

SURROGACY V/S ADOPTION: THE LAW AND RIGHTS OF THE CHILDREN

M.P.Chandrika*

Abstract

It is time when we think about the future citizens of our country. In India couples who do not beget children are considered as have committed sin. There are two modes of having a child who are childless. One is by adoption of a child who is already born to parents who either cannot take care of it or due to circumstances do not want to take care of it. Then the couple can opt for surrogacy, which is a new scientific technique where the child is born from the sperm and ovarian of the couple itself, but, is born from the womb of other women. Here biologically the child will be of the couple. They go for this because the woman is either physically or medically unfit to have a child. Whether they go for adoption or surrogacy, the child will be legally theirs. Then, why not adoption for the child already which is already born? Will it not give a right to the child which it is entitled to under Child Rights Convention?

Key Words

Adoption, Assisted Reproductive Technology, Child, Contract, Rights, Surrogacy.

I Introduction

"The parents construct the child biologically, while the child constructs the parents socially".¹

228th Law Commission Report

Children are the assets of a nation. They are the future generation and hence, their interest and rights is paramount to be considered. The International Covenant on Economic, Social and Cultural Rights,² the Convention on Elimination of All Forms of Discrimination Against Women³ and the Convention on Child Rights⁴ addresses certain rights which are crucial in respect of certain rights of the children which include right to health⁵, the right to support, the right to know one's origin⁶ and

* B.Com, LL.M, M.Phil., Assistant Professor, S.C.Nandimath Law College, Bagalkot-587101, Karnataka, India. E-mail-chandrikakurandwad72@gmail.com.

¹ 228th Report of the Law Commission of India on 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligation of Parties to a Surrogacy', (New Delhi: Minister of Law and Justice, Government of India, 2009), p.6.

² <http://www1.umn.edu/humanrts/instate/b2esc.htm>, visited on 9th June, 2014.

³ G.A. Res 34/180, art. 1, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46, at 193.

⁴ G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1980) (entered into force Sept. 2nd, 1990).

⁵ Article 12 of the International Covenant on Economic, Social and Cultural Rights

the right to a family⁷. If the children are born naturally no problem arises, but, there are many instances where in a couple are unable to beget a child. This problem has two fold solution which are either they can go for adoption or take the help of Assisted Reproductive Technology and have a child from their own sperm and ovarian which is called surrogacy. In both the cases the child will be their legal heir.

Both the methods have their own pros and cons. There are certain legal issues and moral issues concerning both parents as well as the child. In India, the traditional picture of a family would not be complete without children. Many couples face a breakdown of their marriage in their inability to procreate. The inability of a woman to become a mother could also, many a times, be responsible for bigamous marriages, spousal abandonment, and cruelty in the marital family and other forms of domestic violence. The issue should be balanced in the interest of both the parties. Hence, the parents have to either adopt a child or go for surrogacy.

II. Methodology

The methodology Adopted is analytical and purely doctrinal. Law relating to adoption and surrogacy and decisions of courts has been analyzed to form conclusion and suggestion.

III. The Concepts-Surrogacy and Adoption

Surrogacy is when another woman carries and gives birth to a baby for the couple who want to have a child. It is here today because of development in science which has found a new method called as Assisted Reproductive Technology (herein after referred as ART). ART means "all techniques that attempt to obtain a pregnancy by handling or manipulating the gametes, the sperm or the oocyte outside the human body, and transferring the fertilized embryo into the reproductive tract of the woman"⁸.

The word 'surrogate' has its origin in Latin '*surrogatus*', past participle of '*surrogare*', meaning a substitute, that is, a person appointed to act in the place of another. Surrogacy means the process of carrying and delivering a child for another person⁹. In other words surrogacy can be said to be, a recognized method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to the contracting party¹⁰. Surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman. 'Surrogate

⁶ Article 7 of the Child Rights Convention.

⁷ *Ibid.*

⁸ As defined under Section 2(c) of 'The Assisted Reproductive Technologies (Regulation) Bill', 2011.

