

## **Surrogacy in Indian Society**

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**Abstract-** When a woman reproduces biologically, she creates a kid through morally permissible sexual behavior. Procreation is the act of having children, to put it another way. Even if the child's genetic material came from somewhere other than the person's own body, when someone intentionally causes the birth of a child, they intend to raise the child as their own from conception to adulthood and to be legally responsible as the child's parent. Feeling powerless is compelled by fertility. They publish satires on their culture and family, particularly for women. The social institution of society is the family. A human being's fundamental right is to have his or her own family. Infertility is a problem that many married couples face. Medical science has established a number of biological and medical causes of infertility, including frequent miscarriages, high blood pressure, uterine defects, aging fetuses, liver or kidney disease, thyroid abnormalities, diabetes mellitus, adrenal disease, and genetic difficulties. Infertility is actually viewed as a threat to parenthood and fatherhood. The modern era is the era of technology and science. The development of assisted human reproductive technologies, notably surrogacy, has given infertile couples new hope. One of the significant advancements of this new scientific and technological era is surrogacy. The process of being a surrogate benefits intended parents everywhere. Commercial surrogacy is one of the different types of surrogacy.

**Key Words:** - Surrogacy, Curse, Commercial Surrogacy, Infertility, Children and Assisted human reproductive technologies.

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### **I. Introduction:**

“He is my son”; ‘No he is mine.’ After hearing both the ladies,  
the King delivered his judgment. ‘Divide the living child into  
two, and give half to one and half to the other.’<sup>1</sup>

The above mentioned judgment was delivered by the wise King Solomon in order to find out the own mother of the child in question for whom two ladies were quarreling with each other for claiming their rights over the child. Having heard the decision of the King, one woman began to weep and requested the King not to cut the child into two pieces but give it to other woman. At this the King Solomon came to about the real mother and gave the child to the woman who made request him not to cut the child. Although this story shows the wisdom of the King Solomon but such disputes have become a reality in recent times. Due to the scientific developments it has become possible for a child to have mother or father more than one. Today the Kings are replaced by the Courts.

In modern times several persons may claim their rights over a child and to settle such disputes is not an easy task for the Courts but also poses a legal and human rights challenge. This burning problem has emerged due to the scientific developments made by the biologists and medical experts in the sphere of human reproduction for getting a solution for childlessness.

Children are the most precious gift to the spouses in this world. There is no bigger responsibility but the relationship with a child can bear the greatest rewards. Undoubtedly a child is one of the most valuable boons of God to every living creature on this earth. That is why every human being has a natural instinct and desire to have his or her natural children. Regarding from the point of view of performing the different religious rituals and duties, in order to carry out the customs and traditions of the family the importance of the children is depicted in all religions of this world. Children are the flowers in a spouse's life garden. Every living thing has the innate drive and biological need to reproduce in order to produce progeny. Especially human beings want to have their own biological child.

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<sup>1</sup>Dr. Aneesh V. Pillai, “Surrogate Motherhood and the law: International and Natural perspectives” 76-84 (Regal Publications, New Delhi;2015)

Procreation is the process by which an Organism produces others of its biological instinct. Marriage bond is a naturally procreative in the whole world. But due to infertility, married couple find out themselves helpless for beginning their own biological offspring. Infertility means Unable to get pregnant through natural Process. A new family is created during the unique bond of marriage process when two people of the opposite get together and establish a matrimonial relationship. Such types of families are completed with the birth of a child. A child's birth, in the opinion of psychologists, forges a unique link between spouses. Parents take peace of breath that child will Support in our old age. They feel themselves stress free at his birth. The Practice of surrogacy exists from the ancient period in society. Hence surrogacy is not at all new to the present generation, and is slowly but surely becoming more and more popular day by day. Today India has become the hub of surrogacy process. Infertile couple and others also prefer to opt surrogacy for their biological child.

Mostly people compel by the circumstances to opt surrogacy method but some people opt in fashion as actress Priyanka Chopra and Shilpa Shetty etc. In our society, we can easily see many instances where the infertility led to matrimonial break down. Therefore, in Indian society, the life of women is incomplete without a child. Generally, infertility is divided in to two parts like biological and social. Firstly, in biological infertility means that a woman is biologically in competent to unable reproduce a new born baby on her reproductive parts. Due to health issues, Medical Science clearly denies to conceive the baby. Secondly social infertility is one in which a group of or certain classes are barred by the community from reproducing. Surrogacy is only way to alternate to face aforesaid situations. Surrogacy is a method to help such intended parents.

