

ADOPTION v. SURROGACY: AN INDIAN COMPARATIVE LEGAL ANALYSIS

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INTRODUCTION

Adoption has been a practice undertaken by childless parents since times immemorial. However, since India has not adopted a Uniform Civil Code, even the adoption laws are different for each specific religion. While some of them allow adoption, the others do not recognize adoption but allow other forms of the same like foster care, guardianship etc. Though Central Adoption Resource Authority provides for specific and precise guidelines for adoption the sad reality is that it is not followed in most cases, making adoption a difficult, intricate and time consuming process.

These difficulties in procedure among the various other factors lead to emergence of other methods like surrogacy etc. Surrogacy is a productive method for people who want children of their own but unable to conceive or do not have children of own due to other personal reasons. However, due to the absolute lack of express laid down laws in the country, surrogacy is still far from reality. In some cases it leads to the exploitation of the surrogate mother as she is paid really less money for her services or on the other hand problems are created for the parents, especially the foreigners. This is because there are no laws in India to regulate the same and set down a standard procedure.

Thus as seen though both these methods are helpful, in practicality both bring along their own set of problems. This paper also thus provide recommendations and suggestions for reducing such gaps that exist between the existing laws on paper and the real picture by clearly laying down the lacunae in the procedure and laws and necessary changes to be implemented with respect to the same.

ADOPTION UNDER PERSONAL LAWS

Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship.¹ Thus it is referred to as the transplantation of the child from one family to another. i.e it is a process to incorporate a child permanently into a family with all the rights of a natural child, in which he was not been born.²

In India, there is no uniform common stature that governs the laws of adoption. Hence, the various personal laws provide for different provisions regarding adoption .Some of them have been discussed in brief below. The Hindus, who form the majority of the country's population, follow the Hindu Adoption and Maintenance Act, 1956 which consists of many intricate features. Though these were intended to safeguard the adopted children from any kind of exploitation these actually create difficulties in adoption. Some of the essential features of this Act are:³

- The age difference between parent and adopted child (specifically, between adoptive father and adopted daughter, and adoptive mother and adoptive son) must be minimum 21 years.
- If the person already has a biological or adopted child, the second (adopted) child cannot be of the same sex.
- A married female cannot adopt a child during the lifetime of her husband without his consent unless he is of unsound mind and incapable of making decisions or giving consent. Similarly, for a married male intending to adopt, the consent of the spouse is necessary unless she is of unsound mind, has ceased to be a Hindu or has renounced the world.
- An unmarried or widowed or divorced Hindu female can adopt a child.
- The principle right to give a child in adoption lies only with the natural father, but the mother's consent is necessary if she is living. The biological mother can give the child in

¹ Central Adoption Resource Authority , Ministry of Woman and Child Development , Govt. of India as available on <http://www.adoptionindia.nic.in/> , last visited on 12:39 pm 5 September 2014

² Prof G.V.C Subba Rao ,Family Law in India,10th ed., Pg 465

³ Catalysts for Social Action , Legal Guidelines for Hindu Adoption and Maintenance Act , 1956 , available at <http://www.csa.org.in/hama> , last visited on 3:35pm 5 September 2014

adoption if the father is dead or of unsound mind. An orphan child can be placed for adoption by a guardian duly appointed by the court.

- In-country adoption is a private act between the natural and adoptive parents, not requiring the scrutiny or permission of the court, except when a person other than the natural guardian is giving the child in adoption.
- If in the natural family some property was vested in the child before adoption, that will remain in him and he cannot be divested of it just because he has gone out to another family of adoption. Further, the child retains 'sapinda' relationship and degrees of prohibited relationship in his natural family for the purpose of marriage.

As an exception to the above mentioned , the personal laws of followed by Christians and Parsis do not recognize adoption .However , in this case an adoption can take place from an orphanage by obtaining permission from the court under Guardians and Wards Act, 1890⁴. Since there is no adoption law for Christians, they can take a child under the said Act only under foster care. Foster care would be however differ from that of adoption in it's feature. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance. Thus these communities follow the provisions of Guardians and Wards Act, 1890.

