

CHAPTER - II

HISTORICAL DEVELOPMENT OF SURROGACY

Marriage is one of the universal social institutions established to control and regulate the life of mankind. It is closely associated with the institution of family. The institution of marriage is the socio-legal manifestation of social activity; and procreation continues to be the primordial objectives of wedding along with sexual gratification and religious function.¹ Marriage is the expression and commoditization of affection, copulation and breeding. The birth of a child provides completeness to nuptial relationship between husband and wife and strengthens matrimonial bond. But for an infertile couple, the desire of having a child remains unfulfilled. Childlessness is a key difficulty among married couples, which have been disturbing not only their conjugal life but also their societal life.

In our society, it is very well established that a woman is appreciated as a successful wife only if she gives birth to the child whereby it able to established her husband's masculinity and sexual effectiveness to continue his ancestry. Traditionally, child has been and considered to be a means for Indian women to achieve certain kind of right of entry and advantage- ancestral, emotional, material and social. Hence, a policy that encourages childbearing is always regarded, where the child is vital to the concerns of the family. And fertility is the prime factor in the Indian family circle for

¹ Dr. G.K. Goswami, *Assisted Reproduction and Conflict in Rights* 1 (Satyam Law International, New Delhi, 2017)

power distribution. Earlier, natural conception was the only choice to have genetically linked children. Though couple unable to conceive were also accepted adoption to achieve their parenthood dreams but it unable to fulfill the dream of having a child linked genetically.

In Manu Smriti, it states that the production of a son was a dire necessity of a couple. It says that through a son, a man conquers the world, through son's son he obtains immortality but through his grandson's son he gains the world of Sun.² It is also believes that a son delivers his father from hell called Put, he is therefore known as Putra by self existence himself.³ When a husband dies childless or husband is incapable of fatherhood, wife can opt for a method called "Niyoga". So, when there was disability of any couple to produce a male child, the woman may obtain offspring by cohabitation with her brother-in-law or with some other relative (sapinda) on her in-law's side.⁴ There is also an established tradition that the sister-in-law must be clad in white garments with pure intent her brother-in-law will cohabit with her once in every proper season until she conceives.⁵ Apart from these some other conditions were also associated with this process, such as:

- a) The woman would agree to this only for the sake of rightfully having a child and not for pleasure.
- b) The child, thus born would be considered as the child of the husband wife and not that of the appointed man.

² Manusmriti 9/137

³ Ibid., 9/138

⁴ Ibid., 9/59

⁵ Ibid., 9/70

- c) The appointed man would not seek any parental relationship or attachment to the child in the future.
- d) To avoid misuse, a man was allowed a maximum of three times in his lifetimes to be appointed in such way.
- e) The act will be seen as dharma and while doing so, the man and the wife will have only dharma in their mind and not passion

However, ART have appeared as one of the most broadly adopted medical technologies in the last century. Advancement of medical sciences and technology in assisted human reproductive techniques, have been offering number of option, including AI, IVF and surrogacy towards infertile couples to have a genetically linked child. If it is not possible to conceive a child through AI, IVF, in such case people opt for surrogacy. Among these the surrogacy is the most widely being used all over the world for procuring a biologically related child and it is one of the best solutions to infertility issues faced by modern women.

Surrogacy is an agreement 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.⁶ A surrogate mother is a woman who carries a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from another woman.⁷ Ultimately, since ARTs have been introduced in India, it has given the expectation to the hopeless women of having their own child.

⁶ Anita Stuhmcke, "For Love or Money: The Legal Regulation of Surrogate Motherhood" available at <http://www.murdoch.edu.au/elaw/issues/v2n3/stuhmcke23.html> (accessed on January 2, 2018)

⁷ Ghena Vaishnavi and Navneet Takkar, *Surrogacy: Medico-Legal Issues* 3 (Jaypee Brothers Medical Publishers, New Delhi, 1st Ed. 2015)

An in depth study on development of surrogacy is always required, and is very important to understand and follow the entire process of development of surrogacy and surrogacy arrangements. As it helps us to understand change and how the concept of surrogacy becomes acceptable and popular to the society. Though, the world considered surrogacy as a product of modern medical science and reproductive technology but the present stage of surrogate motherhood is not a product of single day; it has been coming through a continuous process of development from past to till date in India and other country as well. The needs and desires of human beings are not static, and to fulfill those needs of the hour always in the field of medical science on human reproduction, new methods and techniques has been introduced. Surrogacy has been seen around a long times and dates back to biblical times. The idea of surrogacy was conventionally prevalent in India from ancient times and mythological epics of India have shown the occurrence of it. To trace the history of development of surrogacy, there are no authentic documents survived up to modern times. Before the improvement of modern techniques on human reproduction, surrogacy by natural conception was the means to have children. In ancient times, usually, a couple was having another woman to bear a child with male half of the couple as the genetic father. Babylonian law and custom allowed this practice, and a woman unable to give birth could use the practice to avoid a divorce, which would otherwise be unavoidable.⁸ Later developments in medical science, social customs, and legal proceedings around the world cemented the way for modern surrogacy.⁹

