

CHAPTER 2

SURROGATE MOTHERHOOD: HISTORY AND CONCEPT

1. INTRODUCTION

Marriage as an institution is the social order through which a married couple wish to beget a child. But for an infertile couple, this desire remains unfulfilled. Over a couple of centuries, this desire of having a child by an infertile couple was being satisfied by adopting a child. In western countries the adoption law is universal. The corresponding law in India is not universal but applies to the Hindus only. The Hindu Adoptions and Maintenance Act, 1956 provides some relief in this regard.⁵⁷

In our society infertility has historically been seen as a problem which merits treatment. Surrogate motherhood provides some couples with their only hope of raising a child genetically related to at least one of them. Surrogate motherhood describes an arrangement where a woman (the surrogate mother) agrees to become pregnant and bear a child for another person or persons (the commissioning parents) to whom the custody of the child will be transferred directly after birth.⁵⁸

It is only in the last 20 years that surrogate motherhood has increasingly become an issue of national and international public debate. Factors such as the growth of infertility in modern society, coupled with the declining number of children available for adoption, the development of the surrogacy contract and commercial surrogacy agencies and the introduction of new technologies such as *in vitro* fertilisation (IVF) which can be combined with surrogate motherhood, have resulted in increasing publicity and public interest in the formation of such agreements between infertile couples.⁵⁹

Surrogate mothers are not a new solution to the old problem of not being able to reproduce an offspring. The basic concept dates back at least 4000 years to Rachel, wife

⁵⁷ Dr. Nandita Adhakari, *Law and Medicine* 164 (2012).

⁵⁸ Anita Stuhmcke, "For Love or Money: The Legal Regulation of Surrogate Motherhood" *Surrogate Motherhood: Law and Legislation* (1995).

⁵⁹ *Ibid.*

of Jacob, the father of the twelve tribes of Israel. Unable to bear children, Rachel sent her husband into the tent of her maid, Bilah. It was understood that the child born of that union belonged to Jacob and Rachel.⁶⁰ Surrogacy has also been seen around a long time and dates back to biblical times. Some say it all started with Sarah and Abraham. Certain people say it started even before them, and that it is only recorded about Abraham because he was written about in the Bible.⁶¹

In ancient Hindu society there existed a practice known as *Niyog Pratha*, wherein a woman who was childless because her husband was impotent was allowed to conceive through her brother-in-law. The child belonged to the couple and the brother-in-law had no claim over it. *Niyog pratha* was surrogate fatherhood. It was much less complicated, legally and emotionally, than surrogate motherhood. The scholars of Islam have pronounced a Fatwa regarding surrogacy; it is considered illegal and immoral for a woman to carry the child of any man other than the husband's. The bible promotes the idea of surrogate motherhood.⁶² However, as far as earlier law of Christians is concerned it promotes surrogate fatherhood.⁶³

Before the advent of modern assisted conception techniques, surrogacy by natural conception was the only means of helping certain barren women to have children. Before artificial insemination, babies were conceived by the natural way. Later as artificial insemination was accepted, this became the usual means of achieving pregnancy in the cases of infertility, being more socially acceptable than the natural way. When assisted conception methods such as *in vitro* fertilisation (IVF) became available, it was a natural step to use the eggs of the woman wanting the baby/donor woman and the sperm of her husband/donor male, to create their embryos *in vitro* and transfer these to a suitable host⁶⁴.

2. HISTORICAL PERSPECTIVE OF SURROGATE MOTHERHOOD

⁶⁰ Barbara S. Parish, "Test Tube on Trial: Let California Blaze the Trail to the Legitimation of Surrogacy" Available at: <http://heionline.org>, Citation: 9 Glendale L. Rev. 56 19 (visited on July 8, 2013).

⁶¹ Grayee P. Storey, "Ethical Problems Surrounding Surrogate Motherhood" Available at: <http://www.yale.edu/ynhti/curriculum/units> (visited on June 5, 2010).

⁶² Genesis 16:2 So she said Abrahm, "the Lord has kept me from having children. Go, sleep with my slave; perhaps I can build a family through her."

⁶³ Deuteronomy (5th book of Hebrew Bibles, chapter 25 verse 5).

⁶⁴ Pratibha Ganesh Chavan, "Psychological and Legal Aspects of Surrogate Motherhood" *AIR* 2008 Jour 103.

There are no authentic documents survived upto contemporary times. Information is to be collected from chronicles, legends, myths, epics and even the folk songs that have survived from oral transmissions from generation to generation. The concept of surrogate motherhood was well known in the ancient world. Some of the instances are traced as under:

2.1 Instances of Surrogate Motherhood in the Ancient World

(I) ANCIENT INDIA

Surrogacy was known and practiced in ancient times. In the Mahabharata, Gandhari, wife of Dhritarashtra, conceived but the pregnancy went on for nearly two years; after which she delivered a mass (mole). Bhagwan Vyasa found that there were 101 cells that were normal in the mass. These cells were put in a nutrient medium and were grown *in vitro* till full term. Of these, 100 developed into male children (Duryodhana, Dushshasana and other Kauravas) and one as a female child called Dushsheela.

There are other well-quoted examples that refer to not only IVF but also to the idea that a male can produce a child without the help of female. Sage Gautama produced two children from his own semen— a son Kripa and a daughter Kripa, who were both test-tube babies. Likewise, Sage Bharadwaj produced Drona, later to be the teacher of Pandavas and Kauravas. The story relating to the birth of Drishtadyumna and Draupadi is even more interesting and reflects the supernatural powers of the great Rishis. King Draupada had enmity with Dronacharya and desired to have a son strong enough to kill Drona. He was given medicine by Rishi and after collecting his semen, processed it and suggested that artificial insemination homologous (AIH) should be done for his wife who however refused. The Rishi then put the semen in a yajnakunda from which Drishtadyumna and Draupadi were born. While the above are quoted as examples of *in vitro* fertilisation (IVF) and parthenogenesis, there is another story, which refers to embryo transfer. According to Bhagwad Gita, even Lord Krishna is understood to have been born without a sexual union. This was regarding the seventh pregnancy of Devaki, by the will of the lord; the embryo was transferred to the womb of Rohini, the first wife

of Vasudev, to prevent the baby being killed by Kansa.⁶⁵

(II) ANCIENT MESOPOTAMIA AND EGYPT

An interesting bible scenario is Sarah, the wife of Abraham. Sarah could not have children in the beginning. She gave her handmaid, Hagar, to her husband Abraham to produce them a child. The method used was copulation. The outcome in this arrangement proved to be a productive one. In this scenario the spouse became jealous, the surrogate became proud and refused to give up the identity of the child and consequently the spouse had both her and her child ousted.⁶⁶

If we look at the history of surrogacy, it really began in the late 1800's with the American Indians who were the first one to truly begin the surrogate mother history. If an Indian woman was found to be infertile, then her husband would go to the chief of his tribe and ask for help. He would then be sent to see the medicine man, who would give the wife certain herbal concoctions. Then, after the witch doctor said nothing could be done to help his wife, the husband would go to see the chief. He would be allowed to take another woman and make her pregnant, hopefully, so that he would be able to father a son to carry on his tribe. The barren wife would have no biological ties to the child.⁶⁷

In many countries, surrogacy has been around since before records. Many cultures have belief systems that abide with the rules of surrogacy and those that do not agree can be thrown out of their families. Numerous religions and civilisations will actually celebrate the surrogate mothers, for their good deeds and service to others. During the 1980's surrogate mothers were used by the gay community to build their families, then, it was frowned upon by society.⁶⁸

The American Indians were not the only cultural group to use surrogacy as a means to carry on the family name. It has been known about throughout Europe and Spain and other such places. King would often bring in several surrogates until one bore him a son, then the surrogates would be kept as nannies to the child; the child would

⁶⁵ *Ibid.*

⁶⁶ *Supra* note 5.