Islam does not recognize adoption. This does not fundamentally mean that they cannot adopt in any manner .This only means that there is no system similar to adoption as recognized in the Hindu System.⁵ Adoption in Muslims can take place from an orphanage by obtaining permission from the court under Guardians and Wards, Act, 1890.

⁴ Romit Agarwal , Adoption : Under Hindu , Muslim , Christian and Parsi Law , available at http://www.legalserviceindia.com/articles/hmcp_adopt.htm , last visited at 6 September 5:00 pm

⁵ *Mohammed Allahabad Khan v. Mohammad Ismail* (1886) ILR 8 All 234

ADOPTION UNDER OTHER STATUTES

The Guardians and Wards Act, 1890

As seen above , except for the Hindus , none of the other cultures have an enabling law to adopt a child legally as thus the people belonging to these religions who are desirous of adopting a child can only take the child in 'guardianship' under the provisions of The Guardians and Wards Act, 1890.

This Statute thus does not allow for full adoption but only guardianship⁶ making the child a ward, not an adopted child. 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.⁷

However, it does not cover the topic of guardianship in its entirety. The law is silent about the orphan, abandoned and surrendered children. Further, there is also no other child specific codified legislation dealing with the adoption of the children of these categories. As a result, several appeared in respect of the custody, guardianship or adoption of these types of children, which were prejudicial to the interest of the children.⁸

Juvenile Justice Act, (Care and Protection of Children) Act, 2000

To remove such uncertainties and fallacies that were present in the personal laws covering adoption and also laws regarding guardianship, Juvenile Justice (Care and Protection of Children) Act, 2000 introduced the concept of secular adoption where a universal right was granted to all citizens to adopt and all children to be adopted, irrespective of the religions. Unlike Guardianship and Wards Act, 1890 here the status granted is that of a parent and not of a guardian and similarly the child is a son/daughter and not a ward. In addition, it allows adoption of two children of the same sex.

⁶ Child Related Legislations : Guardians and Wards Act, 1890 , available at <http://www.childlineindia.org.in/Guardians-and-Wards-Act-1890.htm> , last visited on 6 September 8:09 pm

⁷ Paras Diwan , Family Law, Allahabad Law Agency , Page 413

⁸ Adoption under Juvenile Justice Act : A clarion call to secularism , available at www.legalservicesindia.com , last visited at 12:01 pm on 7 September , 2014

Thus as seen this enactment brought a holistic development to the adoption laws in the country. It removed various restrictions like age, sex, religion which in many cases acted as a barrier. Further amendment made in the year 2006, in addition ensured that these are being implemented properly. Sec.41 of J.J. Act, 2000 read with Rule 33(1) of Central Rules lay down the laws with reference to adoption of orphaned, abandoned or surrendered children. It states that such children can be adopted for their rehabilitation through such mechanism as may be prescribed. Such children may be given in adoption by a Court in keeping with the provisions of several guidelines regarding adoption issued by the State Govt./Central Adoption Resource Authority and notified by the Central Govt.

Apart from these statutory enactments, numerous judgments strengthened the laws of adoption of the country broadening the discussion onto other topics like inter –country adoption. The landmark judgment in the case of *Laxmi Kant Pandey v. Union of India & others*⁹ laid down the laws on inter-country adoption. The Court also issued certain guidelines to be followed while undertaking such adoptions and also stressed on the need for establishment for a central agency that would ensure the implementation of the same. In view of the same, Central Adoption Resource Agency (CARA) was established. Subsequently the Revised Guidelines for the Adoption of Indian children were issued in 1995 to provide a frame work of Rules for regulating and monitoring inter-country adoptions. These Guidelines are now applicable all over the country and they provide a uniform mechanism for processing cases of Inter-country adoptions.¹⁰ On an international scale, India ratified the Hague Convention on Inter-country adoption in the year 2003 as a step towards achieving international cooperation on the subject.

The above paragraphs thus indicate the various provisions under the Indian personal laws in relation to adoption and the other legislations and authorities that facilitate the same. Now, we will be discussing in detail about the other aspect , that is surrogacy and the laws and regulations relating to it in India .

⁹ 1984 SCR (2) 795

¹⁰ Central Adoption Resource Authority , Ministry of Woman and Child Development , Govt. of India as available on <http://www.adoptionindia.nic.in/> , last visited on 12:45pm 5 September 2014

SURROGACY

According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.¹¹ 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. Thus a 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.