⁸ J.N.Postgate, *Early Mesopotamia Society and Economy at the Dawn of History* 105 (Routledge, 1994), available at <http://en.m.wikipedia.org/wiki/Mesopotamia> (accessed on March 12, 2017)

⁹ Faith Merino (2010), *Adoption and Surrogate Pregnancy*, (Infobase Publishing, 2010) available at www.worldcat.org/title/oclc (accessed on March 15, 2017)

2.1. Indian Perspective

Surrogacy was conventionally rampant in India during antique times and various incidents of Indian mythology have revealed the occurrence of surrogate pregnancies. Birth in Indian mythology is initially conceived of as mental, not womb-born.¹⁰ From Vishnu's navel a lotus emerges in which Brahma appears.¹¹ Brahma creates mind-born sons (manas-putra); however they do not agree to multiply, he creates from his mind Svayambhuva Manu and Satarupa, the first couple, who produced humanity.

In Bhagavata puran, the story of King Kansa is the best example of such occurrence, where two fully grown embryos are exchanged between wombs of two mothers and then delivered. It is believed that King Kansa of Mathura city was a tyrant ruler and his act of overthrowing his father, Ugrasen to become king forcefully is also well known to all of us. He had locked up his sister Devaki and her husband Vasudev into a prison cell as during their marriage a forecast warned him about his demise in the hand of eight child of Devaki. So, Kansa planned and managed to kill all progeny immediately upon their birth. Accordingly, the first six new born of Devaki and Vasudev were killed by Kansa. Mythology describes then at the seventh time of pregnancy, Shesha (the serpent of Lord Vishnu) came to Devaki's womb. Considering the possibilities of killing of the child after birth by King Kansa, the transfer of foetus was arranged by Vishnu and ordered Goddess Yogomayya to take out the foetus of Devaki and place in the womb of Rohini,

¹⁰ Available at <http://www.en.wikipedia.org/wiki/surrogacy> (accessed on April 3, 2017)

¹¹ Ibid.

Vasudev's another wife. That is how Rohini became the surrogate mother of Balaram. The Bhagwad Gita also contends that Lord Krishna, the eighth son of Devaki is understood to have been born without a sexual union and was conceived by the divine mental transmission from the mind of Vasudeva into the womb of Devaki.¹²

There is another instance of surrogacy where God Kartikeya was born out of surrogacy through Lord Shiva and Goddess Parvati in the womb of the surrogate mother Ganga, where Goddess Parvati gives a bija to be implanted in Mother Ganga.¹³

It is interesting to mention that there are numerous instances of miraculous births in our epics. In Ramayana, the King Dasharath was unable to impregnate any of his three wives. Therefore he begs for help of a Sage, who gave some magical pudding (kheer) that the supernatural being appearing from the *yajna*-flames handed over to King Dasharath. After consuming the magical pudding by all three wives get pregnant and gave birth to Rama and his three brothers.

There is another reference of how Rama's sons came into being. Rama's wife Sita comes to live in Sage Valmiki's Ashram and gives birth to a son called Luv. One afternoon, Sita leaves Luv in the care of the Sage and retires to her room. During that period Sage Valmiki goes into deep meditation and upon coming he realizes that Luv is missing. Worried that Sita will be devastated, he quickly

¹² Supra note 7, p. 8

¹³ Dr. B. R. Kishore, *Lord Shiva* 21 (Dimond Poket Books Pvt. Ltd., New Delh, 2001) in Aneesh V.Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Unpublished Thesis, Cochin University of Science and Technology)

creates a clone of Luv from a grass blade called Kusha. Luv is found later and they become famous as Luv-Kusha. And now cloning is a reality.

In epic Mahabharata, there are various instances of surrogate fatherhood. Where due to death or impotency of husband lead a woman to take a person for helping her to bear a child, often the person may be a Sage or her brother-in-law. We all know about the instance of the Kuru Queen Satyawati got her illegitimate son Rishi Vyas to perform *niyog* on her two widowed, childless daughter-in-law Ambika and Ambalika, to give birth to a blind Dhritarastra and a sickly, pale Pandu respectively – both unhealthy sons, a consequence of the unhealthiness of the conception performed by the reluctant Vyas with the two reluctant widows.¹⁴

There is another instance well known to us that it is impossible for one woman to give birth to hundred and one children. Gandhari, the wife of Dhritarastra gave birth a lump of flesh that contained 101 normal cells after carrying it in her womb for two years. However, Sage Vyas cut the flesh into 101 pieces, which after being put in a nutrient medium to grow up full term outside of their mother's womb. All 101 of them emerges as fully developed babies after the gestation period as a 100 male children- the Kauravas and one female child called Dusheela.¹⁵ It reveals that the concept of test-tube babies was practiced in ancient times also.

