PARENTS AND CHILDREN: WHEN LAW AND TECHNOLOGY UNBUNDLE TRADITIONAL IDENTITIES

Elizabeth H. Aguiling-Pangalangan
Professor, College of Law, University of the Philippines
Professorial Chair Holder, CJ Panganiban Professorial Chair on Liberty and Prosperity

“The challenge in this era of globalization—for countries and individuals—is to find a healthy balance between preserving a sense of identity, home and community, and doing what it takes to survive within the globalization system. Otherwise stated, the need of the hour is to balance national interest with international survival.”

-Chief Justice Artemio Panganiban

I. LIBERTY AND PROSPERITY AS TWIN BEACONS OF JUSTICE

All students of human rights know that the Universal Declaration of Human Rights\(^2\) together with the UN International Convention on Civil and Political Rights\(^3\) and the UN International Convention on the Economic, Social and Cultural Rights\(^4\) constitute the International Bill of Human Rights. These are the international human rights documents that contain fundamental rights that all humans are presumed to have and are, thus, universally protected.

Chief Justice Artemio Panganiban refers to these two sets of rights as the rights to liberty and prosperity which he champions as the twin beacons of justice.\(^5\) “Liberty” embraces civil and political rights, while “prosperity” embodies economic, social, and cultural rights. His core judicial philosophy is that these two are mutually inclusive, such that nurturing prosperity should not encroach upon safeguarding the liberty of our people, nor is fostering liberty a precondition for the emergence of prosperity. Instead, they must be viewed with equal significance and must be protected, to the same extent, as essentials of life and well-being. In Chief Justice Panganiban’s words, “liberty must include the

---

\(^3\) International Covenant on Civil and Political Rights [hereinafter “ICCPR”], Dec. 16, 1966, available at https://www.refworld.org/docid/3ae6b3aa0.html. This Covenant was adopted by the U.N. General Assembly Resolution 2200A (XXI) of December 16, 1966. It entered into force on March 23, 1976, in accordance with article 49.
\(^5\) 1 ARTEMIO PANGANIBAN, LIBERTY AND PROSPERITY 41 (2006).
freedoms that prosperity allows, and in the same manner, prosperity must include liberty, especially the liberty to strive for the ‘good life’ according to a person’s conception.  

II. CLASSIFICATION OF RIGHTS

Civil and political rights pertain to the personal autonomy of the individual, or rights mandates that the State refrain from doing an act that unduly interferes with an individual’s exercise of civil and political rights. Thus, the State traditionally performs a negative duty to guarantee the protection of these rights, which are generally self-executory. These rights are also referred to as the “first generation rights,” as they were given recognition first in the history of the world.

Civil and political rights encompass rights to physical integrity, which include the right to life, the right to be free from inhumane or degrading treatment or punishment, freedom from slavery and servitude and freedom from discrimination on the one hand, and rights to individual liberties, inclusive of the right of privacy freedom of thought, conscience, and religion, freedom of opinion and expression and the right of marriage, on the other hand.

Economic, social, and cultural rights seek to promote a better quality of living and insure the well-being and economic security of the individual. These are referred to as the “second generation rights,” and the State has to intervene through legislation to create an institutional system that allows their realization. ICESCR provides for the progressive realization by States of economic, social, and cultural rights “to the maximum of its available resources.” The ESC rights encompass the rights to work, to health, to an adequate standard of living, to education, and to enjoy benefits of scientific progress.

Though there is reference to first and second generation rights, all human rights are intrinsically connected and cannot be viewed in isolation from each other. The indivisibility and interdependence of human rights improves the enjoyment of one right and facilitates the advancement of other rights. Consequently, an analysis of the nature of human rights establishes absence of a principled distinction between CP and ESC rights. The Universal Declaration of Human Rights made no distinction between these rights, given that both are derived from the same ideal of human dignity. It can be seen as well from recent human rights treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), that the enjoyment of all human rights is interconnected.

The CEDAW entered into force in 1981 with the Philippines, having ratified the treaty on August 1981, as one of the 189 states that has ratified the CEDAW. It is the principal international legal instrument for the protection and promotion of women’s human rights. Another legally binding international instrument which incorporates the full range of human rights, this time for children, is the CRC. The CRC

---

8 Id. at 42.
7 NOEL VILLAROMAN, COMPENDIUM OF TERMS AND PHRASES ON HUMAN RIGHTS 114 (2002).
8 Id. at 115.
12 It is also Known as the Women’s Convention and the International Bill of Rights for Women.
entered into force in 1990 and has been acceded to by every country in the world except for the US and Somalia. The CRC was acceded to by the Philippines on August 21, 1990. In the Committee on the Rights of the Child General Comment No 13, it is underscored that “there is no hierarchy of rights in the Convention; all the rights provided for therein are in the ‘child’s best interests’ and no right could be compromised by a negative interpretation of the child’s best interests.”

The CRC classifies the rights of the child into four (4) categories. The first of which are survival rights that encompass the right to life and to have the most basic needs met such right to a family, to an adequate standard of living, shelter, nutrition, and medical treatment. Second are development rights that enable children to reach their fullest potential. Among these are education, play and leisure, cultural activities and freedom of thought, conscience and religion. The third category of children’s rights is participation rights or rights that allow children to take an active role in their communities by guaranteeing their freedom to express opinions and to have a say in matters affecting their own lives. Rights essential for safeguarding children and adolescents from all forms of abuse, neglect and exploitation that include protection against child labor and sexual exploitation are referred to as protection rights.

Key CRC rights find resonance in other conventions. The right to life is found in Article 6 of both the CRC and the ICCPR, and Article 2 of the UDHR. The right to health and health services in Article 24 of the CRC, is protected in Article 12 of the ICESCR and CEDAW Article 12, 14(b) while freedom from discrimination in Article 2, CRC, is likewise guaranteed in Article 2 of the UDHR, Article 2(2) of the ICESCR, Article 2, (1) of ICCPR and Article 1-5 of the CEDAW. Likewise, the right to education is safeguarded by Article 28 of the CRC, Article 26 of the UDHR, Article 13 of the ICESCR and CEDAW Articles 5, 10, 11(c), 14(2)(d). The Preamble, Articles 5 and 18 of the CRC, Article 16 of the UDHR, Article 23 of the ICCPR, and Article 10 of the ICESCR, and Articles 13(a), 14(l), 16 of CEDAW all speak of the right to a family.

In September 2011, an authoritative interpretation by experts of the evolution of international human rights law since 1986, and based on more than ten years of legal research, provided three obligations on States, which is now the prevailing international human rights framework — the obligations to respect, protect, and fulfill. The obligation to respect requires non-interference with the enjoyment of rights while the obligation to protect requires States to protect human rights from being

---

13 General Comment no 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art3, para 1), CRC/C/GC/14, available at https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

14 Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon & Ian Seidman, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 34 HUM. RTS. Q 1084 (2012).


16 Maastricht Guidelines, supra note 15, ¶ 6. “Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such
violated by third parties. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. a decision penned by Chief Justice Panganiban, emphasized that the State has an obligation to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions:

According to Isagani Cruz, "[I]t is now obligatory upon the State itself to promote social justice, ... and to adopt other measures intended to ensure the dignity, welfare and security of its citizens. x x x. These functions, while traditionally regarded as merely ministrant and optional, have been made compulsory by the Constitution."

A State is responsible for a human rights violation when it fails to provide domestic redress for a breach of an international human rights law or to prevent the commission of a foreseen human rights violation. This encompasses acts of the State as well as those authorized by and attributable to its agencies. For example, States parties agree to take “all appropriate measures” in accordance with Article 2(c) of the Women’s Convention. Under this article, the State has a duty to protect the rights of women on an equal basis with men and to ensure the non-discrimination of women through competent national courts and other public institutions. Consequently, it has been reasoned that “a state may be considered to have facilitated an international wrong or to be complicit in its commission when the wrong is of a pervasive or persistent character.”

The judiciary has a crucial role in determining the application of international human rights law principles at the national level. If a domestic court judge erroneously interprets a treaty due to

---

18 Id.
19 G.R. No. 143976 & 145846, Apr. 3, 2003
20 Id.
21 In the separate opinion of Justice Panganiban in Serrano v. National Labor Relations Commission and Isetann Department Store, G.R. No. 117040, Jan. 27, 2000, he wrote: [T]raditional doctrine holds that constitutional rights may be invoked only against the State. This is because in the past, only the State was in a position to violate these rights, including the due process clause. However, with the advent of liberalization, deregulation and privatization, the State tended to cede some of its powers to the ”market forces.” Hence, corporate behemoths and even individuals may now be sources of abuses and threats to human rights and liberties.”
a particular national bias or decline to give effect to a treaty by reason of which an individual’s human right could not be enforced, then that State is in breach. At this time, the individual is deemed to have exhausted all domestic judicial remedies and may now bring a complaint before the relevant treaty body. Clearly, important powers and responsibilities lie in the hands of the judiciary to give effect to human rights. Domestic courts can serve as a “missing link between promulgation and realization” of international human rights norms to the benefit of both international and domestic law.

