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## COMMERCIAL SURROGATE MOTHERHOOD – THE MYTH OF EMPOWERMENT – CASE STUDY OF INDIA.

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**Abstract :** There is a wide spread debate on conceptualizing commercial Surrogate motherhood as empowerment or exploitation at the global level. While many feminist opine that Commercial surrogate motherhood exploits women by reducing her person into a womb and takes away from her bodily integrity , dignity and right to person. On the other hand many contend that commercial surrogate motherhood is empowering as it enables women to exercise of equal freedom on par with men to make decisions on right to use her own body, right to enter into commercial contract to engage in gainful employment. Thus there is an obvious ideological dichotomy . Presently a significant case study in this regard is the related nexus between the poor socio economic class and the exploitation of surrogate mothers from south Asian nations namely India in the absence of an effective binding statutory laws. In light of same, there is a felt need to assess the nature of surrogacy arrangements which could be either exploitative and empowering depending on the status of stakeholders, the distribution of rights, liabilities in the surrogacy arrangement existing laws, among other issues and also to enact a law to eliminate exploitation in the surrogacy arrangement.

**Key Words :** Empowerment, Exploitation, Legalization, Surrogate motherhood.

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**Introduction :** Surrogate motherhood refers to an arrangement where a women acts as gestational carrier or substitute mother for gestating or carrying the child to full term and giving birth to child and relinquishing the custody of child to another couple[1]. Feminists are divided on this, on one hand a group of feminists commercial surrogate motherhood is harmful to women as a class as it makes women a mere agency or means of baby making for monetary returns through commoditization of reproductive or procreational labor [2]. On the other a group of radical feminists view surrogate motherhood as freedom enhancing arrangement for entering into contract regarding use of her body for monetary payment [3]. This dichotomy on surrogacy being exploitative or empowering has surfaced in the landmark case of Baby M of New Jersey where critics of surrogacy state that surrogacy is exploitative because the interests of wealthy contracting couples are better served than those of the poor surrogates, there is unjust distribution of benefit and burden in surrogacy[4]. But despite many contesting arguments commercial surrogacy is taken as mutually advantageous as the surrogate mother gains money to meet her dire economic needs and the intending couple get their biological child to build family. Therefore, there are both the facets of exploitative or empowering surrogacy and reasons for the same. This is discussed briefly with supportive arguments as mentioned below.

### **Conceptualizing commercial Surrogate motherhood as empowerment -**

Many feminists have viewed commercial Surrogate motherhood as a new dimension of empowerment of women as it meets both short term and long term

financial needs of the poor women and accordingly commercial surrogate motherhood is called as the new pink collar job providing a source of income or livelihood for many poor, illiterate, socially disadvantaged women agree to be surrogate as they are not in a position to secure a gainful employment due to their own limitations [5]. Surrogacy treats women as responsible and autonomous beings to make procreational or reproductive choices regarding their use and disposition of their gestational or reproductive capacity as men free to assume risks and capable of understanding consequences of entering into contract with respect to body and secures equal contractual legal rights between women and man under surrogacy agreement. For these reasons many liberal feminists supported by the Locke's and Mill endorse commercial surrogacy which epitomizes the ideals of liberalism based on the individual freedom, rights, reproductive justice ,freedom to enter into contract , with respect to body. French philosopher, writer Simone de Beauvoir states that surrogacy would make women free from traditional gendered compulsion and would aid in her quest for political status[6].

### **Judicial pronouncement on Surrogate motherhood as Empowering -**

The most celebrated case of *Baby M* New Jersey USA [7]which took after the landmark US case of *Roe vs Wade*[8] this for the first time laid down a women's right to reproductive freedom by holding a woman's equal individual right to control her own body including contracting it out for reproductive services, similarly the *Baby M* case upheld that woman's individual right to reproductive decisions in the area of assisted reproductive technology.

