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AN ANALYSIS OF THE RIGHTS OF THE CHILD BORN OUT OF SURROGACY

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ABSTRACT

Outsourcing is the demand of the hour, whether it is tech support, tours, and travels, laboratory results to radiographic interpretations. Never must have mankind wondered in its wildest of dreams that babies too could be outsourced through human labor. One would have hardly thought that an enigma as pure as motherhood could be ‘bought’ as mere services. Babies, at present are not only procreated through conception from sexual intercourse, gestation, or adoption, but also with the help of complex reproductive technologies.

In this article, I am going to discuss the rights of the children borne out of surrogacy. The paper has been divided into several parts. The **first part**, of the paper, gives a brief introduction to the same. The **second part** discusses the concept of surrogacy and its variants. **The third part** deals with abusive practices in Surrogacy. **The fourth part** discusses the violation of the rights of a child borne out of surrogacy. The fifth part deals with the theory of the best interest of the child. **The last part** deals with the Indian Context and Surrogacy.

INTRODUCTION

Surrogacy as a conception is gaining popularity among couples who want to conceive but are unable to do so and also among couples who want to be parents but without undergoing the gestational process themselves. There is an international dilemma because of the insufficiency of surrogacy laws or the absolute lack of any kind of regulation of the same.¹ The case of Baby Gammy would be an apt example to cite here wherein a Thai surrogate had gestated twins for an Australian couple.² It came to the knowledge of the Australian couple that one of the twins had Down syndrome. The surrogate was a Buddhist by faith and denied a termination of pregnancy whereas the commissioning parents refused to take Baby Gammy along with them. Surrogacy laws

¹Baby M case, AIR 2009 SC 84.

Baby Manjhi Yemada

² Baby Gammy Case, Thailand

Alexandra Topping and Brenden Foster, International surrogacy laws in the spotlight amid row over baby Gammy, The Guardian (Kolkata) August 4, 2014 available at <https://www.theguardian.com/world/2014/aug/04/global-surrogacy-laws-debate-baby-gammy-thailand>

Thai surrogate baby Gammy: Australian parents contacted, BBC NEWS, August 7, 2014 available at <https://www.bbc.com/news/world-asia-28686114>

in Thailand were largely unregulated therefore there was no mandate on the Australian couple to care for the child. The Thai surrogate mother did not have the funds to take care of Baby Gammy. Additionally, the surrogate was legally baby Gammy's mother, and Gammy was a Thai national. The baby gammy case highlights a peculiar case of the international baby-making industry. Different countries have adopted different measures to deal with the surrogacy-related menace. Some countries allow commercial surrogacy that prevents child trafficking and other offenses, some countries like the United Kingdom allow only the altruistic form of surrogacy while some other countries like India and Thailand have kept it largely unregulated.

For increasingly global it is. In a 2013 study conducted by The Hague Conference on Private International Law, lawyers and agencies in responding states reported assisting parents with international surrogacy arrangements in sixty-eight countries around the world.³

Furthermore, data from five agencies that concentrate on international surrogacy showed that the international surrogacy market grew nearly 1,000 percent between 2006 and 2010. As the surrogacy business continues to boom, countries are beginning to consider reform. The Hague convention found that responses to surrogacy are in a state of fluidity: several States have introduced legislation recently and several others have bills currently into account.”

CONCEPT OF SURROGACY

The concept of surrogacy involves a woman agreeing to become pregnant and give birth to a child to provide it to a third party, who will act as the biological father.⁴ The current situation is that surrogacy is legal in ten countries, banned in about a dozen while remaining unregulated in the rest.⁵ Since the early 1990s, surrogacy has been on the rise it has given hope to infertile and sterile couples. Not only that but it is also undergone by fertile couples who do not want to undergo the

³Pyrce Caitlin, Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem

Source: Indiana Journal of Global Legal Studies , Vol. 23, No. 2 (Summer 2016), pp. 925-952, Available at <https://www.jstor.org/stable/10.2979/indjgolegstu.23.2.0925>

⁴Surrogacy, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

⁵What are the International Surrogacy Laws by Country, SURROGATE.COM, <https://surrogate.com/intendedparents/surrogacy-laws-and-legal-information/what-are-the-international-surrogacy-laws-by-country/>.