⁹ Black Law Dictionary.

¹⁰ *Baby Manji Yamada vs. Union of India and Another*, AIR 2009 SC 84; (2008)13 SCC 518.

motherhood' is a practice in which a woman bears a child for a couple unable to produce children in the usual way¹¹.

Surrogacy may be appropriate when there is a medical condition that makes it impossible or dangerous to get pregnant and to give birth to a child which in medical terminology is called infertility.¹² The type of medical conditions that might make surrogacy necessary includes- absence or malformation of the womb, recurrent pregnancy loss and repeated in vitro fertilisation (IVF) implantation failures. Surrogacy is an old phenomenon. In Hindu mythology we find instances of surrogacy¹³.

There are two types of surrogacy which full surrogacy and the other is partial surrogacy. Full surrogacy involves the implantation of an embryo created using both the eggs and sperm of the intended parents or a donated egg fertilised with sperm from the intended father or an embryo created using donor eggs and sperm. Partial surrogacy involves sperm from the intended father and an egg from the surrogate. Here fertilisation is (usually) done by artificial insemination or intrauterine insemination (IUI).

Adoption is another mode to have a child. Here the child is already born to a couple, but have lost their parents or are not in a position to look after the well being of the child. The couples who are unable to bear a child have a choice to adopt a child. Adoption comes from the Old French word *adoptare*, meaning "to choose for oneself". It is a two step judicial process in conformance to state statutory provisions in which the legal obligations and rights of a child towards the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents. Adoption involves the creation of the parent child relationship between individuals who are not naturally so related. The adopted child is given the rights, privileges and duties of a child and heir by the adoptive family.

Adoption in India is governed by laws like Hindu Adoption and Maintenance Act, 1956¹⁴ and Guardians and Wards Act, 1890¹⁵. There are instances of adoption in Hindu Mythology also¹⁶. The objects of adoption are twofold : the first is religious, to secure spiritual or religious benefit to the

¹¹ New Encyclopaedia Britannica.

¹² See Section 2(u): "infertility", means the inability to conceive after atleast one year of unprotected coitus; or an anatomical/ physiological condition that would prevent an individual from having a child.

¹³ Hindu mythology also offers instances of surrogacy and reflects the secrecy that still surrounds surrogacy practice. In the Bhagvata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead." See Usha Rangachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India", 39 *Cumberland Law Review*, (2009), pp. 15-16.

¹⁴ Act No.78 of 1956.

¹⁵ Act No. 8 of Year 1890.

¹⁶ There are several other tales in Hindu methodology that suggests that the concept of raising a stranger's child has always existed. Children were brought up by sages or Rishi's. Radha adopts Karna after his rescue from his famous basket ride down the river Ganges. She names him Vasusena. The myth of Shakuntla and Andal assumed importance as examples of female adoption.

adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of waters to the soul of adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name.

IV International Conventions on Surrogacy and Adoption

On to Surrogacy, there are currently no international laws which make provision for rights of parentage either from the perspective of the commissioning parents, gestational mothers or most importantly the child. Indeed there is no instrument which allows for the recognition of international surrogacy arrangements, in another state, following an administrative or judicial process in a state where such arrangements are lawful. The United Nation Convention on the Rights of the Child and the European Convention on Human Rights confirm a child's right to parentage, a right to know their parentage and a right to non-discrimination through their status acquired at birth by virtue of their parentage.

The 1993 Hague Intercountry Adoption Convention¹⁷ was the first instrument, with a few adaptations, to regulate international surrogacy arrangements. Indeed it has been reported that, where there is no provision for surrogacy, adoption orders can be made as if the arrangement were an intercountry adoption. Then on 10th March, 2011 the Permanent Bureau of The Hague Conference on Private International Law published a preliminary but comprehensive note entitled "Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements".