Fundamentally, there are two types of surrogacy — traditional surrogacy and gestational surrogacy. In traditional surrogacy, a surrogate mother is artificially inseminated, either by the intended father or an anonymous donor, and carries the baby to term. The child is thereby genetically related to both the surrogate mother, who provides the egg, and the intended father or anonymous donor.

In gestational surrogacy, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. The child is thereby genetically related to the woman who donated the egg and the intended father or sperm donor, but not the surrogate.¹²

Monetary compensation may or may not be involved in surrogacy arrangements. If the surrogate receives compensation beyond the reimbursement of medical and other reasonable expenses, the arrangement is called commercial surrogacy; otherwise, it is often referred to as altruistic surrogacy.¹³

¹¹ Law Commission of India, report no. 228, need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy

¹² Overview Process of Surrogacy , available on <http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process> , last visited at 2:45 pm on 7 September 2014

¹³ Milliez, J. "Surrogacy: FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health." International Journal of Gynecology & Obstetrics, 2008: 312-313

Commercial surrogacy in India is legal in India since 2002.¹⁴ The availability of medical infrastructure and potential surrogates, combined with international demand, has fueled the growth of the industry.¹⁵ Surrogate mothers receive medical, nutritional and overall health care through surrogacy agreements. 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. India is a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice.

However, this picture looks pretty only on paper. In most of the cases involving surrogacy, the surrogate mother is exploited as she is paid comparatively less for her services in India. The usual fee is around \$25,000 to \$30,000 in India which is around 1/3rd of that in developed countries like the USA. In most cases she is cheated by the agent or the other parties involved. All these lacunae arise from the fact that India does not have any laws with respect to the same. Therefore these practices though legal and not regulated in any manner. This creates problems not only for the mother but also for the who find themselves in the midst of many immigration, citizenship and other difficulties.

Since there is no specific legislation on the same, the Indian Council for Medical Research in the year 2005 came up with The National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India. This discussed all the aspects relating to surrogacy including definitions, procedures, legal issues etc. However, owing to it being a mere guideline, its enforceability could not be guaranteed. In view of these inadequate and ineffectual efforts, The Law Commission of India submitted the 228th report on Assisted Reproductive Technology procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements. The following observations had been made by the Law Commission:

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement

¹⁴ The Associated Press (2007-12-30). "India's surrogate mother business raises questions of global ethics". Daily News. Retrieved 2008-07-14.

¹⁵ <http://news.bbc.co.uk/2/hi/business/7935768.stm>

of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

2. A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
7. Right to privacy of donor as well as surrogate mother should be protected.
8. Sex-selective surrogacy should be prohibited.
9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

However, these were only recommendations that needed to be incorporated into a comprehensive legislation which in India was missing. Thus after a long wait of so many years, the Indian

Council of Medical Research (ICMR) came out with a draft Assisted Reproductive Technology (Regulation) Bill , 2010 and Rules 2008. Though this bill acknowledged surrogacy agreements and their legal enforceability and brought out provisions regarding proper procedure to be followed by foreigner and foreign couples. It also laid down provision for safeguarding the right of surrogate by the specifying the age and the no. of times surrogacy can be undertaken by her. However this bill suffered from multiple lacunae. The Bill neither created nor designated or authorized any court or quasi-judicial forum for adjudication of disputes arising out of surrogacy, ART and surrogacy agreements. In addition remedy available to biological parents to obtain exclusive legal custody of surrogate children and many relevant factors were not covered in the bill.

A new bill with some new modifications was, thus introduced in the year 2013 known as Assisted Reproductive Technology (Regulation) Bill, 2013. Various suggestions of several Indian Ministries and Departments were accommodated and the bill attempted to remove many lacunae that existed in the earlier bill. A National Advisory Board for ART will be established under the Health Ministry to recommend modification of rules to the ART techniques and Indian Council of Medical Research will maintain a national registry of ART clinics and banks in India which will act as a central database through which all information related to services offered by clinics will be maintained. Such other recommendations have been paid heed to.