Karen Smith Rotabi, Susan Mapp, Kristen Cheney, Rowena Fong, and Ruth McRoy, Regulating Commercial Global Surrogacy: The Best Interests of the Child, 2 J. HUM. RIGHTS SOC. WORK 64, 67 (2017).

otherwise strenuous procedure of pregnancy owing to lifestyle or work pressure. Surrogate births are not recorded consistently by countries therefore there is no reliable global data on the number of annual surrogate birth.

Traditional surrogacy⁶ is a process in which the egg of the surrogate mother is implanted with the sperm of the intended or commissioning parent⁷ usually through the process of artificial insemination.⁸The children thus borne out of such an arrangement may not be always related to their intended parents. Gestational surrogacy uses IVF to fertilize a third-party egg with the sperm of a third-party donor, or intended parent. The embryo from a donated acolyte and sperm, or from the intended parent(s), is transferred to the surrogate's uterus, resulting in the development of a fetus, which may have no genetic relationship to the surrogate. Depending on whether the third party is an individual or a couple, as well as no matter how much sperm and egg are donated by the intended parent(s), 0 percent, 50 percent, or 100 percent of the child's DNA is genetically related to the third party.⁹

The two types of surrogacy that are witnessed globally are gestational and traditional surrogacy. Gestational surrogacy emanates when pregnancy results from the transfer of an embryo created by IVF. The carrier mother in such a case is called a gestational carrier. In the case of traditional surrogacy pregnancy ensues natural copulation or either through artificial insemination. The child thus born out of such an arrangement is genetically linked to the surrogate.

The other two variations of surrogacy are altruistic surrogacy and commercial surrogacy. Commercial surrogacy has also been referred to as “for-profit” or “compensated” surrogacy. It is a contractual and transactional form of surrogacy in contrast to altruistic surrogacy which is gratuitous. In the case of altruistic surrogacy, the relationship between the surrogate mother and the commissioning parents is a gratuitous one which does not involve any kind of payment to the

⁶Erica Davis, The rise of gestational surrogacy and the pressing need for international regulation, 21 MINN J INT L 1,120, 121 (Spring 2012).

⁷The people who engage in surrogacy to obtain children are often called intended parent. They are often referred to as commissioning parents.

⁸ Willem Ombelet and Johan Van Robays, Artificial insemination history: hurdles and milestones, 7 FACTS VIEWS VISOBGYN 1, 140 (2015)

⁹The International Human Rights Clinic of the University of Chicago Law School, Human Rights Implications Of Global Surrogacy available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1009&context=ihrc>.

surrogate apart from basic medical expenses. Commercial Surrogacy, on the other hand, focuses on payment of remuneration to the surrogate mother in consideration of her services.

ABUSIVE PRACTISES IN SURROGACY

Several cases with regard to the prevalence of abusive practices in surrogacy have been testified. Foul practices in the milieu of surrogacy are well known. Cases include convicted sex criminals from Australia and Israel commissioning surrogate mothers from India and Thailand,¹⁰ an affluent Japanese gentleman using 11 surrogate mothers, leading to the births of 16 children in Thailand and India,¹¹ the desertion of a surrogacy-born infant with infirmity in Thailand,¹² and the abandonment or sale of “surplus” surrogate-born infants in twin births in India.¹³

Commercial surrogacy systems transfer surrogate mothers, occasionally while expecting, across state borders to dodge national regulations; in one such case 15 Vietnamese pregnant women were found and freed by Thai authorities, leading to human trafficking charges in the context of a baby-farming scheme.

Most of the cases of abusive practices in surrogacy take place in unregulated contexts often involving commissioning parents from affluent Western countries who approach the vulnerable surrogates through intermediaries who most often keep a large share of the payment received from the commissioning parents.¹⁴ In this context, it would also be unfair to state that these abusive practices in context to surrogacy take place only in cases of countries having unregulated networks. In California, two prominent surrogacy attorneys were convicted in a baby-selling ring.¹⁵

¹⁰ See, for example, www.geneticsandsociety.org/article.php?id=6933; www.abc.net.au/news/2014-08-06/baby-gammys-father-convicted-on-more-than-20-child-sex-charges/5653502; and [2016] FCWA 17, available at www.familycourt.wa.gov.au/files/Publications/2016FCWA17anon.pdf.

¹¹ See Samantha Hawley, Japanese man fathers 16th baby via surrogate in Thailand, 9 September 2014, at www.abc.net.au/news/2014-09-10/japanese-surrogacy-man-has-another-baby/5732856.

¹² See [2016] FCWA 17 as per footnote 10 above.