¹⁴ Kavita kane, "Surrogacy in Mythology", available at <http://www.shethepeople.tv/news/surrogacy-in-mythology> (accessed on February 5, 2018)

¹⁵ Supra note 7, p.8

Likewise, Kunti while unmarried conceived her eldest son Karna through the God Sun. It is believed that once teenage Kunti had a chance to serve Sage Durvasha. Then satisfied with the service of Kunti, Sage Durvasha gave a mantra to her. Kunti had received a boon from Sage Durvasha, which enable her to invite any God to have a child by him.¹⁶ Later Kunti was married to King Pandu, but Pandu was unable to gave birth of child as he was cursed by a Sage that he would die whenever mate with his wife. Then Kunti confined in him the blessing given by Sage Durvasha to her. After knowing about the boon upon Kunti, Pandu begs her to use mantras to perform niyog. Niyog only if performed by a consenting woman, produce healthy heirs as is proved by Kunti with Indra, Dharma and Vayu to produce Yudhistir, Arjuna and Bhim respectively while the twins Nakul and Sahadev were born from Madri, Pandu's second wife by performing niyog with Ashwini twins.¹⁷ Thus, all these references proved that Indian mythology saw it as a way to protect or create a family in exceptional circumstances.

Rapid evolution in the field of medical science and reproductive technology has brought India to the front position among other countries of the world. Durga, the Indian baby was born on 3rd October 1978, just 67 days after the world's first test tube baby was born on 25 July 1978 at Oldham General Hospital in England.¹⁸ In this remarkable journey Dr. Mukhopadhyay was assisted by Professor Sunit Mukharji and Professor Saroj Kanti Bhattacharya, and they were working on this

¹⁶ Jayatri Gosh, "Satyavati: The Matriarch of the Mahabharata", in Madakranta Bose (ed.), *Faces of the Feminine in Ancient, Medieval, and Modern India* (Oxford: Oxford University Press, 1999), 44.

¹⁷ Supra note 14

¹⁸ Supra note 7, p.9

project at the Nil Ratan Sircar Medical College, Kolkata, West Bengal. In this case, Mr. P.K. Aggarwal, the father of Durga had suffering from infertility due to a low sperm counted. By using hormones Dr. Mukhopadhyay increased the number of ova collected and developed an embryo *in vitro* which he placed in the womb of the intended mother. But it is very unfortunate that such a marvelous achievement was not recognized at that time by the Government. It creates a very sadistic history in the field of innovation of modern reproductive technology. Dr. Mukhopadhyay was harassed by the Government of West Bengal and Government of India by constituting an expert committee and made him guilty for his claim on IVF that could fight against infertility.¹⁹ Actually the members of the constituent committee had never ever seen embryos in their lifetime yet they delivered their final report that his claim was false and counterfeited. Furthermore, he was not allowed to carry further work on IVF and was transferred away from Calcutta to the department of Ophthalmology, where he could not work on hormones.²⁰ He was also not allowed to share his achievements with the international scientific community. In spite of appreciation and recognition for such a revolutionary work; he had received enormous insult and criticism, which leads him to quit the world by committing suicide on 19 June 1981. Most importantly, scientific records maintained that 'Harsha' is the first test tube baby, who was born in Mumbai on 16 August 1986.²¹ The then Director of the Institute of Research in Reproduction (IRR), Dr. T.C. Anand Kumar and gynaecologist Dr. Indira Hinduja were credited

¹⁹ Ibid., p.10

²⁰ Ibid., p.11

²¹ Ibid.

for this achievement. But while in 1997, Dr. T.C. Anand Kumar participating in a Science Congress at Kolkata, all the research documents of Dr. Mukhopadhyay was handed over to him. And after gone through all those documents, Dr. T.C. Anand Kumar realized that the creator of India's first test tube baby is someone else. Later, in 2002, after 21 years of publication of his original works, Dr. T.C. Anand Kumar, acknowledged his contribution as a creator of India's first test tube baby and the International Scientist community has also accepted the great achievements.

Since then in India, the field of ART has grown up very fast and functioning as a best choice for infertile couples to fulfill their intrinsic desire. And Indian surrogacy has also been a popular option for international intended parents without any comprehensive legal framework. In India, the first gestational surrogacy took place in 1994 at Chennai.²² In 1997, the first commercial surrogacy was reported in India. A woman from Chandigarh agreed to carry a child for 50,000 rupees in order to obtain medical treatment of her paralyzed husband.²³ Further in 1999, an Indian newspaper reported the story of a village woman in Gujrat, who served as surrogate for a German couple.²⁴ In 2003, India has begun its surrogacy boom,

²² Geeta Padmanabhan, "Hope in the Test Tube", *The Hindu*, Jan. 19, 2006 in Aneesh V.Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Unpublished Thesis, Cochin University of Science and Technology)

²³ Sandhya Srinivasan, "Surrogacy Comes out of the Closet", *Sunday Times of India*, July 6, 1997, in Aneesh V.Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Unpublished Thesis, Cochin University of Science and Technology)

