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Chapter VII
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7.0 Surrogacy

There is nothing new about the basic idea of surrogate motherhood. It is even in the bible The sixteenth chapter of genesis tells the following story about Abraham and his wife Sarah, not given the new names they received from God after he makes his covenant with Abraham, and hence are referred by their original names of Abraham and Sarai, Abraham’s wife Sarai had bore him no children. She had an Egyptian slave girl whose name was Hagar and she said to Abraham ‘You see that the lord has not allowed me to bear a child. Take my slave girl; perhaps I shall have a family through her’ Abraham agreed to what his wife said, so Sarai, Abraham’s wife brought her slave – girl, Hagar the Egyptian, and gave her to her husband Abraham as a wife, he lay with Hagar and she conceived.

This practice is quite common among several African communities whereby a married woman who is unable to beget children of her own arranges for her husband to marry another woman, on whom she may personally pay the dowry, so that the latter could beget children with the formers husband and such children are considered as her (woman’s husband’s) children. This approach is practiced among the Igbo of Nigeria. Marriage in Nigeria is a very complex institution with a diverse variety of interesting variations varying from community to community. The variations described above were also practiced among the Nso of the Bamenda Highlands of Cameroon, some ‘Queen mothers’ such as famous ‘Yaa Wo Faa’ could marry other women who begot children (with any men of their own choice) and such children were considered as Yaa’s children. In this manner even today NSO’ people pass second degree princes and princess (won – wonntoh) when, in fact they have, no drop of royal blood in them. In many parts of South Africa, biological parenthood is downplayed in favor of social parenthood and marriage is considered as being more of a family lineage and community affair than a contract between individuals.

Surrogate motherhood - The surrogate perhaps is defined as the host or carrying mother. Here the couples who are anxious to have and raise the child are not directly connected with the birth, since the host mother carries and gives birth to the child. A surrogate mother is the woman who is pregnant with the child and intends to relinquish it after birth. The word surrogate, from Latin *subrōgare* (to substitute),
means appointed to act in the place of another. The intended parent(s) is the individual or couple who intends to rear the child after its birth. The biological and the genetic links between the three parties and the child can vary. At one extreme the social parents can also have very strong biological ties, and the host mother very limited ties. As where the wife’s oocyte, inseminated by husband’s semen is implanted into the host mother, at the very extreme the social parents may have no genetic or biological links with the child but the host mother’s link may be very strong or it could be her oocyte which is inseminated by the semen of a third party donor. Between these extremes, the link of the three parents may vary as for example, the more likely situation at present where the oocyte of the host mother is inseminated by the semen of the social father. In all these cases, the social mother does not give birth to the child.

Surrogacy or embryo transfer was first carried out in cows. The method used in early years was to stimulate the cows with hormones and then remove the eggs and inseminate the cows and then flush out the fertilized eggs. Now with improved techniques for developing, freezing and implanting embryos, the possibility of making the technique widely available have increased. In the latest development, scientists collect ova (immature eggs) from slaughtered cows, bring them to maturity in the laboratory, fertilize them and freeze them as seven day embryos. This has become a routine technique. The same technique is applied to women as well. The cycles of both women are made simultaneously by administering hormones. After artificial insemination or five days after natural fertilization, the embryo is flushed out before it had a chance to attach itself to the uterine wall and implanted in recipient woman (surrogate).

The medical procedure would be similar to that of embryo donation either after in vitro fertilization or after in vivo fertilization; but the intent of the participant’s would be different, since the embryo recipient will not be raising the child. The physical risks to the embryo will be the same as the risk as embryo donation. The risks to the genetic mother will be same as the risk of donation, but there is more justification for allowing her to subject herself to those risks since she is using the procedure to solve her infertility problem and obtain a child. The surrogate is subjecting herself to the full risk of implantation and subsequent pregnancy and childbirth without such a tangible benefit. In general, infertility services involving donor gametes (either sperm
or oocytes) have required the procedures to be performed with due consideration of confidentiality so that neither donor nor recipient can identify the receiving or donating the gamete. However, this confidentiality may not be relevant to the situation of surrogacy as gametes are not being transferred. Since pronuclear oocytes (i.e. fertilized eggs) or cleaving embryos are transferred in the procedures known as Prost, IVF-ET, or TEST, the surrogate woman does not contribute her own oocytes and therefore has no genetic attachment to the developing fetus. In simple context, her uterus provides a harbor for the embryo to implant and develop as fetus. Following delivery of the infant, it is proposed that the infertile, commissioning couple should undertake formal adoption contract, for which legislation exists in some countries. Prior to 1990, the only way by which prospective social parents – the ‘commissioning couple’ could achieve their aim through the medium of adoption. Therefore Adoption Act is significant for present purposes. It relates to the prohibition of commercialization within the process – effectively banning baby selling and the private placements of infants. Thus from very beginning, it is very clear, that there was real possibility that surrogate motherhood particularly that which involved some form of monetary transaction – was illegal.

7.1 Medical /Physical Reasons for Practice of Surrogacy

There are medical or physical reasons under which the genetic mother cannot become pregnant for e.g. severe hypertension, or uterine malformation. Under such circumstances a surrogate carrier may be asked to gestate a couple’s embryo and then turn the child over to the couple after birth. The concept of surrogacy may provide only the ‘therapeutic’ solution for the women with Absent Uterus; -- Congenital; 46XX, e.g. Rokitansky –Kuster – Hauser [RKH] syndrome; 46XY, e. g. testicular feminization syndrome, Acquired; Hysterectomy, e. g. For the increasingly common condition of invasive cervical cancer in younger women, Uterine Malfunction or Non receptive hypoplasia, atrophy, Asher man’s syndrome.

7.2 Socio Cultural Reasons for Practice of Surrogacy

In many cases it is seen or noted that infertile wife will agree to her husband’s artificial impregnation of another woman; however there are several explanations for her to agree -For few women, marriage and procreation of children is the ultimate goal in their lives.

1. It is socially structured for many women, “the only way for her to get affection is through the means of her children”
2. Fear of abandonment can be another motive for a woman agreeing to the insemination of a surrogate. In different cultures children are considered as a symbol of manhood.

3. Fear of social ostracism, emotional and economic abandonment does seem to have motivated women to accept surrogates in their private lives.

4. In some communities the husband has the right to remarry, either divorcing his wife or abandoning his wife.

5. The practice of 'surrogate mothers' may appear attractive to women who consider pregnancy to be inconvenient to them or could interfere with their careers.

7.3 Types of Surrogacy

**Straight method**

In traditional surrogacy (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others such as the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic. Sperm from the male partner of the 'commissioning couple' may be used, or alternatively, sperm from a sperm donor can be used. Donor sperm will, for example, be used if the 'commissioning couples' are both female and where the child is commissioned by a single woman.

**Full surrogacy** is when the surrogate mother becomes pregnant after egg donation.

**In gestational surrogacy** (the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is unrelated to the child (e.g. because the child was conceived using egg donation, sperm donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

**Altruistic surrogacy** is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses
related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

**Commercial surrogacy** is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by higher income infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This procedure is legal in several countries including in India where due to 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".

### 7.4 Surrogacy in India

30-year-old Nirmala from Chandigarh caused uproar when she announced her decision to bear a child for an infertile couple for Rs 50,000. By acting as a surrogate she hoped to raise money for the medical bills of her invalid husband, which was otherwise beyond her capacity, her monthly income being only Rs 700. Nirmala expected to conceive through sex with her employer. She openly admitted that she was doing it for money. According to infertility specialist, Dr Parikh, “the woman was using her resources – in this case her womb – to earn money for honorable cause." Nirmala was threatened with action under the Suppression of Immoral Traffic Act. Subsequently she filed a lawsuit seeking legal sanction for her action and threatened to commit *sati* if her husband died of lack of medical help. Surrogacy is still in its infancy in India. The case of Nirmala not only sparked off a controversy but initiated a long – due revision of ethical criteria in medical matters, which were revised after 17 years. A ‘statement of ethical considerations involved in Biomedical Research on Human Subjects’, or the ‘ICMR Code’ was drafted by the Central Ethical Committee on Human Research under the Chairmanship of the former Supreme Court Chief Justice M. N Venkatchalaiah.

The ethical guidelines now also encompass developments in the field of human genetics, organ transplant (including foetal tissue transplant) and assisted reproduction technology (ART) With regard to IVF –ET the ethical committee experts have agreed on the following points.

- Surrogate motherhood should be legal only when it is coupled with authorized
adoption.

- It should be ‘rebuttably presumed that a woman who carries the child and gives birth to its mother’.
- The intending parents should have a preferential right to adopt the child subject to six weeks post-partum delay for necessary maternal consent.
- Surrogate motherhood should be legal only on certified medical indication.
- Abortion under law on medical grounds should be an inviolate right of the surrogate mother and the adoptive parents have no claim over the amounts already paid in the surrogacy contract.

According to the Committee, a child born through ART is presumed to be ‘the legitimate child of the couple having been born within the wedlock, with the consent of both the spouses and with all the attendant rights of parentage, support and inheritance’. Further a ‘sperm or ovum donor should have no parental rights or duties in relation to the child and their anonymity should be protected’.

The Nirmala case is first in the series of incidences and legal battles that are likely to ensue once surrogacy and exchange/sale of eggs, embryos etc, become more common in India as in some parts of the Western world. Some infertility specialists are hesitant to do commercial surrogacy yet, although they do buy ova. Ova are being bought for Rs 5,000 a piece. The surrogate mothers are related to the couples in some or the other way. According to the doctor, the arrangements were assumed to be altruistic through money or property could have changed hands. Therefore the moral, ethical and social issues raised by ART are unresolved. The problems posed for parenthood, when the legal do not parent of a child born to a woman who is neither it genetic nor social mother have not been confronted in India. The issue of commercial surrogacy has not been debated in India and emerged only recently when a case was reported. Commercial surrogacy has been legal in India since 2002.

India is emerging as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients
between $10,000 and $28,000 for the complete package, including fertilization, the surrogate's fee, and delivery of the baby at a hospital. Including the costs of flight tickets, medical procedures and hotels, it comes to roughly a third of the price compared with going through the procedure in the UK. Surrogacy in India is of low cost and the laws are flexible.