⁶⁷ Ashley Kate, "History of Surrogate Motherhood" *Available at:* <http://www.ezinearticles.com> (visited on July 17, 2010).

⁶⁸ *Ibid.*

believe the King and Queen were its biological parents and know nothing about its genetic ties to the nanny. Often things of this matter were kept secret, because if such things got out in the kingdom, one could question the child's right to the throne.⁶⁹

In mid-19th century it began in non-mammalian species. In 1935, Gregory Pincus showed, using the rabbit as the animal model, the experimental conditions necessary for mammalian oocytes (immature ova, or germ cells, or egg cells) to mature *in vitro* and reach the metaphase stage of meiosis (the appropriate developmental stage in cell division necessary for sexual reproduction). In 1959, Min Chueh Chang showed that *in vitro* matured rabbit oocytes could be fertilised *in vitro* and also gives rise to viable embryos. But the conditions used were not entirely *in vitro* because it was wrongly believed then that sperm require *in vivo* activation before being transferred to the *petri dish* for fertilisation. However, in 1963, Chang and Ryuzo Yanagimachi identified experimental conditions by which spermatozoa from hamsters could fertilise oocytes without prior *in vivo* activation and give rise to two-cell-stage embryos.⁷⁰

As early as 1950s, Edwards, working at the National Institute for Medical Research in London, made a number of fundamental discoveries. He clarified how human eggs mature, how different hormones regulated their maturation and at which point in time the eggs were susceptible to fertilisation. After several years of work, Edwards succeeded, in 1965, in finding the right conditions that activated the dormant and immature egg cells *in vitro* and promoted their maturation. He found that human oocytes required 24 hours of incubation before the maturation process began. He also found that this prolonged cultivation resulted in egg cells at a late developmental stage, which were suitable for IVF. In 1969, he had identified the buffer conditions to support *in vitro* activation of hamster oocytes. Edwards used the same buffer conditions and showed that human spermatozoa thus activated could also promote the fertilisation of *in vitro* matured oocytes. This discovery marked an important milestone in the development of treatment for infertility in humans. However, today IVF is an established therapy. The discovery of the technique by Edwards, followed by several improvements on it, marks a major

⁶⁹ *Ibid.*

⁷⁰ Preeti Bhardwaj, "Surrogacy in India- An Analysis" Prof. (Dr.) Paramjit S. Jaswal et al. (eds.) *Gender Issues in India: Sensitisation, Reflection and Solutions* 113 (2012).

medical advance that is a boon to infertile people all over the world.⁷¹

India's very own Dr. Subhas Mukhopadhyay produced the world's second test-tube-baby, Kanupriya Agarwal alias 'Durga' the girl who was brought into the world by the doctor. Both Dr. Mukhopadhyay and British scientists Robert G Edwards and Patrick Steptoe creators of the world's first test-tube-baby-started work at the same time. The Indian baby was born on October 3, 1978, just 67 days after Marie Louise Brown was born on July 25, 1978. However, unfortunately Dr. Mukhopadhyay was prevented from carrying out further work on *in vitro* fertilisation and was transferred away from Kolkata. He was also prevented from going to Tokyo to present a paper. Frustrated and in failing health, Mukhopadhyay killed himself on June 19, 1981. According to scientific records, "Harsha" who was born on August 16, 1986 became the first human test-tube-baby of India. The credit for this achievement went to T.C. Anand Kumar, director of Institute for Research in Reproduction (IRR) of Indian Council of Medical Research (ICMR). In 1997, he went to Kolkata to participate in a Science Congress. It was there that all the research documents of Mukhopadhyay were handed over to him. After meticulously scrutinising and having discussions with Durga's parents, he became certain that Mukhopadhyay was the architect of first human test-tube-baby in India. In T.E. Anand Kumar's initiative, Mukhopadhyay was mentioned as the architect of the first Indian test-tube-baby in a document related to the subject of artificial intercourse in ICMR.⁷²

3. SURROGACY AGENCY

In America, in the late 1970's to early 1980's a lawyer named Noel Keane created the very first surrogacy agency. He went on to create many more agencies that abided by the surrogacy arrangement laws. Since then, there have been more than 30,000 births due to the surrogacy arrangement laws. Society obviously feels that surrogacy is a viable solution to infertile women and gay men. There will always be those who criticise but if they could only look at it from a different angle, they just might see something different and even end up with a different viewpoint.⁷³

Although, Noel Keane is generally recognised as the creator of the legal idea of

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Mary Lane, Brick, "Modern Reproductive Technologies and Motherhood: The Search for Common Ground and the Recognition of Difference" *Virginia Law Review* 62 (November, 1994).

surrogate motherhood. However, it was not until he developed an association with physician Warren J. Ringold in the city of Dearborn, Michigan that the idea became feasible. Dr. Ringold agreed to perform all of the artificial inseminations, and the clinic grew rapidly in the early part of 1981.

Though Keane and Ringold were widely criticised by some members of the press and politicians, they continued and eventually advocated for the passage of laws that protected the idea of surrogate motherhood. Bill Handel, who is a partner in a Los Angeles, Surrogacy firms, also attempted to have such laws passed in California, but his attempts were struck down in the State Congress.⁷⁴

The first recognised surrogate mother arrangement was made in 1976. Between 1976 and 1988, roughly 600 children were born in the United States to surrogate mothers. Since the late 1980s, surrogacy has been more common: between 1987 and 1992, an estimated 5,000 surrogate births occurred in the United States. The number of babies born from surrogates in the United States has continued to rise throughout the last two decades, with thousands of babies born every year.⁷⁵

4. RECENT HISTORY

The issue of surrogate motherhood came to national attention during the 1980s, with the *Baby M* case. In 1984 a New Jersey couple, William Stern and Elizabeth Stern, contracted to pay Mary Beth Whitehead \$10,000 to be artificially inseminated with William Stern's sperm and carry the resulting child to term. Whitehead decided to keep the child after it was born, refused to receive the \$10,000 payment, and fled to Florida. In July 1985, the police arrested Whitehead and returned the child to the Sterns.

In 1987 the New Jersey Superior Court upheld the Stern-Whitehead contract.⁷⁶ The court took all parental and visitation rights away from Whitehead and permitted the Sterns to legally adopt the baby, whom they named Melissa Stern. A year later, the New Jersey Supreme Court reversed much of this decision.⁷⁷ That court declared the contract unenforceable but allowed the Sterns to retain physical custody of the child. The court

⁷⁴ Available at: <http://imaginativeworlds.com/forum/showthread.php?p=10900-Surrogate-Motherhood-Poland-quot-Selling-quot-Babies-for-22k> (visited on June 25, 2011).

⁷⁵ *Supra* note 17.

⁷⁶ *In re Baby M.*, 217 N.J. Super. 313, 525 A.2d 1128 (1987).

⁷⁷ *In re Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988).

also restored some of Whitehead's parental rights, including visitation rights, and voided the adoption by the Sterns. Most important, the decision voided all surrogacy contracts on the ground that they conflict with state public policy. However, the court still permitted voluntary surrogacy arrangements.

The *Baby M.* decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood. Most of those laws prohibit or strictly limit surrogacy arrangements. Michigan responded first, making it a felony to arrange surrogate mother contracts for money and imposing a \$50,000 fine and five years' imprisonment as punishment for the offense.⁷⁸ Florida, Louisiana, Nebraska, and Kentucky enacted similar legislation, and Arkansas and Nevada passed laws permitting surrogacy contracts under judicial regulation.