²⁴ Jyostna Agnihotri Gupta, "Towards Transnational Feminism: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies" in Aneesh V.Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Unpublished Thesis, Cochin University of Science and Technology)

while a U.K. based Indian couple, Aakash and Lata Nagla, had been suffering from infertility and Lata's parents approached Dr. Nayna H. Patel of Anand, Gujrat. As Lata Nagla suffered a rare genetic condition that causes the uterus to develop abnormally, however her eggs and ovaries functioned perfectly. So, through, IVF, Dr. Patel created embryos with Lata's egg and Aakash's sperm, and then transferred it to Lata's 44 years old mother. In January 2004, Lata's mother gave birth to her own grand-children, a twin boy and girl. It was Asia's first and World's fifth case of surrogate grandmother. But now it is under a process of introducing major reform to regulate commercial surrogacy.

2.2. International Scenario

It is fact that, surrogacy has become accepted as a common and fashionable solution for rising a family. However, the idea of surrogacy dates back to Biblical times. The first case of surrogacy can be found "The Book of Genesis" in the story of Sarah and Abraham, they were married but Sarah not able to conceive a child, so, Sarah asked her servant Hagar to be the mother of Abraham's child.²⁵ After that Abram had lived ten years in the land of Canaan with Sarah's maid, Hagar the Egyptian and she conceived. And gave birth a son namely Ishmale. This is a case of traditional surrogacy, where the surrogate contributes her own egg in the child she's carrying for intended parents.²⁶

²⁵ Payal Jha, "Surrogacy: The Concept of Renting a Womb" 4 *IJL* 223(2018)

²⁶ Ibid.

Another reference of surrogacy in the Bible comes from Jacob and his two wives, Rachel and Leah.²⁷ Rachel and Leah both are barren. So Rachel said to Jacob that Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her. And accordingly, Bilhah gave birth to two sons: Dan and Naphtali. While Rachel became mother of two children, Leah had left bearing, so she took Zipah, and gave her to Jacob as wife to bear children. She also gave birth to two sons: Gad and Asher. It reflects that surrogacy was recognized in early Jewish society as a legitimate way by which childless couples had children and shaped a family.

One more reference of surrogacy is Mosaic Law, which followed a type of marriage in which the brother of a deceased man is obliged to marry his brother's widow, and the widow is also obliged to marry her husband's brother.²⁸ Examples of it were impregnation of Ruth by Boaz, Judah and Tamar etc.

Surrogacy is next described in the history of Mesopotamia. The Hammurabi Code (1780) and Babylonian Law, codified laws of 18th century B.C. by King Hammurabi, includes explicit references to surrogates.²⁹ The code regulated and controlled the legal grounds of surrogacy, and was mainly used to advocate producing male offspring in Mesopotamia. It was also quite common in ancient Egypt; many pharaohs used their concubines to produce male heirs. However, the rights of children delivered by these maids were somewhat reduced though they

²⁷ Genesis 30:3

²⁸ Genesis 38

²⁹ Azure Hall, "The History of Surrogacy Dates Back Than You Might Think", available at <http://www.romper.com>the-history-> (accessed on October 9, 2018)

were treated as pharaoh's children. They could assume the throne only if there were no other nobler and more legitimate contenders.³⁰

Since then traditional surrogacy was the only way to get a child by the intended couple and very recently, due to rapid development of reproductive technology, gestational surrogacy come into existence.

In 1930, in U.S., pharmaceutical companies Schering-Kahlbaum and Parke-Davis started the mass production of estrogen.³¹

In 1944, Professor John Rock of Harvard Medical School broke ground by becoming the first person to fertilize human ovary outside the uterus.³²

The potential of IVF as a treatment for infertility was recognized as early as the 1950s by Prof. Robert Edwards, working at the National Institute for Medical Research in London, and had carried out his research in animal reproductive biology using the mouse model.³³ He was able to elucidate how human eggs mature, how different hormones regulated their maturation and at which point in time eggs were susceptible to fertilization.³⁴ In 1960, Edwards started to study human fertilization and in 1965, he succeeded in discoveries of the favorable atmosphere that intended the inactive and young egg cells in vitro and advanced their development. In 1968, he was able to achieve fertilization of human egg in

³⁰ Shamima Lasker, "Surrogacy" in Henk Tev Have (ed.), *Encyclopedia of Global Bioethics* 1-8 (Springer International Publishing, 2016)

³¹ Poonam Pariya, "Womb on Rent: Surrogacy Tourism in India- Ethical or Commercial" 2 *IJRRCEM* 195 (2015)

³² *Ibid.*, p. 196

³³ *Supra* note 7, p.12

³⁴ *Ibid.*, p.13

the laboratory and started to collaborate with Patrick Steptoe, a gynecological surgeon from Oldham.³⁵ Edwards developed human culture media to allow fertilization and early embryo culture, while Steptoe used laparoscopy to recover oocytes from patients with tubal infertility. This effort of them met significant hostility and opposition which resulting a denial of the Medical Research Council to support their research and numeral of lawsuits. In early 1970, Edwards and Steptoe relocated the IVF embryos back into intended mothers, which resulting in short-term pregnancies that ended in natural abortions in at least over a hundred attempts.³⁶