¹³ See, for example, www.bionews.org.uk/page_460525.asp and <http://nymag.com/thecut/2015/03/darkside-of-international-surrogacy.html>.

¹⁴ UN Human Rights Council, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material available at <https://digitallibrary.un.org/record/1638578?ln=en>

See, for example, www.bionews.org.uk/page_460525.asp and <http://nymag.com/thecut/2015/03/darkside-of-international-surrogacy.html>.

¹⁵ Smolin, “Surrogacy as sale of children”, pp. 328–330.

By governmental authorities, a prominent surrogacy attorney admitted that "she and her accomplices used gestational carriers to place an inventory of unborn babies they would sell for more than \$100,000 each".¹⁶

INTERNATIONAL LEGAL FRAMEWORK

The Convention on the Rights of the Child states that States Parties must take all measures to prevent the abduction, sale, or trafficking of minors for any purpose set out in Article 35. The phrase "for any purpose or in any form" is important and surrogacy is not an exception to the Article's prohibition. Families cannot be formed and houses cannot be homes through the abduction or sale of children.

Article 1 of the Optional Protocol to the Convention on the Rights of the Child prohibits the sale of children, child prostitution, and child pornography. In Article 2 (a) of that Optional Protocol, a child is defined as "a child who is transferred from one person or group of persons to another for monetary or other consideration". Several international agreements address the rights and responsibilities of children, including the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child, which declares that the sale of a child constitutes a grave human rights violation in and of itself.¹⁷

Both domestic and international adoption policies are permissible under the UN Convention on the Rights of the Child.¹⁸ There are therefore States that view both domestic adoption and international adoption as methods beneficial to family formation, while other states do not have legislation in place that provides for domestic adoption or international adoption. As expressed in the Hague Convention on the Protection of Children and International Cooperation on Adoption, of 1993, safeguards must be put in place no matter what differences of policy exist between States

¹⁶Rory Devine and R. Stickney, "Convicted surrogacy attorney". Available at

www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html.

¹⁷ John W. Tobin, "To prohibit or permit: what is the (human) rights response to the practice of international commercial surrogacy?" *International and Comparative Law Quarterly*, vol. 63, No. 2 (2014), University of Melbourne Legal Studies research paper No. 689, pp. 18–21 and 24–27, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476751.

¹⁸ See 1993 Hague Convention, art. 21; and *Child Adoption: Trends and Policies*, United Nations publication, available at www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

to prevent abductions, sales, or trafficking of children to be used in the creation of families. This principle also applies to surrogacy. It has consistently noted that in its evaluation of states that are adversely affected by surrogacy, the Committee on the Rights of the Child warns that surrogacy could constitute child trafficking if not properly regulated.¹⁹ Consequently, despite the legitimacy of surrogacy from a political and social perspective, States must prohibit, and establish safeguards against, abduction of, sale of, and trafficking in children as a result of surrogacy.

VIOLATION OF THE RIGHTS OF THE CHILD IN SURROGACY

A child borne out of a surrogacy arrangement may have six adults claiming parental Rights over him or her i.e. the genetic mother (egg donor), the gestational mother (surrogate), the commissioning mother; the genetic father (sperm donor), the husband of the gestational mother (presumption of paternity) and therefore the commissioning father. This kind of manipulation contradicts the truths of genetics, which paradoxically are increasingly sought, especially about fatherhood determination. It is also in gross violation of Article 7 of the Convention on the Rights of the Child which guarantees the right of a child to know his origin and identity.

Surrogacy is inherently and blatantly exploitative in the sense that it makes a baby an object of a contract. As a result, the child is denied the right to dignity which is an imperative element of the right to life. Not only does it commodify the baby but it also reduces the surrogate to a mere gestational oven. The exploitative genuineness of surrogacy provisions and the resulting objectification of women and children have also united religious fundamentalists and feminists.²⁰ The business of surrogacy brimming with opportunities to exploit women and children alike. To prevent both current and future inevitable exploitation, it is essential principles embodied in existing documents, such as the Convention on the Rights of the Child and the Convention on the Adoption of Children are applied by all concerned States.

¹⁹ CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

²⁰Report Presented at The Council of Europe, Surrogate Motherhood: A Violation Of Human Rights Available at <http://www.eclj.org>

TURNING CHILDREN INTO COMMODITIES

At its very core, surrogacy is inherently and blatantly exploitative. Surrogacy compromises the dignity of the surrogate child by treating it as a thing of a contract—a commodity. It further compromises the dignity of the mother, albeit her participation is voluntary, by merely treating her as a gestational oven. When a big amount of cash is invested during a transaction, expectations will increase.