Across India, the tale of baby Manjhi has made headlines and gripped the nation's attention. Born to a Japanese father and surrogate Indian mother, the two month old was caught in legal limbo. In a way, she has three mothers but none who will raise her, and she cannot return to Japan with her father due to complications of Indian law. The saga began when Japanese citizens Dr. Ikufumi and Yuki Yamada were unable to conceive a child of their own. They obtained an egg from an anonymous donor and then traveled to India to locate a surrogate mother. In November 2007, the fertilized embryo was implanted into Pritiben of Ahmedabad, and the Yamadas began the nine month wait for their child. The couple's dream of completing their happy family was dashed when Ikufumi and Yuki divorced just one month before Manjhi's birth. Apparently wanting a complete separation from her old life, Yuki took the additional step of disowning the newborn. Ikufumi experienced the jolt from the dissolution of his marriage, but looked forward to rebuilding his life in Japan with Manjhi. Unfortunately, he soon learned that the Indian legal system was unprepared to deal with his complicated situation. Quite simply, Indian laws have not kept pace with the recent trend of reproductive tourism. The law traditionally favors the mother over the father in a custody battle; in Manjhi's case, the courts have been unable to make a clear statement on who is to be deemed the baby's mother. The biological mother who donated her eggs remains anonymous, the intended mother has severed ties, and the surrogate mother's responsibility ended at childbirth. The second obstacle is that Indian law requires Ikufumi to adopt his own child because of the circumstances under which she was born, yet because he is a single father, the law has also rendered him ineligible. Without re-marrying, he cannot claim the child that he intended to raise with his former wife. To complicate matters even further, a Rajasthan-based NGO has stepped into the picture, claiming that Manjhi's status is that of an "abandoned child." Due to the child's uncertain legal status, and because the father is unable to become her lawful guardian, Ikufumi's efforts to take the baby to Tokyo fit the Indian profile of child trafficking. The Supreme Court has awarded
temporary custody of the infant to her 70-year old grandmother, Emiko. However, several issues still need to be sorted out, most importantly procuring travel documents for the baby. As the helpless father shuttles between Japan and India on a tourist visa to battle through the legal intricacies, the grandmother must struggle to survive daily life using only sign language to communicate. She only speaks Japanese. In 2008, the Supreme Court of India in the Maniji's case (Japanese Baby) has held that commercial surrogacy is permitted in India. That has again increased the international confidence in going in for surrogacy in India. The case has kicked off a public debate on surrogacy and related issues. First to appear under the spotlight was the fact that surrogacy is already an almost US$445 million business in India. (The Indian Council for Medical Research expects profits to reach $6 billion in the coming years). The country has become a leading service provider seemingly overnight; the past two years alone have seen a 150% rise in surrogacy cases in India. The reasons for the surrogacy boom in India are many. Most foreigners are drawn by the relative low cost. It is estimated that surrogacy costs just $12,000 in India compared to about $70,000 in the US. A 37-year old Russian came to Bhopal because she could limit her expenses to merely $4,500 as opposed to the prohibitive $35,000-45,000 in her own country. Easy availability of women for surrogacy in India is also a major attraction. Whereas laws in the US and UK do not allow the surrogate woman to charge the childless couple, in India there are no laws preventing her from accepting compensation for renting her womb. This legal framework encourages more women to serve as surrogates, especially those from socio-economically weak backgrounds. Newspapers and magazines have begun featuring numerous advertisements for 'young, healthy, good-looking lady from decent family for surrogate mother.' The success rate of such ads can be gauged from the fact that within 24 hours of such an advertisement in a leading Hindi daily in Indore, a dozen women came forward to provide their services. The city of Anand in Gujarat has emerged as a hub for surrogate mothers (Manji's case also traces back to Anand). Dr. Nayna Patel, Medical Director of the Akanksha Clinic in Anand is quoted in a report as receiving at least 40-50 requests per month from childless couples the world over. Dr. Dinesh and Dr. Shefali Jain, of the Assisted Reproductive Technology center in Indore, typically receive six domestic surrogacy queries per month. They report that a large number of foreign couples have begun coming to Bhopal and Indore to fulfill their desire to have a child. Similarly, several American, Russian and British women are
registered with Dr. Randhir Singh's Bhopal Test Tube Baby Centre for the procedure; the waiting list has already reached eight months.

Another luring factor for surrogacy tourism in India is the lack of restrictive laws. In fact, at the moment there is no law governing surrogacy in India. There is an upcoming Assisted Reproductive Technology Bill, of 126 pages pending in the parliament aiming to regulate the surrogacy business. The Indian Council of Medical Research (ICMR) issued National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) clinics in India in 2005, but the guidelines are legally non-binding. They are especially hazy on critical issues such as the rights of the surrogate, the minimum age of the surrogate, details about the contracts, informed consent, and adoption requirements. However, it is expected to increase the confidence in clinics by sorting out dubious practitioners, and in this way stimulates the practice. The issue of legal parentage has been particularly contentious, and for this reason surrogacy remains controversial in nations such as Japan. Other nations have already created clear guidelines: it is illegal in Italy and banned for commercial purposes in Australia, Spain and China while it is permitted with restrictions in the US, France and Germany. The Society of Obstetricians & Gynecologists in Japan is not in its favor, citing, in part, the possibility of custody battles. The scenario becomes more dismal due to the lack of regulation of ART clinics. Many clinics are believed to be operating networks of professional surrogates and making profits in recruiting their services. In the absence of legal regulations, victimization of both the surrogate and the intended parents can more easily occur. Of course, there are many ART clinics operating on Indian Council of Medical Research guidelines as well. In such places, the surrogate mother is made to sign a contract with the childless couple. But even then, counter legal experts, it is not clear whether such a contract has any legal sanctity, hence it is necessary to enact surrogacy laws. This opinion was vociferously aired by speaker after speaker at a recent National Moot Court competition organized by Rizvi Law College in Mumbai.

The Union Health Minister, Mr. Anbumani Ramadoss, also recognizes the need of the hour. In an interview with livemint.com, the minister is quoted as saying, "In the light of the recent controversy (involving a Japanese couple and an Indian surrogate mother), I think it's time we had a law on surrogacy. It's become more than sporadic and is lending itself to commercial exploitation like the kidney (transplant). In two
months, we’ll put up a draft regulation on our website for public viewing and debate, and then take it to the law ministry.” For surrogates and childless couples alike, such regulation could not arrive too soon. Although the custody battle in Manjhi’s case arose due to a much unexpected turn of events, the Yamada family’s tragic struggle reveals many holes that remain to be addressed by the Indian legal system. As countless more childless couples make their way to India for less expensive procedures, they should be aware that ignorance of this legal culture could exact a high price. For Ikufumi Yamada, the decision to create his own family using an Indian surrogate mother was one that changed his life forever.ii

The basic rights of surrogate arrangements for consideration are –

- It must allow for changes of hearts on either side.
- If the surrogate is ill then it must be considered along with the abnormalities in the resultant child and other imponderables, some of which, such as abortion within the terms of the Abortion Act, 1967.
- The surrogate may be single or married.
- The couple and the surrogate should be counseled from time to time.
- The natural father under critical circumstances may require the surrogate to undergo amniocentesis test.

The issues for consideration are –

- Can the surrogate sue the father for damages arising from pregnancy?
- If the couple divorces before the baby is born, who is responsible for the baby?
- Is the child considered to be illegitimate?
- Can the sperm donor deny the breeder an abortion?
- What will happen if the couple dies before the child is born.
- If a breeder is being paid for bearing a child does she have control over the child in the wake of missed payments?

The legal dilemmas are —

- What happens if proxy mother gives birth to defective child and the couple refuses to adopt the child?
- How can the husband be sure he is indeed the father of his ‘investment’, short of isolating the surrogate from other male contacts?
- The paid surrogate may be exploitative of the woman concerned in that amount of money offered may overcome the normal expected refusal to submit to such
an erroneous invasion of their private lives.  

- It may be against public policy to permit the transfer of money in respect of the use of the woman's body in particular her womb.  
- The surrogate may violate the principles of maternal responsibility.  
- It entails the use of children as means rather than regarding them as ends in themselves.  
- It may potentially cause distress to children who are witness of the process.  

These concerns should be tackled carefully while drafting legislation on surrogacy arrangements in India so that the interests of the three parties are protected i.e. the commissioning parents, the surrogate and the resultant child.

### 7.5 Surrogacy Contracts under the American Law

The practice of Surrogacy is common in United States. It is also true that cases come to public notice only when there is conflict. The conflicts between the surrogates and the commissioning parents have been resolved by the American Courts.

**Re Baby M 525 A 2d 1128 (NJ 1987)**

In this case the surrogate had agreed to a fee of $10,000/- refused to relinquish her child, and in fact, absconded with it contrary to a court order.

The Trial Court Judge held that a valid contract had been made and broken, and on the other hand, the state's interest in the welfare of its children dictated that the child be adopted by commissioning couple. The Supreme Court of New Jersey overturned this decision. The surrogacy contract was found to be against public policy and as such, invalid, both the termination of mother's parental rights and the adoption order were voided. The Supreme Court could find nothing in law against voluntary, non commercial surrogacy, provided that the arrangement did not include any clause binding on the surrogate to surrender her baby. The court was able to dissociate the contractual aspects of surrogacy and the 'best interests' of the child and followed the lower court in awarding custody to commissioning parents.

**Johnson V/s Calvert 851 P 2d 776 (Cal, 1993)**

The surrogate was paid $10,000 to carry the embryo of commissioning couple. After gestating for six months she changed her mind as to handing over the child and the court was then asked to decide on its parentage. The Trial Court held that surrogate contract was legal and enforceable and the commissioning couples were child's genetic, biological and natural parents, no parental right attached to the surrogate.
appeal the Supreme Court of California upheld that it was the intention of the parties at the time when making the arrangement which decided the issue when there were conflicting grounds on which it was possible to establish parentage. In this case the surrogate had done no more than 'facilitate' procreation of the commissioning couple’s child. The court stated that surrogacy contract did not violate existing public policy as to adoption, any payments in the forereach was effectively made for services rendered, and not as compensation for transfer of parental rights. This opinion has been severely criticized as fundamentally misunderstanding the biological realities of surrogate’s contribution.

The socio legal concerns are –

A. The judgment delivered by different courts merely state the facts that surrogacy contracts are controversial and at times justice may not be rightly delivered.

B. The rights of all four parties are disputed, the right of the surrogate, the commissioning parents and the child who obviously has to accept the decision of the Court.

*Re Marriage of Monchesta.*

In this case the parents of one year old child born by standard surrogacy, separated, and the surrogate then claimed legal parentage. The Court of Appeal, was able to distinguish the case from Johnson because there was no conflict as to maternity – the surrogate was both genetic and gestational mother.


The Michigan Court of Appeals has held that such provision bans payments to surrogate mothers.

*Surrogate Parenting Associate, Inc V. Kentucky, and 704 SW 2d 209 (Ky. 1986)*

In the case of a surrogate carrier, rather than a surrogate mother, it can be argued that both the genetic mother and the genetic father who wish to adopt the child have an existing natural relationship with the child and thus should not be viewed as baby buyers and if they need to pay a surrogate carrier to gestate their child.

The Kentucky Supreme Court held that the surrogate arrangement did not fall within the public policy. There is ban on the sale of babies given under surrogacy but if the biological father who paid a surrogate could not be characterized as buying his own child. The Court stressed that the father had natural and legal relationship with the child. Surrogacy arrangements are available in the U.S.A.
The Infertility Center of New York declared the 300th surrogate baby delivered by arrangements within their clinics. These have been achieved by artificial insemination of the surrogate woman by semen from the commissioning couple. It is estimated that 800 surrogacy cases have been arranged in North America to the end of 1988.

7.6 Noel Keane Propagator and Advocate of Surrogacy Contracts

Attorney Noel Keane is generally recognized as the creator of the legal idea of 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 criticized 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 firm, also attempted to have such laws passed in California, but his attempts were struck down in the State Congress. Presently, the idea of surrogate motherhood has gained some societal acceptance and laws protecting the contractual arrangements exist in eight states. In the United States, the issue of surrogacy was widely publicized in the case of Baby M, in which the surrogate and biological mother of Melissa Stern ("Baby M"), born in 1986, refused to cede custody of Melissa to the couple with whom she had made the surrogacy agreement. The courts of New Jersey eventually awarded custody to Melissa's biological father William Stern and his wife Elizabeth Stern, rather than to the surrogate Mary Beth Whitehead.

Noel Keane, the American lawyer who helped Stefan and Nadia arrange their partial surrogacy contract, has written a book ‘The Surrogate Mother’ describing his work in this new field. Keane credits himself with the path breaking legal work that has made partial surrogacy a reality for many infertile couples. According to him surrogacy arrangements in future will replace adoption. In the book itself, Keane says ‘this is my legal brief on behalf of a controversial cause to make surrogate motherhood a common reality in the years ahead’. Given his advocacy for the cause, some sections of The Surrogate Mother are alarming. The most dramatic story is of Bill and Bridget. It began in 1977.

The cases are –

**Bill and Bridget**

Diane soon became pregnant with Bill’s child. Then things began to go wrong. She
asked Bill and Bridget for money to travel to Boston to visit her mother. They sent her the money. She said that she had been robbed of expense money they had sent her. They sent her another cheque. Then her car needed repairs, she had extra medical expenses and so on. Often when she phoned asking for money, she sounded drunk or stoned on drugs. Sometimes she threatened to kill herself unless she got more money. Bill and Bridget did not dare call her bluff. Shortly, before the baby was due, Diane demanded $3,000 to pay for computer course she planned to take. Bill and Bridget paid. In all they calculated that they sent Diane more than $12,000. Finally two weeks before the due date, Diane phoned to say that she was in jail on a drunk-driving charge, and needed bail money. Bill and Bridget flew to Tennessee to stay with Diane and try to prevent anything else going wrong before she had the baby. That is when they found that Diane’s roommate ‘Vicky’ was really her lover. They found out the woman who was expecting their child was a drug addict, alcoholic and also a lesbian to their despair. Amazingly, the story had a happy ending. Diane gave birth to a boy normal weight and suffering from drug withdrawal symptoms; but after five days in hospital Bill Jr, was healthy enough to go home with his father and his new mother. Diane tried for some time to extract more money by threatening to hold up the adoption proceeding; but when this threat failed to have any effect, she moved interstate without leaving any forwarding address. At that time Keane described the child as ‘in legal limbo’, but Bill and Bridget were happy with their child and they told Keane; He made it all worthwhile.