In 1976, the first successful pregnancy occurred but the embryo was implanted outside the uterine cavity and therefore the pregnancy had to be ended. Finally, on 25 July 1978, their hard work achieved success by the birth of a normal, healthy the world's first test-tube baby, Marie Louise Brown, at 11:47 pm at the Oldham General Hospital, after a full-term pregnancy through IVF of a human oocyte. For which Edwards had been awarded the 2010 Nobel Prize in Physiology or Medicine for the development of IVF.³⁷ Since then IVF meant a new way to help infertile couples to have a baby. Refinements in technology have increased pregnancy rates and it is estimated about 4 million children have been born by IVF in 2010, with approximately 170,000 coming from donated oocyte and embryos.³⁸

³⁵ Robert Edwards, available at <http://en.m.wikipedia.org/wiki/Robert> (accessed on September 16, 2017)

³⁶ Supra note 7, p.14

³⁷ The Nobel Prize in Physiology or Medicine- Press Release, available at <http://nobelprize.org> (accessed on September 15, 2017)

³⁸ Supra note 35

And this achievement paved the way for further innovations of various assisted reproductive technologies and most importantly towards gestational surrogacy. Some forms of ART are also used with regard to fertile couples also for genetic reasons. It is also used for couples who are discordant for certain communicable diseases to reduce the risk of infection when a pregnancy is desired.

Contemporarily, in 1971, the first commercial sperm bank opened in New York, which spurred the growth of this type of business into a highly profitable venture.³⁹

In America, in the late 1970 to early 1980 a Michigan lawyer named Noel Keane created the first surrogacy agency. He is generally recognized as the creator of legal idea of surrogate motherhood.

To know about the evolution of Surrogacy, how it reached the present position from the past, throughout the world, we have to consider some monumental milestones in relation to surrogacy arrangements. These are

a) First paid traditional surrogacy arrangement⁴⁰: In 1980, at America, 37 years old Elizabeth Kane created history by being the first paid surrogate mother traditionally and received \$10,000/- as remuneration for the successful delivery of the child. After, the birth of the child, Elizabeth Kane regretted her decision of being a surrogate mother and later on campaigned against surrogacy and wrote her experiences as a surrogate mother in a book titled, 'Birth Mother'.

³⁹ Supra note 31

⁴⁰ Supra note 7, p.16

b) First menopausal surrogacy via egg donation⁴¹: At Monash University, Australia in 1983, a menopausal woman was the first mother to give birth to a baby using donated eggs proving that surrogate pregnancy is possible even in menopausal women. This experience led to the ground breaking advent of surrogacy industry to the present stage.

c) First Gestational Surrogacy Arrangement⁴²: In 1985, a surrogate mother gave birth to a biological child of a hysterectomized woman who luckily had preserved her ovaries. This was the first gestational surrogate pregnancy.

d) Famous Baby M. Case⁴³: This is the most famous case of traditional surrogacy which creates a remarkable history in the journey of surrogacy. In this case, Bill Stern and Betsy Stern hired Mary Beth Whitehead to be their Surrogate in 1984 and agreed to pay \$10,000/- as cost for the surrogacy. Here, Mary Beth's eggs were used through the process of artificial insemination. Upon birth of her child Melissa, she wanted to keep the baby with her and that custody dispute sustain for two years. The decision of this battle played a key role in the development of the stricter surrogacy laws in the U.S. The New Jersey Supreme Court ruled that the surrogacy agreement between them was illegal and therefore, custody rights were granted to Bill Stern and Mary Beth receiving the rights of visitation. This case is considered as turning point in the history of surrogacy which leads the move towards use of gestational surrogacy.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Payal Jha, "Surrogacy: The Concept of Renting a Womb" 4 *IJL* 224(2018)

e) First surrogate pregnancy in Britain⁴⁴: In 1991, a 51 years old surrogate mother Edith Jones in Britain gave birth to a girl for her daughter as her daughter was born without a womb.

f) First oldest surrogate mother⁴⁵: In 2001, a grandmother, Vivien Morris at the age of 54 years, become first oldest surrogate mother in the world as her daughter could not have children of her own after a cancer operation.

g) First multiple births by surrogate mother⁴⁶: On April 26, 2005, quintuplet boys were born to 54 years old gestational surrogate mother Teresa Anderson who served to a couple she met online.

h) First oldest surrogate mother to twins⁴⁷: In August 2007, a 58 years old woman, Ann Stopler from America gave birth to her own twin granddaughters Itai and Maya. Her daughter, Caryn Chomsky, was unable to conceive due to cervical cancer.

i) First oldest surrogate mother to triplets⁴⁸: In 2008, 56 years old Jaci Dalenberg became the first oldest woman to give birth to triplets. She delivered her own grandchildren by becoming a gestational surrogate mother for her daughter, Kim.