Many couples who seek surrogacy as a means to expand their family already have spent on in vitro fertilization (IVF). IVF can cost as much as \$8,500 per round, plus the costs of medication. Surrogacy can cost as much as \$147,000+. An endeavour in which one invests so much is only natural to expect a positive return. The significant economic investment has, however, led to the trend of not only being able to contract children but also choosing children who are likely to succeed both socially and academically. For decades, egg donation has operated on this mentality. "[Egg donors who are] graduates and those with high IQs are particularly sought after." In addition to paying premium prices for specific physical characteristics, many contracting couples are also willing to pay for good looks and physical attributes." It is no coincidence that an increase in the number of girls who are interested in egg donation because they want to buy their education has been triggered by the willingness of infertile couples to pay significant amounts of cash, even though the process of egg donation carries significant medical risks.

In addition, more and more medical and psychological studies underscore the importance of links created during pregnancy between a mother and her child, and their importance for the child's development. Data are minimal on this matter, but a mother's detachment will affect her child, who may feel abandoned and suffer from cognitive and social disabilities. Biological mothers abandoning adopted children may hurt them physically, but they will suffer more in situations of surrogacy since this abandonment is voluntary, which has been decided in advance. Additionally, no one knows how the child is ultimately affected once they learn the truth about surrogate pregnancy. Research has begun to highlight the psychological impacts of donor sperm conception on children, and comparisons can also be drawn with adopted children. Surrogacy arrangements and sperm donor insemination are comparable, and emerging research is beginning to spell out the implications of donor sperm conception.

HUMAN TRAFFICKING - BABY SELLING CONSPIRACIES

U.S. Attorneys and the Federal Bureau of Investigation recently exposed a conspiracy between attorneys in the United States, specializing in reproductive law, who used Gestational Carriers ("GCs") to create a pool of unborn babies to sell for over \$100,000. Among others, Theresa Erickson and Hilary Neiman were convicted of defrauding US courts and prospective parents. Specifically, Erickson submitted false declarations and pleadings to the California Superior Court in San Diego to obtain pre-birth judgments granting parental rights to Intended Parents ("IPs"). By "paying women to be implanted with embryos in overseas clinics, Erickson and her conspirators created an inventory of babies. Initially, the conspirators falsely claimed that the babies were the result of legitimate surrogacy arrangements, but that the original IPs had backed out." After obtaining pre-birth orders, Erickson acquired seemingly valid surrogacy arrangements between IPs and GCs, allowing IPs' names to appear on the babies' birth certificates, which enabled them to profit from the sale of parental rights. In addition, Erickson applied for coverage for the medical expenses associated with giving birth via one of the state's infant subsidy programs. Due to the "tricky ethics" of rich couples paying poorer women to be surrogate mothers, surrogacy for profit is predominantly banned in Asia. In Thailand, the police have a theory that surrogacy rings take advantage of human trafficking to lower costs." Surrogacy rings operated in Thailand, Cambodia, Vietnam, and Taiwan, announcing on their websites the price of a child at \$32,000, plus other expenses. In Thailand, police arrested fourteen Vietnamese women engaged in illegal surrogacy services. It took the victims several months to realize that they were in a real slum after being promised jobs 'suited to their health' and confined to two houses. "Each victim's passport was seized," says the report.

SURROGATE MOTHERHOOD AND THE BEST INTEREST OF THE CHILD

"Best interests of the child" does not have a standard definition, but the term refers to the consideration that courts give when deciding what type of services, actions, and orders are in the child's best interest and who is best suited to care for them. Best interest decisions usually take into

consideration a range of factors related to the child's circumstances, the parent or caregiver's circumstances and parental capacity, with the child's ultimate safety being the paramount consideration.²¹

A person who has been asked to make decisions about a child, such as a legal representative or judge, will almost always rely on the best interest of the child theory.) The UN Convention on the Rights of the Child (hereafter, CRC) of 1989 contains this standard, which requires that the best interests of the child be a "principal consideration" in all actions concerning them (Article 3). According to Article 6(2) of the UN Convention on the Rights of the Child, every child has the right to survival and development, including physical, psychological, social, and emotional development. A major question that arises about the child thus born from surrogacy is whether separating a child from his or her gestational mother harms the child's development?

