

FOREIGN SURROGACY AGREEMENTS AND PARENTAGE CONFLICTS IN PIL

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Abstract

Surrogacy in recent decade has transcended the national borders, which has created new challenges for the legal systems in determining legal parentage and enforcing surrogacy agreements. The concept of cross-border surrogacy^{2,3,4,5} constitutes involvement of parents from one country, intending to avail surrogacy services in another for various reasons. Such reasons could be more flexible legal frameworks regarding surrogacy, or more convenient costs. Such arrangements require approach under the Private International Law (PIL) which will shall in future apply in matters of legal conflicts such as recognition of legal parentage, conflict of laws, nationality of the child and in matters of surrogacy contracts.

This article explores such conflicting situations and challenges faced during cross-border surrogacy disputes. It studies how various jurisdictions approach to resolve the issues involving foreign surrogacy agreements in the context of private international law within the Indian as well as comparatively international jurisprudence. The paper includes a comparative study of the cross-border surrogacy legal frameworks between India and other legal systems such as the USA and UK. It also includes the conflict of laws in the cases of statelessness of the children born via surrogacy, denials of parental responsibility and case laws recognising the foreign judgements.

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² Trimmings, K. and Beaumont, P., 2013. 'General Report on Surrogacy' in K. Trimmings and P. Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at the International Level*, pp. 439–549.

³ Trimmings, K. and Beaumont, P., 2016. 'Parentage and Surrogacy in a European Perspective' in C. von Scherpe (ed.), *European Family Law*, vol. III, pp. 232–283.

⁴ Beaumont, P. and Trimmings, K., forthcoming. 'A Need for Global Regulation of Surrogacy?' in G. Biagioni and Ippolito (eds), *Migrant Children in the XX Century: Selected Issues of Public and Private International Law*.

⁵ Hague Conference on Private International Law, *The Parentage / Surrogacy Project*

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With the comparative study, the article examines the gap in the existing regulatory legal framework, the requirement for a uniform international regulatory structure to protect the best interest of the surrogate-born children and intending parents.

Keywords: Private International Law, Surrogacy, Cross-Border Surrogacy, Cross-Border Reproductive Arrangements, Agreements, Citizenship.

Introduction

With the advancement in medical science, there had been the development of assisted reproductive technology (ART) to help couples or individuals facing infertility to achieve parenthood through surrogacy. This development coupled with globalization has led to evolution in laws and a surge in foreign surrogacy or cross-border surrogacy arrangements. In a cross-border surrogacy, the intended parents travel across countries to seek surrogates due to favourable legal conditions, social acceptance or low cost charges. Some popular countries favoured for international reproductive tourism are Ukraine, India, Georgia, and certain states of the US. However, the law hasn't evolved in coordination with the consistent development of the foreign surrogacy arrangements. Specifically, in issues concerning the custody, parentage citizenship and recognition of surrogacy contract across the borders.

The core legal complication in the international surrogacy is rooted in the conflict between domestic laws and the national laws. Due to the varying standards of parenthood, difference in public policies and non-recognition of commercial surrogacy across different countries, sometimes the home country of the intending parents does not recognise the surrogate-born child even though the surrogate's country may consider the intending parents to be the legal guardians of the surrogate-born child. Such disputes are matters of consequences which at times leaves the surrogate-born in a status of legal statelessness, prolonged custody cases coupled with emotional and financial trauma for the parties involved.

In India, there was a lacuna in the regulation of cross-border surrogacy and even in the international lever until the year 2021. No existing regulatory instruments provided any specific provisions to guide this particular evolving area of the private international law

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which leads to a surge in the unresolved disputes⁶. Among the many problems in this area of private international law, the significant issues are the legal parentage, nationality and immigration⁷. Apart from these some other issues are some other unforeseen legal challenges⁸. What happens when the intending parents refuse to accept the child in case of disability⁹ or because the marriage breaks down before the child is born¹⁰ or if the surrogate mother decides to keep the baby¹¹ or during the transfer of the legal parenthood¹². There arise several other issues at times such as the access and custody conflicts when the intending parents and the surrogate mother reside at two different countries, at the times of child abduction or financial support¹³ and maintenance disputes¹⁴.

