

**COMMERCIALIZATION OF SURROGACY IN INDIA & ITS LEGAL CONTEXT : A  
CRITICAL STUDY WITH REGARD TO BABY MANJI YAMDA'S CASE**

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**Abstract**

Surrogacy is that topic which is in talks from the ancient times and is been known to almost every societies of the world. Surrogacy means to carry the child for the other woman who is not capable of producing the one, due to certain complexities. The major types of surrogacy are Natural Surrogacy, Gestational Surrogacy, Commercial Surrogacy and Altruistic Surrogacy. India allowed commercial surrogacy in the year 2002, but, it has not got the legal status in the country by the legislature. But, in the year 2008, the Honourable Supreme Court of India, by giving the positive decision in the favour of surrogacy on the case *Baby Manji Yamada vs. Union of India (UOI) and Another* which has thrown the light on the surrogacy to get the legal context in the country. Many ethics have supported the surrogacy to a greater extent by just treating it as new technology for producing the child if they do not harm anyone in this process. The motive of the researcher behind the research is to analyse the entire positive and negative aspects of the Surrogacy, to induce to make it legal and it should get legal status in the country and finally to induce that it is bliss on the society. This research focuses mainly on the bliss of the surrogacy and also on the commercial surrogacy, which is a very good alternative for the commissioning couples as well as for the surrogate mother as they both get the benefits from this. The researcher has followed the analytical approach for researching on the topic and at last the inductive method which helped to arrive at certain conclusion. Within this research the first two

chapters are based on the introduction, present conditions and research methodology which has been used to create this research. The next three succeeding chapters are explaining the History, Review of Related Literatures and the present Law Reforms. Then the last ending three chapters are dealing with main analysis of the topic, verification of hypotheses, recommendations and conclusions. The study includes the comparisons of various laws of the foreign countries with the context of India. The researcher arrived to the conclusions that surrogacy should get the legal status in India, commercial surrogacy is a good alternative than other types of surrogacy, it is bliss to the society and surrogacy is more successful concept in urban areas over the other treatment available for the infertility.

**Keywords:** surrogacy, infertility, legislature, commercialization, altruistic

## **INTRODUCTION**

Surrogacy can be defined when other women carries the child and give birth to him when the couples want a child who are not blessed to produce him themselves. Surrogacy is also appropriate for the person who has an impossible condition or there is a very much danger situation for mother to get pregnant. There are various types of surrogacy:-

### x Natural/Traditional/Partial Surrogacy

In this type of surrogacy, there is genetic relation of embryo with surrogate and it is done with her own ovum. Commissioning father can donate the sperm and becomes the genetic father of the child. In this the sperm can also be taken from some third male person in the case of two female commissioning couples or the single women also, can commission the child. The women can get pregnant through the ways like sexual intercourse, intrauterine insemination (IUI) or In Vitro Fertilisation (IVF).

### x Gestational/Full Surrogacy

In this type, surrogate acts as a carrier of embryo which is genetically not related to her. The pregnancy is obtained by the IVF and implantation of fertilised embryo is done in ioning parents or by some other anonymous persons.

x Commercial Surrogacy

In this type of surrogacy, the surrogate enjoys compensation in monetary terms for womb

x Altruistic Surrogacy

In Altruistic Surrogacy, no financial benefits are given to surrogate. There are only medical expenses given in monetary terms as compensation by commissioning parents.

**Researcher Interest**

Surrogacy is a topic of debate from a very longer period of time in the fields like legal, ethical, social and many other fields. This concept is evolving around the world rapidly. It contains very paradoxical situations because some people favour it and some opposes it. The legalisation of surrogacy varies from country to country. Various countries like United Kingdom, Ireland, Denmark, Belgium, some US states, India, Russia and Ukraine allow the surrogacy in different or the other manner. In India, the legislation has not done anything on it from the point of legal context. The people who are not blessed with a child go with this concept but many other people criticize it. The people, who favour it, want to legalise it so that everyone can have the happiness of getting a child for the future development of family and nation. Researcher had gone through a lot of articles and cases and found that from history till date today some or the other person has supported Surrogacy. The question which arises is that legalisation of Surrogacy will be against the laws governed by the nature?.

