhood:-**

To study about various legal perspectives of surrogacy it is necessary to know about surrogacy. The literal meaning of word surrogate is ‘substitute’. The term surrogacy has been derived from the Latin term ‘*surrogatus*’ which means *appointed to act in place of*<sup>1</sup>. A surrogate mother is a woman who carries a child for someone else. The surrogate mother is also known as ‘Gestational Carrier’.

The term surrogate motherhood has been defined in several laws or instruments. A standard definition is given by American Law Reports in the following manner:-

“ a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child’s birth ”.<sup>2</sup>

It says that the surrogate motherhood is a contractual relationship of bearing a child by a woman to bear the child for other woman.

Again, the Assisted Reproductive Technology (Regulation) Bill, 2010 defines,

“surrogacy as an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate ”.<sup>3</sup> It means it is process of giving birth to a child of another through artificial process of conception of a child.

In the words of Encyclopedia Britannica, surrogate mother means,

“a practice in which a woman ( the surrogate mother ) bears a child for a couple unable to produce children, usually because the wife is infertile or unable to carry a pregnancy to term. The surrogate is impregnated either through artificial insemination or through the implantation of an embryo produced by in vitro fertilization. The surrogate traditionally gives up all parental rights, through this has been subject to legal challenge.”<sup>4</sup> In this we can say that it is the process of carrying the child of another by a woman who may be known or unknown to the intending parents when the intending parents are unable to develop a child naturally.

### **Types of Surrogacy:-**

Surrogacy can be classified as Traditional **Surrogacy and Gestational Surrogacy**. In Traditional Surrogacy the child may or may not be related to the intending parents. If the intended father’s sperm is used the child would be genetically related to the natural father and the surrogate. If a donor sperm is used then the resulting child would be genetically related to the surrogate mother and the donor.

<sup>1</sup> Medicine and Law, Nandita Adhikari, Amar Publications, Ed.2, P-166

<sup>2</sup> Internet Website, www.legaldesire.com

<sup>3</sup> Internet Website, www.legaldesire.com

<sup>4</sup> Encyclopedia Britannica, Encyclopedia Britannica (India) Pvt Ltd., P-178

In Gestational Surrogacy, the embryo created is genetically related to both or any one of the parents and unrelated to the surrogate mother. it means –

1. If the embryo is created using intended father's sperm and the intended mother's eggs, the child is genetically related to both the parents.
2. If the embryo is created using the intended father's sperm and a donor egg the child is genetically related to the intended father.
3. If the embryo is created using intended mother's egg and donor sperm, the resulting child is genetically related to the intended mother.<sup>5</sup>

Along with this surrogacy can be again classified as **Altruistic Surrogacy and Commercial Surrogacy**. Altruistic Surrogacy is a surrogacy which is based on the feeling of morality. In this, the surrogate mother carries the baby for the good of the intended parents, without any personal interest. In this kind of surrogacy there is no formal contract or any payment or fee is involved between the surrogate mother and intended parents. It is usually performed between friends or relatives. The surrogate is paid only for the pain undertaken by her and includes reimbursement of medical expenses.

In contrast to altruistic surrogacy, commercial surrogacy involves payment of heavy sum to the surrogate mother. In this payment is made to the surrogate mother not only for her medical and other related expenses but also for carrying the baby in her womb. This kind of surrogacy is looked as a business and a means of earning by people. In this the transaction is like where a fee is charged for the incubation service, in consideration of the birth mother surrendering the child at birth. In this generally the intended parents and the surrogate mother are strangers.<sup>6</sup>

### **Surrogacy Arrangement and Violation of Human Rights:-**

Surrogacy is a system which fulfills the desire of several people. It provides financial assistance to poor surrogate mothers as it is source of livelihood for them. It fulfills the desire of the couple to have a child of their own. In India this practice has become a business for earning money by people. India has now become a hub for fertility tourism. The reason behind this is low cost of surrogate arrangements, good medical facilities, lack of effective laws, easy availability of surrogate mothers, etc. All these contribute in the development of surrogate business in the country. Surrogacy is a boon for the infertile parents but it leads to violation of human rights of several people in the following way:-

1. **Exploitation of intended parents:-** Intended parents are exploited by middle man or the surrogate arrangement agencies which do not disclose their working patterns and charge heavy amount for their services.