This is where Private International Law (PIL) plays its part. Private International Law regulates the legal issues involving foreign elements, particularly in private relationships and there is a presence of conflict in jurisdictions, application of laws, and recognition of foreign judgments and statutes. In this context, private international law addresses the conflicts between which domestic court must recognise the surrogacy agreement which is executed abroad or the parentage judgement and whether the laws of the country of the intending parents or the surrogate should apply. The courts in this regard decide in the best interest of the child, keeping the rights of the surrogate and the intending parents in view, evaluating all competing notions.

Literature Review

⁶X Y (Foreign Surrogacy) (2008) EWHC 3030 (Fam), per Hedley J at [8]: “many pitfalls confront the couple who consider commissioning foreign surrogacy” and “potentially difficult conflict of law issues arise which may have wholly uncommissioning and unforeseen consequences.”

⁷ Human Fertilisation and Embryology (Parental Orders) Regulations 2010, Explanatory Memorandum, para. 8.7.

Home Office, 2009. *Inter-country Surrogacy and Immigration Rules. Re I (A Child)* [2011] EWHC 921 (Fam), paras 81–111.

Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports) [2015] EWFC 90, paras 76, 94–197.

KB v RT [2016] EWHC 760 (Fam). *Re X (Foreign Surrogacy: Child's Name)* [2016] EWHC 1068 (Fam), paras 6–12.

⁸Theis, L., Gamble, N. and Ghevaert, L., 2009. ‘Re X and Y (Foreign Surrogacy): A Trek Through a Thorn Forest’, *Family Law Journal*, 39(3), p. 239.

⁹Hyder, S., 2010. *BioNews*, 11 October. Farnell&Ors and Chanbua [2016] FCWA 17 (Fam Ct WA).

¹⁰ “Surrogate Mum of Twins Unfazed After Baby Deal Fall Apart”, 2011. *CBC News* (New Brunswick), 13 September.

¹¹*CW v NT & Anor* [2011] EWHC 33 (Fam).

¹²*Re C and D (Children) (Fact-finding Hearing)* [2015] EWHC 1059 (Fam).

¹³ Trimmings, K., 2014. ‘The Interface between Maintenance and Cross-Border Surrogacy’ in P. Beaumont et al. (eds), *The Recovery of Maintenance in the EU and Worldwide*, pp. 261–274.

¹⁴*W and B v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008.

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The surge in the area of cross-border surrogacy has compelled the legal scholars to finally looking into the grey areas of the subject matter to resolve the occurring and the foreseeable conflicts focusing on conflict of laws when intending parents increase services across the border. The literature review explores the global academic debates on cross-border surrogacy, observes the approach of private international law towards this area and identifies the grey areas and gaps in the regulatory framework.

The legal scholars across the globe have observed that reproductive tourism exploits regulatory imbalances between the states. Shenfield charted the rise of cross-border surrogacy market, remarking that countries with weak and permissive regulatory frameworks such as Ukraine and India become hubs for intending parents from restrictive countries such as Germany and France for a surrogate child.¹⁵

They warn that risk of such commercialised exploitation of economically vulnerable women is raising concerns about their human rights and ethics. World Health Organisation (WHO) guidelines safeguards surrogate welfare and the best interest of the child but stop short at binding private international law rules.¹⁶ The Council of Europe's Parliamentary Assembly Recommendation 2010, alerts the member states against the commercialisation of surrogacy and calls for the necessity of legal frameworks prioritising the rights of the children.¹⁷

The Hague Conference on Private International Law's 1996 Convention on the Protection of Children (the 1996 Hague Convention) gives provisions for safeguarding parentage and inter-country adoption but it does not expressly provide for cross-border surrogacy.¹⁸ Borowski has argued for the need of extension in The Hague Convention to cover surrogacy and parentage provisions and suggested to include a "country of celebration" rule to determine conflict of jurisdiction.¹⁹ Among all private international law tools, public policy remains a core tool. It

¹⁵Shenfield, G., Illingworth, P., & Roberts, S. (2016) 'Global Trends in Surrogacy Markets', *Journal of Assisted Reproduction and Genetics*, 33(5), pp. 587–594.