**Meaning and Definition of Surrogacy-** The term "Surrogacy" has been derived from the Latin word "surrogatus" which means 'substitute' that is, a person who is appointed to perform any act in place of another. Surrogacy in the context of medical practice denotes an agreement whereby a woman consents to carry through the pregnancy, labour, and delivery for another person who is either unable or unwilling to do so. Thus, a surrogate mother is a woman who carries a child for another woman using either her own egg or the implantation of a fertilized egg from a different woman in her womb. Through the use of a surrogate, a pregnancy can be achieved without sexual contact. A "Surrogate Mother" is a woman who bears a child on behalf of other parents as part of the surrogacy process, which is a type of assisted reproduction.

Traditionally the Surrogacy can be defined as the technique known as "surrogacy" entails a couple hiring a woman to help them conceive, deliver their kid to term, and then give up all of her parental rights to them. Through the various definitions given by different scholars and laws the author has tried to explain and define the surrogacy and other technical terms precisely in the following way;

According to Black's Law Dictionary surrogacy is an "agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband. She agrees to conceive a child, carry the child to term and after the birth, assign her parental rights to the biological father and his wife."<sup>2</sup> The Oxford Dictionary defines surrogacy as "an arrangement in which a woman (the carrying mother) agrees to bear a child and to hand over that child, on birth, to another person or persons (the commissioning parents)."<sup>3</sup> The Encyclopedia Britannica defines 'surrogate motherhood', "as the practice in which a woman bears a child for a couple who are unable to produce children in the usual way." Warnock Commission Report defines surrogacy, "as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth."<sup>4</sup> According to ICMR, Guidelines 2005, "Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and handover the child to the genetic parents for whom she is acting as a surrogate."<sup>5</sup> "Surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;"<sup>6</sup>

In this way surrogacy means to help infertile couple who is not competent in conceiving and is not able to fulfill her desire to become mother in the creative world. The concept of surrogacy has become an alternative

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<sup>2</sup> Bryan A. Garner (ed.), Black's Law Dictionary, West -Thomson Reuters, U.S.A. (6th ed. 1990), p.1445

<sup>3</sup> Available at <https://www.oxfordreference.com/view>

<sup>4</sup> The Report of the Committee of Inquiry into Human Fertilization and Embryology, 1984 (U.K.) available at <https://www.ethicshare.org/node/751750>

<sup>5</sup> Rule 1.2.33, The national guidelines for Accreditation supervision and regulation of ART clinics in India, Indian Council of Medical Research, issued by Ministry of Health and Family Welfare, Government of India, 2005

<sup>6</sup> Section 2(1)(zd) of THE SURROGACY (REGULATION) ACT, 2021

method for the couples to overcome the problems of having adopted the children as well as to reduce the infertility rates in the society.

**Kinds of Surrogacy** - The subject of surrogacy is seen as being extremely delicate and emotional, with implications that are felt by all those involved. Depending on the suitability and convenience of the partners, many arrangements are conceivable in surrogacy. This led to the development of several types of surrogacy. Every surrogacy agreement is different, and the parties can choose the best and most convenient type of surrogacy out of a variety of options. The sort of arrangement entered into, the financial transactions and connections involved, the usage of genetic material, and other factors can all be used to classify different types of surrogacy as follows;

- **Traditional Surrogacy**- The traditional surrogacy involves artificial insemination of a surrogate mother using donated sperm from the intended father or another donor of sperm. This process is totally medically assisted. If a surrogate's egg is used in this procedure, the woman will also be referred to as the biological mother of the resulting kid. The intended mother will typically go through the step-parent adoption process, and the intended father's name will typically be listed straight on the baby's birth certificate. Regarding surrogacy, we discover that rules vary greatly from state to state and country to country. However, the legislation pertaining to surrogacy has not been processed with adequate uniformity.
- **Gestational Surrogacy**- The foundation of this gestational surrogacy is that the surrogate mother no longer has a genetic or biological connection to the child born. There is an Equal split of involvement at both ends. On one end, the eggs are removed from the intended mother or the egg donor, and on the other end, the sperm from the intended father or the sperm donor is combined. Following this mixing, the developing embryos are placed in the surrogate's womb. Embryos that are not transferred after this mixing process are occasionally frozen and later used for the transfer if the first transfer does not result in pregnancy.
- **Altruistic Surrogacy**- To accurately define altruistic surrogacy, it can be challenging given that many proponents of surrogacy contend that all surrogacy is by inherently altruistic. The phrase "altruistic surrogacy" is, however, typically only used to describe situations in which the surrogate is not paid for her services beyond reimbursement for medical expenditures and other acceptable pregnancy-related costs. Many of these agreements are made as discrete surrogacy between relatives or close acquaintances. Altruistic and commercial surrogacy follows a similar surrogacy process in most cases. But in charitable surrogacy agreements, the majority of intended parents work with surrogates they already know. Many altruistic surrogates are women who donate their gestational services for their siblings, children, or other close family members or acquaintances because of the extraordinary selflessness required of such surrogates. Because the intended parents and surrogate already knew who they were before consulting a surrogacy expert, these situations are referred to as "identified surrogacy."
- **Commercial Surrogacy** - "commercial surrogacy means commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother."<sup>7</sup> The commercial surrogacy is also known 'womb for rent' or compensated surrogacy. Generally commercial surrogacy means to compensate to the surrogate mother for her services except reimbursement of medical expenses.