Two another bizarre cases of Keane stories ended less happily.

**John and Lorelei case.**

John and Lorelei married Connecticut couple unable to have children. Lorelei was transsexual. Until the age of twenty-one, she had been a male. For Keane this was no obstacle. He took the couple as on his clients. They found Rita, a divorced Californian mother of three who said she was interested in being a surrogate mother ‘for humanitarian reasons.’ Rita became pregnant, and then asked for $7500. Keane advised John and Lorelei that they would be breaking the law if they paid, in any case they could not afford to pay. They refused. Rita wrote back; ‘I have decided to keep my baby, and the deal is off.’ The baby was a boy; born in April 1981 Keane brought a custody suit on behalf of John. Blood tests showed with 99% probability.

Before the case came to the Court, however it became apparent that Lorelei’s transsexualism would come out into open and probably damage their already slim chances.
of success. In a vain attempt to avoid publicity, John and Lorelei decided to give the legal battle for custody.

**Alexander and Nadia Malhoff case.**

Late in 1981 Judy Striver, a Michigan housewife, noticed an advertisement in local newspaper. It was one regularly placed by Keane, and it sought women willing to become surrogate mother for a fee.

Judy and her husband Ray, had a two year old daughter, and going through a pregnancy again seemed a good way to earn for some extra cash and pay off their bills. Through Keane, Judy Striver met Alexander and Nadia Malhoff, of New York. She agreed to be impregnated with Alexander Malhoff’s sperm and to abstain from sexual intercourse until the baby was conceived. In return, Malhoff agreed to take the baby and pay Mrs. Striver $10,000. All went well until the baby was born, when it was discovered that he suffered from microcephaly, a condition in which the head is abnormally small, and the child often turns out to be mentally retarded. At first the child was not expected to live; when it became apparent that it would, Malhoff claimed that the baby’s blood tests showed that he could not have been the father. Accordingly he refused to accept the baby, and pay Judy Striver the agreed fee. At first the Strivers also refused to accept the baby, saying that they had come to accept that the baby would be taken from Mrs. Striver, and they did not want another child. When further court ordered blood tests confirmed that Alexander Malhoff was not the father, however the Strivers finally agreed to keep the baby.⁴

Social concerns are:

- There is concern that a woman might be coerced into serving as a surrogate carrier for a fee despite of risk.
- Given a choice between poverty and exploitation many people may prefer the latter.
- Similarly, a sister or a close friend might be coerced because of her personal relationship with the genetic mother.
- Yet doctor can diminish that possibility by interviewing the potential carrier carefully to see that she is participating in the program voluntarily.
- The risk of coercion due to financial incentives or personal relationships can be lessened by counseling of potential carriers and would attempt to obtain informed consent.
- There is concern that surrogate carrier might be psychologically harmed by her participation in the process and by trauma of relinquishing her child.
- Research by psychiatrist Philip Parker has found that the surrogate mother go through a period of grief and mourning after giving the child. (Psychiatric News 1984.). The strong societal discomfort with the notion of surrogacy is evidenced not only through public surveys showing that it ranks as a less appropriate reproductive option than adoption, artificial insemination, embryo donation or IVF (Andrews, 1984) but also the stance various groups have taken against it.

Commercial surrogacy is the most developed in the U.S.A (although it is illegal in some states) also because contract law is more developed there than in Europe. In 1988, 23 agencies were operating in Europe (Klien1989), many of them were branches of agency founded by lawyer Noel Keane who leads a network of commercial surrogacy agencies in the U.S, who recruits women mainly through newspaper advertisements, tried to establish an administrative office in Frankfurt, Germany in 1987, to allow West German to hire women as surrogates. His attempts were foiled by national and international women’s group who mobilized on this issue. At present the internet is being used for this trade. Commercial surrogacy has not taken on in the Netherlands or India yet. In the Netherlands, the government and the political parties in parliament are in agreement that surrogacy in general, and particularly commercial surrogacy should not be encouraged. Since bringing it under criminal law would be difficult to implement in practice, what is criminal is publicity and brokerage and commercialization of these services. However, non commercial surrogacy as a social practice is accepted.

Only isolated instances have been reported in other countries

The Baby Cotton case was publicized in UK in 1985; in which a High Court granted an adoption order to a commissioning couple with the surrogate mother’s consent.

In Australia, one commercial surrogacy arrangement was reported in popular press (New Idea, May 21, 1983.) following which advertisement issuing for the purpose was made illegal in the State of Victoria by the Infertility Medical Procedure Act, 1984. In April 1988, the first Australian case of IVF, surrogacy involving a 35 year old woman acting as surrogate mother for her sister was reported from Melbourne, Victoria in the media. The issue of surrogacy has divided professional for considering the clinical, legal, and moral issues.
7.7 Surrogacy Contract under the Australian Law

There is a default legal assumption in most countries that the woman giving birth to a child is that child's legal mother. In some jurisdictions the possibility of surrogacy has been allowed and the intended parents may be recognized as the legal parents from birth. Many states now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate from the start. In others the possibility of surrogacy is either not recognized (all contracts specifying different legal parents are void), or is prohibited. In all states in Australia, the surrogate mother is deemed by the law to be the legal mother of the child as well, and any surrogacy agreement giving custody to others is void. In addition in many states arranging commercial surrogacy is a criminal offence, although the Northern Territory has no legislation governing surrogacy at all. In 2006 Australian senator Stephen Conroy and his wife Paula Benson announced that they had arranged for a child to be born through egg donation and gestational surrogacy. Unusually, Conroy was put on the birth certificate as the father of the child. Usually couples who make surrogacy arrangements in Australia must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married. After the announcement, Conroy's home state of Victoria announced that they were reconsidering the Victorian laws that make surrogacy within the state almost impossible. In 2009 Queensland Premier Anna Bligh told State Parliament that the Government would overhaul laws to make altruistic surrogacy legal based on recent recommendations. Commercial surrogacy would continue to be illegal.

7.8 Surrogacy Contract under the English Law

Commercial surrogacy arrangements are illegal in the United Kingdom. Whilst it is illegal in the UK to pay more than expenses for a surrogacy, the relationship can be recognized under S 30 of the Human fertilization and Embryology Act 1990 under which a court may make parental orders similar to adoption orders. How this came about is one of those occasions when an ordinary person can change the law. Derek Forrest was a family solicitor in a Preston law firm who was approached by a couple facing proceedings by their local authority. The wife had no womb but did have ova which could be fertilized by her husband's sperm. This they did and a surrogate gave birth to their child. When they took the child home to their Cambrian address the
local authority insisted that they should go through the procedure for registering as foster parents for their child even though genetically it was their own child. It was quickly realized that there was no defense to these proceedings and the only possibility was to adopt their own child. Derek Forrest wrote to The Times setting out the predicament his clients found themselves in and elicited a lot of favorable response. Then chance took a hand because the barrister acting for the parents knew the Member of Parliament who represented the parents. It just so happened that the Human Fertilization and Embryology Bill was going through Parliament at the time and the Barrister spoke to the MP to see what could be done. The MP then got things moving and got law drafted and passed as an amendment through parliament. The result was that the couple was the first to obtain parental orders under the new Act.

The HFEA also allows surrogacy to be initiated in licensed clinics subject to a similar medical restriction. However at times surrogate arrangements depend upon the vagaries of the court and some formulas must be evolved for the commissioning couple to receive the child. In United Kingdom, for the surrogate it is clear, is legal mother whether or it is the product of her own ovum and if she is married and conception was via consensual donor insemination, her husband is its father (1990 Act s. 27 and s. 28); moreover neither can surrender their parental duties. Adoption could provide the solution, but the procedure is often tedious and the issue of an adoption order certainly cannot be guaranteed. S. 30 of 1990 Act now offers an alternative by which the court may make an parental order provided for a child carried by a surrogate to be treated in law as the child of the commissioning couple, provided that the gametes of one or both are involved and that they are married and have attained the age of 18 years. This is subject to the consent of the surrogate, and where applicable, the father of the child, including the man who is the father of the child – by virtue of the 1990 Act (s. 28) if they can be found.

Moreover, the agreement of the woman who carried the child is ineffective if made within six months of the birth and the child must be living with the commissioning couple. Applications are heard in private and a guardian ad litem is appointed to watch over the child’s interests. It is a stipulation that no money, other than reasonable expenses, has been given to the surrogate other than authorized by the court. The question of consent to a parental order leads to consideration of the validity of any contract made between commissioning couple and the surrogate and to
the final current jigsaw of statutory control over surrogacy in the United Kingdom. The Surrogacy Arrangements Act of 1985 has been enacted for prohibiting the making of surrogacy arrangement on commercial basis. The principals involved are excused from commercial liability.

S.2 (2); moreover payments made or to or for the benefit of the surrogate are not regarded as being made on a commercial basis

S.2 (3); No doubt it removes the financially motivated entrepreneur from the scene and at the same time, is at pain to exclude any suggestion of a criminal ancestry for the resulting children. But it does not involve non-commercial agencies. By contrast it appears to preclude the involvement of a remunerated professional lawyer in the making of surrogacy arrangement; there is nothing in the enactment to prevent principals from drawing up an understanding but it seems it must be an amateur affair. The doctor, who merely assists in a pre-arranged surrogacy, however commits no offence, even if he or she is paid for the service. The British Medical Association, while still regarding surrogacy as a reproductive option of last resort ‘in cases where it is impossible or highly undesirable for medical reasons for the intended mother to carry a child herself’ has recognized the widespread acceptance of surrogacy and has softened its attitude to medical participation in the procedure.

Section 36 of the 1990 Act inserts 1A into the Surrogacy Arrangements Act 1985, by virtue of which no surrogacy arrangement is enforceable by or any or the persons making it. Undoubtedly it is the nature of the contract which poses the greatest complications of surrogate motherhood. Nonetheless, commercial surrogacy is not illegal in the United Kingdom and, is therefore a practice which is fundamentally against public policy. The celebrated American, (Baby M) case was based very largely on law of contract. The development of judicial attitudes can be traced through a brief review on well-known cases.

The judicial pronouncements on surrogacy contracts are –

* A v/s C (1985) 8 Fam. Law 170

Unmarried couple arranged for a prostitute’s friend to be inseminated on the understanding that the resultant child was returned to them; a fee of £ 3000 was involved. The mother changed her mind and the father applied for access; this was granted in the child’s best interest.

Nevertheless, on appeal the judge described the agreement as ‘pernicious and void’ and the father as being a ‘constant remainder of the whole sordid story’; the Court of
Appeal unanimously reversed the decision and decreed that A should not be allowed to see his son.

*Re P (Minors) 1987 2 FLR 421*

In this instance the surrogate declined to hand over the twins she had conceived by a married professional man. The children were made wards of the court and were allowed to stay with their natural mother; the court action was essentially a matter of custody. By the time the case came to be heard, the twins had been with their natural mother for five months and the judge was strongly influenced by the degree of maternal bonding that had already arisen. Accordingly he found nothing to outweigh the advantages to these children of preserving the link to the mother to whom they are bonded and who had exercised a satisfactory degree of maternal care the natural mother sought a maintenance order. Once again it should be noted that there was no criticism of either the commissioning parents or of the surrogate for having entered into a surrogacy agreement. The British cases indicate that the public, as represented by its judiciary, are sympathetic to surrogate motherhood — an attitude which probably derives from the fait accompli nature of the proceedings than from any basic empathy with the practice.

Accordingly, it is very unlikely parental orders will be withheld in the event of application by the commissioning parents and consent on the part of the surrogate and the legal father — if there is one. However, the court may over ride the agreements between the parties and may consider the ‘best interests’ of the child and accordingly the court may dispose off the matter. Neither the Warnock Committee nor the resultant legislation has distinguished between partial and full surrogacy. The aspect of ‘womb leasing’ draws special attention — that is, the use of intra — familial surrogates. In this type of surrogacy family relations are seriously disturbed and it also opens door to emotional coercion. This practice should however be made illegal.