⁴⁴ Supra note 7, p.16

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

j) First oldest surrogate mother in Japan⁴⁹: In 2008, a 61 years old surrogate mother in Japan gave birth to her own grandchild for her daughter who has hysterectomized due to cervical cancer and was therefore unable to conceive. But her eggs were able to use by the doctors.

In 2009, the Chinese government increased enforcement of the gestational surrogacy ban, and Chinese women began coming forth with complaints of forced abortions.⁵⁰

It is true that surrogate motherhood pass far throughout the entire existence of surrogacy from conventional surrogacy of past to gestational commercial surrogacy of present day. It also makes possible the dreams of parenthood to single parent, same-sex couples in the United States. Apart from these, one more thing come into existence in the history of surrogacy is International Surrogacy Arrangements. It is a global phenomenon where intended parents are coming from all over the world.

2.3. International Commercial Surrogacy Arrangement in India

International Commercial Surrogacy (ICS) arrangement is a surrogacy practice where a woman of one nation take the responsibility to carry and deliver a child in exchange of money for intended couple belongs to another nation. In this arrangement various parties such as commissioning parents, doctors, clinics, intermediaries (facilitators, agents, brokers), lawyers, donors, surrogate mothers

⁴⁹ Supra note 7, p.17

⁵⁰ Supra note 31

etc. works together to produced a desired child.⁵¹ The global surrogacy practice increased in last decade considering the responses to the demands of people in search of parenthood along with technological, demographic, legal and social developments has emerged in recent years. Advancement of medical science and human reproductive technology allows conception in new and different ways by breaking down the process to very elementary level of gestation and conception.⁵² And this has smooth the way for the development of surrogacy at the international level, as options are available for obtaining sperm, eggs, and a feasible womb from three different sources. The approach of all countries towards International commercial surrogacy is not uniform at all. Though, it is prohibitive and restrictive in a certain state, but the intended parents of the country always adopted a liberal approach toward applying the ART to get a genetically identical child. In such cases, the intended parents always want to go to the other country where surrogacy is legal or permitted. Sometime, it is seen that one ICS Arrangement may often involve more than two states.

The rise of reproductive tourism in India remarkably started in 2002; when the Confederation of Indian Industry (CII), a non-profit trade organization, and international management consultants McKinsey & Company published a study of

⁵¹ V.L.Singh, *Reproductive Bio crossing: Ethical and Legal Implications of a New Form of Global Consumerism through Surrogacy* (2019) (Unpublished Ph.D. thesis, Allahabad University)

⁵² DI. Spar, “The Baby Business: How Money, Science, And Politics drive the Commerce of Conception”, in SR Vidilicka, D Hratic *et. al*, “Bioethical And Legal Challenges Of Surrogate Motherhood In The Republic Of Croatia” 3 *JHR* (2012)..

India's potential for a medical tourism sector.⁵³ In 2003, India's finance minister, Jaswant Singh called for India to become 'a global health destination' and encouraged measures to facilitate a medical tourism industry including improvements in airport infrastructure.⁵⁴ In that regard, a new category of medical visa was introduced and allowed patients and family members to stay in the country for twelve (12) months instead of the normal six (6) months under a tourist visa.⁵⁵ Gradually, fertility tourism has created a valuable industry and the Indian Medical tourism market is valued at more than \$450 million in a year.⁵⁶ The USA, Eastern Europe and India are the major destinations, where a large variety of nations have been engaging for commissioning surrogacy. However, in many countries, ICS is an underground activity. ICS may be, motivated by a desire to have a family, to profit from the arrangement, to help others, or to earn an income, after all, it is common for individuals and businesses to work around laws or to break them to achieve a successful surrogacy. In terms of regulation, countries are accommodating, unregulated, or ban its practice entirely. Couples from countries regulating or banning surrogacy services move to less regulated countries; where

⁵³ Rupa Chinai & Rahul Goswami, Medical visa mark growth of Indian Medical Tourism, 85 BULL. OF WORLD HEALTH ORG. 161 (2007) in UR Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" CLR 23 (2008), available at [smerdon_08_cross_borders_1009.pdf](#). (accessed on June 6, 2018)

⁵⁴ Ibid.

⁵⁵ Shree Mulay & Emily Gibson, Marketing of Assisted Human Reproduction and the Indian State, 49 Development 84, 85 (2006) in UR Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" CLR 23 (2008), available at [smerdon_08_cross_borders_1009.pdf](#). (accessed on June 6, 2018)

⁵⁶ UR Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" in Aneesh V.Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Unpublished Thesis, Cochin University of Science and Technology)

they can access surrogacy without government interference while providing services. However, in 2013, by introducing restrictive legislation in India, surrogacy practiced in India for same sex couples relocated to Thailand, Cambodia, and Nepal. In Thailand, previously surrogacy practice was unregulated s, now banned surrogacy in response to international scandals. Because of the moral and ethical ambiguity surrounding surrogacy, many countries, including China, the Czech Republic, Denmark, France, Germany, Italy, Mexico, Saudi Arabia, Spain, Sweden, Switzerland, Taiwan, Turkey, and some United States have banned surrogacy altogether.⁵⁷ Some countries have imposed partial bans, for instance, Australia, Brazil, Hong Kong, Hungary, Israel, South Africa, and the United Kingdom.⁵⁸ Recently, Laos has become the Asian hotspot for unregulated ICS. The Ukraine and Russia remain popular European destinations, while Poland, Romania, Georgia, Dubai, Iran, and Lebanon are other emerging hotspots.⁵⁹