5. CLASSIC SOCIAL PROBLEM AND LEGISLATIVE ATTENTION

Surrogate motherhood can be viewed as a classic social problem in that its life history can be measured by the rise and fall of attention given to it. Media coverage is the first clear indicator of surrogacy's arrival as social problem in the mid— to late 1980s. Legislative attention provides an important index as well. In 1987, (in America) the year of peak news coverage of surrogate motherhood, twenty-six state legislatures introduced seventy-two bills on the topic. By 1990, however, the number of states introducing legislation dropped to ten and the number of bills to twenty-eight; by 1992, seven states had introduced a total of thirteen bills. Over the next thirteen years, no more than nine states in any given year introduced surrogacy legislation— on average from four to seven states pursued the issue in any year— with as few as one bill introduced in both 1998 and 2002 and none in 2000. In addition to prompting an increase in the number of proposals for dealing with the problem of surrogate motherhood, the *Baby M* case influenced the type of policy responses proposed in the years immediately following the dispute. In 1987, bills were split fifty-fifty on whether to permit or prohibit the practice, but the proportion of bills that sought to prohibit the practice rose to 57 percent in 1988, 66 percent in 1989, and 64 percent in 1990. By the mid-1990s, though, the vast majority of bills in state legislatures had taken a more accepting regulatory approach.⁷⁹

⁷⁸ *Mich. Comp. Laws* S 722.859.

⁷⁹ Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 22 (2007).

In 1989, the American Bar Association (ABA) drafted two alternative model laws involving surrogate motherhood. These laws are not binding but are intended to guide states as they formulate their own laws. One legalises the practice of surrogate motherhood and makes surrogacy contracts enforceable in court; the other bars the enforcement of contracts in which a surrogate mother is paid to have a child and then give up any claim to the child.⁸⁰

Under either American Bar Association model, states legalising surrogate contracts limit them to agreements between a surrogate mother and a married couple. A genetic link must be established between the couple and the child, by the husband's supplying sperm or the wife's contributing an egg, or both. To be valid, the contract must be approved by a judge before conception takes place, and it must be accompanied by proof that the wife is unable to bear a child. The surrogate mother has the right to repudiate the contract up to 180 days after conception, in which case she may keep the child. If she does not repudiate the contract during that time, the couple becomes the child's legal parents 180 days after conception.⁸¹

In 1992, over five years after *Baby M* catapulted surrogate parenting into the national spotlight, only fifteen states had enacted laws pertaining to surrogacy. Of these laws, two-thirds can be classified as prohibiting and banning surrogacy and one-third as permitting and regulating surrogacy. In 1993 District of Columbia also passed legislation prohibiting surrogacy and declaring such contracts unenforceable. It was not until 1999 that legislation was again passed on the state level. That year, Illinois enacted regulations that recognised parental rights under gestational surrogacy transactions. Since then, most legislatures have not addressed the issue. Texas is an exception. A law passed in 2004 allows for and regulates surrogate parenting arrangements. In general, though, at the beginning of the twenty-first century, state's most common response to surrogate motherhood remains a lack of legislation.⁸²

Among those states that have implemented specific laws, the dominant policy response is similar to that found on the international level, namely policies that ban

⁸⁰ Weldon E. Havins and Dalessio J. James "Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulation 'Non- Traditional' Gestational Surrogacy Contracts" *McGeorge Law Review* 31 (Spring, 2000).

⁸¹ *Ibid.*

⁸² *Supra* note 23.

and/or do not recognise surrogacy contracts. This contradicts the common assumption that the United States, unlike most other nations, uncritically embraces new reproductive practices such as surrogate motherhood. At the same time, the range of state level legislation institutionalised thus far signals a diverse political response to surrogate motherhood. Additional evidence of the lack of consensus that surrounds surrogate parenting is present in the scores of bills, introduced but never passed. Between 1987 and 1992, for instance, 208 bills on surrogacy were introduced into state legislatures. Fifteen were enacted. During the same period, fifty-five bills to form study commissions were introduced; the vast majority of these proposals did not make it out of their respective legislatures. This relative standstill and inability to reach consensus has continued past and peak period of legislative attention to surrogate parenting. In the ten years between 1993 and 2003, fifty-one more bills on surrogacy were introduced into state legislatures, and only three were signed into law.⁸³

Furthermore, within the groupings of states broadly categorised as prohibiting or permitting surrogacy, there are many variations at the state level of specific provisions. Of the states prohibiting surrogate parenting, some, like Louisiana and Nebraska, merely claim surrogacy contracts as void and unenforceable; others, like Kentucky and Washington, further specify that payments to surrogates are prohibited. Of the states with a prohibitory surrogacy approach, only Michigan criminalises the practice. The states with a more permissive approach to surrogacy likewise exhibit a variety of legislative responses. Nevada, for instance, bans payments but provides limited guidelines for contracts. Both New Hampshire and Virginia provide extensive regulatory schemas for contracts. In New Hampshire, only contracts preapproved by the court are legally recognised. And although New Hampshire and Virginia allow and regulate surrogacy contracts, surrogates may be compensated only for medical and legal costs.⁸⁴

In 1993 the California Supreme Court issued a landmark ruling declaring surrogacy contracts legal in California. The case, *Johnson v. Calvert*⁸⁵, involved a surrogacy contract between a married couple, Mark Calvert and Crispina Calvert, and Anna L. Johnson. Crispina Calvert was unable to bear children. In 1990 the Calverts and

⁸³ *Id* at 30.

⁸⁴ Andrews and Brandel “Surrogate Parenting Contracts Legislation Enacted” *National Conference of State Legislatures* (1995).

⁸⁵ 5 Cal. 4th 84, (1990).

Johnson signed a surrogacy contract in which the Calverts agreed to pay Johnson \$10,000 to carry an embryo created from the Calverts' ovum and sperm. Disagreements ensued, and later that year, Johnson became the first surrogate mother to seek custody of a child to whom she was not genetically related. After the child's birth, the Calverts were awarded custody. Johnson appealed the decision. The state Supreme Court finally upheld the legality of surrogacy contracts under both the state and federal constitutions. The court held such contracts valid whether or not the surrogate mother provides the egg. The U.S. Supreme Court declined to hear Johnson's appeal.

In many states, surrogacy contracts are considered unenforceable because of existing adoption laws designed to discourage "baby selling." These laws may, for example, forbid any consent to adoption given prior to the birth of the child. They may also make it illegal for a birth mother to receive payment for consenting to give up a child or for an intermediary or broker to receive a fee for arranging an adoption. In states with these laws, a surrogate mother who wishes to keep the child rather than give it up for adoption may successfully challenge an already established surrogacy contract.⁸⁶

Laws concerning artificial insemination can also conflict with surrogacy agreements. Some states have laws maintaining that semen donors are not legally the fathers of children created with their sperm. These laws were originally designed to facilitate the development of sperm banks. In a surrogacy arrangement, they conflict with an attempt to adopt the surrogate child. Increasingly, states are drafting laws that clarify the legal status of surrogacy arrangements, including who is the rightful parent of a child born through surrogate mothering.⁸⁷

By 1995 nineteen states had adopted laws regarding surrogate motherhood. Most of these are designed to prevent or discourage surrogacy. Arizona, the District of Columbia, Kentucky, and Utah all have complete bans on surrogacy. Thirteen states bar the enforcement of paid surrogacy contracts. Ten jurisdictions prohibit a third party, such as a lawyer or physician, from collecting compensation for arranging surrogacy agreements.⁸⁸

⁸⁶ Available at: <http://www.answers.com/topic/surrogate-motherhood> (visited on August 10, 2010).

⁸⁷ *Ibid.*

⁸⁸ Lori B Andrews, "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood" *New Directions in Family Law* 81 (1995).