At present, the IVF associated surrogacy lies within the framework of the Human Fertilization and Embryology Act. 1990, standard surrogacy does not do so unless it involves artificial insemination that is provided as public service. other than in form of AIH or AIP, That being so, Donor Insemination in the context of surrogacy only if performed privately or under cover of licensed clinic, as best not best encouraged by HEFA. This leaves an unsatisfactory dichotomy, the solution of which is central to the repute of the process. Many people agree with the minority of the Warnock Committee that it should remain available as treatment option and it must be
controlled. Against this background the Brazier Review Team was set up in 1997, intending to ensure that the law continued to meet public concerns.

The recommendations of the Brazier Committee's Report are –

1. Payments to surrogate mothers should cover only genuine expenses associated with pregnancy and that additional payments should be prohibited in order to prevent surrogacy arrangements being entered into for financial benefit; reasonable expenses should be defined by the Ministers.

2. The agencies to oversee surrogacy arrangements should be established and registered by Health Departments which would be required to operate within a Code of Practice, an advisory code would be drawn up to provide guidance for the registered agencies and also for those acting in private capacity.

3. Current legislation dealing with surrogacy should be repealed and replaced by a consolidated surrogacy Act which addressed the whole subject rather than specific aspects. In this aspect it has been recommended that surrogacy arrangements should remain unenforceable, that the ban on commercial agencies and advertising should remain in force and that the prohibition should include the operation of unregistered agencies and advertising should remain in force, and that the prohibition should include the operation of unregistered agencies.

7.9 Surrogacy Contracts under the Scottish Law

The Children Act 1975, s 85(2) provides that 'a person cannot surrender or transfer to another any parental right or duty he has as respects a child'. Any agreement then, short of adoption to transfer rights and duties is ineffective. Simply for social parents to assume de facto parental rights over a child because they put themselves in 'locus parentis' to that child, will not vest such right and duties in them. This view would be consistent with the law of adoption which provides that it is criminal offence for any persons to pay or receive money to persuade another person to consent to the adoption of their child (Adoption ACT 1976, S 57)

However there is another way in which the child may be put into the couple's care. The husband as father of the child cannot argue that the responsibilities are being transferred to him simply because he is the father. The parental rights and duties of an illegitimate child, (proxy child), are by law vested entirely in the mother to the exclusion of the father (Children Act 1975, s 85 (7) the natural father has no
automatic entitlement to legal custody or access. However, the father does not have statutory right to apply to the Court (Guardianship of Minors Act, 1971, S. 9 (1) for legal custody of the child or access to him. It is provided that the court may make such order if it thinks fit having regard to the welfare of the child as the first and paramount consideration under the (Guardianship of Minors Act 1971, S. 1), it is possible that Court might consider it best to give custody to the father. Although the contract between the parties would have no force in itself it would be a factor which the judge could take into account in exercising his discretion, and so his decision could be on indirect recognition of the contract itself.

In Scotland no provision is made for the guardianship of an illegitimate child, except by court order. Thus, unlike England, not even the mother is recognized as the guardian. However, the mother of the illegitimate child has an absolute right to custody of the child, subject to control by the courts. Where the parties disagree, further problems arise. The hostess may change her mind and for good reason, or bad, seek an abortion. It is difficult for the social parents to prevent her from doing so.

*Paton v. B. P. A. S. (1979). Q B 276*

The courts have decided that in ordinary marriage husband has no legal right to stop his wife from seeking an abortion, one justification being that this is not the kind of matter which should be restrained by the court order. Even after the child is born there can be a change of mind about the destiny of the child. The couple may refuse to accept the child, perhaps because it has a handicap and does not appeal to them. Alternatively the host mother may decide to retain the child. In either case any attempt to rely upon the contract will be met by robust old-fashioned approach Contracts for sexual intercourse are contrary to public policy and this might be regarded as of similar ilk; as happened in this reported case.

*In Re C Minor (1978)*

A professional man and woman with whom he was living were unable to have children. They found a prostitute who was willing to bear the man's child by AID for pound 300. When the child was born the prostitute refused to give it up. The couple who were married by now, could not persuade the woman to hand over the child, despite of offering additional inducements of car, and in desperation their house. The father brought wardship proceedings unsuccefully and the court refused to recognize the validity of the contract, declaring it to be pernicious and against public
policy thus describing the father and his wife as ‘most selfish and irresponsible’.
In spite of the unenforceability of the contract the natural father has sufficient
standing to apply to the Court in connection with the child’s welfare and so, in
appropriate cases may be awarded custody. He also has responsibilities and the host
mother would be able to apply to the court for financial provision under such
legislation as the Affiliation Proceedings Act or the Guardianship of Minors Act
1971.
In Scotland, financial Orders for ailment are made under the Illegitimate Children
(Scotland Act) 1930. A possible variation of surrogacy parenthood can take place
where the genetic link is with the wife, whose oocyte is transferred to the host
mother, No court has yet decided whether the mother of such a child for legal
purposes is the oocyte donor (the biological or the genetic mother) or the host (who
gave birth to the child). It has been argued, as with AID, that the law would hold that
the mother was the woman who provided the oocyte. If that were so then, she would
have the legal rights and duties with regard to the child, if it were illegitimate and for
e.g. - Where her oocyte was fertilized by her husband before transfer of the embryo to
the hostess mother, the married couple would have parental rights and duties because
the child would then be regarded as legitimate. The courts would regard the woman
who gives birth to the child as the legal mother. In that case, if the husband was the
father, the same problems would arise as discussed earlier. Similar problems arise in
reverse situation where a surrogate or host mother is inseminated by husband’s
sperm, and shortly after implantation the embryo is ‘washed out’ of the surrogate’s
womb and transferred to the wife. Reports of pregnancies have appeared in
California. Here the female genetic link is with the surrogate, but there are biological
links with the both the husband and wife. Where the childless couples have no
generic link with the child, their legal claims against the host mother to have child are
remote. The contract would be unenforceable; The Children Act provides that the
parental rights and duties cannot be surrendered or transferred and it is possible that it
is criminal offence to receive money in attempt to do so. The legal situation is
complex, unclear unsatisfactory. A decision should be taken, as to contracts for
surrogate parenthood should be legally permissible or prohibited.
7.10 Surrogacy under the Dutch Laws
Commercial surrogacy is not legal in the Netherlands, but it is not explicitly banned
either. This is for ethical and practical reasons. The government has taken a realistic
stand on this issue. In practice people do enter into surrogacy arrangements but these arrangements do not have legal sanction. If the surrogate mother decides to keep the child, there is no way she can be legally forced to give to the commissioning parents. The interest of the child is paramount. As long as the risks to the child are not clear surrogacy should not be encouraged.

Dooyeweerd (1985) who conducted study for the (FIOM -- A consultancy agency concerned with problems related to pregnancy and single parenthood) concluded that surrogate motherhood gives rise to more problem than infertility, creating complicated human relationships between the surrogate mother, adoptive parents and the child. The Health Council has advised that surrogacy should be allowed on medical indications, but this has not been adopted in legislation. In the Netherlands a surrogacy contract would be in violation of Article 11 of the Constitution which guarantees the inviolability of the human body. This has its origin in the politics around unwed motherhood. In the 1890s feminists started a political campaign to demand a maintenance duty on men who had fathered so-called illegitimate children. Using the language of nature and blood relationships they advanced the claim that ‘everybody is responsible for their own offspring’. According to a law passed in 1947, it is automatically assumed that an unwed mother has family ties with her child; this was a change to law since 1837 when an unwed mother had to legally acknowledge her child. (Zipper and Sevenhuijsen 1987)

The Dutch Civil Code enshrined in the Bergerlijk Wetboek of 1838 was patterned on the French Civil Code introduced in The Netherlands under Napoleonic rule around 1800. In the 1950s there was a stream of thought which argued that too much significance should not be attached the biological relationship; between a mother and a child. An unmarried mother should have to give up her child for adoption as it was considered better for a child to be raised by a childless couple even when there is no blood relationship. In the interest of the child, adoption became possible for married couples for the first time in 1956. (Holtrust 1985).

‘Mater simper certa est, id est quem nuptiae demonstrant’

According to Current Dutch law, the woman who gives birth to the child is the mother of the child; only if the child is given for adoption can the adoptive parents become the legal parents of the child. Thus, the only way surrogacy is possible is through adoption. The Courts decide whether adoption is in the interest of the child or not. Only a married couple or people in long heterosexual relation can adopt a child.
Individuals living in other associations – lesbians and homosexual men – cannot adopt, although changes in law to allow them to do so are under consideration. Adoption procedures are every lengthy. Also there is an age limit to decide on how old a woman can be if she is allowed to adopt. Many women decide to adopt after several years of inability to conceive and many more years are spent in trying out infertility treatments which may not yield the desired results.

In April 1995, a single woman already looking after a child for several years was allowed by the courts to adopt it. A change in the law which became effective on 1 October 1998 allowed single parents and same sex couples to adopt a child in exceptional cases. Commercial surrogacy does not fit in within prevailing ideology of motherhood. Cases of altruistic surrogacy, for instance women bearing a child of her sister after IVF, are often reported in women’s magazines. It is considered respectable when no money changes hands and the child is borne for a close relative or a friend. In this case the woman who bears a child for another has to be released from guardianship of the child. This can only be done if jurors find her incapable of performing the function of a parent / guardian or in special cases, where the woman is not willing to raise her child and express the desire to leave that responsibility to someone else. Several jurors have expressed having a problem with declaring the natural mother as incapable of bringing up a child. They argue for a change in a law for adoption after surrogacy. Attempts to set up surrogacy agency in The Netherlands by American Businessmen Noel Keane and Bill Handel and Kim Cotton have not succeeded. According to advertisements in English and Dutch newspapers, Bill Handel (handel means trade in Dutch.), an American advocate and business charges 100,000 – 120,000 Dutch guilders for a baby through a surrogate mother.

From this 25,000 guilders are paid to the surrogate, 50,000 guilders cover medical and legal costs and he claims 20,000 guilders for his company, the biggest in the world in this field, which arranges the ‘rent a womb facility’ ‘I am not doing for money, he says, but because I want to see happy families.’ Handel has since set up an agency called, “The center for Surrogate Parenting and Egg Donation in California” which have a website to bring together egg donors / surrogates and couples desiring a child. Kim Cotton a British surrogate mother runs an organization called ‘Cots Childlessness Overcome through Surrogacy’ which she claims does not work from a profit motive She also tried to set up agency in Amsterdam to bring together infertile couples and women wanting to act as surrogates. According to television report,
young women from Poland are being recruited to act as surrogates for infertile Dutch
couples. They are brought to The Netherlands ostensibly as *au pair* and then used to
act as surrogates. In 1997 the case of Dutch couple who has contracted a British
surrogate hit the headlines Sonja and Clemens Peters had been trying for 10 years to
have a baby. Sonja had six miscarriages when the came in contact with Karin Roche
through Cots who agreed to act as surrogate for them for a payment for pound 12,
000. However, during pregnancy problems arose between the couple and the
surrogate. In the twelfth week of pregnancy, Roche told them that she would have an
abortion. In the meantime she tried to sell the (still to be born) to another couple also
for the same amount (pound 12,000). As news of this broke, Karin Roche decided to
keep the baby for them. The Peters filed a lawsuit against the Roche’s. Apparently,
they had a little chance of winning the case.

7.11 Surrogacy Laws in Israel

In March 1996, the Israeli government legalized 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. A state-appointed committee permits
surrogacy arrangements to be filed only by Israeli citizens who share the same
religion. Surrogates must be single, widowed or divorced and only infertile
heterosexual couples are allowed to hire surrogates. The numerous restrictions on
surrogacy under Israeli law have prompted some intended parents to turn to
surrogates outside of the country. Some turn to India because of its low costs. Others
use US surrogates where an added bonus is an automatic U.S. citizenship for the
newborn.