Despite many countries prohibitions or restrictions on surrogacy arrangement, the market for international surrogacy has grown to an estimated size of six billion dollars annually worldwide.⁶⁰ In India ART service providers, hospitals and clinics seems to be actively vying to become the most favored

⁵⁷ Amrita Pande, “The Power of Narratives” in S Dasgupta, SD Dasgupta, (editos.) *Globalization and Transnational Surrogacy in India*, 87-88 (Mayland, US: Lexington Press, 2014).

⁵⁸ Ibid.

⁵⁹ S. Saravanna, “Addressing global issues in Surrogacy” in P Fronek, “Current Prospective on the Ethics of Selling International Surrogacy Support Services”, available at <https://doi.org/10.2147/MB.S134090> (accessed on February 6, 2019)

⁶⁰ Seema Mahapatra, “A Race to the Bottom: The Need for International Regulation of the Rapidly Growing Global Surrogacy Market” in S Dasgupta, SD Dasgupta, (editos.) *Globalization and Transnational Surrogacy in India*, 147 (Mayland, US: Lexington Press, 2014).

destination for commercial surrogacy. India has come to be seen as one of the most popular international surrogacy hub, providing quality fertility services for low cost⁶¹ and most legal protection for intended parents.⁶² For instance, in the year 2008, the surrogacy business was reported to be worth USD 445 million in India, it is estimated to be over USD 20 billion in 2011.⁶³ Moreover Indian government provides tax breaks to hospitals treating international patients.⁶⁴ Additionally Indian women are considered more trustworthy because they are less likely to smoke, drink alcohol, or engage in drug due to cultural and religious norms.⁶⁵ Although there are no accurate figures for the individuals who travel to India for ARTs including surrogacy, however, it is estimated that the surrogacy business alone is worth \$445 million.⁶⁶ But it is not clear that whether international commercial surrogacy should be viewed as basic human rights for enabling procreation.⁶⁷ Surrogacy at the international level poses many troubling questions. Concerns over rising issues of stateless children born out of ICS, followed by other complex issues, such as commodification of women, mainly in developing

⁶¹ Scott Carney, “Inside India’s Rent a Womb Business”, available at <http://www.motherjones.com/politics/2010/04/surrogacy-tourism-india-nayna-patel> (accessed on February 21, 2019)

⁶² Joseph Chamie and Barry Mirkin, “Surrogacy: Human Rights or Reproductive Exploitation?” available at <http://www.yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation> (accessed on April 20, 2019)

⁶³ P Nayak, “The Three Ms Commercial Surrogacy in India: Mother, Money and Medical Market” in SDasgupta, SD Dasgupta, editors. *Globalization and Transnational Surrogacy in India 2* (Mayland, US: Lexington Press, 2014).

⁶⁴ Francoise Baylis and C Mcleods (eds.), *Transnational Commercial Contract Pregnancy in India*, 266 (Oxford University Press, London, 2014)

⁶⁵ Lindesy Coffey, “A Rights-Based Claim to surrogacy: Article-23 of the Convention on the Rights of Persons with Disabilities”, 20 Mich. St. U. Coll. L. Int’l L. Rev. 260 (2011-12)

⁶⁶ 228th Report of the Law Commission of India (2009)

⁶⁷ Ibid.

countries have arisen. Though, there is currently no comprehensive regulation on surrogacy, but there have been a number of high profile international cases in which children born through surrogacy have been suffering to various complex problems, such as immigration, citizenship, parenting, and parentage of the surrogate child. Unregulated cross-border surrogacy arrangements produce parentless and stateless children. Non-recognition of parent-child relationship causes serious consequences for the rights and welfare of the child, such as child's right to acquire a nationality. As result surrogacy has become the agenda of the Huge Conference of Private International Law, which is set to review whether and how international treaty structure put in place.