State laws differ in the way they handle disputes over custody. Surrogacy laws in Michigan and Washington make custody determinations on a case-by-case basis, attempting to reach the decision that best serves the interests of the child. In New Hampshire and Virginia, such laws presume that the contracting couple are the legal parents, but give the surrogate a period of time to change her mind. In North Dakota and Arizona, the surrogate and her husband are the legal parents of the child.⁸⁹

Arkansas, Florida, and Nevada are the only states that allow surrogacy contracts. These states permit the intended parents named in the contract to be the legal parents. In Florida and Nevada, the surrogacy laws apply only to gestational surrogacy, where the egg used is not of the surrogate.⁹⁰

The Commissioners on Uniform Laws created a stir when it amended the Uniform Parentage Act to authorise gestational agreements as valid contracts. According to the prefatory note to the Uniform Act, the commissioners determined that such agreements had become commonplace during the 1990s, so the law was merely designed to provide a legal framework for such agreements. However, several organisations have decried the inclusion of these provisions. As of 2003, two states, Texas and Washington, had adopted the new Uniform Act, while legislatures in four other states were considering its adoption.⁹¹

6. AN ANOMALOUS LAW

In more developed country like United Kingdom, no contract or surrogacy agreement is legally binding. The British law in respect of surrogacy in the past was like that of Virginia State of U.S.A. But social and legal debates ultimately forced the law to be amended to the present form, which provides that the commissioning parents who are partners of a marriage are the legal parents. The embryo can be created by the gametes of the husband or wife or both. In most states in the United States, compensated surrogacy arrangements are either illegal or unenforceable. In some states in Australia, arranging commercial surrogacy is a criminal offence and any surrogacy agreement giving custody to others is void. However, the legislation is not uniform, each State distinguishes

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Amy M. Larkey, "Redefining Motherhood: Determining Legal Maternity and Gestational Surrogacy Arrangements" *Drake Law Review* 51 (March, 2003).

between the concepts of paid and unpaid surrogacy. In the majority of jurisdictions, the legislation treats paid surrogacy more punitively, attaching criminal sanctions to its practice while leaving unpaid surrogacy unregulated. In recent years, this distinction has become increasingly marked. For example, in Victoria in 1993 the Victorian Cabinet recommended that unpaid surrogacy be legalised and the Australian Capital Territory legislature allowed parties to an altruistic surrogacy agreement to seek professional assistance in relation to the formation of such an arrangement. In Canada and New Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. In France, Germany and Italy, surrogacy, commercial or not, is unlawful. In Israel, law only accepts the surrogate mother as the real mother and commercial surrogacy is illegal. In March 1996, the Israeli government legalised gestational surrogacy under the “Embryo Carrying Agreements law”. This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state. In Iceland, law does not approve surrogacy. According to Icelandic laws, the surrogate mother’s husband is child’s father. There is an element of mental attachment which is no less than genetical link. A surrogate mother carries the baby for nine months in her womb and is no way different from normal mothers. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.

In Iran, Gestational surrogacy as a treatment for infertility is being practised in some well-known medical institutions in Tehran and some other cities. While the majority of Muslims in the world are Sunni, the majority of Iranians are Shiite. Most Sunni scholars do not permit surrogate motherhood, since it involves introducing the sperm of a man into the uterus of a woman to whom he is not married. Most Shiite scholars, however, have issued jurisprudential decrees (fatwas) that allow surrogate motherhood as a treatment for infertility, albeit only for legal couples. They regard this practice as transferring an embryo or foetus from one womb to another, which is not forbidden in Shiite jurisprudence. Nevertheless, there are some controversies

There is a prompt need for India to enact a proposed law to make surrogacy agreements legally enforceable to protect the genetic parents, surrogate mother, and the child.

7. SURROGATE MOTHERHOOD : THE CONCEPT

The advent of science and technology has brought a great change in the life of human beings. At the same time it has also brought problems which were otherwise unheard of. The study of biotechnology has helped us to discover sex determination techniques and other scientific developments like DNA testing, fingerprinting etc., to facilitate for administration of justice. The recent development in the field of embryonic stem cell has affected human life in numerous ways. The science has also used therapeutic cloning for treatment of persons who are suffering from genetic disorders. The progress made in surgical procedure of organ transplantation has also now become a debate of ethical problem. The concept of motherhood is also affected and has been changed in to genetic mother, surrogate mother, biological mother and social mother.⁹²

In the past three decades, there has been a spectacular change in the field of reproductive technologies. Reproductive sciences have come up with techniques like donor insemination, *in vitro* fertilisation and embryo transfer methods which have completely revolutionised the reproductive environment. These techniques have infused hope into many infertile couples, who long to have a child of their own.⁹³ Unfortunately complications have also arisen once these methods were combined with surrogacy arrangements.

Surrogacy is often seen as an alternative to adoption, although adoption may be part of the process. Surrogacy occurs when a woman who is not pregnant agrees to bear a child for another/others who will parent the child.

Despite controversial and ethical issues arising out of it, surrogacy has been gaining popularity all over the world, especially in the west where adoption is not easy to come by. Research has stated that one-in-six couples have problems with infertility. Some use medical treatments to overcome this situation, for some however, no help is available. It is these couples where the woman has undergone a hysterectomy or suffered multiple miscarriages or born without a womb where surrogacy comes to the rescue.⁹⁴

7.1 What is Surrogate Motherhood

⁹² Dr. Chintamani Rout, "Surrogacy- A Conceptual and Legal Analysis in 21st Century" *Orient Journal of Law and Social Sciences* 26 (November, 2012).

⁹³ *Ibid.*

⁹⁴ Irvi H. Thakkar, "Is Surrogate Motherhood Moral?" *Cri LJ* 88 (2011).

Surrogate Motherhood is a relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of the child; also called mothering by proxy.

The advancement of the science of assisted reproductive technology (ART) has created ever-increasing options to the person or couple who wishes to beget a genetically related child. Single, infertile, or childless men who, just a few years ago, never would have imagined the possibility of fatherhood can now opt for parenthood. However, the miracle of ART perhaps as significant a milestone in the development of modern science, as mankind walking on the moon— faces its greatest challenge at the regulatory level.⁹⁵ Today, couples nevertheless are incapable of bearing children can select to beget their own genetic children through the modern technique of gestational surrogacy. Women with non-functioning ovaries or women who have undergone a hysterectomy, through the science of ART, can have their own genetic children. Women wishing to delay having children but anxious about losing their opportunity to reproduce, can have their eggs harvested and frozen for their or another's future use.⁹⁶

Although offering to become a surrogate mother for an infertile couple might appear to be an uncomplicated altruistic act, it is not an easy course of action. Equally the intended parents may see surrogacy as the answer to their prayers; but they are also likely to have concerns over the implication of their decision before proceeding.⁹⁷

In surrogate motherhood, one woman acts as a surrogate, or replacement, mother for another woman, sometimes called the intended mother, who either cannot produce fertile eggs or cannot carry a pregnancy through to birth, or term. Surrogate mothering can be accomplished in a number of ways. Most often, the husband's sperm is implanted in the surrogate by a procedure called *artificial insemination*. In this case, the surrogate mother is both the genetic mother and the birth, or gestational mother, of the child. This method of surrogacy is sometimes called traditional surrogacy.⁹⁸

Less often, when the intended mother can produce fertile eggs but cannot carry a

⁹⁵ *Supra* note 24.

⁹⁶ Brittnay M. McMohan, "The Science Behind Surrogacy: Why New York Should Contracts Laws" *Duquesne Law Review* 904 (Summer, 1995).

⁹⁷ Pratibha Ganesh Chavan, "Psychological and Legal Aspects of Surrogate Motherhood" *AIR* 2008 Jour 103.

⁹⁸ Available at: <http://www.legal-dictionary.thefreedictionary.com/surrogate+motherhood> (visited on March 6, 2009).

child to birth, the intended mother's egg is removed, combined with the husband's or another man's sperm in a process called *in vitro* fertilisation (first performed in the late 1970s), and implanted in the surrogate mother. This method is called gestational surrogacy.⁹⁹

7.2 Meaning of Surrogate Motherhood

The literal meaning of word 'surrogate' is 'substitute'. Surrogacy arrangements are motivated by a desire for a genetically related child and the disincentive arising out of the prolix adoption procedures coupled with difficulty in finding suitable child for adoption.

The word surrogate, from Latin *surrogatus*, means appointed to act in place of. Surrogacy is an arrangement between a woman and a couple or individual to carry and deliver a baby. A surrogate mother is a woman who carries a child for someone else, usually a couple struggling with fertility issues. After the child is born, the surrogate mother surrenders it to the people who have hired her. The surrogate mother is also known as 'Gestational Carrier'.

