CHAPTER 3

HISTORICAL DEVELOPMENT OF SURROGACY IN INDIA

3.1- HISTORICAL DEVELOPMENT

Having children have always been important, since time immemorial and the continuity of the family unit has been of major significance in Hindu culture. Throughout the history of mankind people struggled to face challenges of infertility. Women were created to be mothers and man to be fathers (MANU). Manu says the perfect man consists of his wife, himself and his off-spring. Main aim of marriage was to have children. Because it is important for continuity of human race. Procreation in Hindu families was considered important and infertility was deemed to be a social stigma, even today.

Infertility was in existence throughout the ages. But now a days it reaches at alarming position. Hindu text reveals that people uses extra legal method to fulfill the dream of parenthood. There are instances which reveals that the kings who were incapable of procreation. They solve their problem of infertility, often behind a curtain of family secrecy, that's why there is lack of documented evidence of these type of artificial methods of procreation like that of surrogacy. According to Hindu texts in case of male infertility the woman can have

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73 Sharma Ramsharan aspects of Political Ideas and institutions in Ancient India,1978,p.290
74 Ibid
75 Ibid
intercourse with suitable members of the husband’s family (through Niyoga), and in case of a female infertility one of the common solution is to bring home another wife. According to Manu, a man can have a second wife after eight years of infertility, or after eleven years of delivering only female children. In traditional, Indian societies the birth of a child is considered with of great importance, especially of a male child. Son is generally preferred than a daughter because he upholds the family values and ensures the family lineage. Moreover a male child was an asset because of the dowry system prevalent in most Hindu communities. Spiritually son helps parents in their afterlife, by performing their funeral rites, when they die and saving them from the hell, thereafter he performs ‘Shradha ceremonies at regular intervals to ensure their well being in the heaven. In warfare, sons could be more useful as warriors than daughters. A family which does not have children was considered unfortunate. For these reasons craving for son and successor who can continue the family lineage and can assist in spiritual merits, was an urgent and overpowering, sentiments in ancient Indian society. The Arthveda mentions some rituals, which were performed by these parents, who wished to have a son. Even an illegitimate son was preferred to the alternative of having no sons. Such being the state of affairs, if a man had no male issue, he naturally tried to make up the deficiency by adopting other means to have a male child. Such as by way of adoption or resorting to Niyoga or by other means similar like to surrogacy. So the desire of having children for the formation of family lineage is the main reason, for what

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76 Gupta, Jyotsana Agnihotri, New Reproductive Technologies; women’s Health and Autonomy, 1st ed. p.357
77 Ibid
78 Ibid
the artificial means for procreation was invented for. New innovations in the field of ART continued with the passage of time so to fulfill the desire and need of the contemporary society in India.

3.2 DEVELOPMENT OF ART (ASSISTED REPRODUCTIVE TECHNIQUES) IN INDIA

The desire for the children is the main cause for the development of assisted reproductive techniques in the world. Motherhood is most wonderful experience, but some people, who miss out an opportunity of motherhood.

Couples opt for surrogacy when traditional means of conceiving a child have failed, this also includes in vitro fertilization, or it is dangerous for the couple to get pregnant and give birth. The following medical conditions usually necessitate surrogacy:

1. Malformation of or infection in the womb
2. Absence or removal of womb by hysterectomy
3. Recurring miscarriages
4. Repeated failure of IVF

So, infertility is a major problem in the context of important domain of social life such as Kinship, inheritance, marriage and divorce patterns. There are social, cultural and family pressure that lies on couples to use advanced technology such as IVF and AI. These technologies are also encouraged by physicians in a commercial way and a tool for profit earning. In India where there
is a stigma against infertility and childlessness, ART provides hope to infertile couples. This perceived as a great scientific achievement. Having children is a fundamental part of the life of men and women and is seen as a necessary step to reach maturity and personal development, and to respond to what is their socially expected role, leading to the preservation of the human species.

The desire of having a child by an infertile couple was being satisfied by adopting a child. But now modern science and technology has provided new opportunities for infertile couples. The Advent of Assisted Reproductive Techniques infused hopes to many infertile couple as well as fertile couples, who in the ordinary course cannot procreate in a natural way.\(^79\).

Marriages without children s more conspicuous and aberrant than one with children. So ART’s are pursued in order to achieve two interrelated goals, that is to restore the normalcy of marriage and to have a child of one’s own.\(^80\) Technologically Artificial Reproduction is generally regarded as a more desirable and feasible option than adoption. The power of Art to rectify the discrepancy of a childless marriage and to confess genetic or biological parenthood is precisely the reason for their popularity.\(^81\).

The first successful AI (Artificial Insemination) of a human being is credited to Dr. John Hunter, an English physician who used this device upon a


\(^{80}\) Ibid

\(^{81}\) Ibid
married woman using her husband’s semen in the late eighteenth century\textsuperscript{82}. In 1890, Dr Robert L. Dickinson established the practice of AI (Artificial Insemination) using a donor’s semen, however it was not until 20\textsuperscript{th} century, that the recourse was had to AI for the purpose of procreation\textsuperscript{83}. By IVF the eggs and sperms are taken from the father and mother and then fertilized into a Petridish in a laboratory, and then the resulting embryo is surgically implanted into the uterus of surrogate mother. So this is a high technique of Assisted reproduction which involves three main stages 1\textsuperscript{st} collection of genetic material from male female, then fertilization of OVA, and then transferring the embryo into the wife’s or third lady’s uterus when the embryo is transferred into the third lady’s uterus then, the process is known as Surrogacy. embryo into the wife’s or third lady’s uterus when the embryo is transferred into the third lady’s uterus then, the process is known as Surrogacy.