Challenges & Issues in Surrogate motherhood-

Though commercial surrogacy meets their economic survival needs. Yet surrogate motherhood is fraught with many issues as financial, health exploitation of surrogate mothers due to non informed consent, unequal status of parties to surrogacy agreement, which are the characteristic feature of the surrogate mothers of south Asian nations mainly India. Thus these concerns related to exploitation may be discussed here briefly.

#### **Surrogate motherhood – Exploitative -**

The experience of surrogate motherhood in south Asian nations or third world countries is primarily exploitative for various reasons as health, socio economic exploitation. Surrogacy is a salient form of feminization of poverty in third world countries representing a greater burden of struggle against poverty as particularly women in these nations are found to be living below the poverty line due to the lack of economic, social health, human resources , illiteracy, unskilled nature, deprivation of resources and lack of capacity building opportunities are the socioeconomic determinants which are burdening the poor women with coercive choice of renting their womb for their economic survival as an option of last resort failing to find a gainful employment [9].

Surrogacy is held as exploitative primarily for two chief reasons, firstly due to lack of informed consent by surrogate mothers as they are not in a position to make choice due to their illiteracy and marginalized socio economic status secondly there is an economic coercion which compels her to be surrogate mothers this is aptly described as *Majboori* by a surrogate [10]. Thirdly others parties like clinics, agents take unfair advantage of their poor plight by lure these women to be surrogate mothers in promise of high paying jobs and advertise abundant , easy availability of these women to be surrogate mother for their clients to derive commercial gains. Thus the exploitation is writ large on the face of surrogacy in third world countries.

#### **Health Exploitation of Surrogate mothers –**

The surrogacy arrangement is rife with the health exploitation of surrogate mothers. As the medical procedures under surrogacy are invasive are associated with inherent health risks. The surrogate mothers are implanted with multiple embryos resulting in multiple pregnancy as twins , triplets. They are subject to surgical delivery or Caesarean section or C section to match the date of the arrival of intending couple with the date of birth of surrogate child , the surrogate mother are exposed to frequent abortion as selective foetal reduction to ensure birth of healthy surrogate child of desired sex. The surrogate mothers are subject to life support at the time of her death in order to save the life of foetus. Thus the life of un born surrogate child is given over and above priority over the life of surrogate mother.

Along with these health vulnerabilities, the surrogate mothers are neither provided with insurance nor post delivery care. Amongst all surrogate mother is denied the right to seek abortion or medical termination of pregnancy. An important fact that may be pertinent to mention is the rising case of maternal mortality among the surrogate mothers in India, so far there have been quite a few of these case of maternal mortality of surrogate mother, here has been death of surrogate mother named Easwari, in Coimbatore, Tamil Nadu in the year 2009[11], another surrogate mother named PremilaVaghela in the year 2012 at Anand in Gujarat [12] and as recent as this year 2014 Ranjeeta Lal lost her life as being gestational carrier in Hazaribagh, Bihar [13]. All these surrogate mothers lost their life during the course of delivery but none of them had been covered under any insurance nor their surviving family has been provided with any financial support. This context is summed up as, “In a country where maternal mortality rates are among the highest in the world and there are few reproductive rights, unregulated surrogacy could be disastrous, rather than empowering” [14].

#### **Economic Exploitation of Surrogate mothers –**

It is found that the surrogate mothers are paid lesser than the amount signed or only one third of the total amount paid by the intending couple to the clinic. Surrogate mothers are subject to economic offences as fraud, forgery, cheating , misappropriation or expropriation of property, criminal breach of trust by middle men [15].The surrogate mothers are made to sign on a bond paper value of as little value as merely fifty rupees which held out to be as surrogacy agreement, such agreement may is usually forged with no legal validity [16].