III. WHY EXAMINE HUMAN RIGHTS WITHIN THE FAMILY?

Examination of concepts of liberty and prosperity within the realm of family law is not common. In the Philippines, the subject matter of each case falls under a specific substantive area of law. Family law is regarded as a Civil law subject while human rights is a matter within the purview of Constitutional and international law. Yet, I was struck by the idea of viewing family law from the lens of human rights after coming across a speech given by Eleanor Roosevelt, first lady of the United States from 1933–1945 and US Delegate to the United Nations General Assembly from 1945-1953. On the Tenth Anniversary of the Universal Declaration of Human Rights on 27 March 1958 she shared this valuable message:

Where after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farms or office where he works.

Such are the places where every man, woman or child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

This led me to look at the human rights instruments that protect the family, most specifically the rights of children. After all, though the family is basically private in nature and thus should be left untrammeled, it is subject to regulation in the presence of compelling State interests. These regulations may be imposed by the State to protect and promote the human rights of members of the family. Conversely, human rights of individual family members could end up violated by unnecessary State intrusion into the affairs of the family.

---

24 There are eight UN treaty bodies which may receive individual complaints from individuals. These are the Human Rights Committee, Committee on the Elimination of Discrimination against Women, Committee against Torture, Committee on the Elimination of Racial Discrimination, Committee on the Rights of Persons with Disabilities, Committee on Enforces Disappearances, Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.


A. Right to a family

The CRC protects the right to a family as a Survival Right. This is found in several provisions of the CRC as follows:

1. CRC Preamble: “The family, as the fundamental group of society and the natural environment for the growth and well-being of its members should be afforded protection.”

2. Article 5: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

3. Article 8, paragraph 1: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

4. Article 9, paragraph 1: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

5. Article 18, paragraph 1: “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”

These rights are protected as well by the Constitution and Philippine statute laws on family and family relations. Section 1, Art. XV., Constitution “recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.” Art. 1 of the Family Code explains the role played by the family and reiterates the Constitution’s characterization of the family as “the foundation of the nation.” The Family Code depicts the family as “a basic social institution which public policy cherishes and protects. Consequently, family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect.”

The Civil Code provides the presumption in favor of the solidarity of the family. Consequently, Republic v. Molina underscores that:

Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity. This is rooted in the fact that both our Constitution and our laws cherish the validity of marriage and unity of the family. Thus, our Constitution devotes an

28 Id. art 146.
29 CIVIL CODE, art 220. “In case of doubt, al presumptions favor the solidarity of the family. Thus every intendment of law or facts leans toward the validity of the marriage, the indissolubility of the marriage bonds, the legitimacy of children, the community of property during marriage, the authority of parents over their children and the validity of defense for any member of the family in case of unlawful aggression.”
entire Article on the Family, recognizing it “as the foundation of the nation.” It decrees marriage as legally “inviolable,” thereby protecting it from dissolution at the whim of the parties. Both the family and marriage are to be “protected” by the state. The Family Code echoes this constitutional edict on marriage and the family and emphasizes their permanence, inviolability and solidarity.

B. What is a “family”?

There are bases in domestic and international law that establish the right to a family and the duty of the State to protect the family. But what is the family?

In international law, the right to a family as the “natural and fundamental group unit of society” and entitled to State and societal protection, is enshrined in Article 23 of the ICCPR and Article 10 of the ICESCR. Article 17 provides for protection against “arbitrary or unlawful interference with his privacy, family, home or correspondence.” The UN Human Rights Committee in its General Comment on Article 17 of the ICCPR concluded that the term “family includes all those comprising the family as understood in the society of the State party concerned.”

The right to a family is also protected in Articles 9, 11 and 16 of the CEDAW that safeguard women from discrimination in all matters pertaining to marriage and family relations and ensures the right of women to keep their nationality despite marriage to an alien. Protection from discrimination of persons with disabilities in matters relating to marriage and family is explicit in Article 23 of the Convention on the Rights of Persons with Disabilities.

---

31 ICCPR, supra note 3, art. 23. “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. […]”

32 ICESCR, supra note 4, art. 10. “The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. […]”

A review of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, shows that the term “members of the family” is defined, although in a general and rather nebulous manner, as:

Persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the State concerned.

There is no categorical definition of the family found in any international human rights treaty. Reference is instead made to the applicable law”, which in the absence of any specific treaty, will ultimately be the domestic law of the parties concerned. However, as earlier mentioned, there is neither Constitutional nor statute law that defines what a family is.

I came across some definitions of “family” from other sources. The Philippine Legal Encyclopedia defines family as the “natural and social institution founded on conjugal union, binding together the individuals composing it, for the common accomplishment of the individual and spiritual ends of life, under the authority of the original ascendant who heads it.” In compiling statistics and conducting censuses on different sectors of Philippines society, the National Statistics Office classifies a family as a group of people that usually lives together and is “composed of the head and other persons related to the head by blood, marriage or adoption.”

The prevailing concept of a family is one that is of a married heterosexual couple with offspring who are genetically related to them, and their relatives (grandparents, siblings, aunts and uncles, cousins) connected to them by consanguinity or affinity. Traditionally, family ties are created by “nature.” This concept and image of the family where there are fixed identities and pre-identified roles to be played by its members is one recognized in international conventions.

In Article 9(1) of the CRC, “States Parties shall ensure that a child shall not be separated from his or her parents against their will.” Likewise, the Preamble of the Hague Convention for the Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague ICAC) establishes that “[e]ach State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.” Again “family of origin” presupposes the biological family.

However, Chief Justice Panganiban points out that “advances in telecommunications, the migration of people, the rapid changes in technology, and the scientific realities of our ever-shrinking world have modified the absoluteness of the territoriality doctrine.” These developments have likewise introduced modifications in the structure and concept of a family.

How technological advances have introduced and spurred these changes and the legal issues that arise therefrom are exemplified in the the areas of adoption and surrogacy, which are the focus of my paper. In both adoption and surrogacy, the Best interest of child standard is applied and an understanding of this concept is essential to grasp fully the competing rights at stake.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.


IV. CENTRAL PRINCIPLES ON CHILD’S RIGHTS

A. Best interests of the Child

1. Basis in Law

The following are the provisions of the CRC and the Hague Convention on Intercountry Adoption that introduce the best interests of the child as a central principle in child’s rights. We find this standard stated in the following provisions of the Convention on the Rights of the Child:

a. Article 3: In all actions concerning children the best interests of the child shall be a primary consideration.

b. Article 9(1): States Parties shall ensure that a child shall not be separated from his or her parents against their will, except […] separation is necessary for the best interests of the child […].

c. Article 21: States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.

The Hague ICAC likewise refers to the best interests of the child standard in deciding the appropriateness of the child’s adoption, as found in the following articles pf the Convention:

a. Article 1: “The objects of the present Convention are:

   a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;”

b. Article 4: “An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin

   b) have determined,—that an intercountry adoption is in the child's best interests.”

Both conventions recognize the existence of the family ties by nature between the birth mother and the child but the Hague ICAC has a narrower focus. While drawing on the CRC principles, it provides minimum safeguard to protect the rights of children affected by ICA. Both Conventions accept that under certain circumstances, the family ties by nature or ties with the family of origin are severed and a new set of parents, who are strangers to the child, take over the parental rights and responsibilities. Both concede the responsibility of national authorities to assess how the alternative childcare solutions including ICA meet the best interests of children without a family.

2. Best interests of the Child: limitations of the standard

a. Problem of Indeterminacy

Though it is a principle that has received universal acceptance, the best interest of the child standard is subject to different interpretations depending on culture, religion and traditions. What is best
of the child is determined if not conditioned by values, a set of beliefs and upbringing of the person making the judgment.

Another concern I raise with the best interest of the child standard is the absence of rules on the basis of which a judge determines what is in the best interest of the child. Should the judge make the call based on the child’s current interest (formulated in relation to actual life conditions and experiences) or should the judge endeavor to foresee, if not speculate on future-oriented interests? In short, should the judge who has to make the decision as to what is best for the child base that decision on the present needs of the child? Or should the judge anticipate what the person might say ten years from now but looking back to what he or she needed when he/she was a child? Without any principled guidelines, cases with similar facts may still be decided differently depending on how the judge arrives at what he or she believes the best interest of the child is and how that will be served.

b. The question of weight to be given the BIC

In the CRC, the best interest of the child is “a primary consideration” in all actions concerning him/her. The Committee on the rights of the Child General Comment No. 14 underscores that:

40). Viewing the best interests of the child as “primary” requires a consciousness about the place that children’s interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.