On the other hand amount is paid to surrogate mother for her services beyond medical expense. India has developed into a centre for commercial surrogacy because there are less expenses in comparisons other nations in the world. When a surrogate mother carries a kid in her womb and then gives the baby to the commissioning parents in exchange for money other than medical costs, this is known as commercial surrogacy. In India, commercial surrogacy has been prevalent on a large scale. Due to poverty, surrogate mother agrees to carry pregnancy for intended parents at less cost. And due to all these factors the commercial surrogacy has become on large scale a profitable business in India. There are a number of nations where all these medical procedures are practiced, have legalized and approved them. Following the Baby Manji decision in 2002, the Apex Court declared that commercial surrogacy is legal in India. But the new legislation namely THE SURROGACY (REGULATION) ACT, 2021, prohibits the commercial surrogacy completely.

**Legal, Ethical and Moral issues of Surrogacy**- Every couple wants to experience what it's like to be a parent, but for some couples, infertility prevents them from realizing this desire. Couples can now feel the breath of

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<sup>7</sup>Section 2(1) (g) of THE SURROGACY (REGULATION) ACT, 2021

their own blood thanks to the development of in-vitro fertilization and other medical and technological advances. The process of surrogacy is a boon for India. Many infertile couples from over the world have been drawn to India by surrogacy, and there are many women who are willing to carry another person's kid here. Notwithstanding the surrogacy is not limited to the medical side but also includes several social, legal and ethical concerns. There is a dominant fear of commercializing childbirth and fear of abuse of women and the poor, and a mother with another child who transfers the child to another woman is not readily tolerated in society and commonly accepted. In Surrogacy, a woman is contracted to carry pregnancy for another married couples. But, yet, India has the definite legislation namely The Surrogacy (Regulation) Act, 2021 to regulate the surrogacy. The Act has made commercial surrogacy illegal and focused only on altruistic surrogacy. Moreover, foreign infertile couples are banned to have a child through surrogacy process in India. Surrogacy is more likely to have legal, ethical and moral and issues

- **Legal Issues-** The legal issues surrounding a surrogacy are complex, diverse and unsettled which results into hardships regarding defining the legality of surrogacy contracts, determining the status of surrogate child, commissioning parent, settling disputes regarding custody, citizenship of surrogate child. India has never outlawed surrogacy, but in recent years it has come to realize how important it is to regulate the sector. However, it is anticipated that more formal regulation will be adopted at the federal and state levels. Until now, regulation has taken the form of non-binding guidelines issued by the medical sector. The necessity for regulation is obvious given the volume of troubling situations that continue to be reported involving cross-border surrogacy arrangements where the child's citizenship and parentage status are ambiguous, as well as given the worries regarding proper protections for surrogate mothers.<sup>8</sup> But now India has the definite legislation namely The Surrogacy (Regulation) Act, 2021 to regulate the surrogacy.

- **Ethical Issues-** There are several ethical issues regarding surrogacy in Indian culture. For the purpose of evaluating practical ethics, women's readiness to fully and voluntarily consent to serving as substitutes is crucial. Some critics contend that the prohibition on substitution restricts women's ability to use their reproductive powers anyway they see fit and that women's autonomy in determining how to use their time and abilities is shameful. In this sense, women are rational, autonomously responsible beings who are prepared to make major decisions about their lives and bodies, even practical ones, due to their realistic circumstances and resources. "Substitution would thus culminate in the treatment of a kid as a good, which is ethically wrong and unethical. Substitution with in vitro fertilization frequently leads in the delivery of triplets or quadruplets, according to studies. This might be harmful to the baby's growth since the commissioning parents would not be capable of caring for a great amount of children who were born not as per their will. Furthermore, there is a possibility that surrogate children will be born with abnormalities. The verification of paternity and child custody is yet another difficult topic in the procedure."<sup>9</sup>