ADOPTION PROCEDURE IN INDIA

The following are the steps as stated in the CARA guidelines that are to be undertaken for adopting a child in India.¹⁶It consists of the following 7 stages:

Stage I : Registration :A person desiring to adopt a child shall register themselves only with one with State Adoption Resource Agency (SARA)/ Recognised Indian Placement Agency (RIPA)/Special Adoption Agency or SAA/Licensed Adoption Placement Agency (LAPA) which shall guide them on the registration process..

Stage II: Pre-adoption Counselling and Preparation of the PAP(s): The concerned RIPA/SAA/LAPA shall provide pre-adoption counseling to them. Such agency shall also prepare them for the adoption and related process by providing them with all relevant information.

¹⁶ <http://cara.nic.in/parents/Guidelines-for-Adoption.html> , last visited at 7:08 pm on 11 September 2014

Stage III: Home Study and Other requirements: Documents listed shall be furnished to the concerned SAA/ RIPA to facilitate conduct of home study.

Stage IV : Referral and Acceptance : An ‘Adoption Committee’ is constituted. After matching the child, the RIPA/SAA/LAPA shall advise to see the child physically before they give their acceptance. This process is known as “referral”. In case the referred child is not acceptable to the PAP(s), a maximum of two other children shall be shown to them at a given time. In case, matching does not take place, the PAPs would be eligible for reconsideration only after a lapse of three months from the date when the last child was shown to them. If the PAP(s) decide to adopt the proposed child, they shall give their formal acceptance for adoption.

Stage V: Pre-adoption foster Care: The Child can be placed in pre-adoption foster care after acceptance of referral. Before physically entrusting the child to the prospective adoptive parents, the adoption agency should ensure that they have record of local contacts of the couple including contact details of two close relatives. .

Stage VI: Legal Procedure: The child can be legally placed in adoption by the competent court. For this purpose, the court having jurisdiction over the area where the RIPA/SAA/LAPA is located will be the competent court.

Stage VII: Follow up visits and post-adoption services: The RIPA/SAA/LAPA shall carry out half yearly follow-up visits to the child from the time the child has been placed in pre-adoption foster care till a period of two years after the legal adoption.

SURROGACY PROCEDURE IN INDIA

As seen in the case of adoption, there is a set procedure which if effectively implemented may ensure that none of the adopted children are exploited. On the other hand, there is no set procedure which is present in case of surrogacy that are to be undertaken. However, the govt. has proposed several guidelines and the ART bill is pending and yet to be passed. Therefore, since there is no body that regulates surrogacy and a laid down procedure that is to be followed, yet, the guidelines and the general procedure followed, as laid down by the Govt. in this regard are discussed below.

Procedure followed for Surrogacy in India

1. *Requirements for Surrogacy*

A contract is drafted specifying that the baby becomes the legitimate adopted child of the genetic couple. The genetic parents, the surrogate mother and her spouse will sign this document. The requirements and the details of the parties and the surrogacy agreement are written in the same document.

2. *Screening the surrogate mother*

The services begin with finding an Indian surrogate, who is sourced by means of advertisements in local newspapers. Surrogacy clinics in India ensure that surrogate mothers taken into their program are qualified for the job. She is tested for HIV beforehand, and tested again, just before embryo transfer.

3. *The process*

Matured eggs developed in both ovaries of the genetic mother and the semen from the genetic father are transferred into the embryo transfer of surrogate.

4. *Delivery and Birth Certificate*

Once the embryo transfer has taken place, the surrogate is placed under the care of the clinic's efficient obstetricians till term (9 months). Genetic parents will be provided with regular updates about the surrogate mother's progress through e-mail. The baby will be delivered in a hospital set up and handed over to the genetic parents immediately following the birth. The Government of India issues a birth certificate in the name of the Intended parents / Genetic parents.

Thus, it can be viewed that the procedure for both that is adoption and surrogacy. Both contain cumbersome and intricate procedures that have to be complied to, the only differentiating factor being there is a specific procedure that is enforceable by regulatory authorities for adoption, while for surrogacy the procedure is not specially enforceable but is the one which is generally followed. Further, surrogacy includes a lot of medical procedures like insemination of the egg etc. This may make the process a bit more complex and expensive. Considering the procedure to be followed in adoption, these, do not include much medical procedures, just a basic medical

and health check up of the child .Further, in adoption the only three particular agencies are involved: The couple who have come for adoption also known as PAP , the child and the concerned authority. Surrogacy would include more members like the doctors, the surrogate mother, the couple itself etc.