¹⁶ World Health Organization (2010) *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation*, Geneva: WHO, Principle 2.

¹⁷ Council of Europe Parliamentary Assembly (2010) *Recommendation 2010(1): Ethical Aspects of Surrogacy Arrangements*, Strasbourg: Council of Europe, 20 January.

¹⁸ Hague Conference on Private International Law (1996) *Convention of 29 May 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, The Hague: HCCH.

¹⁹Borowski, A. (2018) 'Extending the 1996 Hague Convention to Surrogacy', in Basedow, J. (ed.) *Conflict of Laws in Family Matters*. Oxford: Oxford University Press, pp. 145–168.

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comes in action when the foreign surrogacy agreement overlaps with the domestic fundamental norms and refuses recognition.²⁰

Law Commission of India, Report No. 271 (2018) pointed out the regulatory gaps in foreign surrogacy and recommend preventing rampant commercial surrogacy by foreign nationals however it did not explicitly address the foreign parentage regulations.²¹ Post the Surrogacy (Regulation) Act, 2021, the focus shifted towards the regulatory issues and to safeguard the surrogate's rights and interests. Yet until now only few considerations have been taken into how India will recognise parentage certificates issued abroad or surrogacy judgements.^{22, 23}

In the US, there is no federal surrogacy legislation. Some states, such as California, enforce gestational surrogacy agreements through simplified parental-order processes, while others, including New York until 2021, consider them invalid for public policy reasons.²⁴ In the United Kingdom, the Surrogacy Arrangements Act of 1985 and the Adoption and Children Act of 2002 require intending parents to get a parental order following delivery. Section 55 of the Family Law Act 1986 requires courts to review overseas surrogacy agreements and refuse to enforce them if they contradict with UK public policy.²⁵

Research Objectives

The research paper aims to study the multifaceted legal issues arising from foreign surrogacy arrangements, their contractual validity, the rights of the surrogates, and enforceability of surrogacy agreements across borders.

To observe the approach of private international law and its application of the doctrines such as Lex domicile, Lex loci celebrationis and the public policy exceptions in various cases in determining the nationality status and parentage born through cross-border surrogacy.

²⁰ Bell, J. and Herring, J. (2018) *Principles of International Law*, 5th edn. Oxford: Oxford University Press, Chapter 4.

²¹ Law Commission of India (2018) *Report No. 271: Surrogacy Regulation*, New Delhi: Law Commission of India, Paras. 4.1–4.35.

²² Government of India (2021) *Surrogacy (Regulation) Act, 2021*, Act No. 19 of 2021, New Delhi: Ministry of Law and Justice.

²³ Gupta, K. (2022) 'Altruistic Surrogacy under the Surrogacy Regulation Act, 2021', *Journal of Family Law Studies*, 4(2), pp. 89–114.

²⁴ State of California (2017) *Uniform Parentage Act*, as amended, California Family Code §§ 7960–7968, Sacramento: California Legislative Information.

Marquardt, E., Blyth, C., & Frith, L. (2020) 'Surrogacy Laws in the United States', *Family Law Quarterly*, 54(2), pp. 233–260.

²⁵ United Kingdom (1985) *Surrogacy Arrangements Act 1985*, c. 49, London: HMSO.

United Kingdom (2002) *Adoption and Children Act 2002*, c. 38, Part III, London: HMSO.

United Kingdom (1986) *Family Law Act 1986*, c. 55, London: HMSO.

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To make a comparative analysis of the legal status of cross-border surrogacy across various jurisdictions, an exhaustive study of India's Surrogacy (Regulation) Act, 2021, and relevant case laws, important judicial decisions that shaped the legislative frameworks under various jurisdictions.

To observe gaps and inconsistency in judicial approaches, treaty gaps and conflicts in public policy and obstacles that hinder recognition of parentage and enforcement of foreign surrogacy agreements.