The use in the CRC of “a” instead of “the” primary consideration gives rise to different results. As “the” primary consideration, the best interest of the child standard would be a consideration of first importance among other considerations and have absolute priority over those other considerations. As a consequence, it does not give the decision-maker flexibility even in extreme cases. For instance, in a situation when a pregnant woman has to undergo a medical procedure necessary to save her life, the best interest of the child as “the” primary consideration means that the unborn child’s interest and welfare must be protected at all costs. On the other hand, “a” merely means that the best interests of the child is one of the vital considerations. Moreover, General Comment No 14 explains the significance of the best interests of the child as a primary consideration:

37. The expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

A shift to the best interest standard being “the paramount consideration” is noticeably seen in adoption, which infers that the child’s best interests are determinative when the decision involves termination of parental ties with the parents by nature and creating new ones with a new family. “The paramount consideration” makes it is more than the first but comes close to being the only consideration. This is the standard applied in Philippine laws such as the Child and Youth Welfare Code that states that “[I]n all matters relating to the care, custody, education and property of the child, his welfare shall be the

---

37 General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), CRC/C/GC/14, available at https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.
paramount consideration.” Likewise, the Domestic Adoption Act provides that, “[I]n all matters relating to the care, custody and adoption of a child, his/her interest shall be the paramount consideration [...].”

c. The Role of the Best Interest of the Child standard

A study made by UNICEF yielded the conclusion that “instead of being the sole basis for defining what action to take, best interests now have—or should have—a far more limited role within human rights constraints. This means that determining best interests needs to be a thorough and well-prescribed process directed, in particular, towards identifying which of two or more rights-based solutions is most likely to enable children to realize their rights, bearing in mind that the other people affected by those solutions also have their own human rights.”

Professor Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions from August 2004 to July 2010 and Co-Chair of the NYU law School Center for Human Rights and Global Justice, dissected the BIC standard and identifies the three roles it plays. First, he says it is meant to “support, justify or clarify a particular approach to issues arising under the Convention.” Second, the standard is a “mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention.” Finally, Alston examines the BIC as a basis for evaluating the laws and practices of States Parties where the matter is “not governed by positive rights in the Convention.”

In Philippine jurisprudence, most often, the BIC plays the second role as a mediating principle. The Court uses the best interest of the child standard to decide a broad range of matters, where there are competing rights between the parties, usually parents, seeking sole custody of their child. In Briones v. Miguel, a decision penned by Justice Panganiban, the court held that “the welfare and the best interest of the minor as the controlling factor.”

In Gualberto v Gualberto, the Court held:

The Convention on the Rights of the Child provides that In all actions concerning children, whether undertaken by public or private social welfare Institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The principle of best interest of the child pervades Philippine cases involving adoption, guardianship, support, personal status, minors in conflict with the law, and child custody.

The principle of best interest of the child pervades Philippine cases involving adoption, guardianship, support, personal status, minors in conflict with the law, and child custody. In these cases, it has long been recognized that in choosing the parent to whom custody is given, the welfare of the minors should always be the paramount consideration. Courts are mandated to take into account all relevant circumstances that would have a bearing on the children’s well-being and development. Aside from the material resources and the moral and social situations of each parent, other factors may also be considered to ascertain which one has the capability to attend to the physical, educational, social and moral welfare of

43 G.R. No. 154994, June 28, 2005.
the children. Among these factors are the previous care and devotion shown by each of the parents; their religious background, moral uprightness, home environment and time availability, as well as the children’s emotional and educational needs.\textsuperscript{44}

B. ICA as the Last Resort: The Subsidiarity principle

“Subsidiarity” means that Contracting States recognize that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care should be considered.\textsuperscript{45}

1. Subsidiarity provisions in the Conventions

The preference for the child remaining with his/her family of origin is stressed in Articles 20 and 21 of the Convention on the Rights of the Child:

Article 20:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

Article 21:

States Parties that recognize and/or permit the system of adoption shall …(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin:…”

On the other hand, the Hague Intercountry Adoption Convention provides that:

Article 4:

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -

b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests […].

Interestingly, there is a discrepancy in the application of the Subsidiarity principle enunciated in the CRC and in the HC ICAC. Article 21(b), CRC gives preference to in-country foster care and other suitable institutional care instead of out-of-country adoptions. In contrast, Article 4, ICAC gives preference to permanent placement through ICA if there is no permanent placement in the State of Origin.

\textsuperscript{44} Id.
V. ADOPTION

A. Adoption defined

Adoption is defined as a “juridical act which creates between the adopter and the person adopted a relationship similar to that which results from legitimate paternity and filiation.”46 Similarly, the Philippine Domestic Adoption Act defines adoption as a “socio-legal process of providing a permanent family to a child whose parents have voluntarily or involuntarily relinquished parental authority over the child.”47

However, adoption is not a recent phenomenon. Ancient origins of Adoption can be traced to biblical stories as those of Moses and the Pharaoh’s daughter (Exodus 2:10), Orphan Esther who was adopted and became Queen of Persia (Esther 2:7) and Jacobs adoption of Ephraim and Manesseh (Genesis 4:8).

Likewise, in Babylonia, back in 2286 BC, the Code of Hammurabi had enduring themes such as permanence of the parent-child relationship created in adoption and the indispensability of the biological parents’ consent to the adoption.48

The distinction however between the earlier concept of adoption and modern day adoption is found in its rationale. Historically, adoption was adopter-centric and was done for the benefit of the head of a family. Particularly it was to avoid extinction of the family name or to enable a person to fall under the paternal power of the new head of a family. The effect was that it made the adoptee the child of the adopter by legal fiction, therefore it was conditioned on the adopter being a full generation older. Thus, adoption imitated nature.49

In contrast, the modern view stresses that adoption shall be done in the “best interests of the child and with respect for his or her fundamental rights.”50 This is to ensure that child grows up in the “kind of family love and care that will enable them to grow up with a decent chance of living a healthy and fulfilling life.”51

The Philippines follows the subsidiarity principle as defined in the Hague Convention on Intercountry adoption. Aliens who adopt under the Domestic Adoption Act are treated like any other adopter. Filipino prospective adopters enjoy no preference over alien domestic adopters. However, if the alien adopts through the ICA, then the Filipino child may be adopted through intercountry adoption if his/her adoption within the Philippines is impossible, even if temporary foster care is still available within the country. Republic Act 8043 says:

49 Id at 98
Section 7. Intercountry Adoption as the Last Resort- The Board shall ensure that all possibilities for adoption of the child under the Family Code have been exhausted and that Intercountry adoption is in the best interest of the child [...]  

Hence, all Filipino children who are declared legally available for adoption first go through the Domestic Adoption matching process. Only after it has been satisfactorily shown that the no adoptive family could be found within the Philippines may the child be adopted through Intercountry Adoption. Intercountry adoption is made possible by reason of the ease in travel from the Receiving State and Country of Origin and the innovations in telecommunications which make exchange of documents and coordination among the relevant parties and agencies to be completed with efficiency and relative swiftness. 

B. Effects of Adoption: Non-discrimination

After the adoption decree is issued, right to custody, exercise of parental authority and the duty of support are transferred to the adopters permanently. Adoption gives rise to legal effects. Since the adoptee for all intents and purposes becomes the legitimate child of the adopter, the adoptee’s right to a name, support and succession from his adopting parents does not differ from legitimate biological children. 

There is a variance however in the right to citizenship of the adoptee. Acquisition by a minor of the foreign citizenship of his adopted parents is not one of the ways by which Philippine citizenship may be lost and cannot have the effect of naturalization or renunciation of Philippine citizenship. The adopter’s citizenship is not automatically conferred on the adoptee. The case of Therkelsen v Republic illustrates this point. Here, Therkelsen, a Turkish subject permanently residing in the Philippines was married to a Filipina and applied to adopt a Filipino child. The family court denied petition for adoption on the ground that Turkish law does not confer citizenship to adoptee. The SC, in the voice of Justice JBL Reyes, held that there is no requirement that the adopter’s citizenship must automatic confer citizenship to adoptee. The citizenship of the adopter is a matter political, and not civil in nature. Adoption law does not and cannot require the transfer of citizenship to the child for the alien prospective adopter’s petition for adoption to be granted. 

Following this reasoning, the Department of Justice issued an Opinion that there is no loss of Filipino citizenship resulting from adoption of a Filipino child by aliens. Filipino children who are adopted by foreigners retain their Philippine citizenship notwithstanding acquisition of the citizenship of adoptive parents. The reason for this is that under existing laws, acquisition by a minor of the foreign citizenship of his adopted parents is not one of the ways by which Philippine citizenship may be lost. The adopted child thus becomes a dual citizen. 

Other countries like the US have resolved the issue of citizenship to benefit the adopted child. The US Child Citizenship Act (2000) gives internationally adopted children automatic citizenship rights immediately upon adoption and proof of citizenship is delivered to adopters’ home within a month of arrival in the Receiving State. This move is focal in the direction of reducing disparities in the treatment of adoptive parentage as compared to biologically-related parenthood. Giving automatic citizenship to adopted children, as biologically-related children do, is consistent with principles of non-discrimination found in the CRC, Article 2. 