<sup>5</sup> Internet website [www.wikipedia.org](http://www.wikipedia.org)

<sup>6</sup> Surrogacy in India, Suresh Mishra, Sheetal Law Pub., Ed.2, P-12

2. **Exploitation of surrogate mothers:-** Generally the surrogate mothers are poor and illiterate. These women are fooled by the surrogate agencies by paying them less than the amount actually received by the agency to be paid to the surrogate mothers.
3. **Rights of the child:-** If the surrogate services are given to foreign nationals it creates problems related to the nationality and citizenship of the child as the child takes place in another country. And due to complex laws it takes two to three months in the transfer of the custody of the child to the intended parents. Sometimes the intended parents deny to take the custody of the child. As happened in the case *Baby Manji Yamada V. Union of India AIR 2009 SC 84*,<sup>7</sup> in this case, a baby girl was born to the intended parents who divorced each other before the birth of the child. In this case the custody was given to the grandmother of the child for which the Government of India issued travel visa for the baby on the direction of the Supreme Court.

Similarly in another case, *Jan Balaz V. Anand Municipality AIR 2010 Guj 21*,<sup>8</sup> in this case twin children were born to foreign nationals in India. As Indian Law do not allow dual citizenship, so in this case also special documents were issued by the Government of India so that the children could reach their countries.

4. **Forced surrogate mothers:-** Poor women are forced by their spouse or family members to become a surrogate for earning money. These women has no rights to decide about their own body, life and privacy. Sometimes it also happens that if the result of e surrogacy fails, the women are denied to be paid in full.
5. **Health of the surrogate mothers:-** Surrogate mothers are given proper care and nutrition before the birth of the child but once the child is born the women are not given post natal care properly. Post natal care is also equally important for women. Frequent pregnancies also causes deterioration of health of the women. It causes several health issues which sometimes may cause death of the women.

Thus by studying the above points it can be said that surrogate system has now become a source of earning. And it is also used as a means of playing fraud on people. It violates human rights of the surrogate mother, intended parents and child also.

### **Law on Surrogacy in India:**

As we studied above, surrogacy is very popular practice in India. Our country has become a worldwide destination for childless people. The reason behind this is that commercial surrogacy has been legalized in India in 2002. This resulted in growth of this system. Several known personalities like Karan Johar, Amir Khan, Shahrukh Khan, etc. are adopting this technique to have a child. But there is a drawback

<sup>7</sup>Internet website [www.wikipedia.org](http://www.wikipedia.org)

<sup>8</sup> Ibid

that in India there is no specific legislation to regulate the practice of surrogacy. There are guidelines issued by Indian Council of Medical Research (ICMR) only which regulate it to some extent but it lacks legal backing.

In 2002, **ICMR issued guidelines** which prohibits sex selective surrogacy, it provides that the birth certificate of the child would bear the name of commissioning parents only, one of the commissioning parents should be donor, it also provides for the life insurance cover of the surrogate mother, etc. But these guidelines are not backed by any legislation which makes them less effective in implementation.

There are some bills on laws related to surrogacy are pending in Parliament but not passed yet. There is **Assisted Reproductive Technology Bill, 2010**, is pending in Parliament. Its object is to regulate the practice of commercial surrogacy and to prevent misuse of such practice. This bill provides for the establishment of authorities at the national and state level to regulate and register the I.V.F. Clinics and A.R.T. Centers. It also provides for the establishment of a forum for filing complaints against misuse of such practice. It provides that a woman between the age of 21-35 years can become a surrogate and can give birth to five children including her own children. The bill also provides for the consent of the husband of the surrogate woman to enter into a surrogate agreement.

Again, there is **Surrogacy (Regulation) Bill, 2016**, also which was introduced as a specific bill on surrogacy but this is also pending in Parliament. This bill completely bans commercial surrogacy in the country. It allows altruistic surrogacy only. It also stands for the right to privacy of the surrogate mother to protect her from social stigma. It also provides for the registration of A.R.T. clinics. The bill makes abandoning of surrogate child, exploitation of surrogate mother, selling of human embryo, etc. as punishable offences.

### **Conclusion :-**

By studying the above discussion, we can say that surrogacy is a system which directly affects the functional unit of the society i.e. family. It is a humanitarian practice which brings a new life into existence. But as we know that every coin has two sides, so surrogacy also has some good and some bad effects on human rights. The major problem with this is the absence of any law in India. It is highly required to have a strict law to regulate commercialization of this practice as this technique is being used as a means of earning money by making it as a business by several surrogate agencies in the country. It is necessary to maintain the purity of this practice.

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