In 1993, the Hague Convention on Inter-country Adoption included this principle as a core principle. The purpose of the Convention is to ensure that "inter-country adoptions are conducted in the best interests of the child and with respect for his or her fundamental rights" (Art. 1), and "to prevent the abduction, sale, or trafficking in children". The two essential conditions of inter-country adoption are that the consent of the family of origin has not been induced by monetary or other considerations (Article 4, Para. c.3) and that the consent of the mother is only given after the birth of the child". Numerous domestic laws also incorporate the principle. In Switzerland, such provisions are found in the law on Assisted Reproduction of 1998, which states that reproductive techniques can only be utilized "when the interests of the child are protected" (Article 3, Para. 1).

It's important to consider several factors when determining the best interest of the child. Children's physical and mental health, their identity, their relationship with parents and siblings, and their safety are among the various factors considered.²² When considering the best interests of a child, it is impossible to ignore the fragmented nature of maternity to which the children conceived through surrogacy must be exposed. The children will have two mothers: the intended mother and the surrogate mother; if the egg is donated by another woman, a third mother can also be added. If

²¹Determining the Best Interests of the Child available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf

²² See, for instance: UN High Commissioner for Refugees (UNHCR), *Guidelines on Determining the Best Interest of the Child*, Geneva, UNHCR, 2008.

surrogate motherhood is viewed from the perspective of the best interests of the child, this fragmentation of maternity is one of the main concerns. The fragmentation of maternity can be detrimental not only to the child but also to all the different categories of mothers involved, thus infringing on several fundamental rights.

The surrogacy contracts reduce to the children to the status of the commodity which is even more visible when due to some defect in the ensuing child the commissioning parents refuse to take the child so born. In few instances, it has so happened that the intending parents have refused to take the child because he or she suffers from an unexpected ailment or is not of them as they had wanted. This happened, for instance, in the case of a baby born a surrogate mother happened, in the case of a baby born a surrogate mother in Thailand in 2014 (known as 'Baby Grammy's case').²³

It is noteworthy that, at present, there is no overt prohibition of surrogacy in any international or regional treaty. Conversely, there is either no explicit recognition in international law stating anyone has a positive 'right' to contract with a surrogate or provide services as a surrogate. The few international human rights norms that have been articulated are non-binding and address gestational surrogacy from the perspective of the children who result from these arrangements. The Committee on the Rights of the Child in its concluding comments noted that inadequate regulation of commercial surrogacy rises the resin in the Australian couple's case, the surrogate mother refused to take the baby due to his Down syndrome, leaving him with his impoverished mother. However, his twin sister was healthy and was taken home by his family. The case of Baby Grammy led Thailand to pass a law in 2015, imposing a ban on commercial surrogacy for foreigners in the country in 2014 (known commonly as 'Baby Grammy's case'). Thailand passed a law against commercial surrogacy in 2015 in response to cases like this and others like it.

UN Special Rapporteur on the sale of children, child prostitution, and child pornography, in her UN Human Rights Council report on illegal adoption of 2016 echoes those concerns. In her speech, she highlighted the growth of international commercial surrogacy, the lack of international regulation, and the potential harm to children. Furthermore, the author states, "from a legal

²³"Thailand bans commercial surrogacy for foreigners", BBC News, 20 February 2015. Available at: <http://www.bbc.com/news/world-asia-31546717>

standpoint, the practice is, in essence, a sale of children and may result in an illegal adoption". The sale of children and trafficking of children is prohibited under customary international law. Among the various means to prohibit such exploitation is the Convention on the Rights of the Child (CRC) (Article 35) as well as the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000) (Article 1).

INDIAN CONTEXT

The surrogacy industry in India is a million-dollar industry. The industry has mushroomed since 2002. It was at its zenith in 2014 when it was estimated to be worth over 2000 crores or USD 500 million.²⁴ A million-dollar industry exists in India's surrogacy industry. Since 2002, the surrogacy industry has grown significantly. It peaked in 2014 when it was estimated to be worth more than 2000 crores. In 2005-2006, the Indian Council for Medical Research (ICMR) had estimated that revenues from the surrogacy industry in India would cross USD 6 billion in the next few years. According to a report submitted to the Rajya Sabha in August 2017, the parliamentary standing committee for the department of health and family welfare estimated 2,000 surrogacy births in India over the preceding three years.²⁵

The National ART Registry of India (NARI), which is maintained by the Indian Society for Assisted Reproduction (ISAR), which is the nodal agency for monitoring surrogacy cases, reports a decline in surrogacy cases during the period of 2015-2017.²⁶ Doctors say that Based on clinics' voluntary uploads; these are partially accurate since they reflect only the information that was recorded. Indian law forbids commercial surrogacy, which is the major reason for such declination.