#### **Criminal exploitation & offences against surrogate mothers –**

There are reports of many human trafficking rings operated under the guise of commercial surrogacy both at national, international level. There is a recent case of arrest of two doctors running IVF Clinic on charges of human trafficking for selling surrogate babies by Gujarat Police [17]. Surrogate mothers being abducted, then subject to forced pregnancy to act as gestational carriers for the firm or clinic, there are reported instances of illegal inter country movement of surrogate mothers from Nepal and India border regions from the study conducted by NGO Women’s Rehabilitation Centre (WOREC) and SAMA [18]. Legalization of commercial surrogacy & Developments of regulating legal Instruments in India Surrogacy as a form of infertility treatment was permitted in India since the year 2002 as a part of reproductive tourism policy aimed at earning greater foreign exchange [19]. The supreme court of India in the case of *Baby Manaji vs Union Of India* [20]

formally legalized commercial surrogacy. In the subsequent case *Jan Balaz vs Anand Municipality* [21] also reiterate the apex court ruling. The court identified the fact of easy and abundant availability of poor women who agree to act as surrogate mothers in return for monetary payment as one of the favorable reasons for legalizing surrogacy in India. Invariably, in both these cases the court directed for the enactment of a statute to regulate surrogacy arrangement in the absence of any existing binding law on the same. Following the same, the Indian Council of Medical Research (ICMR) [22] under the aegis Ministry of Health & Family welfare Government of India drafted the Assisted Reproductive Technologies ART( Regulation) Bill [23]. Among the salient feature of the Bill, there is the enumeration of right and liability among the parties to surrogacy arrangement of parties to surrogacy agreement. As a part of this, the surrogate mother has been conferred with certain rights, duties vis a vis among other parties to the arrangement under the relevant provisions of the Bill. Many women rights NGO have made strong criticism of the Bill owing to lack of reproductive health safeguards for the surrogate mother leaving the surrogate mother vulnerable.

#### **The ART Bill – Empowering or Exploitative -**

In the line of the above analysis, the provisions in ART Bill may be identified as either empowering or exploitative. The ART Bill grants right to monetary compensation for gestational services under the agreement to surrogate mother. The Bill confers right to surrogate mother to enter into agreement in her own legal capacity to negotiate on the terms and conditions of the surrogacy agreement. Thirdly surrogate mother is entitled to protection of her right to privacy, confidentiality of her identity. While some of the provisions are empowering, the other provisions are exploitative or harmful. Under the provisions of the Bill the surrogate mother is subject to Multiple pregnancy coupled with selective Fetal reduction or abortion. Multiple pregnancy cause the health risks of miscarriage, Anemia, urinary tract infection, high blood pressure gestational diabetes among others. In addition, there is an absence of

insurance for surrogate mother which is a gross violation of reproductive health care of surrogate mother. Another glaring omission is the privation of right to termination of medical pregnancy to the surrogate mother which is inconsistent with the Medical Termination of pregnancy Act as well with the landmark judicial pronouncement in *Laxmi Mandal vs Deen Dayal Harinagar Hospital*[24], the Delhi High court held that the right to reproductive health, right to bodily freedom, autonomy, integrity of women are the inalienable rights that form part of the right to life under Article 21 of the Constitution. Thus the Bill has both empowering and exploitative provisions and it is in the case of the latter that the ART Bill is subject to criticism and needs necessary reconsideration and improvement.

#### **Suggestion & Conclusion -**

Weighing both the facets as empowering and exploitative , some of the suggestion in terms of making surrogacy arrangement empowering for women may be enlisted here. The surrogate mother may be given right to rescind the contract by seeking medical termination of pregnancy in accordance with the statutory guarantee of MTP Act as this affirms the constitutional rights of self-determination , bodily integrity and dignity of women. It may also be suggested that insurance ought to be made mandatory along with necessary post delivery care for surrogate mother in all cases. The concerned Women and Child Ministry as well as the Women's Commissions should lay down necessary guidelines for the protection and prevention of exploitation of surrogate mothers. There is a need for monitoring and record keeping on the number of surrogate pregnancies, maternal mortality and other such vital records related to surrogacy , this is crucial for assessing the plight of surrogate mothers in society . The surrogate should be provided with physical, psychological consultation, legal counseling or assistance, the surrogacy agreements may be approved by court or notary to check for any discrepancies for better enforcement of agreement. Thus there are some of the measures in order to make the surrogacy arrangements empowering for the surrogate mother.

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