7.12 Surrogacy Laws in France, Georgia, Canada, Japan, Belgium and Saudi
Arabia

In France, since 1994, surrogacy, commercial or not is considered as unlawful and
sanctioned by the law (art 16-7 du code civil).

**Georgia** - Since 1997 ovum and sperm donation and surrogacy is legal in Georgia.
According to the law a donor or surrogate mother has no parental rights over the child
born. In Georgia the compensation of the surrogate mother does not exceed EUR
9000 during the pregnancy period and after the birth of a child (post-natal
rehabilitation period). The major part of the surrogate mother's compensation shall be paid after the seventeenth week of pregnancy and in the post-natal rehabilitation period. Commercial surrogacy arrangements were prohibited in 2004 by the Assisted Human Reproduction Act in Canada. Altruistic surrogacy remains legal.

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. Commercial surrogacy is legal in Belgium, but illegal in the Netherlands.

Religious authorities in Saudi Arabia do not allow the use of surrogate mothers. They have instead suggested medical procedures to restore female fertility and ability to deliver. To this end, Saudi authorities sanctioned the world's first uterus transplant in an infertile woman. Since 2002, surrogacy is legal in Ukraine. According to the law a donor or a surrogate mother has no parental rights over the child born and the child born is legally the child of the prospective parents.

7.13 Socio Legal Concerns

7.13(i). Surrogate mother viewed as vessel for man’s seed

In surrogate motherhood, the woman is seen as the vessel for a man’s seed just as she was as under Aristotelian Thomistic biology. According to Aristotle, woman merely supplied matter which the active male principle formed and molded into a human being. Men played the major role in reproduction while woman served as passive incubator of his seed. In 1980s it was revealed that Joseph Orbie, a single 30 year old man, was looking for a surrogate mother who would bear him a son. He planned to hire a sex pre determination researcher who would attempt to remove the X sperm from his semen and inseminate the breeder with the remaining Y sperm. At present producing sons for men is the prime function of women. Now through technology it is easy for men to employ her for this purpose with minimal human involvement. Women can serve as mere vessels for the incubation of men’s sons though they supply the eggs and nurture the babies within their bodies, their connection to the child is not acknowledged. They are to disappear after child’s birth, leaving the man as his parent. The surrogate mother is viewed as a vessel for the man’s seed is evident from the language constantly used to describe her. The women are referred to as inanimate objects – incubators receptacles a “kind of hatchery”, rented property,
References to women’s body as property are very common. It is often asserted “that the person benefiting from the surrogate mother’s gift” is the infertile wife, not the husband. But it is the reverse. The overriding ethic is that the man’s issue may be reproduced in the world.

7.13(ii) Children being treated as commodities

In a market transaction there must be goods or commodity for which there is demand, there must be a seller who wishes to sell, a buyer who is willing to pay a [monetary] consideration for the good, and very often there is middleman broker or agent. The framework of the transaction is governed by a written contract, which is legally enforceable, and the tacit understanding is that each party acts in a manner aimed at protecting his own rights and best interests within this framework. The issue before us is to specify the respects in which a surrogate arrangement treats children as commodities and why such treatment is socially and legally objectionable.

7.13(iii) Parallel arrangements between Surrogate Arrangements and Market Transactions

At, there are clear parallel arrangements between a surrogate arrangements and a market transaction. The intending parents are the buyers because they are willing to pay for the commodities like eggs, parental rights, child and 9 months service, the egg donor and the surrogate mother the sellers, while the doctor[s] and surrogate agency are brokers, they hire women screen them and inseminate the chosen ones, and are responsible for facilitating the contract. A surrogate arrangement corresponds exactly to the exactly to the formal requirements of buying and selling commodities in market.

7.13(iv). Screening and Interviewing Surrogates

Second, the purpose of screening and interviewing the surrogate is akin to clients specifying the kind of product they want and the industry responds with the ‘customized product’, or what in marketing is called ‘product differentiation’. Surrogate agencies allow intending parents to specify characteristics like height, color looks, I,Q, religion, race in the hope that some of these traits would pass on to the offspring. Just as there are designer products aimed at satisfying selected customer needs there are designer babies aimed at satisfying the needs of the foster parents.

7.13(v). Transfer of Rights

According to the market norms, the seller transfers or relinquishes his rights and interests over the commodity in his possession in favor of the buyer for market
consideration. The only relevant issues in the contract are the rights of the two parties — surrogate mother and the couple. Parental rights are equivalent to property rights and they are made disposable and transferable against payment. None of the contacting parties owe the child a right to have its best interest determined — parental trust. In order to see this more clearly, suppose it is in the child’s best interest to remain with the gestational mother, under the contract there seems no way of giving effect to the right. The right cannot be enforced because the father has an enforceable right in the contract that renders any such right null and void. The father has ‘paid’ surrogate for relinquishing her parental rights. There is no question of deciding which party is in better position to promote the best interest of the child anymore than a manufacturing industry has to decide to look after the ‘interests’ of its commodities or which customer can best protect the interest of its commodities. For these reasons surrogate contracts replaces and disregards parental norms with respect to rights and custody of the child with the market norms, in particular the priority accorded to monetary relationship over parental relationship. What is morally objectionable about such treatment, for that matter children are not objects to be bought and sold? Why do we find slavery abhorrent or why do we object to prostitution. What is ethically wrong with human trafficking? All involve exchange of money for humans. Respect are mode of evaluation, which is distinct and contrary to monetary consideration. Humans are to be values in terms of their rationality, moral agency, autonomy and beneficence. According to Immanuel Kant they (humans) have inherent moral worth hence they deserve to be treated with respect. Commodities are generally valued with money; they have extrinsic or instrumental value, hence the question of respect does not arise. If the terms and conditions in a surrogate contract are governed by market norms in general and specifically by the wishes and desires of the couples, which in turn is acquired through monetary consideration, it leads to co modification of the child which is morally objectionable. Proliferation of surrogate arrangements have given rise to the BPO industry — Baby producing and outsourcing industry.

7.13(vi). Commodification of Women’s Labor
The surrogate arrangement also commodifies women’s labor. The child is vulnerable to being treated as commodity in that the contract ignores specifying obligations of concerned parties to do. The surrogate is not in the same position as she is aware of rights and duties, she voluntarily agrees to the terms and conditions and she signs the
contract only after having legal counsel in the matter. In short it is justified to state that the surrogate is fully aware of the contract before she is signing and her autonomy is fully safeguarded and respected. The above justification for surrogate arrangement uncritically assumes co modification of one's own body voluntarily by consenting to it. But this is a mistaken argument. The following aspects must be taken into account

- Why voluntary consent and co modification are not exclusive,
- How exactly does a woman's labor get co modified?

For e.g. --- Slave owners cannot justify slavery on the grounds that they do not treat their slaves disrespectfully, allow them some freedom and they have consented to be slaves by consent. People involved in human trafficking cannot justify their deed by arguing that those trafficked are given adequate respect, or they had voluntarily and legally consented to be treated that way. Therefore slave owners and traffickers are not legally justified because there are inherent moral objections in the contract itself. The same reason applies to surrogacy contract. The intending parents extract a written commitment from the surrogate mother of the relinquishment of her parental rights over the child, in favor of them, she is liable to be exploited and commodified, notwithstanding the fact that she has voluntary consented.

The co modification occurs in the following manner ----

The surrogate mother is reminded and counseled at regular sessions during her pregnancy to emotionally disengage from the child for fear that she may develop a parental relationship with the child rather than a relationship of contract laborer, which it ought to be. Similarly the contract stipulates that she should try to psychologically and emotionally sever herself from the child, thus denying the reality of the trauma the mother will go through after separation. The counseling sessions and contract seeks to alienate the surrogate's nine months labor from the emotional relationship that naturally develops between the mother and the child. The market norm becomes clearly visible. In a market producer is not attached to the product he produces for sale, he has no qualms about separating goods he owns. The surrogate contract similarly undertakes to manipulate the surrogate mother's emotions not to develop any parental attachment towards the child and more importance is given to monetary factor and not the maternal factor. And despite the fact that she agrees to emotionally estrange herself from her child she is naturally going to fail. The contract
commodifies the ‘surrogates’ labor by requiring her to repress her parental love she naturally feels for the baby denying the reality of such emotional bond between the mother and the child. The contract has an inherent disregard and insensitivity towards the gestational mother by expecting her to transform her nine months labor of emotional relationship into economic one with the same willingness and detachment as a trader does when he parts with his goods.

7.13(vii). **Inalienable rights are transferred as inalienable property**

Some rights in a person are basically essential for maintaining his dignity and autonomy, that they must be held inalienable. In other words these rights are inalienable and cannot be traded off as alienable property. The right to autonomy is an inalienable right that cannot, without contradiction be turned into an alienable property. And this is precisely what surrogate contract seeks to achieve. The surrogate mother is counseled into exercising her autonomy to relinquish her autonomy over the child. Her autonomy over the child is her parental love and affection which she has acquired by carrying the child for nine months. This is inalienable right and cannot be traded off through a contract as alienable property. To do this is inherently morally objectionable. Significant numbers of people oppose surrogate motherhood even for couples who otherwise cannot have children. Some think it as unnatural and for that reason wrong. The crucial question is whether the procedure is likely to do more good than harm. The opponents of surrogacy point out horrendous legal tangles that could arise with full surrogacy. Some of these tangles have already arisen in partial surrogacy arrangements made so far.

7.13(viii). **Proxy Baby Schemes**: have captured considerable media attention in the US and increasing attention in other countries. At the non professional level there have been cases where a husband and wife have advertised in the newspaper for a ‘carrier’ a healthy woman willing to be artificially inseminated with the husband’s semen and to carry and bear a child a child for them. If the advertisement is answered the parties meet, negotiate terms, and within a year the carrier may produce a child for a married couple. Such individual initiatives, however have now been overtaken in the US clinics especially established to arrange for host mothers to arrange babies for childless couples sometimes referred as ‘womb leasing.’ Such practices are increasing and in the past year it has been reported that the American enterprises are being imported into Britain and in one case the figure pound 16 thousand has been mentioned as the cost to a couple seeking a proxy child. It is important that the legal
responses to such developments should be based upon rational grounds; it is easy to form an instinctive and emotional hostility towards such procedures and to condemn them as undesirable practices. If the host mother enters into such arrangements primarily for money then it can be argued that she is exploited by the arrangement – the ‘prostitution’ of motherhood.’ However, those who favor these procedures support them with reasonable arguments.

The arguments are -

It could be beneficial, socially and personally to provide childless couples with children genetically linked to one of them. Provided that the host mother is a healthy adult and she should have the right to make a fee, voluntary and informed decision. The contract or arrangements is not one to sell but rather to bear a child and the ultimate result is significantly different from that of adoption so that with appropriate safeguards, there should be, no rational objections to it. People should follow the present judicial line which makes such contracts civilly unenforceable. Whether the contracts are or are not enforceable, it should be open for an application to be made to the court to enable it to exercise a broad discretion with Surrogacy contracts. –

The forms of contract drawn up in USA at some of these centers for surrogate parenthood demonstrate on paper at least the care that has been taken to protect the interest of all parties. Because the legal validity of such contracts is yet uncertain, even in U.S, there is often acknowledgement that the rights and liabilities of the parties ‘may or may not be honored in a Court of Law should a breach arise ‘ but the rights and liabilities are set out to assist the court in establishing the intention of the parties. The general terms of the contract provide that the couple pay a fee to the clinic which includes a sum for the host mother and all her reasonable expenses. When the baby is delivered, the semen donor agrees to become legally responsible for its care and support

The contract specifies terms and conditions which are as good as anything available at the AID clinics; the couple are informed of the physical characteristics (race, height, weight, age, etc) and the psychological evaluation of the host mother, but it is agreed that they must have no contact. All parties agree to receive counseling and the host mother undertakes to refrain from doing anything which might affect the safety and well being of the baby (use of illegal drugs, excessive alcohol sexual promiscuity and so on ) and she is monitored and cared for medically throughout the pregnancy. She also agrees not to have an abortion save for clearly accepted reasons. Breach of
contract by either side, for example -- the host mother refusing to hand over the child, or the couple refusing to pay or to take custody of the child at birth, exposes them to liability in damages. To demonstrate that no pressure or undue pressure is placed upon the host mother, the clinic mother ensures that she is able to obtain (at the cost of couple) advice and review of the contract by an independent lawyer. Contracts of the kind are subject to judicial scrutiny. The contract itself seems to be of doubtful validity. Even when the host mother wishes to comply with the agreement or contract to give the child to the couple, there are a number of statutory provisions which suggest that this is not legally permissible.