The Hague Conference has identified the basic criteria that would be covered by any comprehensive international and multinational agreement such as, there will uniform rules on the jurisdiction of courts or other authorities to make decisions as to legal parentage, uniform rules will be framed on the applicable law governing the surrogacy arrangement, corresponding rules providing for the recognition and enforcement of parental decisions relating to the legal parentage shall be adopted in the arrangement or agreement and there shall be uniform rules as to recognizing the parentage and citizenship of the child born out of surrogacy.

The Permanent Bureau has also recommended that any international instrument would have to be backed up by safeguards to protect children born of surrogacy arrangements. This would include, as a minimum, assessment of commissioning parents and gestational mothers. There would also be a need have a system of licensing and control of agencies and authorities providing surrogacy services.

On to adoption the UN Convention on the Rights of the Child, 1989, Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993 are the two instruments framed for the protection of children who are given in adoption from one country to

¹⁷Concluded on 29th May, 1993.

another. The conventions have dealt with all issues relating to child rights as well as intercountry adoption.

V Legal Issues Relating to Surrogacy an Adoption in India

Legal Issues Relating to Surrogacy-

Very often, the issue of surrogacy crops up throwing questions on the legality of surrogacy contracts, legal recognition and rights of a child born out of a surrogacy, rights of the persons who opts to have a child out of surrogacy in India as well as the thriving surrogacy Indian industry. The morality of surrogacy as a practice always crops up in these discussions, especially when it involves money. The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. There is no specific law in India which governs surrogacy but, considering the growing demand for IVF and Surrogacy, the Government of India took an initiative to come out with guidelines for the ethical conduct of Surrogacy in India which is called as The Assisted Reproductive Technologies (Regulation) Bill, 2011.

The Assisted Reproductive Technologies (Regulation) Bill, 2011- Highlights

1. Constitution of authorities to regulate assisted reproductive technology by framing policies and guidelines. These authorities are also to receive any complaints relating to surrogacy. The Bill stipulates the establishment of Advisory Boards at the state and national level. The proceedings before these boards are to be considered as judicial proceedings.
2. The assisted reproductive clinics are to be regulated by the Advisory Boards and their registration and accreditation is to be mandatorily sought before the Registration Authority. This entails that these clinics will function under heavy regulation.
3. It details the rights of the patients (persons, who seek the help of assisted reproductive technology; who can be such 'patients' has also been dealt with), gamete donors, surrogates and children.
4. It criminalizes advertisements relating to pre-natal sex determination.
5. A draft of a surrogacy agreement has also been given in the Schedule to the Draft Rules.
6. The Bill is also liberal as to marital status of the couple is concerned. The couple who are in live-in-relationship, gays, lesbians, and even a bachelor can go for surrogacy¹⁸.
7. Certain conditions have been imposed for valid surrogacy such as either of the commissioning couple must be infertile or the mother must be incapable of baby to full term, a couple or an individual shall not have the service of more than one surrogate at any given time, the couple shall not have simultaneous transfer of the embryos in the woman and in a surrogate, etc. And if these conditions are fulfilled than the person/persons can opt for surrogacy.

¹⁸ *Jan Balaz v Union of India*, (2008) 13 SCC 518.

The ART Bill was amended in 2012 and in 2013. In 2012 Bill surrogacy by single parents was held to be invalid and the Ministry of Home Affairs restricted surrogacy to foreign nationals¹⁹, and if they still wanted to go then the man and the woman married for at least two years would be required to take a medical visa prior to entering surrogacy agreement in India²⁰. The 2013 Bill is not published and is still pending in the parliament for approval.

The ART Guidelines forms the base for most of the Surrogacy in India along with the *Indian Contract Act*,²¹ 1872 (herein after referred as Contract Act). Surrogacy is commercial or altruistic depending on whether the surrogate receives financial reward for her pregnancy or the relinquishment of the child, or not. In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. Hence, the first step is that it is contract.