---

The Committee on the Rights of the Child comments:

[T]he right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.

One of these positive measures the Philippines should pass is a law that eliminates any distinction in the rights of children who are with their original family and those who are adopted. After all, the Domestic Adoption Law states that:

Sec 17. Legitimacy. The adoptee shall be considered the son/daughter of the adopter for all intents and purposes and as such is entitled to all the rights and obligations provided to legitimate sons/daughters born to them without discrimination of any kind. To this end, the adoptee is entitled to love, guidance, and support in keeping with the means of the family.56

Chief Justice Panganiban’s dissent in De Santos v Angeles57 is instructive:

Indeed, it is hardly fair to stigmatize and create social and successional prejudice against children who had no fault in nor control over the marital impediments which bedeviled their parents. They are the victims, not the perpetrators, of these vagaries of life […]. And this dissent finds its philosophy in this: that children, unarguably born and reared innocent in this world, should benefit by every intendment of the law […].

C. Problem areas in Adoption

1. Interracial/Intercountry Adoption

a. Race as a factor

Proponents for Intercountry adoption argue that race should not be a factor in adoption, the only aim being to find a permanent home for the child at the soonest time. The requirement of same race placements violates the principle of anti-discrimination since finding and giving love is not based on the color of one’s skin. Demanding that the child and the adopters must belong to the same race or ethnic group may sometimes prevent children from being adopted altogether. Postponing to place the child so that he/she may be placed with those of his/her same race is not necessarily in the child’s best interest because of difficulty of placing older children. Instead of spending their formative years with a family who is in a better position to teach positive values to the children and mold their mind and character, they end up waiting it out in child caring agencies or living in the streets.

Opponents to intercountry adoption on the other hand point to the loss of cultural identity as the biggest casualty of interracial adoption. It is argued that children are best served by remaining in their community of origin, where they can enjoy their national heritage. Opponents also argue that intercountry adoption is the ultimate form of human exploitations given that typically, rich, powerful and white couples take children from poor, powerless members of poor countries, “thus imposing on those who have little what many of us think of as the ultimate loss.”58

This is validated by official figures do show that the top 20 countries of origin are relatively less wealthy countries in Asia and Africa while the top 20 receiving states are in Europe and North America. (See Tables).

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Russia</td>
<td>9.440</td>
<td>7.569</td>
<td>6.837</td>
<td>4.926</td>
<td>4.174</td>
<td>4.088</td>
<td>3.426</td>
<td>3.434</td>
<td>2.883</td>
<td>1.838</td>
<td>1.057</td>
<td>0.779</td>
<td>0.481</td>
<td>0.343</td>
<td>51.035</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1.534</td>
<td>1.799</td>
<td>2.184</td>
<td>3.041</td>
<td>3.911</td>
<td>4.551</td>
<td>4.369</td>
<td>3.455</td>
<td>2.786</td>
<td>2.099</td>
<td>1.086</td>
<td>0.864</td>
<td>0.321</td>
<td>0.470</td>
<td>32.202</td>
</tr>
<tr>
<td>Colombia</td>
<td>1.749</td>
<td>1.500</td>
<td>1.681</td>
<td>1.643</td>
<td>1.913</td>
<td>1.403</td>
<td>1.826</td>
<td>1.599</td>
<td>0.933</td>
<td>0.575</td>
<td>0.536</td>
<td>0.523</td>
<td>0.485</td>
<td>0.550</td>
<td>16.616</td>
</tr>
<tr>
<td>Ukraine</td>
<td>2.119</td>
<td>2.035</td>
<td>1.077</td>
<td>1.623</td>
<td>1.603</td>
<td>1.505</td>
<td>1.098</td>
<td>1.065</td>
<td>0.722</td>
<td>0.642</td>
<td>0.610</td>
<td>0.382</td>
<td>0.394</td>
<td>0.274</td>
<td>15.149</td>
</tr>
<tr>
<td>Sth Korea</td>
<td>2.239</td>
<td>2.120</td>
<td>1.813</td>
<td>1.225</td>
<td>1.366</td>
<td>1.395</td>
<td>1.128</td>
<td>0.950</td>
<td>0.818</td>
<td>0.227</td>
<td>0.506</td>
<td>0.431</td>
<td>0.376</td>
<td>0.401</td>
<td>14.995</td>
</tr>
<tr>
<td>Viet Nam</td>
<td>492</td>
<td>1.199</td>
<td>1.363</td>
<td>1.691</td>
<td>1.722</td>
<td>1.500</td>
<td>1.260</td>
<td>0.704</td>
<td>0.214</td>
<td>0.295</td>
<td>0.407</td>
<td>0.429</td>
<td>0.399</td>
<td>0.378</td>
<td>12.053</td>
</tr>
<tr>
<td>Haiti</td>
<td>1.170</td>
<td>0.949</td>
<td>1.108</td>
<td>0.822</td>
<td>1.310</td>
<td>1.210</td>
<td>2.502</td>
<td>0.239</td>
<td>0.369</td>
<td>0.546</td>
<td>0.572</td>
<td>0.287</td>
<td>0.396</td>
<td>0.397</td>
<td>11.877</td>
</tr>
<tr>
<td>India</td>
<td>1.067</td>
<td>0.864</td>
<td>0.832</td>
<td>0.987</td>
<td>0.742</td>
<td>0.710</td>
<td>0.607</td>
<td>0.627</td>
<td>0.393</td>
<td>0.351</td>
<td>0.353</td>
<td>0.343</td>
<td>0.486</td>
<td>0.578</td>
<td>8.940</td>
</tr>
<tr>
<td>Philippines</td>
<td>410</td>
<td>509</td>
<td>483</td>
<td>568</td>
<td>589</td>
<td>558</td>
<td>496</td>
<td>490</td>
<td>411</td>
<td>534</td>
<td>458</td>
<td>401</td>
<td>359</td>
<td>324</td>
<td>6.590</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>899</td>
<td>849</td>
<td>735</td>
<td>817</td>
<td>768</td>
<td>682</td>
<td>516</td>
<td>218</td>
<td>5</td>
<td>26</td>
<td>63</td>
<td>34</td>
<td>20</td>
<td>17</td>
<td>5.651</td>
</tr>
<tr>
<td>Thailand</td>
<td>535</td>
<td>491</td>
<td>423</td>
<td>467</td>
<td>400</td>
<td>368</td>
<td>303</td>
<td>283</td>
<td>282</td>
<td>306</td>
<td>273</td>
<td>259</td>
<td>292</td>
<td>225</td>
<td>4.907</td>
</tr>
<tr>
<td>Brazil</td>
<td>487</td>
<td>488</td>
<td>529</td>
<td>490</td>
<td>492</td>
<td>466</td>
<td>377</td>
<td>350</td>
<td>334</td>
<td>240</td>
<td>132</td>
<td>143</td>
<td>126</td>
<td>116</td>
<td>4.770</td>
</tr>
<tr>
<td>Poland</td>
<td>407</td>
<td>406</td>
<td>393</td>
<td>371</td>
<td>398</td>
<td>391</td>
<td>317</td>
<td>290</td>
<td>244</td>
<td>304</td>
<td>297</td>
<td>296</td>
<td>325</td>
<td>192</td>
<td>4.631</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>395</td>
<td>149</td>
<td>112</td>
<td>100</td>
<td>140</td>
<td>140</td>
<td>225</td>
<td>237</td>
<td>308</td>
<td>354</td>
<td>411</td>
<td>415</td>
<td>421</td>
<td>373</td>
<td>298</td>
</tr>
<tr>
<td>Taiwan</td>
<td>186</td>
<td>242</td>
<td>269</td>
<td>273</td>
<td>374</td>
<td>398</td>
<td>415</td>
<td>323</td>
<td>302</td>
<td>192</td>
<td>191</td>
<td>181</td>
<td>168</td>
<td>159</td>
<td>3.673</td>
</tr>
<tr>
<td>Congo RD</td>
<td>15</td>
<td>45</td>
<td>62</td>
<td>69</td>
<td>62</td>
<td>156</td>
<td>198</td>
<td>354</td>
<td>523</td>
<td>602</td>
<td>241</td>
<td>385</td>
<td>631</td>
<td>54</td>
<td>3.387</td>
</tr>
<tr>
<td>South Africa</td>
<td>241</td>
<td>268</td>
<td>262</td>
<td>255</td>
<td>273</td>
<td>311</td>
<td>219</td>
<td>203</td>
<td>173</td>
<td>222</td>
<td>220</td>
<td>217</td>
<td>147</td>
<td>162</td>
<td>3.173</td>
</tr>
<tr>
<td>USA</td>
<td>132</td>
<td>168</td>
<td>176</td>
<td>181</td>
<td>266</td>
<td>265</td>
<td>184</td>
<td>261</td>
<td>238</td>
<td>168</td>
<td>165</td>
<td>167</td>
<td>161</td>
<td>96</td>
<td>2.628</td>
</tr>
</tbody>
</table>
Indeed, there are more meaningful and long-term ways wealthy countries can help poor ones. In the Foreword to the last Millennium Development Goals (MDG) Report, then UN Secretary General Ban Ki-Moon wrote that “the global mobilization behind the Millennium Development goals has produced the most successful anti-poverty movement in history.” Wealthy countries should have committed to all or any of the MDGs among them, to eradicate extreme poverty and hunger (Goal 1), achieve universal primary education (Goal 2), promote gender equality and empower women (Goal 3), reduce child mortality (Goal 4), improve maternal health (Goal 5) Combat HIV/AIDS, Malaria and other diseases (Goal 6), ensure environmental sustainability (Goal 7) and develop a global partnership for development (Goal 8).