The validity and enforceability of surrogate contracts are thereby challenged

1. The policies that justify criminal law regulation of trading in children are inapplicable to surrogate parenthood contract.
2. These contracts involve personal and private matters between the parties and it is not for law to seek to interfere with them but this view cannot be accepted because the life and the welfare of the child are involved.
3. The welfare of the child being the paramount consideration. Those who contemplate upon embarking upon formal or informal surrogate parenthood should also be prepared to accept that a court has an over-riding duty to approve or make satisfactory arrangements for the child, where appropriate to clarify his status.


Surrogacy reinforces traditional ideas regarding the family and the ideology of motherhood. Through Assisted Reproductive Techniques, motherhood is reduced to its biological dimensions alone. The social construction and social meaning of motherhood is not addressed. Non biological and social mothering in the form of adoption, co-parenting, fosters parenting or community care of children – other choices besides having one's own biological children are ruled out. Social attitudes to infertility and mothering and the way in which childless women are perceived in society play important role in the demand of these technologies. Although voluntary childlessness is more accepted nowadays in the west, women are generally assumed to desire motherhood. But this biological instinct is considered legitimate only for women only who are either married or living in a long standing relationship. Those women who do not fit into this traditional nuclear family model are considered unfit. Eligibility for IVF is one side of the coin, contraception being the other; who should or who should not be allowed to bear children. (CROWE 1990) considers how IVF, a
medical scientific technique introduced for the treatment of infertility—‘makes it possible for its practitioners to become the arbiters of its values and standards relating to women’s reproduction and motherhood.’ Adopting admittance criteria which are not only medical but also to screen prospective IVF patients demonstrate that it is not only a medical practitioners, but other bodies such as hospital ethical committees etc which take decisions on hospital policies, and the state by way of legislation which takes the decision. Another remarkable development is the rise of the surrogacy industry which has created new complex problems. The nature of motherhood has changed with the buying and selling of the babies. The market is reshaping social relations, although it may make use of non-biological ties. Sperm donor unrelated to the family, ova donor surrogate mother. A child may have five parents. – a sperm donor, an egg donor, a surrogate mother and two social parents leading to the creation of rights and counter rights. The famous Baby M case – in which Mary Beth Whitehead contracted to act as a surrogate and bear a child for the Sterns which she later decided to keep. However, the Court ruled in favor of the Sterns. This is good illustrations of these dilemmas. To acknowledge the surrogate Mary B. Whitehead’s maternal tie with Baby M would reinforce patriarchal constructions of womanhood with motherhood being its primary role and coercing upon women the very biological essentialism that justifies traditional female roles, the sexual division of labor. Some argued that to put the bond between the mother and the child on the level of contract law denied the personhood of women, contributing to their dehumanization. The surrogate mother should have the right to change her mind if she so wishes, whereas contracting parents should be bound to accept, even if the child is handicapped or unacceptable for whatever other reason. In this case it became a class question - the well off and educated Sterns would be able to provide the child with a better future than the lower middle class Mary B Whitehead.

7.15 Economic Exploitation of Women

There is further exploitation of working class - only economically weak women are likely to act as surrogates for the economically well off, thus increasing the gap between the ‘haves and have nots’. Surrogacy reinforces the image of women as traditional ‘home workers’- the society not concerned with the social position of pregnant workers, who cannot make a career of it. Surrogacy might be yet another ‘cottage industry’. Women in financial need, having their own children, are likely to be excellent recruits as their circumstances would guarantee the surrender of the
child, which in its greed for maximization of profits has to do away with the integrity of the individual and is named as the “supermarket of reproductive alternatives” as a whole person is reduced to saleable and disposable parts. The right to choose is reduced to a right to consume. To her, this so called liberal feminist position is perversion of everything the ideology of women’s liberalization stands for. This liberalism will lead to more state intervention and control in reproductive processes; even it is to prevent excesses of the market. The benefits of surrogacy are only personal and the practice does not advance women’s strategic gender interest. The marketing of wombs, or the marketing of reproductive capacity, undermines the support for feminist claims. Surrogacy agreements inevitably involve structural class inequalities between the parents who ‘order the child and the mother who bears it. Under capitalism, new freedom (here the freedom to rent one’s womb) can also lead to new forms of exploitation of working class and poor women. Surrogacy is exploitative, alienated labor, exploitative women as breeder women. This has become in surrogacy contracts particularly in America – a consumer society its ultimate form. The woman is paid not for the service but for the ‘product’ which has to be of good quality. Contracting parents require the birth of ‘healthy baby. There is social and psychological selection of woman to determine if she is a fit person. Also there is erroneous control over the daily life of surrogate mother. Once she is pregnant for a commissioning party, she is made to undergo frequent medical check ups and prenatal diagnosis for genetic screening of the embryo, as the ‘product ‘she is supposed to deliver must be perfect. In case if there is something wrong with the fetus, the commissioning couple would decide if she should have an abortion. If, the baby were born dead, she would get only a minimal amount, not full payment, because she would have not delivered the goods. Some feminist draw a parallel between surrogacy and prostitution. There are two models in which women’s reproductive capacities are controlled, ‘the farming model and the brothel model.’ The act of men buying women for sex bears a striking resemblance to men buying women’s reproductive services in surrogacy. Surrogate brokers are reproductive pimps. Poor women can be exploited in this way to earn a livelihood. A surrogate contract is not simply an individual arrangement between a woman and supposedly desperate couple – it is the procurement of women for breeding. It is a system in which women are movable property, objects of exchange, brokered by go betweens mainly serving the buyer. Surrogate mothers are victims of commercialization and
exploitation. Surrogate contracts have created a national traffic in women and could have become international traffic, had not attempts to do so been foiled by feminists. Commercial surrogates like prostitutes will have to organize their rights for better working conditions to be laid down in contracts.

IVF is a form of patriarchal exploitation of woman’s body and women who undergo this treatment as victims of medical power. Surrogacy challenges the bourgeois and patriarchal notions of ‘good parenting’ and ‘motherhood’. Technologically assisted surrogacy is also using IVF deliberately to assist a normally fertile and healthy woman to conceive a child born from the egg of a sister or a friend and to relinquish the child to the egg donor. Some may do it for truly altruistic reason – women are praised for self sacrificing nature --- others may be physically financially coerced to bear a child for a sister or a friend. Non commercial surrogacy remains a grey area; if a surrogate is not paid, it is generally not seen as an ethical problem. There is separate counseling for women to rule out particularly hidden forms of coercion. Advocates of technologically assisted surrogacy have three major faults in their arguments. They assume that power dynamics do not operate within families, that a woman is less connected to a child not from her own egg and that genetics are the determiner of all relationships. The legal rule *mater semper certa est.* (who the mother is always certain) is called into question between egg donor woman, carrying woman and social mother. By privileging the rights of the woman whose eggs are used or men whose sperm are used over the rights of the woman who carries the pregnancy to term, medicine is redefining motherhood/parenthood.

7.16. Post Menopausal Women and Motherhood

Cases of babies of brain dead mothers have been noted in U.S. Brain dead women have been kept alive on life support systems until the fetus they are carrying is mature enough to be delivered by caesarean section. In medical terms this is referred to as post mortem ventilation (PMV). In 1992, there was a big controversy in Germany when doctors at the University clinic in Erlanger tried to keep an 18 year old woman who had died in a traffic accident artificially alive in order to save her 15-week-old fetus so that the doctors could bring it to term and deliver it by caesarean section. However the operation could not be carried out to the end as the fetus did not survive. These incidents prove that treated as ‘foetal environment’ or ‘maternal environment’ or reduced to wombs by privileging the rights of husbands, partners love over those
of women in acquiescing to their requests. The integrity of women’s body is not considered. The image of the seed and the field in Indian philosophy thinking on the subject corresponds to that of the medical scientist who view woman as the receptacle or the incubator of life that may be largely determined by others. This is particularly true in surrogacy. And not only in life, but even in death, women are seen as ‘givers’. Elisabetta is the most famous baby in Italy. She was born after two years after the death of her mother who was undergoing an IVF programme. Four embryos were frozen to be planted in the biological mother who was undergoing an IVF programme when she suddenly died. Her husband got her sister to act as surrogate.

However, in the market of reproductive alternatives, women are not only seller of services; they themselves put pressure on doctors with their demands. In France, 21 year old, Corrine Parapalix went to courts as she wanted to be inseminated with the frozen sperm of her 24 year old friend Alain who had died of cancer. A similar case was reported in Leiden, The Netherlands as well. Diane Blood, a 33 year old British widow won the right to use the frozen sperm of her husband who has died in 1995, after a long legal battle. Earlier the court ruled that she could not get access to her husband’s sperm as he had not given permission for its use. Later, however, the court ruled they could not forbid its use as his sperm was already frozen without his permission. Diane Blood exported the sperm to Belgium where she underwent AID and is expected to have given birth to her dead husband’s child in early in 1999. Researchers in Scotland delivered baby mice using the ovaries of aborted mice fetuses, a process they think could be replicated in humans. This gives rise to the prospect of creating babies whose genetic mothers have never even been born.

**7.17 Post Human Motherhood Fatherhood**

A child is a joy at any age,’ announced the cover of the journal, Human Reproduction. Is child for a woman past her menopause a joy or a toy asks Guido de Wert in his contribution in the Forum page of a Dutch daily commenting on the news about a 63 – year old Italian woman, Rosanna Dalla Corte, who became pregnant after receiving donated egg, fertilized through IVF and implanted in her? The couples had lost their son in an accident and were not found eligible for adoption because of their age. Their Italian gynecologist Severino Antinori also helped a 59 year old British woman who gave birth to twins using donated eggs implanted in her uterus. Antinori already had helped a dozen of 50 and 60 year old women in his clinic in Rome, claims that pregnancy for these women is not necessarily more dangerous
than it for women between 30 and 40, and thinks it is cruel to forbid such women from having children only because of their advanced age. Most debates on late motherhood take place within the liberal human rights discourse of the right of every woman to her own biological child, and the right of people to make their own reproductive decisions without interference from the State legislating in terms of imposing restrictions on who may or who may not be eligible for IVF. Some consider it sexist that there should be an age limit for women in this regard and not for men. Dr Jansen (professor of medical ethics at Erasmus University, Rotterdam a prominent gynecologist) does not favor medical technology being used in this way to achieve equality between the sexes. In his opinion government should devise regulations which have to be followed by the practitioners and medical ethical committees should have the role of watch dogs.vi Altruistic motives may sometimes play a part – to give the gift of child, of family life, to someone who cannot conceive naturally. Altruistic motives may sometimes play a part – to give the gift of child, of family life, to someone who cannot conceive naturally. 48 year old South African Pat Anthony became known world wide as surrogate grandmother, when she gave birth to triplets in a Johannesburg clinic on 1st October 1987 conceived from her daughter’s eggs and son in laws sperm. Pat had a baby for her daughter through IVF –ET and made history four times – as the oldest surrogate, the first surrogate to have triplets, the first woman to give birth to her own grandchildren and the first woman to have triplets from another woman’s egg. Her daughter had a hysterectomy when she nearly died while giving birth to her first and only child, a son three years earlier. (The Australian, 1987; McIntosh, 1987).

Another case of history being created with ‘gestational surrogacy’ was when a woman gave birth to twins – two babies born of embryos of two different couples. One woman from whose egg was taken a heart patient and other had no uterus, therefore they chose surrogacy. Significant number of people opposes surrogate motherhood even for couples who otherwise cannot have children. The opponents point out the legal tangles which have relatively arisen in partial surrogacy. Although partial surrogacy differs in some respect from full surrogacy.

