



## **LAWGIC STRATUM**

(Legal Wisdom and Legal Services)

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We believe in the motto that it is a “*Right to write your thoughts in a way up straight to the height*”.

We would like to thank our Authors who contributed their works and the readers of Lawgic Stratum for their enormous trust and support.



**LEGAL ASPECT, JUDICIAL RESPONSE AND VIEW OF SOCIETY ON SURROGACY**  
**- NAGA OM SIVA SHIRDIK<sup>1</sup>**

**Abstract:**

Begetting a child for the perpetual succession of the family is at the core of marital relationships, however, not all are able to beget a child naturally and this is where surrogacy plays a crucial role. This paper takes a detailed study into the social aspect and social causes for surrogacy and the need for surrogacy in this modern era. It explores the legal aspect and contracts that are entered into and for the purposes of surrogacy and it also tests the validity of these contracts. This paper inquires the rights of children, born out of surrogacy, and parents. This paper discusses the judicial aspect of surrogacy in bygone days and the contemporary aspect. This paper discusses and makes a detailed study of the issues that are dealt with by the Supreme Court in the case *Baby Manji Yamda v. Union of India*. The commercial aspect of surrogacy is also investigated. As every action by a person or group of persons depends on the viewpoint of a society towards a particular action, this paper makes a study of surrogacy in the eye of society and the ethical aspect of surrogacy.

**Social aspect and issues:**

In a country like India where social relations are embedded closely with the members of the society, the society's outlook towards a particular aspect affects the members of the society. In India, the awareness relating to surrogacy is low compared to the western countries where they are aware of the science involved behind the surrogacy process but in India, the society viewed the surrogate as an unaffectionate, money-oriented, evil person who sold her child for money and the surrogates to escape stereotyping hide their pregnancy. Many surrogate women were also accused of having had an illicit affair and the child was the result of the illicit affair and not a lot was ready to believe what the surrogate had to say, even her blood relations.

Surrogacy is also seen as the labor which emphasizes or symbolizes women as a reproductive machine i.e., a woman is born only to give birth to a child which critically undermines the efforts put forward by modern-day governments and feminist groups. And it is also seen as labor which does not give a relationship or right over the product that is created through that labor.

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### **Legal aspect:**

This legal aspect of surrogacy is scrutinized and also their legal value is discussed in the below sub-topics.

### **Regulation and Contract of surrogacy and its validity:**

The regulation of surrogacy is crucial in developing countries like India. Before the regulation, India is a hub for commercial surrogacy where foreign couples come empty-handed and leave India with a baby. After the regulation of the act, such instances are restricted. The intending couple should have a certificate for the process of surrogacy from the district medical board that they are infertile. The couple should be in possession of an order from the magistrate of firstclass or above containing parentage and child custody. Where the surrogate mother should possess insurance covering sixteen months of the post-partum delivery complications from a recognized insurance company. An only close relative of the intending parents shall proceed with the proceedings. A surrogate mother has no right under the contract to provide her own gametes. The health of the surrogate mother is crucial before performing the procedures of surrogacy and a fitness certificate is necessary.

There are some key guidelines for the intending couple to follow without choice. The couple should marry at least five years before the day of certification and also should be an Indian citizen. The couple should not have any child neither biologically nor through adoption. The side effects and after effects should know by the surrogate mother if not known valid. And also, the consent of the surrogate mother should obtain without any influence. The intending couple has no right to abandon the child born out of surrogacy and the child has all rights like a natural child.

The law which abides surrogacy is vague and uncertain. The validity and enforceability of surrogacy contracts differ from country to country. Where the contract of surrogacy in India is opposed to public policy because begetting a child and handed over to another and amount is also given for the surrogate mother. Thus, it looks like renting a mother's womb. In India contracts which affect public policy is a totally void contract according to Indian contract act, 1872. So, the legality of the surrogacy contract is uncertain.

### **Judicial response of surrogacy:**

The considerable issue of surrogacy arrangement was brought before Supreme Court in Baby Manji Yamada's case<sup>2</sup>, in this case, a Japanese couple entered surrogacy contact and baby manji was born

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<sup>2</sup>Baby Manji Yamda v. Union of India and another AIR 2009 SC 84 (2008) 13 SCC 518.



because of an Indian surrogate mother. Mr. Yamanda tried to travel the baby to Japan but it is not possible. But Japanese embassy in India refused to give a Japanese passport to baby manji. Then Yamanda tried to obtain Indian passport and birth certificate is mandatory for that and birth certificate laws in India requires both mother and father's name. Where Yamanda is the genetic father but controversial with mother because baby manji has three mothers- commissioning mother, egg donor, and surrogate mother. So, obtaining legal mother status was uncertain. But Indian authorities refused to provide the baby with an Indian passport. The court has no decision to give it directed the case to the national commission for protection of child rights for further directions.