The Sustainable Development Goals (SGD) continue the energy generated by the MDGs. The 17 SDGs, if devoted the full attention of world leaders, especially those of wealthy and powerful nations, can bring us closer to a world without extreme poverty (SDG1) which is one of the most common reasons why children are given up for adoption. In addition, SDG 2 aims to achieve zero hunger, SDG 3 pertains to attaining good health and well-being, and SDG 4 relates to quality education, all of which will be made available to children who are placed with permanent families, irrespective of race.

---


Yet, the most determined and concerted efforts to meet the SDGs between 2015-20130 need not be an obstacle to providing loving homes to children now.

The competing values of liberty and prosperity involved here are the importance of preserving ones racial ethnic community and heritage or the right to an identity (to preserve one’s identity) but with countervailing right of the child to an adequate standard of living, the right to a family, right to health, and right to education.

Likewise, not placing children from poor nations in families from wealthy nations would violate the child’s right to an adequate standard of living. In the case of *Gan v. Reyes*, the court, through Justice Josue Bellosillo, emphasized that, “In all cases involving a child, his interest and welfare are always the paramount concerns.” The Court held that its grant of support in favor of the child could not wait for the result of the paternity test because in the meantime he would have suffered from lack of food and other necessities. Here, the Supreme Court had recognized the inviolable right of a child to adequate standard of living, pursuant to Article 27 of the CRC.

This was expounded on in a more vivid language in *De Leon v. Soriano* decided by Justice Montemayor:

The money and property adjudged for support and education should and must be given presently and without delay because if it had to wait the final judgment, the children may in the meantime have suffered because of lack of food or have missed and lost years in school because of lack of funds. One cannot delay the payment of such funds for support and education for the reason that if paid long afterwards, however much the accumulated amount, its payment cannot cure the evil and repair the damage caused. The children with such belated payment for support and education cannot act as gluttons and eat voraciously and unwisely, afterwards, to make up for the years of hunger and starvation. Neither may they enroll in several classes and schools and take up numerous subjects all at once to make up for the years they missed in school, due to non-payment of the funds when needed […]

Thus, preventing the adoption of a child and the opportunity for him/her to be in a loving and permanent home where his/her needs will be attended to, purely on the basis of race, is a violation of the child’s rights under the CRC.

2. *Sealing of birth records and confidentiality of adoption records*

Proponents for secrecy invoke the need to protect the privacy of all parties, including the birth mother who may not want the stigma of having gotten pregnant outside of wedlock and having to give up a child. This right to decisional privacy is protected under our Constitution. Likewise, the adopters may consider the threat of reappearance of the birth mother as one that will impinge forging strong bonds between the child and the adoptive family.

---

61 G.R. No. 145527, May 28, 2002
Article 16(1), of the CRC provides that “[N]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence…” and keeping documents and records relevant to the adoption will ensure against this.

Opponents of sealing records on the other hand argue that child’s biological connection/ genetic link to his parents is a fact, and no part of the child’s identity should be permanently hidden. They add that to be denied access to knowledge of one’s genetic history may impede the development of a person’s identity and sense of self-worth.

Provisions of the Philippine Domestic Adoption and Intercountry Adoption laws do not prohibit access to sealed records by the adoptee of legal age.64

The competing rights in the decision to unseal adoption records are the right to privacy (of the birth mother, in many instances) versus the right of the child to information and the child’s right to identity, which includes access to origins.

3. Other important concerns

Other problems in adoption and in particular, intercountry adoption involves the hazards of the abduction sale, trafficking and exploitation of the child to be adopted. Several provisions of the Optional Protocol to the CRC call upon States to take all appropriate measures to prevent these problems. The Human Rights Council Report draws the connection between the heightened risks to which adopted children are exposed:65

Illegal adoption is also an extremely hidden phenomenon. […] Existing records suggest that there has been an increase in intercountry adoptions worldwide between 2000 and 2004, followed by a significant decrease. Demand for adoption has continued to increase, while supply decreases, creating the conditions for abuse, corruption, excessive fees amounting to the sale of children, and the illegal adoption of children.

VI. Surrogacy

A. Assisted Reproductive Technology and Surrogacy

1. Not a new concept

The arrangement whereby a third party to the marriage is introduced in order to take over giving birth to a child who will be considered the child of the couple is not a new concept. Greek Mythology includes a story of Semele who died when she was pregnant with Dionysus, the god of wine. Zeus took the developing fetus, sewed it into his thigh, and birthed Dionysus.66 In the Book of Genesis, Sarah, the wife of Abraham, was unable to conceive a child. Sarah told her husband, “[t]he Lord has kept me from having children. Go, sleep with my slave; perhaps I can build a family through her.”67 The Book of Genesis also

64 Id. at 172-182.
65 A/HRC/25/48(December 2016).
tells of Rachel, who is infertile, and gives her servant to Jacob as a concubine to serve as a surrogate in order to procreate a child who will be considered the offspring of Rachel and Jacob.68

2. Definition of Terms

With the advent of modern medicine, specifically assisted reproductive technology (ART), surrogacy arrangements have become more common yet more complex. There are terms that we must have familiarity with to be able to wade through the legal issues of surrogacy. These are:

a) Surrogacy: The process of carrying and delivering a child for another person.” (Black’s Law Dictionary 1674 (10th ed. 2014).)

[An] arrangement whereby a woman (‘the surrogate mother’) agrees to conceive and bear a child, which she intends to transfer to another or others (the ‘commissioning couple’ or ‘commissioning husband’ and ‘commissioning wife’) upon the child’s birth [Lowe & Barry, Australian Family Law]

b) Traditional Surrogacy: A surrogate mother is naturally or artificially inseminated with the Commissioning father’s sperm. The traditional surrogacy arrangement the surrogate mother has a genetic link to the child she is carrying. The surrogate is not only the gestational carrier, but also the egg donor.

c) Gestational surrogacy (total surrogacy): Under such agreements, gestational carriers agree to carry the embryo created from the ova and sperm of the intended parents. There is no genetic relation between the surrogate and the child she carries.

d) Parties to a Surrogacy Arrangement

1) Intended Parents/Commissioning Couple: Those who request another to carry a child for them, with the intention that they will take custody of the child as their own.”

2) Genetic Parents: the woman who provides the egg and the man who provides the sperm that fertilizes the egg.

3) Surrogate Mother: The woman who carries the pregnancy to term with the understanding that she must relinquish her parental rights over the child after birth. She may also be called the gestational carrier.

3. How many parents can a child have?

Traditionally, a child would have two parents: one father and one mother. With assisted reproductive technology a person can have two fathers- on is the biological father who donates his sperm and the other is the legal father or he who will legally exercise parental authority over the child and other right and duties of a parent. Motherhood is even more complicated. Aside from the legal mother, the biological function can be further divided into two. The woman who donates her egg is the child's genetic mother. Once that egg is fertilized but implanted in the uterine cavity of another woman, then that other woman is the gestational mother.

The last situation is possible as a result of scientific progress such as artificial insemination and IVF have made surrogacy possible. Specifically, IVF “has enabled the genetic link between the surrogate

mother and the child to be severed, in some cases allowing the creation of a genetic tie between the intending mother and child.”

Chief Justice Panganiban commented on the interplay between technology and law:

It is obvious that the gigantic strides in life sciences and life technologies will change human behavior and social interaction. That is certain. These resulting alterations will, in turn, require new modes of governance and, for us in the judiciary, new jurisprudential norms without precedence. For this reason, the Supreme Court has been monitoring these epochal transformations wrought by bio-sciences and biotechnologies and the need to keep our judiciary attuned to them […] ⁶⁹

First and foremost, it is the responsibility of the Legislative branch of government to pass laws that will address new legal situations resulting from advances in science. However, science has always gotten ahead of law and as a result, faced with an actual live case, the judiciary must act and decide based on “jurisprudential norms without precedence.”