- **Moral Issues-** There are several moral and emotional issues as far as surrogacy is concerned in Indian society. Psychology experts believe that surrogacy, on the other hand, is more usually linked to stress. These are a few of the main emotional concerns that surrogate mom's experience.<sup>10</sup> Like, enforced suppression of feelings for the child, Relationships with the foetus' genetic parents, family, and other relatives; worry over her husband's reactions to marriage and sexual activity, Concerns about disclosing the pregnancy type to her own children, Persons engaging in the surrogacy operation encounter religious challenges in the absence of societal and religious acceptance etc. Another important psychological aspect of the surrogate pregnancy is the mother's emotional attachment to the child as it develops during pregnancy. A woman's inner experience and feelings change during a typical pregnancy, and she forms an emotional link and attachment to the unborn child. Infants' mental health is significantly influenced by the nature of the mother-foetus bond and level of attachment. Similarly Surrogate babies have a difficult time accepting the fact that someone other than their biological mother carried them. However, find it easier to accept the idea that they are not linked to the individuals raising them on a biological level. A surrogate's children are more likely to have behavioral and emotional issues.<sup>11</sup>

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<sup>8</sup>.Katarina Trimmings and Paul Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level*, 186 -187 (Hart Publishing Ltd United Kingdom Oxford, OX1 2JW, 2013).

<sup>9</sup>.Dr.S.S. Das & Priyanka Maut, "Commercialization of Surrogacy in India" A Critical Analysis, Available at <https://www.researchgate.net/publication/281710247>, visited on 30/02/2021

<sup>10</sup>Oksana Sulaieva,- Medical aspects of surrogate motherhood| vol. 64 Proc. Shevchenko Sci. Soc. Med Sci. (2021) Available at <https://mspss.org.ua/index.php/journal/article/view/392/400>, Access on 1/4/2021

<sup>11</sup> [www.dailymail.co.uk/health/article-2344362/Surrogate-born-children-likely-suffer-depression](http://www.dailymail.co.uk/health/article-2344362/Surrogate-born-children-likely-suffer-depression)



**Judicial response on Surrogacy in India-** The function of the Indian judiciary and legislative initiatives pertaining to the surrogacy concept set the way for the concrete form in this area. The Supreme Court has taken a unique approach in a number of instances involving the surrogacy notion since it is the protector of basic rights. In 2002, India made commercial surrogacy legal, and since then, the industry has expanded tremendously. Consequently, a plethora of for-profit businesses claiming to be experts in surrogacy law have emerged, providing advice and aid to foreign visitors to India looking for an Indian mother who will rent her womb for the blessing of a child. The Indian Council of Medical Research (ICMR) issued<sup>12</sup> guidelines for surrogacy agreements in 2005. The couple and the surrogate mother would determine the surrogate mother's entitlement to a certain amount of financial remuneration in accordance with the requirements. According to the criteria, the surrogate mother cannot use her own eggs for the surrogacy and must forfeit all parental rights to the child she is carrying. But presently by "The Surrogacy (Regulation) Act of 2021", any clinic offering surrogacy services, gynecologists, embryologist, or other medical professional is prohibited from performing commercial surrogacy in any way. Under the 2021 Act, only altruistic surrogacy is permitted. According to Indian law, the intended pair, or the couple wishing to become parents, must be legally wed. Females should be between the ages of 25 and 50, and males should be between the ages of 26 and 55. They also cannot already be parents to biological, surrogate, or adopted children. This demand is essential. The age of the surrogate mother providing this service must be between 35 and 45. One surrogate mother placement is allowed per woman during her lifetime. An intended couple who has a medical need for surrogacy<sup>13</sup> must receive a "Certificate of Essentiality/Infertility" from the National/State Assisted Reproductive Technology and Surrogacy Board.