7.18. Self Determination and Autonomy

While the contraceptive pill is said have ushered in the first sexual revolution, technologies used for assisted reproduction are said to be responsible for the second revolution. If the woman can use the pill to postpone pregnancy, why should it be a
problem if she has her embryos frozen to be implanted in her at a time more convenient to her? How far does the right of self determination regarding one’s body go? The capacity to reproduce can be turned into earning money. The ‘Baby M’ case brought out the dilemmas inherent in the language of control which made it difficult to come out with the ‘feminist’ response. Problems with the tenet a ‘woman’s right to control her body’ arose. Some feminist see this as a part of the pro-choice expansion of the right of self determination over their own body; they believe that women can use these technologies to their own advantage. They accuse feminists who oppose technological reproduction of portraying women as helpless victims who are not capable of making decisions in their own interest, and accuse them of undermining women’s rights. According to Lorry B Andrews, surrogacy was a natural outgrowth of women’s movement. It is women’s right to rent her womb. USA Project on Reproductive laws exemplifies this approach. The whole discourse uses the terminology of reproductive alternatives as ‘reproductive options’ reproductive choice’ ‘reproductive autonomy’ and ‘reproductive rights’. She basis this free choice on the constitutional right to privacy, the State has no business to interfere in individual’s reproductive choice; the constitutional underpinnings for reproductive choice regarding abortion and contraception also protect autonomy in the use of artificial insemination, embryo donation, surrogacy and so forth (Andrews 1987). Other scholars use the language of rights initially used by feminists to defend abortion, to claim a ‘fundamental right’ to a child of one’s own flesh and body, thus also to choose to be a surrogate mother. Andrews and other thinkers who think on these lines argue for a total liberalization of the possibility to reproduce, so that women may rent their wombs for money, not only as a service in individual cases of infertility but as a home industry. For Andrews surrogacy is fine if voluntary and based on informed consent, and if women are paid reasonably. Her only problem is if body parts are sold without the consent of the owner. To counter that, these scholars propose a series of changes in law and to take away the existing legal restrictions on reproductive industry. This group sees it as an extension of the struggles already won in the area of contraception and abortion. Other possibilities to decide about their fertility, such as AID and IVF, as well as genetic testing for quality control of children should form a part of these choices. One major advantage they see of NRTS in this field is that through them the traditional structure of the family is broken. Legal problems such as custodial rights to children should be decided upon before
fertilization, through binding contracts. Those who favor surrogacy generally argue that it is like any other business agreement between two parties acting freely. As long as both parties understand their rights and obligations and no coercion is involved, there is nothing wrong with it. Some even see it as ‘valorizing women’s labor’ as otherwise it is done for free. However it is clear from the profiles of the women who act as surrogates and those who are the commissioning parties that the two are not equal. Other feminist have a problem with this liberal approach to the technologisation and commercialization of women’s reproduction and see it a further control over women’s bodies through juridical laws and the reduction of children to commodities. Andrea Dworkin (1983), feminist philosopher rejects the notion that the women are freely choosing to become surrogates. She points out that women’s will is socially and economically constructed. Women do not get the same opportunities as men for making money. Usually women with low education, low or no income, or in low paying, low status jobs choose to become surrogates. Socially women are taught from infancy to be self sacrificing, seeking to please others putting the needs of others above their own. They have been taught that child bearing is most valued activity they can engage in. In surrogacy, they can realize this idea of benefit to others while at the same time fulfilling their ‘natural’ function in life, bearing children.

Surrogate motherhood is a curious and ad hoc compromise of biological and social connection which confirms to no principle whatsoever, but merely serves the interests of whosoever possesses economic and social power to turn generative capacities, technological innovations and economic advantages to their personal use. It is not a matter of motherhood versus fatherhood, but one concerned with who has been nurturing a child. Feminist encourage fathers and other long term care takers to have a similarly deep and complex relationship with children but these develop through time and through hard work. They are not inherent in the ‘biology of egg and the sperm’. Another issue for discussion is the legal right of the donors. Opinions are divided on this. Dutch feminist lawyer Nora Holtrust (1985) writes that feminist doubt whether forced legal parenthood is in the interest of either the mother or the child. While legal fatherhood is increasing, there is little change in social fatherhood, in terms of real care for the child, there is not much change. As women’s movement is claiming more freedom for women the incidence of single motherhood is increasing, the need for men to reaffirm their claim over children is also increasing.
Through it men are seeking certainty over their paternity

At the heart surrogacy debate is the question of money. Some consider embryo donation in the same category as blood transfusion and organ donation. The child is reduced to a produce which can be bought and sold. There is a big leap from acknowledging the pain of infertility or the difficulties associated with adoption to a willingness to rent another person’s body and buy a baby. Surrogacy is particularly controversial. While the technical ability to separate genetic gestational and nurturing parenting may help us visualize different parental functions, surrogacy for pay ‘does not raise anything new’ just the old ugly concept of woman as vessel.

Social arrangements are not inherent in technology but shape the uses to which we put it. This raises the fundamental question of subjecting women to risky procedure such as IVF, thus leading to further arguments that women’s choice to participate in infertility treatments conditioned by social stigma of infertility and a socially imposed norm of maternity is no real ‘choice’. Women collaborate, because they (have to) employ their bodies as means of restructur ing their private and social relations; as a reaction to contradictions of being women in patriarchy, of getting controlled self determination instead of ‘self determined control’ and of allying guilt.

Surrogacy is opposed to women’s right of self determination and is against women’s emancipation. Anxieties about male appropriation of female power over reproduction are also voiced. The feminists put less emphasis on the discussions about the status of embryo and fetal therapy, but more concerned about the removal and use of women’s egg or embryos without informing women or obtaining their consent. Few discussions of surrogacy take into account the growth of the reproductive market for the eggs, fetal tissues and embryos for research. A new form of ‘rent a womb’ could be well one in which the women may be urged to conceive, and later, to abort, to allow for foetal tissues to be harvested or to carry pregnancies to term to extract the liver of the newborn for transplant.

According to Gene Corea (American feminist) Women’s bodies are not only recipients of so-called treatments of infertility like in vitro fertilization but in the institution of surrogate motherhood, our bodies actually become infertility treatments. Women are hired to be artificially inseminated, to gestate a child, and then to turn that child over to the sperm donor, thereby ‘treating’ the infertility of sperm donor’s wife. According to a 1986 ethics report by the American Fertility Society, a professional association of some 10,000 US physicians and scientists who work in
reproductive biology. 'The primary medical indication for use of a surrogate mother is the inability of a woman to provide either the genetic egg or the gestational component the uterus for childbearing. A man's desire to conceive his own genetic child is transformed in the report into a 'medical indication' for buying a woman's body. The report was forwarded by DR Howard Jones, co-lab parent of the US's first test tube baby states; 'For the husband of an infertile woman, the use of a surrogate may be the only way in which he can conceive and rear a child with a biological tie to himself, short of divorcing his wife and remarrying only for that reason or of having an adulterous union. Certainly the use of a surrogate mother under the auspices of a medical practitioner seems far less destructive of institution of family than the latter two options. The report medicalizes the sale of women's bodies. It uses the language of 'therapy' to sanitize and legitimate this new traffic in women and to make the suffering of women and the violations of their human dignity invisible.

The following medical phrases should be considered from the report. They are;
'A situation in which surrogate motherhood provides the sole medical solution'
'The medical aspects of surrogate motherhood'
'There could be a role for surrogate gestation in reproductive medicine'

The American Fertility Society Ethics Committee recommends that if surrogate gestational motherhood is pursue, it should be pursued as a 'clinical experiment' (If 19th century physicians in the United States had medicalized slavery, they could have conducted a 'clinical experiment' to see if slavery were truly therapeutic for the slave holders). Entrepreneurs in the surrogate industry often tout surrogacy as a practice designed to fill empty arms of an infertile woman with a child. But for whom is surrogacy really being considered? Often the 'infertile wife' already has children by a previous marriage. After bearing her children, she either becomes infertile or undergoes a voluntary sterilization. When she remarries, her second husband wants children of her own.

7.19 Experience of Infertile Wife

Elizabeth Kane, the first legal and paid surrogate mother in the United States said in testimony before a Michigan legislative hearing on 12 April, 1988; 'It is her husband who has become obsessed with his desire to obtain an heir.' In order to preserve the marriage, she must go along with his plan to hire a surrogate wife' to everybody's
shock and surprise she further stated that: ‘It’s so humiliating to have my husband ask a strange woman to bear a child. (Kane 1988). The real concern is, “is surrogacy truly aimed at relieving the suffering of infertile women or does surrogacy create that suffering”. In surrogacy, reproductive technologies, many of which are developed for use on infertile women, are applied to fertile women to make them more efficient breeders. The women, who are generally low income, become ‘living laboratories’ for experiments with such technologies. These technologies include amniocentesis, sex determination, embryo flushing, in vitro fertilization, and super ovulation.

7.20 Experiences Narrated by Surrogate Mothers

**PATRICIA FOSTER. — Surrogacy combined with sex predetermination**

Foster’s sperm donor ordered that his sperm be split, separating out male engendering and female engendering sperm, and that Foster be inseminated only with the male sperm. He wanted—not just any child—but a son.

**MARY BETH WHITEHEAD; Surrogacy combined with amniocentesis.**

Although Whitehead was under thirty and not in need of any prenatal diagnosis, she was required to submit to amniocentesis especially, for quality control over the product she was producing. She bitterly resented this and tried to resist it, unsuccessfully. (The contract called for her to abort if the test found the product was not acceptable] The word ‘product’ was objected by the judge in the famous Baby M case). Elizabeth Stern, a physician and the wife of the sperm donor, drew blood form Whitehead’s arm several times during the pregnancy. Whitehead was not told why this was being done to her. According to law of contract; facts should be disclosed to the other party (Whitehead) failing which amounts to breach of contract.

**ALEJANDRA MUNOZ. Surrogacy combined with Embryo flushing**

Munoz, a twenty—one—year old Mexican woman with a second grade education and no knowledge of English language, was brought across the border illegally to produce a child for a man in National City near San Diego. She was told that she would be artificially inseminated and that after three weeks the embryo will be flushed out of her and transferred into the womb of the man’s wife. She was familiar with the concept, knowing that this procedure was used on cows on farms near her home in Mexico. The embryo was never flushed out. Munoz who had planned to be in the country for only a few weeks for what she thought she was would be a minor
procedure, ended up undergoing major surgery—a caesarian section. She was offered $1,500 well below the already exploitative $10,000 fee generally offered to white Anglo women.

**NANCY BARASS; Surrogacy combined with super ovulation.**

After an insemination, Barass contracted a bacteria infection from the baby buyer’s sperm. This could have delayed her impregnation. But rather than waiting for the infection to clear up, the surrogate company’s doctor prescribed a triple dose of Clomid, the fertility drug. He continued to inseminate her. She suffered serious side effects, including a pain in her left ovary so intense she was unable to walk.

**JANE DOE; Surrogacy combined with super ovulation**

Between the ages of fourteen and twenty-five Jane Doe had nine pregnancies, five of which ended in miscarriage, as reported by Rochelle Sharpe of Gannet News Service. According to Doe, when the physician who screened her for the surrogate company heard she had nine pregnancies, he was not alarmed. Instead he said, ‘Good, you’re really fertile. Since she was breastfeeding an infant at that time she agreed to be inseminated, she was not ovulating. Instead of waiting for her to begin ovulating again naturally, the physician super ovulated her with fertility drugs, infact hazardous to the health and to her infant baby.

All these incidents show the manner in which women are exploited once they agree to act as surrogates. Often there is breach of terms and conditions mentioned in the contract. Women are subjected to the medical services rendered by the doctors and at times they are victimized, causing them with health hazards along with the trauma they have to face while surrendering the child to the genetic parents.

7.21 Recommendations by different Committees

The RCOG committee, the Waller Committee and the Warnock Committee have come out against surrogate carriers. The American College of Obstetricians and Gynecologist statement on ethical surrogate motherhood assumes that there will be instances in which physicians are called on to participate in the procedure. It recommends that a participating physician should appropriately screen the couple and the surrogate, receive only the customary compensation and not participate in a surrogate program likely to exploit any of the parties financially. (American College of Obstetrician and Gynecology 1983). The ACOG guidelines also express concern about who should have decision making power during the pregnancy. They state that
the surrogate mother should be the source of consent. If the contracting couple are to play a role in decision making, the surrogate's agreement is necessary and the boundaries of that role should be clear.