Surrogacy agreements are treated on par with general contracts under the principles of the *Contract Act*. The surrogacy agreements are treated at par with other contracts under the Contract Act and other laws applicable to these kinds of agreements. Both the couple/single parent and surrogate mother need to enter into a surrogacy agreement covering all issues, which would be legally enforceable²². A few provisions under the *Contract Act* are analyzed in the light of surrogacy.

Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract. As to lawful consideration, the Contract Act says, "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise²³. The same is required to be complied in case of surrogacy agreements also. Section 23 deals "The consideration or object of an agreement is lawful, unless -It is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy". Such agreements are void. Surrogacy is regarded as lawful agreement and neither forbidden by Indian law.

Then Section 25 of the Act deals with situation when an agreement without consideration becomes lawful. It mandates that the agreement should be registered and should be in writing. The agreement should also be signed. This encourages altruistic surrogacy. If it is altruistic surrogacy

¹⁹ Section 35 (3) of ART Bill, 2012.

²⁰ Article by Anil Malhotra, The Hindu, 3rd May, 2014. Available at ehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece. visited on 7th June, 2014.

²¹ Act No. 9 of 1872.

²² *The Assisted Reproductive Technologies (Regulation) Bill, 2011*.

²³ Section 2(d) of the *Indian Contract Act, 1872*.

what is to be proved is that consent was obtained free. Hence, the only thing to be asserted is whether the agreement has been entered with free consent or not. Consent is said to be free when it is not caused by coercion²⁴, undue influence²⁵, fraud²⁶, misrepresentation²⁷ or mistake²⁸. In India mass are illiterate and uneducated. In many instance undue influence and fraud are commonly practiced. In case the matter is referred to the court, the paramount consideration will be given to the agreement that is entered by the parties which hampers the right of the surrogate mother. The ART guidelines do not address this issue.

Apart from the *Indian Contract Act, Medical Termination of Preganacy Act*²⁹, 1971 (herein after referred as MTP Act) applies to surrogacy also. Sex-selective surrogacy is prohibited and Cases of abortions is governed by the MTP Act, 1971 only.³⁰ At times, the prenatal tests may diagnose a disability or congenital anomaly in the baby and the commissioning parents may desire abortion. But if the surrogate mother denies then problem arises³¹. The fetus growing inside of her is “technically” the biological creation of another. The question is undecided. The MTP Act gives certain ground under which a woman can terminate her pregnancy. They are the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.³² But this is subject to condition that the registered medical practitioners have to provide their opinion for the same. Even after this, it is the woman who is carrying shall decide to terminate or not. Her consent is paramount. The prospective Bill is required to address this issue specifically.

Legal Issues Relating to Adoption-

Another mode to have a child for a childless couple is through adoption. Adoption is a social, emotional, and legal process through which, children who will not be raised by their birth parents become full, permanent, and legal members of another family. Adoption can be a most beautiful solution not only for childless couples and single people but also for homeless children. “Adoption as defined under the law is creation of a parent-child relationship by judicial order between two parties who usually are unrelated. This relationship is brought about only after a determination that the child is an orphan or has been abandoned or that the parental rights have been terminated by the court’s order. The *Hindu Adoption and Guardianship Act* is clear that adoption should be acted only

²⁴ Section 15 *Ibid.*

²⁵ Section 16 *Ibid.*

²⁶ Section 17 *Ibid.*

²⁷ Section 18 *Ibid.*

²⁸ Section 20,21 & 22 *Ibid.*

²⁹ Act No. 34 of 1971.

³⁰ *Supra* note 1.

³¹ Bryan Robinson, ‘*Fetuses and Surrogacy Lose in Legal Battle*’, The case involves Helen Beasley, a 26-year-old surrogate mother who is six months pregnant, and is suing Charles Wheeler and Martha Berman because, she claims in legal papers, they backed out of their agreement when she refused to abort one of the twins she is carrying. Available at <http://abcnews.go.com/US/story?id=92627>

³² Section 3 of the *Medical Termination of Pregnancy Act*, 1971.

after following the due procedure of law. The power to issue an order for adoption is with the session's court. Central Adoption Resource Authority (CARA) guidelines are also clear in this regard.