***Statement of Problems***

This research is trying to analyse the various aspects of law on Surrogacy in different countries and India, and also with regard to Commercialization of Surrogacy in India with reference to Baby Manji Yamda's Case whether it is bliss or a curse in Indian legal context; who are the persons who can access it; who are the persons to whom it can be done; what should be the punishments awarded if there is any violation of right/s of the person. There are several views of various people regarding the topic which includes legal scholars and legal researchers

### Review Of Related Literatures

The reviews of various e-sources, e-books have been taken to analyse the topic Surrogacy for getting the views of various people and their psychologies about it for better understanding of topic which will help to get the results of research. **Nigam** (2013) gives conclusion that surrogacy is a reproductive technology and countries like India need clear guidelines from legislature. She also states that commercial surrogacy is best for all when done with a contract and rights of the born baby should be addressed in details. **The Iona Institute** (2102) gives summary in their paper that commercial surrogacy is a very good activity and many countries are adopting it. They help the couples who are incapable of producing the child naturally. Many agencies form the databases of the women who are ready to become the surrogates and the commissioning couple can choose from them by their own that are more capable of producing their child. In developing countries like India, the rated of the commercial surrogacy are much less than those of the developed countries like California. **Teman** (2001) states in her book that in 1991 the ministers of health and justice made a public committee for legislating the surrogacy in Israel. After that the ban for surrogacy was cancelled in the nation after the petitions of 25 couples who were not capable of producing the child. After that the Israel became the only country in the world to start the practice of surrogacy and helped a lot of couples to enjoy the right of the birth of child. **Tehran, Tashi, Mehran, Eskandari, Dadkhah** et al (2014) concluded that the pregnancy of a surrogate is related with the experiences of emotions and they should be considered thoroughly. They also recommended that the counselling of the surrogates should be done before the pregnancy, during the period of being pregnant and after giving the birth to child to prevent any negativity of thoughts in them. **Islam, Nordin, Shamsuddin, Mohd Nor, Al-Mahmood** et al (2013) concluded that, the study of surrogacy from the point of ethics in comparison of western countries with Islamic countries made the point clear that western bioethics are from the view of the moral values and in Islamic, it is from the point of five purposes of the Shariat. They also stated that the debate will continue as we are developing and judging in our own senses on the morality of the surrogate women. To make it good from the consequential part of view then we should change, evaluate the deontological position and justify its relevance to the society.

**European Parliament** (2013) concluded that the surrogacy agreements must be made in legal sense and all those agreements which prohibited doing the surrogacy or prevented from the point of view of ethics should be made void. It also concluded that it appears to be untenable at a large level in spite of the law enacted in the nation for prohibiting it. **Pilka, Rumpik, Koudelka, Prudil** et al (2009) concluded that public has shifted its opinion and recognized that surrogacy is an appropriate measure in the cases of the infertility. It is also expected that this technique will get strength and supported by the people and will have good & favourable effects on the life of the people. **The American Congress of Obstetricians and Gynaecologists Stanford University** (2008) stated that the surrogacy is a very good practice if it is done by the contract between the commissioning parents and the surrogate mother. It should contain all the points which protect the women rights. It also stated that by surrogacy there is a huge ethics which support the Surrogacy as the new technology to overcome the infertility issues. **Mukherjee, S** (2011) concluded that right to reproduce is a fundamental right and also a human right. Surrogacy is the best way to overcome both biological and social infertility. It provides to have the child of our own regardless of the marriage. He also concluded that legalization of gestational surrogacy will protect rights of surrogate mother as well as of the commissioning parents who need the child. **Yale University** (2014) stated that the practice of surrogacy is rapidly increasing day by day. By this technique U.S accounts for more than 2000 babies which are three times as the decade ago. Similar is the case with UK and Australia where it has been doubled in six years and tripled in three years respectively. By observing all the above stated review of related literatures to the topic Surrogacy, it can be concluded that surrogacy is a reproductive technology which is a fundamental and human right and in which the commercial surrogacy is best and well suited to the entire person because the surrogate get the compensation for what she sacrifices. By this type, the from this. The feelings of the surrogate should also be taken care of so that there are no negative impacts on the child which is in the womb of the surrogate. So, proper counselling should be made to her. Many ethics support this and many not but the best way is that of the people living in the western culture which only observes the moral values of the person which help the commissioning parents to enjoy the rights of the child. There should be the legal agreement and should be legalize because in spite of being prohibited it is uncontrollable to stop it completely. The

technique has bright future ahead and will have a favourable impact on the lives of the people.