4. ART and surrogacy in the Philippines

In 1996, the first IVF center, RM lab, was established. Today if one searches “surrogacy Philippines,” one can find eight (8) hospitals/clinics offering surrogacy services. These include big and reputable hospitals such as St. Luke’s Medical Center and Makati Medical Center as well as relatively smaller and affordable gynecological hospitals like Dr. Jesus Delgado hospital and Quirino Memorial hospital that have been around for a long time. Curiously, the Lung Center of the Philippines likewise offers assisted reproductive technology, specifically in vitro fertilization. Fees in these hospitals range from PhP 250,000 to 500,000 for one IVF cycle- extraction, fertilization, implantation. Expenses to cover the needs of the surrogate are negotiated separately.

With assisted reproductive technology available abroad and in the Philippines, some Filipinos are involved in surrogacy arrangements whether as intending parents in an International Surrogacy Agreement(ISA) or as surrogate mothers.

The most known case of surrogacy where a Filipino was the one who commissioned for the surrogacy involves the perfume tycoon Joel Cruz. He is the father to two sets of twins, born to Russian surrogates. The children hold both Philippine and Russian passports. Most recently, former Senator Manuel Roxas II and his wife, newscaster Korina Sanchez announced the arrival of their twins who were born via a surrogate in the United States. Chief Justice Panganiban wrote on this and the legal issues that arise in his column. ⁷⁰

In both instances, the Cruz and Roxas surrogacy arrangements were entered into in a foreign country. These kinds of contracts are called ISAs which are defined as surrogacy arrangements entered into in the State of the habitual residence of the surrogate mother for the purpose of a surrogate birth in that state by intending parents who have the intention of living in a different State and have an intention of living in that State with the child born as a result of that arrangement.

5. Legal Issues

There are two types of disputes that could arise over rearing rights and duties with assisted reproductive technology. First, the donor might later attempt to assert rearing or other legal rights. Second, the intending parents might after birth of the child attempt to hold the donor liable for child

---

support and other obligations. There have been several cases involving surrogacy and the competing rights of the parties involved and I will mention a few.

An example of the first type of dispute is *In re Baby M.* In this case William Stern and Mary Beth Whitehead entered into a surrogacy contract, which provided that Stern's wife, Elizabeth, was infertile, but that they wanted to have a child. For $10,000, Mrs. Whitehead was willing to provide that child as the mother with Mr. Stern as the father. She changed her mind after giving birth to the child. The Court invalidate the surrogacy contract because it conflicts with the law and public policy of this State. Though the Court recognized “the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women.”

In *Johnson v Calvert* the Court held that since Mark’s sperm was used to fertilize the egg of his wife Crispina Calvert, the Calverts were the child’s genetic, biological and natural parents. Anna, the surrogate had no parental rights to the child, and that the surrogacy contract was legal and enforceable against Anna. The Court further stated:

Because the two women each have presented acceptable proof of maternity, we do not believe this can can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement. But for their (the Calverts) acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark’s and Crispina’s child into the world, not for Mark and Crispina to donate a zygote to Anna.

The case of *Marvin McMurrey III v. Cindy Close* was different from the two previous cases in that it placed in the center of the controversy the legal determination of who the mother of the child is. In this case, Close and Mc Murrey, who were in their 40s, wanted to become parents. Both were unmarried and they decided to co-parent a baby. They used IVF to make Close pregnant using McMurrey’s sperm and an anonymous egg donor’s eggs. When the child was born, McMurrey argued that although Close was the "birthing mother" or the gestating mother, but not a genetic parent because her eggs were not used in the process. The Court held that Close is the mother of the twins even if she is not genetically-related to them. Since there was no proof that Close agreed to be a mere surrogate of the babies then she is the mother of the child she gave birth to.

In the Philippines, no case has been decided by the Supreme Court on validity of surrogacy contracts or the issue of who is the mother of the child born by surrogacy. Consider however that several hospitals in the Philippines provide assisted reproductive technologies and advertise that they offer full service, legal issues will predictably arise. A Google search will yield several results and one I found was <https://www.elawoman.com/philippines/surrogacy>. This website listed at least nine hospitals or clinics as “Best Surrogacy Centres in the Philippines.”

The website enumerates the services surrogacy centers offered with the cost for the various services:

“Philippine surrogacy centers are known for providing all forms of gestational surrogacy services under one roof at reasonable prices:

- Surrogacy with your own eggs
- Surrogacy with donor eggs
- Surrogacy with frozen embryo

72 851 P.2d 776 (Cal. 1993).
- Surrogacy with frozen eggs
- Surrogacy with donor eggs and sperms.”

With the goal of inviting and convincing potential intending parents and surrogates, it explains:

“Legal Aspect of Surrogacy in Philippines

Surrogacy in Philippines is much simpler and cost-effective than anywhere else in the world. There are an increasing amount of intended parents who choose Philippines as their surrogacy destination. The main reason for this increase is lesser cost of surrogacy and better flexible laws. In 2008, the Court of Asia held that commercial surrogacy is permitted in Asia. That has again increased the interests of medical tourists going in for surrogacy in Asia. Philippines is emerging as a leader in surrogacy procedures due to high success rate and wide options for surrogacy centres.”

Not only does the website claim that the Philippines has “flexible laws” but also boasts of the “high success rate in surrogacy services to patients at least legal requirements.”

The rights of the surrogate mother, genetic parents and commissioning parents are determined by law. The Philippines is sorely lacking of laws and legislation to regulate assisted reproductive technology (ART) and surrogacy. In the Family Code, artificial insemination by a married woman “with the sperm of the husband or that of a donor or both” is the only ART recognized and the children conceived and born as a result thereof enjoy some legal protection if other requirements of authorization and registration are met. 73

Without legal parameters, “the profit-driven industry is largely unregulated, as it simply shifts to new countries when one tightens its regulations.” 74 Without laws, human rights are at the mercy of market forces.

6. Alternative ways of addressing the legal problems in Surrogacy

It is the very vacuum in legal protection given the parties to ART and surrogacy and the child borne of these agreements that makes the Philippines an attractive venue for international surrogacy arrangements. Legal issues surrounding surrogacy focus on the extent of government regulation of surrogacy agreements. There are four possible courses of action that may be taken by the State. 75

The first approach is to prohibit all forms of surrogacy. The State could pass a law that makes surrogacy illegal on the ground that the woman who agreed to be a surrogate did not really know what she was getting into. Furthermore, it may be argued that even if the surrogate knew, there was no real consent give. The premise here for invalidating or banning surrogacy contracts is that that there can be no meaningful choice and informed consent if the surrogate was so poor and desperate. Martha Field, Professor at Harvard Law School, wrote that “if society has created circumstances that coerce poor women to give away or sell their children, a decision to perform as a surrogate cannot be truly voluntary; social

73 FAMILY CODE, art. 164. “[…] Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.”
and economic conditions are such that surrogacy is the best way for some women to support themselves.”

Yet, a strong counter argument to this was articulated by the Court in *Johnson v. Calvert*.

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.

A total ban on surrogacy agreements might be resorted to by States also for the reason that surrogacy is dehumanizing. This fosters the attitude that women’s wombs and children are mere commodities. The commodification of women and children reduces inherent personhood of a human to a market product and assisted reproductive technology builds on this desensitization. An example is the “Baby Gammy scandal” where an Australian couple commissioned for a child through surrogacy in Thailand. Twins were born, but one was with Down syndrome. The couple took only the healthy baby and disregarded the other baby. Absence of laws or poor law enforcement gave way to “a crude ‘returns policy’ where the unwanted child is abandoned or left behind when the commissioning parent return to their home country.”

Corollary to this is the argument that the State has a duty to protect the family. Consequently, the interest of families and children in particular will be best served if complications and uncertainties of this nature and magnitude are eliminated.

The first counter argument to a total ban on surrogacy is that it will be by and large, an exercise in futility. Since people can travel to many places in the world where surrogacy contracts may be entered into without much controversy, cross border surrogacy and its attendant expenses will skyrocket but not enough to hinder the wealthy. Yet, it will effectively take away this option from the middle class. Second, this will likely exacerbate the black market and the only goal the ban achieves is to push surrogacy arrangements underground. Again this will lead to increasing costs and even more challenging, to unsafe and untrustworthy medical services. Third, the ban will violate the right of parents to be and the woman who agrees to carry the pregnancy to term to the human right to enjoy benefits of scientific progress.

Chief Justice Panganiban wrote:

> Controversies including the bio-sciences and bio-technologies range from the ability to invent and influence life forms to the molecular level, to the technical deployment of reversible and permanent changes in crops, plants and animal life. And to the structure and function of human biology. To repeat, consequences and the implications of these decisions transcend territorial jurisdictions.

> Thus courts have been tasked to decide cases relating to embryo ownership and disposition, including questions of fertility, abortion, reproductive rights, paternity and heirship.