Hence, the *Hindu Adoption and Maintenance Act, 1956*³³ (herein after referred as HAMA) governs adoption amongst the Hindus in India. It does not permit non-Hindus to adopt a Hindu child. This Act provides for adoption of Hindu children by the adoptive parents belonging to Hinduism. And this is not applicable to other communities like Muslims, Christians and Parsis. There are certain other conditions imposed under Section 11(i) and (ii) which states, in every adoption, the following conditions must be complied with –

- if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son (whether by legitimate blood relationship or by adoption),
- if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption."

Thus, the impugned Act restricts a person from having second son or daughter by adoption. In *Andhya alias Supriya Kulkarni & another v. The Union of India & another*³⁴, they have questioned the validity of these conditions on the ground of violation of Articles 14 and 21 of the Constitution of India. Thus, the impugned provisions inject a person from having second son or daughter by adoption. The main challenge put forth is that the Right to Life under Article 21 as explored through various judicial pronouncements has numerous dimensions. Life with human dignity is one such. The right to have size of a family according to one's own choice is comprehended within the concept of human dignity. Since the impugned provisions prevent such right, they are violative of the rights guaranteed under the Indian Constitutional. Hence, the restriction is unreasonable.

Personal laws of Muslims, Christians, Parsis and Jews do not recognize complete adoption. Islamic regulations regarding adoption are distinct from western practices and customs of adoption. Contrary to what happens in the western world, a child does not formally leave his or her family to enter the one that raises them. While raising someone else's child is allowed and even encouraged in case of an orphan, the child does not become a child of the new parents. This form of adoption where children retain membership to their original family is called, in Arabic *kafala*. This implies for example that the new father cannot name the son after him, and that the child is counted as a non-*Mahram*. Our Apex court has also shown light towards adoption amongst the Mohamedian community also.

³³ Act no. 78 of 1956.

³⁴ AIR 1998 Bom 228.

Though Islamic law prohibits adoption but they are free to adopt under general law. For the interpretation of the *Muslim Personal Law (Shariat) Application Act, 1937*³⁵, reference was made by two division bench judgments of the Madras High Court in *Puthiya Purahil Abdurahiman Kurnavan v. Thuyath Kancheentavida Avoomma*³⁶ and *Maulvi Mohd. v. Mahboob Begam*³⁷, where it has been held that the non mention of other subjects such as adoption in respect of which a valid custom could govern and be binding on the parties does not mean that it is not permissible for the parties to rely on such a valid custom, if there is one. The conclusion, therefore, is that the Holy Quran nowhere prohibits adoption³⁸.

The other mode for Non-Hindus to go for guardianship instead of adoption and this is governed by the *Guardian and Wards Act, 1890*³⁹. This law applies to non Hindus who wish to go for adoption. It is not adoption but guardianship. Under this law, when children turn 21 years of age, they no longer remain wards and assume individual identities. They do not have an automatic right of inheritance. Adoptive parents have to leave whatever they wish to bequeath to their children through a will, which can be contested by any 'blood' relative'.

To overcome this problem, the legislature has found a secular law for adoption in India which is called '*The Juvenile Justice (care and protection) Children Act, 2000*'⁴⁰, whereby without reference any religion a right has been granted for all the citizens to adopt a child and all children a right to be adopted.

VI Indian Judiciary on Surrogacy and Adoption

Surrogacy is under experimental stage in India. As already stated there is no specific law also in this regard. A few judicial pronouncement is all what we have based on which the ART Bill is being drafted and amended⁴¹. For ex in *Jan Balaz v. Union of India*, wherein it was held that the child has no right to claim its citizenship because the citizenship which it gets is that of the biological parents irrespective that the child was born in another State where the surrogate mother resided. In the same case, the issue relating to single parent who could go for surrogacy was also questioned and the court held that single parents can go for surrogacy.⁴²

Adoption is not new to India. For there was, till recently, no specific law for child adoption and hence courts through have set precedents for the contiguous issues and other complexities in child adoption. Due to the complete lack of a statute governing the process of adoption, detailed guidelines for adoption, especially for inter-country adoption of children were first laid by the

³⁵ Act No. 26 of 1937.