### ***Objectives of Research***

At the present date, the birth of the child is very important for the society in which we are living, to continue its existence in future period. There are people who are not blessed with the quality to create a new life. So, there are persons who let do this work for the others for the continuation of their families. There are many factors in which the rights can be infringed of the other person. The major concerns are:-

- x To study about the issues under Surrogacy & the Rights of women
- x To bring out the odds in the Surrogacy
- x To analyse whether the form of Altruistic Surrogacy can be incited or not.

### ***Hypotheses***

- x Surrogacy Bill 2016 will legalise Surrogacy in India, which exists in a legal grey area right now & under the proposed framework, commercial surrogacy will be banned in the country.
- x Surrogacy Bill 2016 may legalise surrogacy in the country & protect the individuals rights to privacy, dignity & body anatomy.

### ***Type of Research***

The type opted by the researcher for research making is Qualitative/Doctrinal. Qualitative research is done to obtain the behaviour and thinking of different persons to a specific issues. These types of researches have hypotheses which are to be proven by analysing various sources of the data. When hypotheses are verified by the researcher, it is called a doctrine, and hence, a doctrinal research<sup>11</sup>.

### ***Research Methods***

The research method which has been adapted by researcher is analytical<sup>13</sup> in which comparisons of various laws of other countries with India legal context. Induction<sup>14</sup> method is also used for getting the final result of the research. Mainly researcher has adopted observational method to observe the data to get his results for verification of his hypotheses. The researcher will also try to compare the laws of the various countries and compare the recent conditions of India with them which will help a lot to reach to the final result.

### **Coverage and Scope**

The different types of cases of various countries are analysed. The landmark cases related to the Surrogacy in India are also analysed. Various researches of researchers, articles and book of various authors are also analysed. The condition of India is compared with the conditions of foreign countries. Various thoughts given by the persons on Surrogacy are also included under this research.

In this research, the researcher will mainly focus on the positive and negative aspects of the surrogacy. The researcher also included the positive and negative arguments and finally reached to the conclusion that surrogacy is bliss for the society. The best form of it is commercial surrogacy and it is a very useful concept in the urban areas for treating the infertility.

### **LAW REFORMS**

#### ***Report***

In 228<sup>th</sup> report of Law Commission of India, many important points are recommended which are stated as follows:-

- x Surrogacy should be done with a contract which should contain all the requirements like consent of the surrogate mother and of her family members that she can bear the child, the expenses for her in monetary as well as in the medical terms and the child should be finally hand over to the commissioning parents. The agreement which is done should not be for the commercial purposes.
  
- x There should be the financial arrangements for the child who had been born by surrogacy if there occurs the death of the commissioning parents or any individual who was bearing the child or the divorce between the couples or nobody is willing to take the child.
  
- x Contract for surrogacy should cover the life insurance of the surrogate mother.

- x One of the commissioning parents should also be a donor because there will be a genetic relation between parents and child, which will be fruitful, which will further reduce the child abuse observed in many cases.
- x Surrogate child should be a legal child of the commissioning parents without declaration of guardians or by adoption of him. This type of provisions should be recognized by our Legislative.
- x The name of the commissioning parents should be imprinted on the birth certificate of the surrogate child.
- x There should be not being any violation of Right to Privacy of the donor as well as of the surrogate mother.
- x There should be prohibition of sex selective surrogacy.
- x Abortion cases should be only governed by Medical Termination of Pregnancy Act, 1971<sup>33</sup>.