The concept of "rent a uterus" in fact may be readily acceptable in the more analytical frame of the mind with the argument "at least the baby is made with our gametes, even though nourished in a rented body". With sisters, sisters-in-law and even mothers lending a hand or rather a uterus, it received greater acceptability (even if future consequences arouse, it could be solved very easily and the helping hand of near and close relative may not be taken out after delivering the child).¹⁰⁰

7.3 Definitions

According to Bernard Dickens, Professor of Law at the University of Toronto, an initial difficulty in addressing surrogate motherhood arrangements is that they do not conform to predictable patterns of behaviour, and no legal language exists to describe the human and social relationships that they create.

7.3.1 A standard definition of surrogacy is offered by the **American Law Reports** in the following manner:

⁹⁹ *Ibid.*

¹⁰⁰ *Supra* note 41.

“...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.”¹⁰¹

7.3.2 The New South Wales Law Reform Commission defined surrogacy as:

“...an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody at or shortly after birth.”

7.3.3 The Assisted Reproductive Technologies (Regulation) Bill, 2010 defines “**surrogacy**” as an agreement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or 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.

It defines “**surrogate mother**” as a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple/individual that had asked for surrogacy.

7.3.4 Dictionary Meaning

Surrogate Mother:

- (a) A person or animal acting the role of mother
- (b) A woman who bears a child on behalf of another woman, either from her own egg fertilised by the other woman’s partner or from the implantation in her womb of a fertilised egg from the other woman.¹⁰²

7.3.5 The Black’s Law Dictionary

Surrogate Mother:

¹⁰¹ American Law Reports “Validity and Construction of Surrogate Parenting Agreement” 77 A.L.R 4th 70 (1989).

¹⁰² *Oxford English Dictionary*, sixth edition, vol 2, 3123 (2007).

- (i) A woman who carries out the gestational function and gives birth to a child for another; esp. a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of the child.
- A surrogate mother may or may not be the genetic mother of a child.¹⁰³

It categorises surrogacy in two classes— traditional surrogacy and gestational surrogacy. It may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy or relinquishment of child. In any of these cases, a number of controversies can arise, as it involves the social, ethical as well as legal issues into it.¹⁰⁴

7.3.6 Encyclopedia Britannica

Surrogate Motherhood:

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 (usually with the sperm of the husband) or through the implantation of an embryo produced by *in vitro* fertilisation. The surrogate traditionally gives up all parental rights, though this has been subject to legal challenge.¹⁰⁵

8. TYPES OF SURROGACY

- (i) **Traditional or Partial Surrogacy:** This involves artificially inseminating a surrogate mother with the intended father's sperm via intrauterine insemination (IUI), *in-vitro* fertilisation(IVF) or home insemination. In this case the surrogate's own egg will be used. With this method, the child is genetically related to its father and the surrogate mother.
- (ii) **Traditional Surrogacy and Donor Sperm:** A surrogate mother is artificially inseminated with donor sperm via IUI, IVF or home insemination. The child born is genetically related to the sperm donor and the surrogate mother.

¹⁰³ *Black's Law Dictionary*, Eighth Edition, 1036 (2004).

¹⁰⁴ *Ibid.*

¹⁰⁵ Available at: <http://www.britannica.com/EBchecked/topic/575390/surrogate-motherhood> (visited on March 10, 2009).

- (iii) **Gestational or Total Surrogacy:** When the intended mother is not able to carry a baby to term due to hysterectomy, diabetes, cancer, etc., her egg and the intended father's sperm are used to create an embryo (via IVF) that is transferred into and carried by the surrogate mother. The resulting child is genetically related to its parents while the surrogate mother has no genetic relation.
- (iv) **Gestational Surrogacy and Egg Donation:** If there is no intended mother or the intended mother is unable to produce eggs, the surrogate mother carries the embryo developed from a donor egg that has been fertilised by sperm from the intended father. With this method, the child born is genetically related to the intended father and the surrogate mother has no genetic relation.
- (v) **Gestational Surrogacy and Donor Sperm:** If there is no intended father or the intended father is unable to produce sperm, the surrogate mother carries an embryo developed from the intended mother's egg (who is unable to carry a pregnancy herself) and donor sperm. With this method, the child born is genetically related to the intended mother and the surrogate mother has no genetic relation.
- (vi) **Gestational Surrogacy and Donor Embryo:** In order for a pregnancy to take place, a sperm, egg, and a uterus are necessary. When the intended parents are unable to produce sperm, egg, or embryo, the surrogate mother can carry a donated embryo (often from other couples who have completed IVF that have leftover embryos). The child born is genetically related neither to the intended parents nor the surrogate mother. Egg and sperm are extracted from the donors and *in vitro* fertilised (creation of the embryo in a *petri dish*) and implanted into uterus of the surrogate. This is an expensive procedure. Again, the unused embryos may be frozen for further use if the first transfer does not result in pregnancy.

According to another classification surrogacy can be categorised as either *altruistic (non-commercial)* or *commercial*.

8.1 Altruistic Surrogacy

It is the term used to describe the situation where there is no formal contract or

any payment or fee to the birth mother. It is usually an arrangement between very close friends or relatives. In *altruistic* surrogacy, the essential elements are child-bearing by a surrogate mother, termination of her parental rights after his birth and payment of money by the genetic parents. The surrogate is paid merely to recompense her for the pain undertaken by her and includes reimbursement of medical and other expenses or is not paid at all.¹⁰⁶

8.2 Commercial Surrogacy

In contrast thereto, *commercial* surrogacy involves payment of hefty sum of money as income to the surrogate for the service offered by her plus any expenses incurred in her pregnancy and surrogacy is thereby looked upon as a business opportunity. It is a business like transaction where a fee is charged for the incubation service, in consideration of the birth mother surrendering the child at birth. There are usually financial arrangements like the above in addition to ancillary expenses, loss of wages etc. And often stipulates behavior the birth mother agrees to undertake (e.g. undergoing tests, or having an abortion if foetus is defective or avoid smoking and drinking). The commissioning couple and the birth mother are often strangers. It is argued by many that payment simply for expenses and earnings and not the service and surrender of custodial rights will entail calling the agreement non-commercial.¹⁰⁷

This medical procedure is legal in several countries including 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.”¹⁰⁸

9. SURROGACY PARENTING AGREEMENT

A contract between a woman and typically an infertile couple under which the woman provides her uterus to carry an embryo throughout pregnancy; esp., an agreement between a person (the intentional parent) and a woman (the surrogate mother) providing

¹⁰⁶ Kush Kalra, “Surrogacy Arrangements; Legal and Social Issues” *Journal of Law Teachers India* 125 (2010).

¹⁰⁷ Kush Kalra, “Custody of the Child and Surrogacy Contracts in India” *Shreeram’s The Law* 42 (July, 2013).

¹⁰⁸ J.P.S. Sirohi, *Criminology and Penology* 679 (2011).

that the surrogate mother will (1) bear a child for the intentional parent, and (2) relinquish any and all rights to her child. If the surrogate mother is married, her husband must also consent to the terms of the surrogacy contract. The agreement usually provides that the woman will relinquish to the couple any parental rights she may have upon the birth of the child.¹⁰⁹

A surrogacy agreement is an agreement entered between the surrogate mother and the intended parent/s, making their intentions clear with regard to each of their roles for performing the act of surrogacy. The surrogacy agreement should contain all aspects of their relationship between the intended parents, surrogate mother and the child. The contents of the agreement include the payment module to the surrogate mother. The contract phase of the surrogacy agreement finalises the monetary reward to the surrogate to be paid by the intended couple for the service rendered by the surrogate. The agreement demarcates the liability of the surrogate and intended parent upon which either of the parties to the agreement has agreed upon. The surrogate and the intended parent/s are required to sign the surrogacy agreement after clearly understanding the contents of the agreement.¹¹⁰

The parties to the surrogacy agreement are:

- (i) The intended parents
- (ii) The surrogate mother

Indian Surrogacy Law Centre¹¹¹ recommends that not only intended parents and the surrogate mother but the spouse of the surrogate mother also signs the agreement, so as to show his acknowledgement to the surrogacy agreement. Also the intended parents may appoint a person who shall be named in the agreement, who shall take the child into his possession, in an event of uncertainty over the actual intended parents' possibility of taking custody of the child.