ISSUES

ADOPTION

After having seen the various legislations and also the procedure regarding adoption and surrogacy in the country, the next step would be to see the several shortcomings of both these methods and also the things to be done and applied while going for these.

One of the major shortcomings of adoption is that the children who are adopted are exploited in various forms .They are made to do household work and exploited in several other forms. Sometimes the people who adopt are part of a big child trafficking racket that exists and therefore, children especially girls end up being sexually and physically exploited by many. Therefore, nowadays special care is taken by the adoption agencies especially in case of inter country adoptions.

It is not only that the adopted children are exploited, another major issue concerned with adoption is the long cumbersome process that people have to undergo . This , in many cases makes the people reluctant to take such a step. Keeping in mind the various adoption scams that we come across in our lives everyday, it is pertinent following things should be kept in mind while going for adoption:

- Never register with multiple agencies; it may cause delay and duplication in the procedure.
- Maintain all correspondence and terms with the agency in writing.
- Always get an independent medical advice about the child before adoption.
- Ask for a break-up of the cost the agency claims to have spent on the child.

- Always adopt from an authorised agency and do not enter into any private illegal dealings. Private dealings can look faster but are not reliable and may even result in you losing the child at the end.

There are not much other legal issues in regard to adoption , but lots of psychological ones. The issue whether the biological mother(if own) should be made to meet or visit the child, whether the parents should the child of him or her being adopted , the treatment of the children in case the couple has another child of their own all exists. These should be dealt with carefully.

On the other hand , the issue with surrogacy in India is that there is no settled law in this regard. Many bills including the latest 2013 ART bill though have been brought to the scrutiny of the Parliament, none have been passed. Further even this bill does not cover holistically all the aspects relating to surrogacy and there were objections raised with respect to some criteria mentioned. For eg: The bill strictly barred homosexual couples, foreign single individuals and couples in live in relationships to have children by the way of surrogacy.

LEGAL AND MORAL ISSUES –SURROGACY

The moral issues associated with surrogacy are pretty obvious, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement.¹⁷

As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the *Universal Declaration of Human Rights 1948* says, *inter alia*, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”. The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in *B. K. Parthasarathi v. Government of Andhra Pradesh*¹⁸, the Andhra Pradesh High Court upheld “the right of reproductive

¹⁷ Law Commission of India, report no. 228, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY

¹⁸ AIR 2000 A. P. 156

autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*¹⁹, which characterised the right to reproduce as “one of the basic civil rights of man”.

However, the question in dispute is not whether surrogacy should be held to be illegal because there is no inherent reproductive right in the individuals. The dispute is on whether India has reached where such assisted reproductive technologies can be undertaken without leading to exploitation of the surrogate mother or creating technical difficulties for the parents. The laws in the other countries of the world are also not uniform in nature , creating more uncertainties.

In the famous *Baby M case*²⁰, the New Jersey Supreme Court, though allowed custody to commissioning parents in the “best interest of the child”, came to the conclusion that surrogacy contract is against public policy. It must be noted that in the US, surrogacy laws are different in different states.

If the 1988 *Baby M case* in the US forced many to put on legal thinking caps, then that year also saw Australia battling with societal eruptions over the *Kirkman sisters’ case* in Victoria. Linda Kirkman agreed to gestate the genetic child of her older sister Maggie. The baby girl, called Alice, was handed over to Maggie and her husband at birth. This sparked much community and legal debate and soon Australian states attempted to settle the legal complications in surrogacy. Now in Australia, commercial surrogacy is illegal, contracts in relation to surrogacy arrangement unenforceable and any payment for soliciting a surrogacy arrangement is illegal.