The second option is to allow altruistic surrogacy but ban commercial surrogacy. Under this approach, payment for services of the surrogate is deemed unethical because it creates coercive inducements to poorer women to serve in this role. However, this can easily be countered by the argument

---

77 *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)
78 Pascoe, supra note 72, at 465.
that prohibiting payment for gestational services violates the surrogate’s right to work. This human right is protected under ICESCR Article 6,80 7,81 10(3)83 and CEDAW Articles 5(a),84 6,85 11,86 14(1).87

80 ICESCR, supra note 4, art. 6. “1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. […]”

81 ICESCR, supra note 4, art. 7. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

82 ICESCR, supra note 4, art. 8.

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

83 ICESCR, supra note 4, art. 10. “[…] 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”

84 CEDAW, supra note 10, art. 5. “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women […]”

85 CEDAW, supra note 10, art. 6. “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

86 CEDAW, supra note 10, art. 11.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
The right to work entitles women workers to have the opportunity to earn their living through freely chosen work and to working conditions that are safe and healthy and are not demeaning to human dignity. Workers must be guaranteed a fair wage that allows for a decent life for them and their families.

The Philippine Supreme Court, in the case of Philippine Association of Service Exporters, Inc. v. Drilon, had occasion to decide on the constitutionality of a government order thought to violate women’s right to work and travel and freedom from discrimination. The Court upheld the constitutionality of a Department of Labor and Employment Order which provided for the suspension of deployment of Filipino domestic and household workers. It found that it was a valid police power measure in light of the evidence of women domestic workers being ill-treated abroad in massive instances. The purpose of the order is to enhance the protection for Filipino female overseas workers and that such order temporarily banning their deployment overseas will be for their own good and welfare. Furthermore, the order does not provide for an absolute ban as it lists exceptions wherein a Filipino female overseas worker may be deployed abroad.

Furthermore, the Court held that neither does the order violate the right to travel as it is subject to the requirements of public safety, as may be provided by law. The order is consistent with the basic policy of the state as enshrined in the Constitution and the Labor Code that the state must afford protection to labor. The Court clarified that in fulfilling this duty, it does not merely refer to the promotion of employment but also to employment that is decent, just, and humane. The government is duty bound to insure that overseas workers have adequate protection, personally and economically.

Relating this to the argument that may be raised by some women who desire to be surrogates, the Philippine Association of Service Exporters ruling may be used as basis to prohibit surrogacy as employment that is not decent, just and humane. It thus becomes necessary for surrogacy be regulated. This will ensure that the agreed service does not pose a danger to and a diminution of the rights of the surrogate who may have commercial surrogacy as the only paid work she is capable of doing under her existing circumstances.

---

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
   (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
   (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
   (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
   (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

---

87 CEDAW, supra note 10, art. 14. “1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. […]”

Chief Justice Panganiban emphasized the importance of the right to work to make meaningful civil and political rights:

Taking off from a speech I delivered before the Asean Law Association a few years ago, let me begin with a famous quotation of Dr. Martin Luther King Jr., “If a man does not have a job or an income, he has neither life nor liberty nor the possibility for the pursuit of happiness” […].

[…]

Humans need both justice and jobs; freedom and food; ethics and economics; peace and development; liberty and prosperity; these twin beacons must always go together; one is useless without the other.\(^9\)

A third option is to allow but closely regulate Commercial Surrogacy Arrangements. In regulating commercial surrogacy, the law could either impose high fees or ensure payment of low fees depending on the public policy it wishes to advance.

a) Enforce high fees

Martha Field, in her book Surrogate Motherhood points out that as may be expected the couple has greater financial means than the woman who agrees to be the surrogate. “Does it constitute exploitation for childless persons or couples to pay women to conceive and bear children for them? “, she inquires. I maintain that generous payment for a surrogacy arrangement makes it less exploitative. Since the woman will gestate for nine long months, the payment to her must be commensurate to the difficulty of the work and the its concomitant risks.

b) Enforce low fees

Field raises the issue of high fees serving as an irresistible temptation to women. Surrogacy arrangements are harder to resist for women who have no other means of livelihood. Therefore, so as not to entice women to act against their better judgment, is has been argued that laws should set a low amount to paid to surrogates. Mandatory low fees to be paid to the surrogate is intended to disincentive surrogacy It does not make much sense though to constrain wealthy commissioning parents from paying a high fees to poor women for the tremendous act and service she will do. I would also contend that payment of low fees made by wealthy commissioning parents to a less wealthy, if not poor, surrogate is all the more exploitative and oppressive. This will be no different from paying someone pittance for successfully doing a difficult task and will be equivalent to non-compensation for women's work.

A version of regulation of surrogacy arrangements does not look at mandating low or high fees. Instead legislature should provide a floor and/or ceiling for the payment of surrogacy services. Regulation should also center screening of the couple proposing to raise the child, which is already required for would-be adopters. The law should also require screening of the surrogate mother, which is now this is done by the intending couple themselves despite the absence of any qualifications for would be surrogates. The law should establish a minimum age for surrogate mothers and identify what are reasonable health duties of prenatal that the commissioning couple could impose on a surrogate. The reasonableness of these duties will not unnecessarily curtail the right to liberty of the woman in other aspects of her life but not put in danger the right to life of the fetus in her womb.

The fourth and last possible response to address surrogacy is to leave it to the private ordering by not regulating surrogacy arrangements. This approach considers any form of regulation as patronizing to women. Regulations are deemed a threat to women’s rights when laws apply protectionist measures to override women’s decisions. Anyone of legal age, whether a man or a woman, is capable for all acts of civil life and has capacity to act with legal effects. Thus, a woman’s rights are breached when government or society assumes the role of protecting her from acting in accordance with a decision she has made, whether or not society or government approves of her decision to be a surrogate. Protectionists measures that displace a woman’s choice to enter a surrogacy agreement “implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive activity.”

In the United States there are those that promote surrogate motherhood and advocate to uphold women’s right to play that role. Though these arguments in favor of women’s independent decision making are powerful, the disparity in the financial and educational circumstances of the intending parents and surrogates will likely result in a contract that will not uphold the rights of the surrogate. Moreover, where another human being, a child, is the ultimate outcome of the arrangement, the State must come in to ascertain the protection of the human rights of that child.

VII. WHOSE HUMAN RIGHTS?

A. Women’s Rights

The ICESCR, in Articles 2(2) and 3, and in CEDAW Articles 2, 3, 4, and 5, recognize the economic and social structures that generate and perpetuate discrimination against women. Article 3 mandates an affirmative state obligation to "take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men." Moreover, as a State party to the convention, the Philippines has committed to end discrimination against women in all forms. The CEDAW requires States to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The standard of equality for women “requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.” As stated early, prohibiting all forms of surrogacy will violate a woman’s right to work.

Furthermore, equal protection argument can be raised against anti-surrogacy legislation since such a law will treat infertile couples differently from one another. Articles 164 and 166 of the Family Code provides that the child conceived and born as a result of the artificial insemination of the wife by the sperm of the husband or a donor enjoys the status of legitimacy.

---

90 Rep. Act, No. 6809.
93 CEDAW, supra note 10.
94 Masstricht Guidelines, supra note 15, ¶ 12.
Philippine law allows couples in which the man is sterile to have a legitimate child, through artificial insemination, who is biologically related to his wife and even to him, if his semen is used. It is a violation of the equal protection clause, for the state to prohibit an arrangement whereby an infertile woman cannot have a legitimate child who is the husband's biological child and hers, as well.

B. Child’s Rights

Article 2 of the CRC provides that “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.” [underscoring supplied]

All human beings regardless of their status are entitled to the same rights. This implicates the fundamental rights and interests of children, including the right not to suffer adverse discrimination on the basis of their having been born through surrogacy. The child has to have his or her best interests regarded as the paramount consideration in all actions concerning him or her. Laws should categorically state that the rights of children born to surrogates are no different from the rights of other children.

Pursuant to Article 33 of the CRC, States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. The Human Rights Council Report\(^95\) identifies areas where legal, administrative and other measure are needed to protect the child from trafficking. The Special Rapporteur points out that trafficking, in persons of women and children, is primarily a human rights violation. The CRC and its Optional Protocol have placed emphasis on several acts that endanger the interests and well-being of children. Among these are:

1. Optional Protocol, Article 2 (a). Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

2. Optional Protocol, Article 2 (b) Child Prostitution - use of a child in sexual activities for remuneration; and

3. Optional Protocol, Article 2(c) Child pornography - any representation of a child engaged in real or simulated explicit sexual activities.

There are increased risks of trafficking and sexual abuse and exploitation of children born to surrogates, particularly in cross border surrogacy agreements. It is imperative that the Philippines pass measures that will ensure the protection of children born to a surrogate especially considering that several surrogacy centers operate openly in the Philippines.

**VIII. Private International Law Issues**

Situations where the parties to the surrogacy contract are nationals, domiciliaries or habitual residents of different states, or where the surrogacy agreement is entered into in a State other than the abovementioned states or where the birth of the child will take place is yet another State, have given rise to complex legal issues. At least two countries are involved and both are presumed to be interested in

\(^95\) A/HRC/25/48 at 22-24 (December 2013).
applying their laws to govern the legal relationship and effects of the arrangement. Thus, the private international law problems that arise are manifold.