The voyage of commercial surrogacy in India can be said to have begun in 2002 when the Supreme Court, the highest court in the nation,<sup>14</sup> declared it permissible. The Supreme Court and several High Courts of the various States have produced a number of decisions that have been essential in India's surrogacy industry. *Baby Manji Yamada vs. Union of India & Anr.*<sup>15</sup> It is very first case which was filed through a writ petition under Article 32 of the Constitution of India, 1950, before the Supreme Court of India for declaration of legalities of the various issues relating to surrogacy arrangement. Till the date no enact proper law which governs various aspects of surrogacy. "The Supreme Court opined in this case that surrogacy arrangements are legal in India and so it ordered to hand over the child Manji born through surrogacy arrangement, to her guardians. The court also held that the medical procedure even in commercial surrogacy is legal in India as it is in many countries of the world."<sup>16</sup> *Jan Balaz v. Anand Municipality and others* (AIR 2010 GUJ 21). In this case, Jan Balaz and his wife Susanne Anna Lohle came to Anand, Gujarat and opted surrogacy to get the twin children. Jan Balaz applied to the regional Passport Office of the Ministry of External Affairs, Government of India for<sup>17</sup> granting passport to the twin's baby. Accordingly passport was granted under "Tatkal Scheme" "Latter on, Ministry of External Affairs issued a notice withdrawing the passport due to coming across some new facts that surrogacy is not recognized in Germany and twins' baby cannot get German citizenship if they are not first recognized as India citizen. The twins' babies were left "Stateless" for more than two years."<sup>18</sup> This case raised the fundamental question of whether foreign biological parents who want to send the surrogate child back to his or her native country or place of permanent residency need a court ruling outlining the parties' rights in a surrogacy relationship.<sup>19</sup> In *P. Geetha vs. The Kerala Livestock Development Board*<sup>20</sup> Ltd., 2015, the court had the opportunity to address a number of important issues in this case, including the concept of motherhood obtained through medical technology, including surrogacy, the legal safeguard for maternity rights, the right of a child to health care, as well as the incorporation of international convention laws into municipal law, and beneficial interpretation of laws.<sup>21</sup> There are many cases before or after the enactment of The Surrogacy (Regulation) Act, 2021 (No. 47 of 2021) and Surrogacy (Regulation) Rules, 2022, which instead of regulating the practice of surrogacy in a democratic and organized way seek to ban commercial surrogacy completely,

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<sup>12</sup><https://odishatv.in/coronavirus/covid-19-icmr-mulling-to-removeplasma-therapy-from-treatmentprotocol-486350>

<sup>13</sup><https://blog.ipleaders.in/issurrogacy-legal-in-india/>

<sup>14</sup><https://legalknowledgebase.com/is-the-supreme-court-the-highest-court-in-the-nation>

<sup>15</sup>(2008) 13 SCC 518, Available at <https://bnblegal.com/landmark/baby-manji-yamada-vs-unionindia-anr/>

<sup>16</sup>Dr. M.P.Verma, *Surrogacy: Medico-Legal Parading* (G.B. Books New Delhi ed. 1st 2016)

<sup>17</sup><https://mdtu.chiefsec.wp.gov.lk/en/?p=2035>

<sup>18</sup>Supra note 1

<sup>19</sup> Ibid

<sup>20</sup><https://www.mondaq.com/india/constitutional--administrativelaw/1126150/surrogacyregulations-in-india>

<sup>21</sup>SonaliKusum, "Right to child care leave for the women attaining motherhood through surrogacy in India", Volume, 48 AIR's Labour and industrial cases journal (2015), Access on 22/01/22. Available at <https://www.familiesthrusurrogacy.com/india>

which is practically not possible too, the Indian Judiciary has played the very crucial role regarding surrogacy in Indian society.

## **II. Conclusion**

In the present day, surrogacy has become a blessing for humanity. It gave infertile couples who are unable to have children naturally a viable choice. It gives those optimistic parents who are childless the chance, if they so desire, to have a genetically related child. All living things, including humans, have a limited lifespan. Marriage is a lifelong commitment and the cornerstone of the family. It is a particular kind of relationship between people of different sexes that serves social, psychological, biological, and religious objectives within societies and cultures. Almost all ancient societies assigned the fertilization, childbearing, and childrearing of children to the institution of family through marriage. And all of the world's main religions, including Hinduism, Christianity, and Islam, place the highest value on human reproduction. In India, surrogacy has industrialized as a million dollar business and become a major destination for commissioning surrogacy by foreigners also. Modern sophisticated technology and medical expertise easy accessibility of surrogate women, low medical cost in comparison to other countries. Therefore the overall conclusion of the author is that commercial surrogacy arrangements are dehumanizing and degrading to the dignity of the women, uses her body as machine of procreation and takes the resulting child as a commodity, throw the child in various conflicts of custody and parenthood, nationality and otherwise immediately after the birth, which is violation of all the rights of child and against the human dignity. Surrogacy Regulation Act 2021, has made the biggest change that there is no scope for commercial surrogacy. The legislature regulates exploitation of surrogate mother and child. Commercial surrogacy has been made an offence through the existing Act 2021. Indian Legislature has taken a good step by prohibiting the commercial surrogacy in India.