10. SURROGACY ARRANGEMENT AGREEMENT

Surrogacy Arrangement Agreement is entered between the intended parents and the Hospital/Agency agreeing the terms and conditions which determine the conduct of

¹⁰⁹ *Supra* note 47 at 1485.

¹¹⁰ Irvi H. Thakkar, "Is Surrogate Motherhood Moral?" *Cri LJ* 88 (2011).

¹¹¹ India's first fertility law firm, Chennai.

the parties during the surrogacy program. This agreement shall cover details such as the fee structure, dates of the procedures, mode of payment, medical tests to be done, dates for implantation of the embryos and other medical procedures, which shall provide with unlimited back up to the intended parents till the time you sign the agreement. Moreover, this agreement is enforceable and the intended parents are assured of getting those services as per the Surrogacy Arrangement Agreement.¹¹²

11. WHO MIGHT USE SURROGACY

Some women are unable to carry a child to a term. A variety of causes account for this, including:

- (a) Failure of embryo to transplant
- (b) Repeated miscarriage
- (c) Hysterectomy or pelvic disorder
- (d) Dangerously high blood pressure
- (e) Heart or liver disease

Due to above reasons, pregnancy would entail a serious risk for them. Some people may come to terms with their childlessness. Others may find adoption or fostering an acceptable alternative.¹¹³

Carrier oriented women with their professional constraints (e.g. actors, models) can also opt for surrogacy. Even single and homosexual couples can realise their dream of parenthood through surrogacy.

12. COMMISSIONING PARENT

The commissioning parent, sometimes also called as the intended parent is generally the term used to describe the person or persons for whom the child is to be borne. The intended parents opting for surrogacy can be Indian, Non-Resident Indians (NRIs) or Foreigners. In India, surrogacy is increasingly becoming a popular and well accepted practice amongst childless couples; most of such commissioning parents hail

¹¹² *Supra* note 54.

¹¹³ Available at: <http://www.yale.edu/ynhti/curriculum/units> (visited on March 6, 2009).

from the creamy layer of the society who can bear the huge cost of surrogacy.¹¹⁴ India is emerging as a leader in international surrogacy and a destination in surrogacy related fertility tourism.

13. PARENTAL ORDER

A parental order, which is obtainable by application to the courts, makes the intended parents, the legal parents of the child to be born. This has the same effect as an adoption, but allows quicker route in case of surrogacy. In order to apply for the parental order, the following criteria must be met:

- i) The child must be genetically related to one or both of the intended parents.
- ii) The intended parents must be married to each other and must both be aged 18 or over.
- iii) The legal mother and father (i.e. the surrogate mother and her partner, if she has one) must consent to the making of order (this consent cannot be given until six weeks after the birth of the child).
- iv) No money other than reasonable expenses has been paid for the surrogacy arrangement unless the payment has been authorised by a court.
- v) An application must be made within six months of the birth of the child.

14. CRITERIA FOR BECOMING SURROGATE MOTHER

- (a) A surrogate must be in good overall health.
- (b) No medical problems which could lead to complication with pregnancy.
- (c) She should not be overweight, heavy smoker, drinker or substance abuser not suitable as surrogate mother, because of the associated risk both to the woman and to the baby.
- (d) Surrogate mother should borne atleast one child previously and preferably has completed her own family.
- (e) She should give her own consent.
- (f) She should be below age of 35 years.

¹¹⁴ Gail Dutton, *A Matter of Trust: The Guide to Gestational Surrogacy* 217 (1997).

- (g) Being a surrogate mother is an emotionally and physically demanding task. So there should be a backing of partner, family or friends.
- (h) Careful consideration must be given to the medical, emotional, legal and practical issues.

Thought must also be given to the effect of any existing children, the potential surrogate mother's partner, family and friends.¹¹⁵

15. HEALTH RISKS TO THE SURROGATE MOTHER

There is a risk of transmitting infection, such as HIV or Hepatitis, to the surrogate mother from the infected parents. This risk can be reduced by testing and if the sperm or embryos are quarantined, the risk is very low.

In full surrogacy, when more than one embryo is replaced onto the surrogate mother's uterus, the risk of multiple pregnancy increases. Around 20 to 25 per cent of pregnancies resulting from *in vitro* fertilisation will result in a multiple pregnancy of twins or triplets, depending upon the number of embryos replaced. This carries associated risk for both mother and babies and there are serious implications for the intended parents of raising children from a multiple pregnancy. Careful consideration should be given to the number of embryos to be replaced.¹¹⁶

Every month a large number of surrogacy success stories are reported yet there are some risks associated with surrogate motherhood in India involving ethnic factors as well. Pregnancy is fraught with risks at all stages and puts a huge mental and physical strain on the surrogate mother. The surrogacy laws of western countries may not be compatible with those in India. Negligence of the health of the mother and child by the fertility clinics can lead to the complete wastage of the entire procedure.¹¹⁷

16. SURROGACY IN THE INDIAN CONTEXT

To understand surrogacy in the Indian context, one must begin with the fact that, while the Transplantation of Human Organs Act, 1994 banned the sale of human organs, organ loaning— an equally difficult and risky venture—is being promoted through paid surrogacy. This is due to a medical industry that welcomes profitable international

¹¹⁵ *Supra* note 41.

¹¹⁶ Available at: <http://www.bma.org.uk/ap.nsf/content/consideringsurrogacy> (visited on April 3, 2009).

¹¹⁷ Dr. Archana Dhawan, "Paving Path to Parenthood" *The Tribune*, December 30, 2011.

ventures like “reproductive tourism” even when infertility constitutes a small segment of domestic priorities. The incidence of total infertility in India is estimated at 8 to 10 per cent, and for the vast majority of Indian women it is preventable as it is caused by poor health, nutrition, maternity services and high levels of infections. Only about 2 per cent of Indian women suffer from “primary” infertility which is amenable to ART alone. Moreover, it is further reported that among the cases of women who come for ART treatment, barely one per cent require surrogacy assistance.¹¹⁸

Surrogacy is the practice of gestating a child for another couple and could involve any of the various Assisted Reproductive Technologies (ARTs) like IVF (*in vitro* fertilisation), IUI (*intra uterine* insemination) etc. Surrogacy has gathered much attention of late due to the increase in the number of couples opting for surrogacy as well as of the women acting as surrogates. The fertility market is estimated at Rs. 25,000 crore today, with reproductive tourism industry growing by leaps and bounds. The past two years have seen a 150 per cent rise in surrogacy cases in India. The Gujarat town of Anand, for example, is a hub of surrogate mothers.¹¹⁹

India has become the favorite destination for infertile couples from across the globe because of the lower cost, less restrictive laws, lack of regulation of ART clinics and availability of surrogate mothers. But surrogacy arrangements are drawn up in a random fashion and can be exploitive, especially since surrogates are mostly from socio-economically weaker sections.

With India fast emerging as a favoured destination for childless couples across the world, commercial surrogacy raises a host of moral, ethical as well as legal issues. More recently, even the Supreme Court had entered the debate. Hearing a petition filed by a German couple (Jan Balaz and Susan Anna Lohlad) with regard to grant of Indian citizenship for their surrogate twins, it made pertinent queries. The twins born to an Indian surrogate mother in January 2008 were stateless citizens, having neither German nor Indian citizenship. The German authorities had been steadfastly refusing visas to Nikolas and Leonard (said twins) on the ground that the state law did not recognise surrogacy as a means to parenthood. But finally agreed to provide the necessary

¹¹⁸ Imrana Qadeer and Mary E John, “The Business and Ethics of Surrogacy” *Economic and Political Weekly* 10 (January, 2009).