#### **Present Laws in India and Foreign countries**

Due to rapid increase in the prices in European countries, access to infertility services are decreased by a great amount. This has resulted into visiting of the couples in some other countries where there are minimal rates for the surrogacy. Every country has the separate laws on the surrogacy, many allow it and many forbidden it. In the countries like Germany, Sweden, France and U.K. etc. surrogacy is banned. There is a rapid growth in international surrogacy, but there are no uniform rules or regulations which need to be adhered by all the nations regarding this matter. Some countries also demand that DNA of the surrogate child should at least match with one of the commissioning parents. In U.S.A., there are various legal formalities which need to be performed in the cases of surrogacy. This creates numerous problems and stress to the commissioning parents because of the time taking formalities. In Belgium, Altruistic surrogacy is allowed but commercial surrogacy is banned. Although Altruistic surrogacy is allowed but there is only one hospital which takes

in the couples, but, there to with the strict rules. So, the people generally prefer to have treatment outside the country.

In France, Article 17/6 of Civil Code makes the agreement with the third person completely void relating to the gestation. The highest court in France, Cour de Cassation, gave the judgement on a case that, giving the agreements for the foreign surrogacy will be, on the other hand, which is the highest administrative court, over tuned the decision of French Consulate in India whose decision was not to issue. In Germany, courts held this to violation of its Article 1 of the Constitution, which means that the human cannot be subjected to a contract including the use of the body of the third person for the reproduction of new life. It is also not permissible under German Civil Code.

Netherlands allows the Altruistic surrogacy, but not the commercial surrogacy. This country has the same conditions like Belgium where few hospitals take the couples which have strict rules. So, maximum persons seek for the treatment outside their country. In United Kingdom, Commercial surrogacy is illegal and is prohibited by the Surrogacy Arrangements Act, 1985. The agreements on surrogacy are not legally enforceable and the child belongs to the surrogate mother only. The child becomes the legally of the commissioning parents only after the adoption or parental order is made. This approach makes very difficult for the persons to get into the commercial surrogacy. In United States, citizenship of the child is governed by Immigration and Nationality Act (INA) Section 301 and 309. The citizenship depends on the genetic connections of the child with the commissioning parents. Furthermore the child should have the genetic relationship with the father in order to acquire the U.S. citizenship.

***Analysis of Case Law Baby Manji Yamada vs. Union of India (UOI) and Another<sup>44</sup> (2008)***

***Facts:-***

The petition was filed under Article 32 of the Indian Constitution. This was regarding the custody of child named Manji Yamada. The petition was filed by the grandmother of the child Emiko Yamada. Union of India through Home Ministry, State of Rajasthan through the Principle Secretary, Director General of Police, Government of Rajasthan and the Superintendent if Police, Jaipur were made the opposite parties. This case is very relevant because it brought the light on the issues of surrogacy for the first time and there were no laws regarding this matter. Thus, it can be said that this case directed for the formation of Assisted Reproductive Technologies Bill, 2010. This case is also important because it was

decided on the facts which were presumed that the surrogacy is legal in Indian context. At that time, there were the guidelines of the presumption of the legality of surrogacy of the Indian Council of Medical Research, 2006 which found no place in judgement of the Supreme Court in the above mentioned case. Baby Manji was born on 25<sup>th</sup> July, 2008 where the commissioning parents were from the Japan. The egg was donated by the mother, Dr. Ikufumi Yamada and was fertilised by the sperm of her father Dr. Yuki Yamada. After this there was implantation of egg in the Indian surrogate mother. The biological parents soon developed some marital problems and got separated. The mother returned to Japan. After some time the father also returned because of the expiration of the visa. Baby was under the care of her paternal grandmother. She was issued a birth certificate in the name of her biological father.

**Judgement:-**

The Supreme Court held that there was no ground of filing petition in High Court as there was no interest of Public Interest Litigation was found. The court set aside the judgement of High Court. The order was made to issue the passport for the baby and visa for the extension of grandmother. The Supreme Court judgement also included in its Para Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

**Analysis:-**

These facts were also highlighted in **Jan Balaz v. Anan Municipality and Others**<sup>48</sup>, where there were questions about the nationality of the twins which were genetically related to the father, Jan Balaz. Presently the case is pending in the apex court<sup>49</sup>.