³⁶ AIR 1956 Mad 244.

³⁷ AIR 1984 Mad 7.

³⁸ *Mohd. Yunus v. Syed Unnisa*, AIR 1961 SC 809.

³⁹ Act No. 8 of 1890

⁴⁰ Act No. 56 of 2000.

⁴¹ *Supra* note 18.

⁴² Which was made illegal by 2012 ART Bill.

Supreme Court. This was done in a series of decisions in a public interest petition initiated on the basis of a letter addressed by an advocate called Laxmikant Pandey, complaining of malpractices indulged by social organizations and agencies engaged in offering Indian children to foreign parents in adoption. This petition resulted in the landmark judgment of the Supreme Court in *Laxmikant Pandey v. Union of India*⁴³ in which detailed guidelines relating to all the precautions for both in-country and inter-country adoptions were formulated. This judgment laid down norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for such adoption, keeping the best interests of the child in mind. This judgment for the first time in India even addressed the needs of adopted children to know about their biological parents. The Supreme Court recommended the constitution of a CARA to set up guidelines for adoption safeguarding welfare and rights of children at the time of adoption, in terms of the observations of the Supreme Court.

In *L.K. Pandey v. Union of India*⁴⁴, The court stated that the *Juvenile Justice (Care and Protection of Children) Act, 2006*⁴⁵ clearly provides that a court may allow a child to be given in adoption to an individual, irrespective of his or her marital status. The *Guardian and Wards Act, 1890* and *The Hindu Minority and Guardianship Act, 1956* permit a guardian to be declared or appointed where the Court is satisfied that it is for the welfare of a minor. Barring single parents to adopt is not statutory but can be a restraint in a particular case upon examination by a competent court. The Supreme Court in *Stephanie Joan Becker v. State*⁴⁶ in 2013 permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigour of the guidelines of the Central Adoption Resource Authority (CARA). It said the proposed adoption would be beneficial to the child. Likewise, in *Shabnam Hashmi v. Union of India*⁴⁷, the Court upheld the recognition of the right to adopt and to be adopted as a fundamental right. It held that every person, irrespective of the religion he/she professes, is entitled to adopt.

VII Children's Rights in Surrogacy and Adoption

The CARA was set up and it has framed guidelines, however these guidelines are silent on the rights of adopted children to know information about their biological parents and make no provision for finding out such information. This psychological need to know one's origins has now been recognized as "sufficiently fundamental or vital to give rise to a human right."⁴⁸ The European

⁴³ AIR 1984 SC 469.

⁴⁴ AIR 1987 SC 232.

⁴⁵ Act no. 33 of 2006.

⁴⁶ Arising out of SLP (Civil) No. 29505 of 2012.

⁴⁷ (2014) 4 SCC 1.

⁴⁸ M Freeman, 'The New Birth Right?: Identity and the Child of the Reproductive Revolution' 4 (3) *International Journal of Children's Rights* 273.

Court of Human rights in *Gaskin v. United Kingdom*⁴⁹, interpreted Article 8 of the ECHR to cover the right to know one's parents' identity as well as circumstances of one's birth.

The International Covenant on Economic, Social and Cultural Rights⁵⁰, the Convention on the Elimination of All Forms of Discrimination Against Women⁵¹ (CEDAW) and The Convention on the Rights of the Child⁵² (CRC) address rights crucial in the context of certain rights, including the right to health⁵³, the right to support, the right to know one's origins⁵⁴, and the right to a family⁵⁵. In this context there is a grave violation of child rights where in surrogacy a homosexual can also opt for it.