¹¹⁹ N.B. Sarojini and Aastha Sharma, “Guidelines Not Enough, Enact Surrogacy Laws”, *Hindustan Times*, August 8, 2008.

documents after Balaz and his wife went through the inter-country adoption process supervised by Central Adoption Resources Agency. The Indian government, which was refusing to grant the toddlers Indian citizenship on the ground that they were surrogate children, also played its part in arranging their flight home by agreeing to provide exit permits.¹²⁰ The Supreme Court also echoed concern about the absence of a law regulating surrogacy, so that there should not be any repetition of such a case.

The complicated case of Japanese baby Manji born to an Indian surrogate mother with IVF technology upon fertilisation of her Japanese parents' eggs and sperms in Tokyo and the embryo being implanted in Ahmadabad, triggered off complex knotty issues. The Japanese biological parents divorced and the mother disowned the infant. Under the Hindu Adoptions and Maintenance Act, 1956 a single father can not adopt a girl child and since he is only the biological father, the girl's legitimacy will have to be proved. The grandmother of the infant petitioned the Supreme Court challenging the directions given by the Rajasthan High Court relating to production and custody of baby Manji Yamada.¹²¹

The issues related to surrogacy remain complex. Even the Law Commission of India has recommended to the Centre that legislation to regulate ART as well as the rights and obligations of parties involved in surrogacy should be enacted. As of now, surrogacy arrangements are governed by individual contracts within parties in question. Often contentious concerns arise, especially those involving foreign couples. For many countries, like Germany, do not recognise surrogacy, thus leading to legal complications. Still, as the Supreme Court judgement in the Manji case proved, the legal environment in India remains favourable to surrogacy. Adding to it the cost advantage that India has and surrogacy seems to be thriving, particularly in Anand in Gujarat that has come to be known as India's surrogacy centre. The country that is becoming a hub of fertility tourism can not afford to put the interests of children as well as surrogate mother at risk.¹²²

Medical science is advancing rapidly and awareness of the process of *in vitro* fertilisation is growing fast among the people. Childless couples are prone to the process

¹²⁰ Dhananjay Mahapatra, "Surrogate Twins to Finally go Home" *Times of India*, May 27, 2010.

¹²¹ Anil Malhotra, "Business of Babies" *The Tribune*, December 14, 2008.

¹²² Editorial, "Surrogate Motherhood" *The Tribune*, December 23, 2009.

of surrogate arrangements. It is likely that the process will continue to thrive. Hence, some regulations are necessary in the form of licensing and authoritative inspection for the benefit of the society. Centre must pass a comprehensive legislation that would regulate surrogate motherhood. Rights of not only children but also of surrogate mothers, many of whom are often exploited, have to be protected. Whole gamut of concern, including health risks to the surrogate mothers, (as a majority of them hails from underprivileged sections of society) should have been taken into account.

There is no law governing surrogacy in India. There is only 126 page document regulating the technologies used. The Indian Council of Medical Research (ICMR) issued National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India in 2005, but the guidelines are legally non-binding. They are hazy on issues like the rights of the surrogate the minimum age of surrogate, details about the contracts, informed consent, adoption requirements etc. The issue of legal parentage has been particularly contentious.

Moreover, many clinics were found to be operating networks of professional surrogates and making profits in recruiting their services. While different factors—ranging from patriarchy, poverty, lack of livelihoods, need for biological child to stigmatisation of infertility—complicate situations on the ground, debates on the issue tend to focus on more elementary questions.

In India, in September 2000, Central Ethics Committee on Human Research (CECHR) of the Indian Council of Medical Research (ICMR) has come out with a statement of specific principles for assisted reproductive technologies. In 2002, a Bill drafted by a 15—member team of experts headed by Baidyanath Chakraborty in collaboration with the Indian Council for Medical Research and National Academy of Medical Sciences was submitted to the Union Health and Law Ministries on National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technologies (ART) Clinics in India. This document has drawn up guidelines for the ethical practice of acceptable ART methods and for taking measures for setting up of an independent body through legislation for accreditation, regulation and supervision of infertility clinics in India, which was later, in 2005; released as a published document. However, since these guidelines had no legal binding and the rules and regulations were

not mandatory, they were not strictly implemented, resulting in an absence of any form of regulation.¹²³ Recently ICMR and Ministry of Health and Family Welfare (MOHFW) have come up with the draft Assisted Reproductive Technologies (Regulation) Bill & Rules 2010.

17. SURROGACY AND ARTICLE 21 OF THE CONSTITUTION

The relation of the surrogate mother to the child she is carrying is nothing, but womb leasing or womb for rent. After the child is born she has no right to keep the child because she is neither the mother (where her ovum has not been used) nor the owner of the genetic material. She is only a contractor who is willing to give the end product once the contract between her and the person is fulfilled.¹²⁴

Article 21 of the Indian Constitution, which is counterpart to the Due Process Clause in the U.S., uses the term personal liberty. The framers of the Indian Constitution intended to narrow the protection afforded by the provision to only certain kinds of liberties related to the life and person of an individual. The Indian Constitution does not grant in specific and express terms any right of privacy as a fundamental right.¹²⁵ Nevertheless, the Supreme Court has interpreted the term ‘personal liberty’ in a broad manner to include ‘right to privacy’,¹²⁶ which has been defined as the state of being free from intrusion or disturbance in one’s personal life.¹²⁷ The principle evolved by the court was that the right to privacy is lost only if public interest is involved or if the information is already within the public domain, say, in the form of public records.¹²⁸

The word “personal Liberty” in Article 21¹²⁹ is of the widest amplitude and it includes the “right to socialise” with members of family and friends, subject of course, to any valid prison regulations which must be reasonable and non-arbitrary.¹³⁰ It has been

¹²³ Sama Team, “Assisted Reproductive Technologies: For Whose Benefit?” *Economic and Political Weekly* 25 (May, 2009).

¹²⁴ Sugato Mukherjee, “Legal and Ethical Issues of Commercial Surrogacy in India: an Overview” Available at: <http://www.academia.edu/1955503> (visited on June 25, 2013).

¹²⁵ M.P. Jain, *Indian Constitutional Law* 1133 (2005).

¹²⁶ *Govind vs. State of M.P.*, AIR 1975 SC 1378, the court followed the US decision in the case of *Jane Roe vs. Henry Wade*, 410 US 113 (1973) where the court recognised the right of privacy.

¹²⁷ *District Registrar and Collector vs. Canara Bank*, 2005 (1) SCC 496.

¹²⁸ *R. Rajagopal vs. State of Tamil Nadu*, AIR 1995 SC 264.

¹²⁹ Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹³⁰ *Francis Coralie vs. Union Territory of Delhi*, AIR 1981 SC 746.

held in a plethora of cases that right to life does not mean a mere animal existence and includes right to live with human dignity.¹³¹ Judicial activism has expanded the scope of Article 21, which has in turn received the widest possible interpretation. In *Kharak Singh vs. State of Uttar Pradesh*,¹³² the Hon'ble Supreme Court held that, "personal liberty is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19 (1). In another case the court held that, "the expression 'personal liberty' is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of the man."¹³³

In the matter of *R. Rajagopal vs. State of Tamil Nadu*,¹³⁴ after referring to *Kharak Singh* and American decisions, the learned Judge stated the law in the following words: any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. Furthermore the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.¹³⁵ The right to privacy has been read into the right to life under Article 21 of the Constitution.¹³⁶ Thus it can be said that surrogacy might just further the right to procreation and to have a family that is implicit under Article 21.