Laws in various states affect whether surrogate motherhood may take place and if so, who the legal parents of the child are. No state laws prohibit the use of volunteer surrogate carriers except to the extent that the embryos transfer to an unrelated woman might be considered an unlawful experimentation on the embryo. However, paid surrogacy may run afoul of the laws in 24 states that prohibit payment to a mother, beyond certain enumerated medical and legal expenses, in connection with giving a child up for adoption.

While selecting the surrogate, the following conditions should be fulfilled:

1. The woman is providing the service for altruistic reason and may therefore be a relative or a close friend of the infertile commissioning couple.
2. Medical costs and traveling expenses may be covered by the commissioning couple but there is no commercial fee for providing surrogate services.
3. The surrogate woman is in the reproductive age range and has children of her own, has completed her own family and does not have an adverse past obstetric history.
4. The surrogate woman understands the need to comply with the medical advice regarding good obstetric care, and any specific management advised by medical practitioner.

Expenses

The recipient's (commissioning couple) will be expected to cover all medical expenses involved in gamete collection, fertilization, and embryo preparation. This will also be expected to cover reasonable fees encountered by the surrogate woman. No commercial fee is to be paid to the surrogate for providing her services for altruistic reasons.

Medico-Legal aspects are

The legal implications of medical practices in relation to surrogacy are not universal. At present, it is presumption under the common law that he surrogate mother is the lawful mother of any child born, irrespective of the origin of the genetic material involved. This is enshrined in (Artificial Conception Act, 1985) (Western Australia) specifies that the birth mother is the legal mother.
However, under the Adoption of Children Act (896-1985) there is allowance of a preferred adoption of a child by a relative or the natural father. This appears to allow for a preferred adoption of a child in surrogacy arrangement which a known biological (genetic attachment) to potential adopting parents. A research report by the New South Wales Law Reform Commission Published in 1987 is one of the series in the area of artificial conception, which indicated that that the Australian public opinion is not opposed to surrogacy arrangements and that the large majority of Australians support disclosure of surrogate’s identity to the child.

There are several deficiencies in this report, including the fact that it did not cover the IVF – surrogacy situation where embryos from commissioning couples are transferred to a surrogate female who therefore has no genetic attachment. It does not cover the possibility of a friend or relative being the surrogate mother in which situation the identity of the surrogate woman would always be known to the child who in fact may have close association with the woman (e.g. aunt), and therefore the principle of maintaining confidentiality is irrelevant.

7.22. The European Society of Human Reproduction and Embryology (ESHRE) Task Force on Surrogacy, Ethics and Law

Surrogacy is acceptable procedure as the interests of the intended parents, the surrogate and the future child may differ. Surrogacy presents complex problems of treatment involving third parties (collaborative treatment) e.g. the intended relinquishment of by the gestating woman of the child she has carried, the relationship of commissioning parents towards the child and towards the surrogate; and potential commercialization.

Psychosocial aspects

The commissioning parents -

Within the appropriate text (implication of counseling, screening of all parties involved) It is generally experienced as a positive procedure by the commissioning parents, which is understandable as it is their only chance to become parents. However on some occasions, major legal and psychological problems arise. The procedure is also likely to be less problematic when both commissioning parents have a genetic link with the offspring. Surrogate mothers do not generally experience major problems under the same conditions mentioned above (appropriate counseling and careful selection of candidates) nevertheless, some of them experience
psychological problems at the moment they relinquish the child, and there have been reports of exceptional cases where the surrogate woman decides to keep the child.

The surrogate children: the available information is extremely limited. The psychological consequences for the surrogate's children of the new born sibling are unknown.

The prospective child of the commissioning parents
Again the available information is extremely limited; some risks are known (risk of rejection or risk of being the object of a conflict between the parties) others are not known as long – term follow – up studies have only been started.

Surrogacy is acceptable procedure if it is an altruistic act by the woman to help a couple for which it is impossible or medically contraindicated to carry a pregnancy. There are moral objections against this procedure and there are potential risks and complications. However, according to the committee these objections are insufficient reasons to prohibit surrogacy altogether. But it is essential that here are measures and guidelines in order to protect all parties, to guarantee well considered

Payment
Several arguments have been presented against payment for surrogacy. These include insulting human dignity, the instrumentalization of human body, potential exploitation of vulnerable women and inappropriate inducement (coercion) of women. Considering all these arguments, altruistic surrogacy is the only acceptable form. Reimbursement of medical expenses incurred during the pregnancy and directly pregnancy related complications, which are not covered by the National Health Service or private insurance, should be reimbursed. The surrogate should be compensated for pregnancy related expenses as well as the loss of actual income (If this is not covered) by national security system.

Autonomy
By the very, nature of the agreement both parties involved [the commissioning couple and the surrogate] have voluntarily accepted certain restrictions on their autonomy. The agreement creates prevailing moral obligations for both parties. They cannot unilaterally change their minds after the start of pregnancy. Even in the case of divorce, the original agreement stands and the commissioning parents will still be the parents. Only in the case of the commissioning parents 'deaths before birth would the surrogate have first choice to keep the child or give it up for adoption. Since the
Surrogate freely accepted to conceive and deliver a child on behalf of another couple, she simultaneously accepted certain restrictions to her autonomy; she is expected to behave as a responsible woman (i.e. to adopt healthy life style etc) and to confirm to original agreement with the future parents with regards to prenatal screening and testing. This includes the possibility of considering a termination of pregnancy in case of severe malformation of the fetus.

**Informed Consent**

The Surrogate - Generally, when a women carries a child, there is a legal rule presumption are of the child is going to be undertaken by her, and she will assume this moral responsibility. Surrogacy is intended to bring about a child for the commissioning parents. The implication of the process is therefore that the surrogate woman cannot keep any right or responsibility for the child after delivery. The woman who gestates is not expected to have parental rights or responsibility for the child after she delivers. Therefore it should be made clear at the outset, of the procedure that the intended parents have the primary responsibility of the child. The information provided to the future surrogate should thus be that she will have to hand over the child to the commissioning parents.

The commissioning parents; --They should be informed that they are parents of any born child. For the best interest of the future child, their moral responsibility is engaged from the start of the project. The gestational woman’s family; -The consent of the current partner is necessary in order to protect their relationship, and also because, as the law stands in a number of countries, the male partner would be the legal father of the child till the commissioning parents become the legal parents. The interest of her [children] must also be taken into consideration during the implication counseling process.

**Safety**

The same precautions should be implemented as for gamete donation including screening for HIV, hepatitis B and Hepatitis C. Also it has been recommended by the task force committee that there must be transfer of only one embryo of good quality and two at the most if the embryos are of less good quality, the oocyte provider is of less than 35 years of age and /or the number of fertilized oocytes is low. The surrogate should be fit for pregnancy as judged by appropriate medical and psychological criteria. It is further recommended that one act of surrogacy per woman, unless the pregnancy is for the same commissioning couple.
Specific principles are

Antenatal screening; a mutual agreement should ideally be reached along the usual recommendations of antenatal screening unless all parties decide otherwise consensually.

Pre conception and prenatal care; the surrogate undertakes the pregnancy freely and deliberately. As a consequence, she should behave as a reasonable pregnant woman by taking all the precautions advised in modern antenatal care (vitamins, no smoking, moderate alcohol use, etc.

Termination of pregnancy

A termination of pregnancy can be justified for medical reasons for the surrogate. From an ethical point of view, it is inappropriate to terminate a healthy pregnancy against the wish of the commissioning parents. However, the surrogate has a legal right to do so and this risk should be taken into account by the commissioning couple when stepping into the agreement. Given the principle of respect of autonomy, and bodily integrity of a pregnant woman, it is impossible either the gestating woman from terminating the pregnancy, or to force termination upon her. Nevertheless, since she freely accepted this project, she has the prima facie moral obligation to continue the pregnancy.

Mode of delivery;

Taking into account the principle of autonomy of the pregnant woman, she cannot be forced to accept the advice of the obstetric team, but she still has prima facie obligation to accept the advice that will ensure the best outcome for the child as well as for herself.

Enforceability of the agreement

Legal enforcement of the surrogate’s behavior is not possible before delivery. Therefore counseling should raise all points detailed above, and the parties should reach mutual agreement on all foreseeable hazards. Since the commissioning parents are fully responsible for the born child, a surrogate has right to keep the child. Like a gamete donor she never acquired parental rights or responsibilities. On the other hand, the agreement is also binding for the commissioning parents in case the child would be handicapped or in case of a multiple pregnancy. Regardless of what is stipulated in the agreement, the child or children born are their responsibility.
**The welfare of the child from surrogacy contract**

There is little empirical evidence and no long-term follow up studies regarding the social and psychological consequences of such agreement. No information is available on the potential confusion of maternal roles. Long term consequences if the surrogate woman keeps in contact with the resulting family have not been studied earlier. The possibility of conflicts can not be excluded.

Openness by the parents towards the child about its mode of conception is advisable. The wish of the child to know its genetic consideration by the parents, in cases where donor gametes or the oocytes of the surrogates have been used.

**Responsibility of the Doctor**

There is neither a moral or legal obligation on part of the doctor to collaborate in a surrogacy project. If he or she has decided to collaborate, he or she has:

- A duty to inform all parties about the medical, social and psychological, moral, emotional and legal issues involved in surrogacy contracts.
- To make sure that the candidates fulfill all the indications.
- To ensure that the parties receive appropriate screening and counseling in order to reduce the risk and promote free and well informed decision making.
- The practitioner has the same obligation of care towards the pregnant surrogate as to any pregnant woman, although additional counseling and additional support may be necessary.

**Intra familial Surrogacy**

Different types of intra familial surrogacy can be distinguished; between sisters and inter generational, either of mother for her daughter or vice versa. The main concerns in the literature are moral coercion and relationship bewilderment for the offspring. There is no principled objection to known surrogacy either by the mother or by the sister. No evidence is available at present that such arrangements have generated additional problems but careful counseling of both parties is indispensable. For those cases where the daughter serves as a surrogate for her mother, there may be an increased risk of dependency and undue pressure.

**Further Recommendations are**

- Surrogacy is a morally acceptable method of assisted reproduction of last resort. The last problematic indication is the absence of the uterus regardless of etiology. Other indication may include serious health risks
and uncertainties for all parties involved, reluctance regarding the broadening of relative indication, reluctance regarding the broadening of relative indication id advisable.

- Payment of services is unacceptable only re imbursement of reasonable expenses and compensation for loss of actual income should be considered.

- All parties involved should be counseled and screened separately by independent specialists.

- The surrogate should be aged below the age of 35 years for partial surrogacy and less than 45 years for full surrogacy. In order to ensure free and well considered decision making by the surrogate / gestating woman, it is required that the woman has at least one child.

- A ‘cooling off period’ is recommended so that only one embryo should be replaced in order to prevent multiple pregnancies and to avoid unnecessary endangerment of the surrogate’s and the future child’s health. For special conditions, the replacement of a maximum of two embryos can be considered.

- Long – term – up follow up studies both of the resulting family and of the family of the gestating woman should be conducted, especially to gain insight in the psychological impact of the agreement on the (children). The commissioning parents should be well aware that the surrogate has the legal right to make the decision about her pregnancy against her will and against the original agreement. The concept of surrogacy is well known and surrogacy is practiced in different communities.


iii Rowland R; Living Laboratories; Women and Reproductive Technologies; Bloomington, Indiana University Press, 1992.


v Melinda Beck et al., How far can we push Mother Nature? Newsweek, 17/1/94.
vi Staff Reporter, Artsen in Italy, *de Volkstrant*, 4/4/1995


viii Shenfield and F. 'Justice and access to infertility treatments. In; Shenfield F, Sureau C, eds; *Ethical Dilemmas in Assisted Reproduction.*

ix American Fertility Society Ethics Committee. September (1986); 'Ethical Considerations of New Reproductive Technologies' *Fertility and Sterility*, Supplement 1, 46 (3)