*Baby Manji Yamada v. Union of India*²¹ concerned production/custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. The sperm had come from Dr Ikufumi Yamada, but egg from a donor, not from Dr Yuki Yamada. There were matrimonial discords between the commissioning parents. The genetic father Dr Ikufumi Yamada desired to take custody of the child, but he had to return to Japan due to expiration of his visa. The

¹⁹ 316 US 535

²⁰ 537 A.2d 1227

²¹ JT 2008 (11) SC 150

Municipality at Anand issued a birth certificate indicating the name of the genetic father. The child was born on 25.07 2008 and moved on 03.08.2008 to Arya Hospital in Jaipur following a law and order situation in Gujarat. The baby was provided with much needed care including being breastfed by a woman. The grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under article 32 of the Constitution. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.

Thereafter was in the news the Israeli gay couple's case²². The gay couple Yonathan and Omer could not in Israel adopt or have a surrogate mother. They came to Mumbai. Yonathan donated his sperm. They selected a surrogate. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove their paternity before the baby's passport and other documents were prepared.

One of the major drawbacks is the manner in which the surrogate mother is treated in this "transaction". A meager amount is paid to her, as less as Rs 10,000 for a job that takes away 10 months of her life. India, being a fertile ground for reproductive tourism, many girls who have not even attained majority, are pushed into such a lucrative business.

ADOPTION V. SURROGACY

The aim of this paper was to find out the most or the better option that can be adopted by couples who do not have children. In the process, we have discussed the definition of both adoption and surrogacy, various legislations and provisions available with respect to India etc. In addition, we have discussed in depth the procedure involved in both, which can be one of the major deciding factors of many people. Last but not the least various legal, moral and psychological issues relating to the same were discussed.

The above mentioned are the points which are the major issues that exist regarding these methods. There is no way in which we can point out which of these is a better method as compared to the other. Adoption has existed in India since a long period of time, unlike surrogacy whose commercialization was legalized only in the year 2002. Surrogacy, being a new

²² The Times of India, Mumbai, 18.11.2008

concept in India , in my view, is not implemented properly due to their being no legislation to control or regulate it in any manner. The surrogate mother is exploited in many ways. There is no centralized agency that keeps a record of the ART clinic or the number of woman who act as surrogates. A woman, who acts as a surrogate, is in fact given a certificate, which is a very insensitive thing to be done according to me. Though after the Baby Manji case, the govt, came up with guidelines, they have not been passed yet and therefore not implemented properly. Thus in the end it can be said that , though surrogacy is a very lucrative business for India , bringing in almost Rs 55000 crores into the country every year, unless and until it is properly implemented and regulated , people would be hesitant to go for it.

Adoption, on the other hand, as said previously, has existed in India since early history. Everybody is aware about the procedure to be undertaken to go for adoption. There is a centralized agency, CARA, which keeps a record of all the adoption agencies and children. In today's time adoption is done in a regulated manner, by following all the legal procedures in the correct manner .Though there still exist lot of issues regarding adoption , the well planned implementation of adoption under various personal and secular laws have led to them being reduced to a bare minimum. Adoption scams in the past, that have been brought into limelight have made the public aware of the cons of the system and thus has led to the new regulated manner in which adoption takes place.

CONCLUSION

There can be no outright answer to the question about which among, Adoption and Surrogacy is a better option. Both have their own pros and cons and the method to be selected depends upon the particular couple and their requirement. A couple, who may want children of their own, may go for surrogacy by inseminating the egg and sperm into the surrogate mother, who would then give birth to the couple's own child. On the other hand, if a person is ready to give life to another's man's child may go for adoption .Another attributing factor in this case, would be the monetary consideration. Surrogacy is expensive as compared to adoption.

Therefore, in the end it can be said that many factors play a role in deciding among these two factors. Further, each have their own share of issues, advantages and disadvantages as explained above. All these should be kept mind while undertaking these. In addition, the personal laws of

the person should also be kept in mind since India does not follow uniform law on adoption. The legal issues involved in each of the personal and secular laws should be paid heed to .For example, under HAMA the status of the person is that of a parent but in the GAWA it is that of a guardian. All these should be kept in mind.

Thus, concluding it can only be stated that it both adoption and surrogacy cannot be expressly stated as a boon or bane. It can be boon if not regulated and implemented properly as it may lead to exploitation of many children and may in turn make the adoption process really long and lengthy. On the other hand, it can act as a boon to a number of childless couples , if they are being carried out in a proper manner. Thus, all of us, especially the authorities should strive to achieve the latter.