18. FEMINIST PERSPECTIVE ON SURROGACY

The preliminary argument given by a majority of feminist thinkers in the area of surrogacy is that it is used against women of colour and disproportionately poorer women who are thus exploited by richer white women. A great deal of discussion has centered on *Johnson vs. Calvert*¹³⁷, in which a black woman was hired to bear a child for a woman who was unable to carry a child to term. The egg of the genetic mother was combined with the sperm of the genetic father. The resulting zygote was then placed in the womb of Anna Johnson, the black surrogate. After the birth of the child, Johnson refused to

¹³¹ *Maneka Gandhi vs. Union of India*, AIR 1978 SC 597.

¹³² AIR 1963 SC 1295.

¹³³ *B.K. Parthasarathi vs. Government of Andhra Pradesh*, AIR 2000 AP 156

¹³⁴ AIR 1995 SC 264.

¹³⁵ *Ibid.*

¹³⁶ *Unni Krishnan vs. State of A.P.*, AIR 1993 SC 2178, *Gobind vs. State of M.P.*, AIR 1975 SC 1378.

¹³⁷ 851 P.2d 776 (Cal.1993).

relinquish her parental rights. The court eventually granted custody to the genetic parents; the surrogate mother was denied even visitation rights. Because the genetic father was white, the case is usually analysed as a racist privileging of a white patriarch. Lisa Ikemoto¹³⁸ describes the case as “selective applying the parental status laws to maintain white fatherhood” and as “erasing black woman’s status as wife and mother.” This argument may be partially applicable to Indian conditions, which is the part of these theories stating that women of deprived sections may be exploited and this is already happening in our country which seems to have become new cheap destination for surrogacy services for couples from other developed nations, thus there is a need to protect the rights of the surrogate mothers available in such vast numbers in our country, as their vulnerability will be exploited if nothing is done. The fear of the feminist thinkers has taken reality’s form in our country.¹³⁹

Currently, there is a great potential for exploitation of poor women. Thus to protect these vulnerable women it is important for the surrogate –for –money arrangements are limited to non-compensation voluntary arrangements in the view of a few thinkers, there would be no question as to exploitation. Couples who desire children would not have to be the highest bidder, and the child would not be a commodity. The limit to be put on the amount of consideration to be only that of the medical requirements and well being of the surrogate and the mother has to be made by the legislature itself.¹⁴⁰

Another argument put forth by the feminists against surrogacy agreements is the commodification of child theory that there are moral and constitutional reasons behind this theory. In *Runkles vs. Maryland*,¹⁴¹ the court addressed the issue of “baby selling”. Although the court did not find the appellant guilty of selling the child, Judge Davis did address the slavery issue in relation to the sale of a child. Judge Davis stated, “The thirteenth Amendment to the United States Constitution, ratified on December 6, 1865, abolished involuntary servitude and the corresponding commercial buying and selling of people as chattel.” Thus this is another view that some feminists hold as their argument against surrogacy arrangements, but this argument seems very one sided. The child may

¹³⁸ Ikemoto C Lisa, “The Infertile, the too Fertile, and the Infertile Fertile” 47 *Hastings L.J.* 1007 (1996).

¹³⁹ Kush Kalra, “Surrogacy Arrangements: Legal and Social Issues” *Journal of Law Teachers India* 137 (2010).

¹⁴⁰ Klinke Ruth Katy, “The Baby M Controversy: A Class Distinction” 18 *Oklahoma City University Law Review* 113 (1993).

¹⁴¹ 590 A.2d 552 (Md.1991).

be commoditised if there is no proper law that regulates these arguments, thus there is need for legislation so that surrogacy does not turn into a baby selling market, instead it should act as a boon for the unfortunate couples who cannot bear children or other single parents who want children in their lives (and cannot adopt as it is difficult for single parents to adopt due to stringent provisions).

Further the feminists antagonistic of surrogacy contracts believe that there is a threat to the health of the surrogate who is being used as a child making machine and might be unaware of the risks to her health and also the pain of giving away the child at the time of making the agreement. The infertile woman may be devastated by her inability to become pregnant; on the other hand, the fertile woman may be devastated as a result of relinquishment of her child. Development of legislation aimed at preventing harm to both women will be a monumental task. There are also several physical changes in normal pregnancy that may be potentially harmful to the woman. Some of the more underlying occurrences include low blood pressure, high blood pressure, skin changes, swelling in the extremities, anemia and problems with the digestive system.¹⁴² Many of the surrogate mothers are poor and thus not very highly educated and thus might not know of the abovementioned risks to their physical health and it is also asserted by certain thinkers that women cannot judge the emotional loss they might feel while parting with the child at such an early stage thus it is important that laws are made in our country to make counseling sessions compulsory for surrogate mothers before they make uniformed decisions which might affect them adversely later.

However, not all feminists oppose surrogacy. For instance, liberal feminists and their supporters defend a woman's right to use her body as she chooses, even if that means being a surrogate. For these feminists, to prevent women from entering into surrogacy contracts is to deny them both democratic and reproductive freedom. This perspective casts surrogate parenting as no different from any other wage labour contract. Therefore, according women special treatment in this area would only undermine their autonomy and equality as citizens. At the same time, liberal feminists recognise the problems and confusions that can arise when surrogacy is handled under existing adoption laws that were not written to deal with the particular nuances of surrogate

¹⁴² *Supra* note 84.

parenting (e.g., international conception). Therefore, while such feminists advocate making surrogacy legal, they also endorse regulating the practice.¹⁴³

A final group of feminist scholars has argued for a more complex and less polemical understanding of surrogacy. This approach recognises the simultaneously reactionary (e.g., privileging the heterosexual nuclear family) and radical (e.g., making parenthood feasible for gay and lesbian couples and for single women) potentials of surrogacy and new reproductive technologies for redefining what family, women, motherhood, and responsibility to children mean. As they are aware of both the liberating and oppressive potentials of surrogacy, these feminists advocate regulating surrogacy so that its worst aspects are eliminated and its best ones retained.¹⁴⁴

Commercial surrogacy though has been viewed as a means of providing women with greater control over their bodies, it has also been argued to prove as how it does not empower women. Instead it provides an opportunity for women to sign away their rights. Until the twentieth century, women lacked many rights, including the right to legal custody of their children thus no need for commercial surrogacy arose because the father already owned the child, and commercial surrogacy now provides a convenient vehicle with which to step back in time.¹⁴⁵ Thus as can be seen feminists in totality are divided in their views on surrogacy, but the criticism of surrogacy put forth by them to a large extent probable and should be considered while making laws regarding surrogacy.

19. CONCLUSION

Since the 1980s, advances in technology have increased the use of gestational surrogacy. As it has become more common, there has been an increase in the number of Latin American, Asian American, and African American Surrogates.

The Center for Surrogate Parenting (CSP) estimates a cost of \$56,525 for traditional surrogacy, in which artificial insemination is used, and a cost of \$69,325 if another woman's egg is used. Approximately \$15,000 of these fees is paid to the surrogate herself for the time and sacrifice of the pregnancy. When surrogacy agreements first surfaced in the mid-1970s, there was no payment for surrogate motherhood, and it

¹⁴³ Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 16 (2007).

¹⁴⁴ *Ibid.*

¹⁴⁵ Vossmeier M. Celeste Schejbal, "What Money Cannot Buy: Commercial Surrogacy and The Doctrine of Illegal Contracts" 32 *Saint Louis University Law Journal* 1171 (1988).

tended to involve middle-class and blue-collar couples, with friends and sisters helping each other.¹⁴⁶

In 2002, most states had no specific laws regarding surrogate motherhood. While many states do not uphold surrogacy contracts, all states recognise birth certificates and adoption certificates from other states, making surrogate services available to anyone with the money to hire them.

Nowadays, we are lucky that due to technological breakthroughs in this field of science a woman can feel safe knowing that even though another woman is carrying her child, the surrogate mother never actually had any relations with her spouse. Such things have, in the past, caused battles and feuds between the people involved and it is quite understandable. The technological solution has saved an awful lot of heartache for many families, and this solution has become a blessing for many families now.



¹⁴⁶ Helena Ragone, *Surrogate Motherhood: Conception in the heart* 194 (1994).