²⁴ Namita Kohli, 'Commercial Surrogacy: The Half Mothers of Anand', Hindustan Times, Aug. 20, 2018 Available at: <https://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUeI9CGC5FoilmshKE4O.html> (Last visited on April, 2, 2021)

²⁵ Puneet Nicholas Yadav, Rent-A-Womb? Wait, The Government Is Planning to Ban It; 'Absurd', Say Experts, The Outlook, Aug.5, 2019, available at: <https://www.outlookindia.com/magazine/story/india-news-rent-a-womb-wait-the-government-is-planning-toban-it-absurd-say-experts/301961> (Last visited on April, 2, 2021)

²⁶ Sudipta Sengupta, New strict Surrogacy Bill on the anvil, clinics shut shop, The Economic Times, Nov. 16, 2019, available at: https://economictimes.indiatimes.com/news/politics-and-nation/new-strict-surrogacy-bill-on-the-anvil-clinics-shutshop/articleshow/72081780.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on April 2,2020)

BABY MANJI YAMADA CASE

Dr. Yuki Yamada and Dr. Ikufumi Yamada, a Japanese couple, visited India in 2007 to procure surrogacy services. In Anand, Gujarat, the biological parents/intending couples and the surrogate mother visited a surrogacy clinic and chose a surrogate mother. The surrogacy contract was signed by both parties. The couple divorced due to unforeseeable circumstances, and the biological father Dr. Ifukumi Yamada left for Japan due to his expired visa. The child was born on 25th July 2008, and he or she was nursed and cared for in the clinic. There is a birth certificate issued by the Municipality of Anand that indicates the genetic father's name. Ms. Emiko Yamada, the grandmother of the baby, filed with the Regional Passport Authority for a Certificate of Identification for the baby to go back to Japan. The petition was rejected, nonetheless, because, in India, single men are not permitted to adopt children. Despite being denied travel documents, Manji's father filed a petition with the Supreme Court seeking the baby's passport. After that, the Regional Passport Authority, Rajasthan issued Certificates of Identification instead of passports to all Indians, as per instructions of the Supreme Court.

JAN BALAZ CASE

German nationals, Jan Balaz and Susanne Anna Lohle had twins 'Balaz Nikolas' and 'Balaz Leonard' by fertilizing donated ova with sperm from Balaz through a surrogate mother. A citizen of India, Marthaben Immanuel Khristi. In the birth certificate issued for the twins, however, the father was given as Jan Balaz, and the mother was given as Marthaben Immanuel Khristi, the surrogate mother instead of Susanne Anna Lohle, Jan Balaz's wife. For the twins to return home, the couple applied for a passport. A passport in the names of the twins was issued. In a notice served to Mr. Jan Balaz, the passports were asked to be surrendered. An Indian surrogate mother gave birth to twins, and the question of the nationality of the twins was subsequently filed in the High Court of Gujarat. With exhaustive analysis of the Baby Manji case and precedent, the court directed passport authorities to issue a certificate of identity. It was widely reported in Indian and global media that these two cases highlighted the need for regulation and oversight of surrogacy, which led to various laws that came into being as a result of the legal and diplomatic crisis.

CONCLUSION

Not many will argue about the fact that commercial surrogacy is a grey area where ample work has to be done. The issues are mainly about the conflicting interests of various categories of individuals involved in the process. The concept of surrogacy finds its roots in a benevolent idea of providing babies to infertile parents and one of the objectives of commercial surrogacy was to provide financial aid to the surrogate. Nonetheless, it ends up jeopardizing the interests of the very same key members, the surrogate and the child born out of surrogacy. The Preamble to the Constitution of India guarantees to the people justice of social, economic and political. The executive has made its stand clear on the position and has not shied away from bringing in traditional policies to regulate the same. It's high time that the other two organs of the government, the legislature and the executive too take the requisite measures.

The tender age of children makes them extremely vulnerable and therein creeps the need for extra care and protection for them. The best interest of the child theory is the best method to determine the rights and liabilities owed to children born out of surrogacy. The child born out of a surrogacy arrangement is the only voiceless and innocent party who at the time of the making of the agreement had no say in the same but might end up bearing the brutal brunt of the negative effects of same.