At present there are two simultaneous institutional efforts to protect the rights of women and children in surrogacy. These are The Hague Conference on Private International Law (HCCH) which has a project on Parentage including surrogacy. This project began in 2016. I am one of the 17 members, and the only Filipino to be in the Experts’ Group that has been discussing how to ensure that the best interests of the child standard is adhered to in surrogacy arrangements. We are studying the need for a Convention that will determine choice of law rules in international surrogacy arrangements. The other work is being undertaken by the International Social Services based in Geneva. This group is drafting Principles for better protection of children’s rights in Surrogacy. I am a consultant for this group and we last met in The Hague in December 2018 and we will have a regional conference later this year in Asia to further refine the Principles which will focus on the right of the child born through surrogacy to be free from all forms of discrimination.

The child’s right to acquire a nationality and to preserve his or her identity are human rights as well as private international law issues. The nationality of the child will be dependent on who are considered to be the child’s legal parents. Even when both parties- the intending parents and the surrogate mother – agree to the terms of the contract and the relinquishment of the child to the intending parents is not in issue, the disparity between the laws of the state of origin (where the surrogate is a habitual resident and where the child was born) and the receiving state (state where the intending parent are residents) will result in a conflict of laws case.

Limping parentage is one of the major consequences of relevant states having differing laws on the legality and recognition of surrogacy contracts. Children may be left with “limping” legal parentage, with the consequent child protection concerns that this involves. For example, if the country of birth allows the names of the intending parents to be in the birth certificate, parental rights are immediately given. But if the country of the intending parents does not allow surrogacy, but the place of birth of the child does, then the child born of the surrogate will not be considered her child but the law of the intending parents will not consider them to be the parents either.

Yamada v. Union of India, known as the case of Baby Manji, is in point. A surrogacy agreement was entered into by an Indian woman to act as surrogate for a Japanese couple. The India-Embryo Carrying Agreement Act allows domestic surrogacy arrangement. They have no law prohibiting International Surrogacy Arrangements. Japan on the other hand bans surrogacy. The parties enter into a traditional surrogacy arrangement where the egg of the Indian woman is fertilized with the sperm of the Japanese male. The child, Manji, is born in India. However, prior to the birth of the child, the Japanese couple divorce. The Japanese woman (ex-wife) does not want the child since she is not genetically related to the baby. The surrogate does not want to exercise parental rights over the child since it is clear to her that this is a commercial surrogacy arrangement. The Japanese man claims the child as his own but Japanese law does not consider children born to surrogates as children of the Japanese national. Hence, the Japanese biological father is unable to bring the child to Japan as his own. He decides to adopt the child in Japan to establish a legitimate parent child relationship and get a Japanese passport for the baby. The Japanese man’s plan is thwarted given India’s law that prohibits single-parent adoption.

97 http://www.geneve-int.ch/international-social-service-iss-0.
He leaves baby Manji in India for six months at which time he works furiously on getting legal papers for the boy. Although the Japanese man is eventually able to bring the child into Japan and there process the documents for the baby, this case illustrates the complications that arise in an international surrogacy arrangement. The Japanese man is considered the father of the child in India but not in Japan.

The refusal by Japan to recognize a child born to a surrogate and a Japanese father as a citizen of Japan coupled with the law in India prohibiting a single parent adoption even by the child’s biological father give rise to several violations of the child’s human rights. Among these are the child’s right to be with his family, the right to a name and identity and the right to a nationality. The very survival of the child and his right to a family protected under the Convention on the Rights of Child turn on the immediate resolution of the Conflict of Laws issues of this case.

IX. CONCLUSION

On the legal conundrum that has ensued in the age of biotechnology, Chief Justice Panganiban wrote that:

[T]here are many baffling areas where we may not have firm answers as yet. But we must still grapple with the realities of the new bio-sciences and learn to cope with the long-term and far-reaching effects they will have on our legal system and dispensation of justice. After all, under our Civil Code, the silence, the obscurity or the insufficiency of our laws in not an excuse to avoid rendering judgments in appropriate cases.

Hence, if a case similar to the Baby Manji case is brought before Philippine courts and with the paucity of legislation to cover this legal situation, the courts will nonetheless have to rule over the matter in a way that will respect, protect and fulfill the rights of the child and uphold his/her best interests.

I submit three possible solutions.

One, is for the Court to characterize the case as one of contract. It could void the Surrogacy contract on the ground that the subject matter of the contract is not within the commerce of man.99 Applying lex loci contractus, the law of the Philippines will apply. Thus, the woman who was the surrogate and the commissioning father are the parents of the child, no different than a situation when two unmarried people have a child outside of wedlock. Since they are not married, the child is an illegitimate child under the parental authority of the mother, with visitation rights exercised by the father. The Court could also hold that since the surrogate mother was in a valid marriage at the time of the conception and birth of the child, then the child is presumed to be the legitimate child of the woman and her legal husband.100 This will be subject to the surrogate’s husband’s filing an action to impugn the legitimacy of the child based on scientific proof that the child could not have been his in accordance with Article 166(2) and absence of written authorization or ratification under Article 166(3).101

99 CIVIL CODE, art. 1409. “The following contracts are inexistent and void from the beginning: […] (4) Those whose object is outside the commerce of men […]”.
100 FAMILY CODE, art 164. “Children conceived or born during the marriage the parents are legitimate […]”.
101 FAMILY CODE, art 166. “Legitimacy of a child may be impugned only on the following grounds:…2) that it is proved that for biological or other scientific reasons, the child could not have been that of the husband, or (3) that in case of children conceived through artificial insemination, that written authorization or ratification of wither parent was obtained through mistake, fraud, violence, intimidation, or undue influence.”
A second option is for the Court to uphold the contract. Courts have an interest in sustaining the stability of commercial transactions. Therefore, in the absence of a Philippine law prohibiting surrogacy agreements and there being no coercion to enter into the contract, such surrogacy agreements are valid. The surrogate is not the mother of the child. The commissioning couple is the parents of the child in accordance with the manifest intentions of the parties. From a human rights perspective, the Court may uphold the contract to protect the economic rights of the surrogate and at the same time ensure the best interests of the child to grow up where his needs will be taken care of amply by two people who went to great lengths to create him.

Another solution is for the Court to characterize this legal problem as a Family Law case. Philippine laws have no provisions on maternity. Articles 163 to 182 of the Family Code are on Paternity and Filiation. Our law simply presumes that the mother is the woman who gives birth to the child. Thus, the woman who is both the genetic and gestational surrogate in a case similar to the Baby Manji case, will be indubitably judged as the mother of the child.

However, if the woman is the gestational surrogate but the egg of the female commissioning/intending parent was fertilized by her husband’s sperm, as proven by DNA testing, then there will be a legal conundrum. The legal presumption that the woman who gives birth to the child is the mother will favor the woman who carried the child to term and delivers him/her. On the other hand, there will be basis to adjudge the commissioning couple as the legal parents of the child considering that the genetic materials come from the married couple. In 

\[\text{Herrera v Alba,}^{102}\] \[\text{the Supreme Court held that “by 2002, there was no longer any question on the validity of the use of DNA analysis as evidence” given that:}\]

- DNA is the fundamental building block of a person’s entire genetic make-up. DNA is found in all human cells and is the same in every cell of the same person. Genetic identity is unique. Hence, a person’s DNA profile can determine his identity.

- The scenarios I gave above presume that the surrogacy agreement was entered into voluntarily. This is the most important aspect of a surrogacy contract to ascertain. To ensure this, attention should focus on the parties’ negotiations before conception. If there was no coercion or pressure on the surrogate mother then she is an autonomous agent. The State should recognize the surrogacy agreement, whether local or international, as the consequence of the surrogate’s autonomous reproductive decision.

- In these discussions I hasten to underscore that legislation must catch up with these challenges brought about by advancement in science.

A law regulating surrogacy should provide that there is no binding consent by the woman until after childbirth. The surrogate mother may change her mind even after having given consent to relinquish her child in the Surrogacy Agreement. This is because at the time she entered into the agreement, one element of the contract, the child, had not yet been born. It is only after she has given birth to the child, that the woman will know whether she can part with the child or not. Though this will give the surrogate an advantage over the commissioning couple, the right of a woman to remain with her children should be upheld over and above the binding effect of contract and stability of commercial transactions.

---

\[102\] G.R. No. 148220, June 15, 2005.
I hope my lecture has helped the audience understand the legal issues and ramifications of adoption and surrogacy; legislators recognize urgency in passing laws that address these issues; and judges who have to face the dilemmas on their own, to none the less render a sound judgment; that all will be guided by the standards of the best interest of the child for child’s rights, and equality and non-discrimination for women’s rights.

- o 0 o -