The unsolved surrogate mother as a natural mother has once again visited the Supreme Court to challenge the ruling given to *Jan Blaze v. Anand Municipality*<sup>3</sup>. This case is popularly known as the German couple case. In this case where the couple had twins through a surrogate mother by Anand infertility clinic, Gujarat. German laws do not recognize surrogacy as means of parenthood, and it says such a child cannot be treated as a German citizen. So, the couple applied for Indian citizen through Gujarat High Court. The court in this case along with citizenship and issue of passport to twins was also concerned with the gestational surrogate mother and donor of ova. The father is biologically related to the child but the mother is not accepted as a natural mother, she is the only legal mother.

In the year 2010, a gay couple, Dan Goldberg and Arnon Angel from Israel to whom twin baby boys were born in Mumbai to an Indian surrogate mother. India allowed the Jerusalem family court to allow a paternity test to initiate the process of Israeli citizenship. Then a DNA test was taken by Goldberg and his baby boy Itai and Liron. The DNA sample of Goldberg was matched with the twins and he is accepted as their father and Israel passports were granted.

So, the judiciary played a pivotal role in structuring the surrogacy laws in India. Judiciary has no such laws to govern some cases where it has taken some sincere effort to bring a law. Surrogacy is new to the judiciary where but also steps taken to solve the problem amicably. *Baby Manji Yamda v. Union of India and another*<sup>4</sup>.

### **Commercial surrogacy and India:**

Commercial surrogacy is like renting a mother's womb. Thousands of infertile couples across the globe are ready to spend lakhs and lakhs for a baby through commercial surrogacy. Due to this many fertility clinics have opened across the country. Indian surrogates can make a huge amount for a baby. Women from the economically backward class are ready to do the job. This is because there no proper laws to govern surrogacy in India. So, this happens in India higher than in any other country.

<sup>3</sup>AIR 2010 Gujarat 21.

<sup>4</sup>AIR 2009 SC 84, (2008) 13 SCC 518.



In the 2019 winter, session the Indian parliament has brought a bill i.e. The Surrogacy Bill, 2019. The bill bans commercial surrogacy and allows only altruistic surrogacy for Indian citizens. The medical expense of the surrogate mother should take care of by intending couple. The bill also has regulated no gay, single parent, unmarried, and live-in should do surrogacy. The bill is a setback for all IVF centers in the country which earn crores through facilitating surrogacy. These clinics charge 10-20 lakhs from a couple who tend to do surrogacy. But after this bill, these clinics are totally regularized and no unregistered can survive in this country.

The penalty for offenses like undertaking or advertising commercial surrogacy, exploiting the surrogate mother, abandoning, exploiting, or disowning a surrogated child, and selling or importing human embryos or gametes for the purpose of surrogacy may have imprisonment up to 10 years and a fine up to 10 lakh rupees.

### **Surrogacy in the eye of society:**

Surrogacy is good for society but many are exploiting the system that made it look like evil in the eyes of the people. Surrogacy is done with the consent of the mother where in some cases the consent may change at the middle of the process where it is not possible to do. So it makes a bad impression. Surrogacy is a boon for infertile couples where this is their last chance to enjoy their parenthood and also to make their relatives proud. Society is not totally against surrogacy but due to its some exploiters, it became an evil thing. But regulation of the surrogacy act is totally made the system looks clean but has some disadvantages in it.

In India, after the regulation of the act, it seems that surrogacy has gained its respect. Socially and economically backward women do this for money they don't know the pleasure of really doing this. So now India is free from those wrong impressions, it is possible only because of the bill passed by the Parliament of India.

### **Conclusion:**

In my opinion surrogacy as a method of begetting a child should be encouraged so that the opportunity of the gift of having a child to succeed is available for all the people of this country. But there is the presence of exploitation in its very essence. Even though regulations are in place restricting the persons and the way through which surrogacy could be accessed, in the contemporary world these regulations are very far from meeting the standards that are required to completely restrict the exploitation of surrogates. But, a complete ban on surrogacy cannot be put in place as such restrictions will make the surrogacy seekers opt for black market surrogacy. So, in order to be best of both worlds' situation, the



eligibility criteria of the surrogate and intended parents must have stringent norms put immediately to effect in the coming years as to serve the purpose for which it was created which giving the deprived (intended parents) the gift of God (child). As Commercial surrogacy is completely banned as per the Surrogacy bill, 2019 should be lifted and subsequently, commercial surrogacy should allow but with much heavier stringent regulations than that of altruistic surrogacy. Mere rules are in no way sufficient they must be reinforced with appropriate committees, personnel, funds allocated to them for their appropriate functioning. If the above-mentioned ones are well taken care of then it is needless to say that it will turn out to be a better method of Assisted reproductive technology.