The most noticeable facts in Baby Manji case are that the court not only presumed the surrogacy as legal but also that it was a pro-contract. The contract between the couples and

the commissioning parents was held to be valid though it was against the legislation of the country.

### ***Process of Surrogacy***

The process of Surrogacy in India starts with the legal counselling before the surrogacy of the surrogate mother and the commissioning parents. After this, there is a surrogacy agreement and the final contract. The care of the child is nurtured by the commissioning parents to the surrogate mother. All the financial aids of the surrogate mother during the period of pregnancy and after the birth of the child are done by the commissioning parents and the monetary compensation is also given to her by them which are decided in the contract between the two parties. All the different perspective like failure of pregnancy, multiple pregnancies and handicapped child etc. are well explained to the commissioning parents and to the surrogate mother.

### ***Surrogacy and Human Rights***

There are many views of different people regarding the human rights in context to the surrogacy. Many people treat it in a positive way and many in the negative way and consider it as a violation of the human rights. The reproductive rights are recent in the international laws. The very first document was approved regarding this matter in Teheran Conference on Human Rights, 1968. In this conference, it was decided that the person is free to access all these rights by his own thinking and he will be only responsible for all the consequences. The catholic churches do not favour the assisted reproductive technologies but favours all the treatments given to the women for the infertility. Baptist, Methodist, Lutheran, Mormon, Presbyterian, Episcopal, United Church of Christ, Christian Science, Jeh Witness, and Mennonite religion, these all have liberalisation towards the treatments of in fertilisation. In Islamic Laws, there is all freedom for the cure of infertility. It also extends to the use of In Vitro Fertilisation in which only husband and wife are involved. In Hinduism this topic is not very seriously in debate as that of others. They never debated on the Assisted Reproductive Technology because they always believe in the Karmas of the person which actually starts after the birth of the child. They

never opposed the Assisted Reproduction rather considered as the treatment and not the violation of the religious beliefs.

The surrogate agrees to sacrifice herself for the baby and will always prevent the baby from the risks due to the behaviour of her like taking the drugs which are not suitable to body/non prescribed drugs, smoking and taking alcohol etc. Her husband also has to abstain himself from practicing sex without prescription of doctor. The surrogate also gives up all the parental rights of the surrogate child in writing.

#### ***Arguments in Support of Surrogacy***

Arguments which are in support for the proper legalisation of surrogacy by the legislatures are of the great importance dreams. Surrogacy can allow the couples to have the child when they are unable to produce by the gifts of nature due to come incapability or medical complexities of not achieving the pregnancy of the commissioning mother. They can have their child by the method of the adoption but then there will not be any genetic/biological connection or relation between the parents and child which surrogacy provides easily. Surrogacy is good option for them as they can have a genetic linkage between their child and also where there is scarcity of the adoption of the children. Surrogacy provides the reproductive liberty to the persons. In country like United States, there is a great freedom, which is highly valued and protected, to bear a child at the right time. Some people had argued that the commissioning parents and the surrogate mothers cooperate for the medical facilities which are needed for the proper and the healthy birth of the child. This is all done for the child, which is the work of great moral values.

Many women in the world participate willingly in the surrogacy to help the couples to have their own child which is genetically connected to them, who are not capable of producing the child themselves. They experience a lot of satisfaction in helping the intending parents. Also, many women like the Altruistic type of surrogacy who believes this as a service to the couples for their joy. Commercial surrogacy helps the poor, single or minority women as it provides the money for their womb taken on rent by the commissioning parents for their child. They also open the door of happiness to the families and adoptions of the child for establishment of their complete family<sup>73</sup>. The money which is provided to the surrogate mother can be used for the education of their real children, for the home making etc. which will help a lot to up bring their status in the

society. One more argument which supports the surrogacy is that it makes the couples who are gay, lesbian or single man or woman, they can have their child by this method and can complete the family or theirs and there can also be the existence of the biological relationship between the child and intending parents.