It was with the birth of Louise Brown the world’s first test tube baby in Great Britain in July 1978, that IVF became known and technique gained currency. Louise Brown’s birth marked the beginning of a scientific revolution, in the realm on of assisted reproduction. After two months after the birth of Louise Brown, India’s first test tube baby Durga was born in October, 1978 by adopting this technique, which caused great public debate and criticism. Till then there has been a tremendous increase in these technologies for procreation and earning money. So the development of ART has broadened the scope of the practice of surrogacy. In India surrogacy was came into limelight when a debate starts on

\textsuperscript{82} Koolwal Manju, surrogate parenthood (An Indian Socio-legal) Journal of legal studies p160

\textsuperscript{83} Ibid
the matter of custody dispute of a child born to Indian surrogate in 2008 and the matter came in the court. After this case a bill was made known as ART Regulation bill 2008 to deal with the matter of surrogacy in India, which was later on amended in 2010 and named as Draft Art (Regulation) Bill & Rules 2010.

3.3 DEVELOPMENT OF COMMERCIAL SURROGACY IN INDIA

Over a period of time there has been a drastic advancement in the field of Reproduction, which results into the incorporation of new methods of procreation which infused hopes to many people who are incapable of procreation in usual way. And surrogacy in one of them, which enables a infertile couple to have a child, with whom they have genetic links. There are lots of reasons for which this practice of surrogacy develops and foremost of them is for infertility related problems, mainly of female infertility. Infertility, which defined as the inability to conceive after one year of intercourse without contraception\textsuperscript{84} Causes of female infertility include natural reproductive pathology or removal of the uterus and/or ovaries, other cause may be advanced age or premature menopause; effects of chemical or mechanical contraception, such as pelvic inflammatory disease associated with use of intra-uterine device; the effect of sexually transmitted disease, and spontaneous and induced abortion. Wider causes may include environmental and industrial pollutions. A major direct cause is irreversible voluntary sterilization. Today There is a reported increase in infertility in society. This factor combined with the advent of technologies, such as IVF have increase

\textsuperscript{84} Defined by WHO
awareness and interest in surrogacy as a means for infertile couple to become parents. Secondly, fertile couples may seek a surrogate mother when the female cannot physically bear a pregnancy, such as when she is affected by heart condition or chronic spontaneous abortion, or when she may transmit a harmful genetic or other congenital condition to child she might conceive. Some of these problems could be solved by in-vitro fertilization, perhaps coupled with ovum donation. For other the only option is surrogacy.

Some believes that the motivation to become a parent and have a biological child is one of the most fundamental desires of human beings. For those unable to conceive, adoption traditionally has been the only alternative. But the compliance process of adoption however, has made it less than the ideal solution, moreover parents desires for a genetic link with their children which makes surrogacy attractive. The opportunity to have genetic children, while adoption does not replace the desire to have genetic children for most couples. Inability to bear or have children naturally is what drives most couples to enter into surrogacy arrangement, for most couples surrogacy is last resort. Despite of the complexities involved in surrogacy many couples adopts for surrogacy because of the reason, to have baby with whom they are genetically related and surrogacy allow them to fulfill their dream of having their own child with whom they have blood relations. Today, surrogacy is also adopted by women, who are fertile, but does not want to bear the burden of conceiving and delivering of a child, for the sake of their life style and hired the services of a surrogate mother for delivering of a child.
Thus surrogacy is more than a solution for infertility. Surrogacy is a possible solution for couples, who want to have children, but are unable to do so because of infertility or other barriers to reproduction. Surrogacy does not only allows heterosexual couples to have children by non-traditional means, but it also allows homosexual couples who are restricted from having children for biological reasons to obtain children by means of other than adoption, opening the doors to the possibility that the child may be genetically related to one of them.

Furthermore the desire to have a biological child of one’s own flesh, blood and DNA aided with technology and the purchasing power of money has contributed to the increase of commercial surrogacy in India. Not only for infertile couple, surrogacy also comes to the rescue of Indian women who are poor such as daily wage earners or who have no employment and husband do not contribute sufficiently to family, thus the surrogates are easily available in India at a low price, than those developed countries, which fuels into the increase of surrogacy cases in India. The other reason for which commercial surrogacy is increasing day by day in India is that of absence of any law for the regulation of this practice by which couples from foreign countries opts for surrogacy here, as the process becomes haste-free in the absence of law on the issue of commercial surrogacy.

3.4 PRESENT DAY NEED FOR COMMERCIAL SURROGACY

There is an increasing acceptance of surrogacy arrangement in certain jurisdictions around the world. The growth of infertility in modern society and declining number of children for adoption had increased the need for further
Assisted Reproductive Technologies options to be made available. As has been discussed earlier that infertility related problems are the main cause for the demand of these technologies combined with surrogacy arrangements. As infertility rate is growing high day by day which results in opting for such types of practices like that of surrogacy, to overcome the problem of infertility mainly for commercial surrogacy is that, if payment for gestating a child is not involved in this arrangement, then there may be decline in number of women who serves as surrogate mothers because the main reason in most of the cases for providing the services as surrogate is for money. As women who are in need of money may provide their services easily and can earn money for them. The practice is beneficial for both parties and serves both the parties, whereby at one hand a couple who are incapable of procreating children needs to help of woman to serve as a surrogate to procreate a child for them, and on the other hand the woman is in need of money, which she can get in reward by going through this process. So by this practice both the needy one’s can help each other’s by providing their services. There may not a women who will be ready to serve as a surrogate for an infertile couple. So there is a demand or need of commercial surrogacy at present day society because without it many couples may remains childless, which is harmful to society also, because childlessness may endangers the existence of mankind. So there is a need of such type of surrogacy arrangement which serves more without harming little.