Surrogacy implicates several rights of the child under the CRC. First, the child's rights are to be "respect[ed] and ensure[d] . . . without discrimination of any kind . . . [including] birth or other status."⁵⁶ While this provision was originally intended to protect illegitimate children⁵⁷, its inclusiveness suggests a generous and expansive application, including children born of surrogacy. Article 7.1 provides in pertinent part that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents." There are two difficulties with this provision, both grounded in its presumptive incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation. Either problem can be rectified by reforming domestic law or as proposed in the pending Indian legislation on surrogacy, by requiring the intending parents to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship in the state where her intending parents live, and that they, in fact, will be legally recognized as her parents in that state⁵⁸.

The right of the child is also affected when the child is treated as tradeable object in case of commercial surrogacy. In market transactions the will and desire of the parties determines the allocation between them of their freely alienable rights. Each party is expected to look after her own interests; neither party is expected to look after the interests of the other, or of third parties, except to the minimal extent required by law. The question at stake in contract pregnancy is whether norms like this, governing the sphere of market transactions, should be extended to cover the allocation of

⁴⁹ (1989) 12 EHRR 36.

⁵⁰ *Supra* note 2.

⁵¹ *Supra* note 3.

⁵² *Supra* note 4.

⁵³ *Supra* note 5.

⁵⁴ Article 7 of the Child Rights Convention.

⁵⁵ *Ibid.*

⁵⁶ Article 2(1), *Ibid.*

⁵⁷ Article 1 *Ibid.*

⁵⁸ G. Joslin, 'Protecting Children: Marriage, Gender, and Assisted Reproductive Technology', Southern California Law Review, vol. 83, No. 101, Oct. (2010), pp. 1177-1228.

parental and custodial rights to children.⁵⁹ The child has no right claim its citizenship because the citizenship which it gets is that of the biological parents irrespective that the child was born in another State where the surrogate mother resided.⁶⁰ It could mean to relinquish one's "right to claim legal parenthood of the child."⁶¹ It's more difficult for youngsters to deal with the idea that they grew in an unrelated woman's womb, than with the concept that they are not biologically related to one or both parents.⁶² There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage.⁶³

Rights of children who are adopted are recognized at the international level. . The right to know one's origins means the right to know one's parentage, i.e. one's biological family and ascendance and one's conditions of birth. Internationally, this right is widely perceived as the Right to Know – and is considered as an integral part of one's Right to Life and Right to Privacy.

The right to know one's identity has also been guaranteed in the 1989 Convention on the Rights of the Child, the 1993 Convention on the Protection of Children and Cooperation in respect of Inter-country Adoption. The novelty of the CRC has been that in Article 7 and 8 it protects the child's right to know her parents as a child and not only later as an adult. This right to know is not yet universally accepted or acknowledged as being sufficiently fundamental or vital to give rise to a human right in India. Article 21 of the Indian constitution is broad enough to encompass within its ambit the child's right to identity and the right to know one's parentage.

An adopted child's birth certificate contains only the names of the adopted parents, as they are deemed to be the legal parents. If it is agreed to by the adoptive parents, a child may keep his or her natural last name. However, once a child turns 20, he or she may apply to the Registrar-General of Births and Deaths for an original birth certificate. The Registrar-General must notify the adopted person of the counseling services that are available. If the adopted person then indicates that he or she does wish to attend counseling, the birth certificate is sent to the relevant counselor or counseling organization and the adopted person can then obtain it from that counselor or organization. If the adopted person doesn't notify the Registrar-General that counseling is desired, the adopted person is notified that the birth certificate is being kept on his or her behalf and is then sent to the person if he or she makes another request for it.

VIII Conclusion

⁵⁹ Elizabeth S. Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales', Kluwer Academic Publishers, Netherlands, 2000, p. 20.

⁶⁰ *Jan Balaz v Union of India*, (2008) 13 SCC 518.

⁶¹ *Supra* note 37 at 21.

⁶² ⁶¹Susan Golombok, et. al., 'Children born through reproductive donation: a longitudinal study of psychological adjustment', *Journal of Child Psychology and Psychiatry*, June, 2013, pp. 653-660.