### ***Arguments Opposing Surrogacy***

The arguments which are opposing the views of legalizing the Surrogacy and the Surrogate Motherhood primarily are based on harms. There are thoughts of producing harms to the child which is born from the womb of the surrogate mother, harms to the surrogate mother herself by the repetitive births of the children from her womb. If she has her real genetic children then it will also affect them all by this act of their mother and hence, it will provide the harm to the society as a whole. If there emerges any dispute regarding the child then it would surely affect the child. If there are any anomalies or the child who is born is abnormal and both parties i.e. the commissioning parents and the surrogate mother refuses to accept the child then, it will surely affect the child because of this behaviour of the parties. The child will also get harmed if there is high level of stress during the pregnancy of the surrogate mother. The harm can also be extended to the reputation of the women by giving her tags like vehicle for genetic perpetuations for others. This will affect the status of the women in the society. It will also affect the traditional values of the families because of the new concepts of motherhood in the society. As children are more vulnerable when compared to the adults, so, there should not be any harm which makes them to suffer a lot.

It has been observed that the doctors and nurses do not help those people who are generally not suffering from any kind of diseases. Whenever, in these type of cases the doctors/nurses refuses to help the couples who are gay, lesbian or single who want to have their own child. This may constitute into a great discrimination for the public at general.

### **SUGGESTIONS AND CONCLUSIONS**

#### ***Pros of Surrogacy***

- x It fulfils the wish for the couples to complete their family.
  
- x It is the good alternate for the women who have infertilities due to certain reasons. It is the latest tool for the fight against the infertility.

- x It possesses the genes of the intending parents so there is genetic relation between the commissioning parents and the surrogate child.
- x It is better than adoptions because it takes time, a huge paper work, the psychology of the child with the couples. It can take to some years to complete all the formalities to adopt the child.
- x Women have the positive experience by helping the peoples to have their own child.
- x In commercial surrogacy the poor women are greatly helped by getting the money to meet their need and also can be used for the future purposes for their own child/children or for their families.
- x Any person can have the privilege of having the child whether they are couples, lesbian, gay or single person.
- x The birth and the death ratio of the country improve.

#### ***Cons of Surrogacy***

- x Surrogacy may be treated like the prostitution.
- x There can be exploitations of the women regarding the surrogacy for the money.
- x Women can be treated as a labour which provides the facilities for the birth of the child.

#### ***Suggestions***

- x The rights of the surrogate mother should be protected in every possible manner.
- x There should be a proper contract done to avoid the anomalies between the commissioning parents & the surrogate mother and also to protect the rights of the child. The contract should also contain that, there also will be the second legal parent if some problems arises with the first parent.
- x The commissioning parents should be the legal parents of the child.
- x The nationality of the child should be same as that of the commissioning parents

## CONCLUSION

Surrogacy can be defined as, when the other woman carries the child of the couples who are not capable of producing themselves. It is very beneficial to those who have some disorder of being a pregnant woman. It gives the happiness to the couples to complete their families. Surrogacy is practised from many years. It dates back to the epics like Mahabharata and Bible, in which it is greatly supported. Surrogacy is allowed in many countries while other bans it or allows it partially. In countries like Germany, Sweden and France etc. it is banned. In Belgium and many other countries only altruistic surrogacy is allowed. Some countries consider it as against the ethical values and some believes only in moral values and allows it. In India, Surrogacy is allowed in its all forms since 2002. But, it has not got any legal status. judgement in the favour of the Baby Manji in *Baby Manji Yamada vs. Union of India (UOI) and Another*<sup>92</sup> which opens the door for legal status of the surrogacy in the country. Law Ministry also has proposed the Assisted Reproductive Technology Bill in which there is guidelines to do surrogacy and protect the rights of the people regarding this matter. So, the most important organ of the government of the country i.e. judiciary who are also regarded as the guardians of the constitution has allowed the surrogacy to help the people, then definitely it may be taken into account that it is a bliss for the society and it should definitely get the legal status in the country. Commercial surrogacy is beneficial for both commissioning parents and surrogate mothers because the surrogate mother gets the benefits of the sacrifices she makes to give birth to the child and there will be no liabilities on the commissioning parents that they were only concentrating on the baby for their own happiness, not for the surrogate mother.

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