2.4. Single Parent Surrogacy in India

Not only in India, around the world there is a continuing rise of single parent families, constituted through modern assisted reproductive technologies. Single parent surrogacy is a medical necessity while a person is diagnosed with asexual genetic disorder. To deal with such medical problem IVF, Embryo Transfer, Gamete donors are the only and the last opportunity to have genetically related child. The single parent surrogacy in India gained popularity mainly through commissioning the single parent surrogacy by the Hindi film celebrities. Very recently in India, the first ever single parent surrogacy reported that in Mumbai on June 2016, Tusshar Kapoor (39) commissioned a surrogate baby boy named Lakshya Kapoor.⁶⁸ Toban Morrison (31)

⁶⁸ Available at <https://m.timesofindia.com> (June 28, 2016) (accessed on January 8, 2017)

single man from Canada had a male surrogate child named Orion on July 26, 2011 in Mumbai, India through donated sperm, anonymous egg donor.⁶⁹

Apart from these in the west also, in 2008 an international celebrity namely Ricky Martin, Latin American Singer commissioned for single father surrogacy by availing the gestational services of an anonymous surrogate mother, egg donor resulting in birth of surrogate male twins namely Matteo and Valentino.⁷⁰ In August 2015, an American Actress, Lucy Liu commissioned for single mother surrogacy and had a surrogate male child named Rockwell.⁷¹

The ART (Reg.) Bill 2010 allows the services of assisted reproductive technology to all persons including single persons, married couples and unmarried couples. But in contrary to that the ART (Reg.) Bill 2014 restricts the option of surrogacy and shall be available to only Indian heterosexually married infertile couples. And the Surrogacy (Reg.) Bill 2016, 2019 and the proposed Surrogacy (Reg.) Bill 2020 permits only heterosexually married Indian Couples, Indian-origin couples, who have sustained their marriage for 5 years to commission surrogacy.

⁶⁹ Cynthia Vukets, “Single man wanted a child, hired a surrogate, had a baby, the star, health & wellness”, Aug 12, 2011 in Progressive Legal & Judicial Developments on Single Parent Surrogacy in India and around the world available at <https://writingsonsurrogacy.wordpress.com/tag/surrogacy-india/html> (accessed on January 20, 2020)

⁷⁰ Fox News, Associated Press, “Ricky Martin Father of Twins Boys via Surrogate Mother” in Progressive Legal & Judicial Developments on Single Parent Surrogacy in India & around the World, June 3, 2017 in Progressive Legal & Judicial Developments on Single Parent Surrogacy in India and around the world available at <https://writingsonsurrogacy.wordpress.com/tag/surrogacy-india/html> (accessed on January 20, 2020)

⁷¹ Isabelle Khoo, “Celebrity Surrogate: Famous Parents Who Are Thankful for Their Surrogates Huffington Post Canada” in Progressive Legal & Judicial Developments on Single Parent Surrogacy in India & around the World, June 3, 2017 available at <https://writingsonsurrogacy.wordpress.com/tag/surrogacy-india/html> (accessed on January 20, 2020)

The Apex Court of the country also in the famous case of *Baby Manji Vs Union of India*⁷² acknowledges the fact that for certain individuals under typical medical condition, surrogacy is the only alternative available for parents who wish to have a genetically related child to them. The Supreme Court of India also mentioned that single parent, homosexual may also commission for surrogacy referred to both medical and non-medical reasons.⁷³ But now it is pertinent to mention and discuss the changing legal provisions permitting single parenting through adoption under the JJ Act 2015⁷⁴ while the proposed Surrogacy (Regulation) Bill 2020 is not permitted single parent surrogacy. The CARA is issuing guidelines for governing adoption of children under the Juvenile Justice Act 2015.

So to conclude the conflicts arising among legal provisions, it is necessary to resolve with favorable legislative policy changes and through judicious amendments in International level too. However, one of the most recent positive development with regard to legalizing single parent surrogacy is initiated by the world renowned WHO, which has proposed amendments to the current definition of ‘infertility’ to include ‘singles’ seek to give every person who desires a family, the right to have a child

⁷² AIR 2009 SC 84

⁷³ Para 11 of 228th Report of Law Commission of India

⁷⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, an Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.

regardless of whether they have health challenges that cause infertility or just do not have or want a partner to sire a child with.⁷⁵

The procreation is the personification of life of human beings from the time of its existence to till date. Every individual has the right to marry and found a family by begetting children. Nevertheless the aspiration to have offspring remains discontented due to infertility. Human productiveness is greatly appreciated and hence children are always acknowledged as resource of pleasure and societal safety and to maintain the continuity of family line. To overcome the problem of infertility, since time immemorial people have been adopting various methods for getting children and regarding this various well-known incidences are there in Hindu Mythology and in the Bible.

The concept of surrogate motherhood is not a result of a single day; it has travelled a long way in the history to reach the present position. Previously management for infertility was mainly based upon medications to correct human abnormalities or conducting surgery to adjust anatomical imperfections. These were mostly non-controversial in nature, from ethical and religious perspective. But due to advancement of ARTs, the process of procreation from natural, confidential, personal acts of husband and wife transformed to artificial manipulations in a laboratory. Likewise throughout the world, traditional surrogacy of past also changed to gestational commercial surrogacy, international commercial surrogacy, single parent surrogacy of today.

⁷⁵ Graham Kajilwa, "Why single men could get babies through surrogacy standard media" in Progressive Legal & Judicial Developments on Single Parent Surrogacy in India & around the World, June 3, 2017 available at <https://writingsonsurrogacy.wordpress.com/tag/surrogacy-india/html> (accessed on January 20, 2020)