⁶³ Pikee Saxena, et. al., 'Surrogacy: Ethical and Legal', *Indian Journal on Community Medicine*, Oct. 2012, pp. 211-213.

There are understandable concerns at a prescriptive and restrictive approach to international surrogacy arrangements. The inter country adoption convention has been said by many to have led to a reduction in the number of such adoptions worldwide because it has made the bureaucratic hoops insurmountable. The legal status of children born of international surrogacy arrangements is complex and uncertain. The time has come to unify the various efforts to deal the issues surrounding international surrogacy into a multi-lateral convention, providing a framework for the growing number of international surrogacy arrangements being entered into. The Permanent Bureau at the Hague Conference on Private International Law, commercial surrogacy has been banned in many nation states.⁶⁴ In India alone, reproductive tourism is a \$400 to \$500 million per year business.⁶⁵ In addition to the monetary costs, there are human costs. Transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights.⁶⁶

The proposed law does not spell out what a surrogate mother would be paid in the case of a miscarriage or other complications during pregnancy. It is also true that a child born out of surrogacy, with the involvement of numerous individuals is placed at a vulnerable position when born but if not taken by the commissioning couple, especially if they are foreigners. Section 34(19) requires that foreign couples appoint a local guardian for the surrogate mother to look after her welfare during the pregnancy and at the time of delivery. It also requires that the commissioning parents make an undertaking that surrogacy is legal in the country of their origin and that the child born through the surrogacy will be allowed to enter their country. However, this Clause also works on the supposition that the child might not be claimed after it is born and thus be subjected to neglect which is a non-committal acceptance of possible abuses of surrogacy.

IX Suggestions

1. The rights and interest of the child should be paramount when having a child whether under surrogacy or adoption. As per the prevalent Indian Council of Medical Research (ICMR) guidelines, a child born through ART has a right to seek information about his genetic parent/surrogate mother on reaching 18 years of age. The parents are not obliged to provide the information on their own. The new ART bill should state that the child should be provided the information when it is in the best interest of the child once he/she reaches 18 years of age. This issue becomes necessary if there are any disease which is due to genes.
2. An application should be made to the court before or after ART is adapted, to issue pre-birth or post birth order. This is required, in case the surrogate mother changes her mind after the birth to give up the parental rights to the couple. This should be made mandatory in case of surrogacy.

⁶⁴ Hague Conference on Private Int'l Law, Private International Law, '*Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*', at 3. <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>, visited on 28th June, 2014.

⁶⁵ Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 225 (2009).

⁶⁶ Hague Conf. on Private Int'l Law, *Supra* note 64, at 3-4.

3. According to IMRC guidelines, surrogacy should be considered only for parents for whom it would be physically and medically impossible to have a baby. This should be included in the Bill. Because instances have shown parents who are physically and medically strong also are opting for surrogacy. (Ex. In case of Cine Actor Shahrukh Khan).
4. After going through the above article, adoption is better than surrogacy. Because we need to protect the interest of child who is already born. Why give birth to another child when there is already a child who is waiting to have a family? For this law relating to adoption has to be amended. In India, there is HAMA applicable to Hindus and there is now secular law called Juvenile Justice (Care and Protection of Children) Act which is not a complete law by itself. In country and intercountry adoption should be allowed once it is in the best interest of the child. And if the parents are able to take care of another child, even when they have a same sex child.
5. A single parent can adopt a child and also go for surrogacy. Of course on surrogacy there is no clear picture as the Bill is yet to be passed. A child if it has to grow in family environment it is in the best interest of the child that a couple is allowed to adopt or go for surrogacy. If in natural circumstances the child loses one of its parents, it is fate. But when the child is being adopted or is born out of surrogacy, at the time of adoption or surrogacy it is better it has both the parents.

Before passing surrogacy Bill the Indian legislature has to stress that the interest of child is almost taken care of and at the same time suitable amendment should be carried in adoption law also.