Methodology

The paper adopts a doctrinal legal research methodology, following a systematic study of primary legal sources, scholarly commentary, detailed analysis of statutory provisions, judicial decisions and international jurisprudence and legal instruments valid in context of cross-border surrogacy²⁶.

The key sources include Private International Law treatises, family law textbooks, law reviews, articles, case laws, policy papers etc. This doctrinal and comparative methodology offers a comprehensive overview over the global as well as India context of cross-border surrogacy.

Discussion

A reproductive arrangement where a woman, referred to as the surrogate mother, agrees to, carries and delivers a child on behalf of another individual or a couple, referred to as the intended parents is known as Surrogacy²⁷. Due to the development in in-vitro fertilization (IVF) and other assisted reproductive technologies (ART), the practice of surrogacy has become more common in the recent decade.²⁸ The rise in cross-border surrogacy, in which intending parents seek surrogate mothers across the border, in other countries, because of various factors like cost convenient, shorter people of waiting time, flexible policies, and permissive surrogacy laws. Countries like India, Georgia and Ukraine with permissive surrogacy laws and lower health costs are now popular destinations for cross-border

²⁶ Mills, K., 2013. International Surrogacy and the Conflict of Laws. *Law Quarterly Review*, 129, pp. 196–199.

²⁷ Horsey, K. and Wagenaar, H. (eds), 2016. *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*. Cambridge: Cambridge University Press.

²⁸ Horsey, K., 2023. The future of surrogacy: a review of current global trends and national landscapes. *Reproductive Biomedicine Online*

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surrogacy practice that creates a transitional surrogacy industry that caters to a global clientele.²⁹

Surrogacy can be categorised into altruistic and commercial types. In the altruistic surrogacy, the surrogates are not paid beyond reasonable amount. The only cost that the intending parents bear are the medical expenses and essential costs. Post 2021 regulation³⁰, India provides altruistic surrogacy services along with the United Kingdom and parts of Australia³¹. The second category is commercial surrogacy in which the surrogate is paid beyond reasonable expenses. This form surrogacy, with its popularisation has raised a series of ethical concerns pointing out that it has led to commodification of women's bodies³². Commercial surrogacy is practiced in some states of the United States and Ukraine. It used to be legal in India previously, before the enactment of the Surrogacy (Regulation) Act, 2021 which now holds it illegal.

The arrangement of cross-border surrogacy begins with a private contract between the surrogate and the intended parents. These contracts include the terms and conditions of the surrogacy, compensation, medical obligations, parental rights and the post birth procedures. However, when it comes to the legal enforceability, it differs across different jurisdictions. Some jurisdictions hold them void for being against their public policy and come uphold them for stricter legal overview. Courts render orders regarding the contract that deem to fit their jurisdiction and in the best interest of the child that also doesn't violate the local ethical codes.

The core legal complexities that cross-border surrogacy agreements face are mostly regarding citizenship, parentage and recognition of foreign judgements. Therefore, such surrogacy agreements don't only include private contract issues but also private international law and family law issues. Therefore, conflict of domicile, conflict in jurisdictions and choice of laws, makes it a rich area for private international law for study.

²⁹ Horsey, K., 2023. The future of surrogacy: a review of current global trends and national landscapes. *Reproductive Biomedicine Online*, 56, 103764.

³⁰ Surrogacy (Regulation) Act, 2021 (India), No. 47 of 2021.

³¹ Trimmings, K. and Beaumont, P., 2013. General Report on Surrogacy. In: K. Trimmings and P. Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at the International Level*. Oxford: Hart Publishing, pp.439–549.

³² Pennings, G., 2001. Reproductive tourism as moral pluralism in motion. *Journal of Medical Ethics*, 27(5), pp.337–341.

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Before the development of assisted reproductive technologies (ART), legal parentage was of little to no concern in context of private international law. The concept was talked about by a “common core” of law which was established on the conflict of legal motherhood with regards towards gestation and childbirth and legal fatherhood determined by the father’s marriage to the mother of the child.³³ However this is a traditional concept which the assisted reproductive system, the concept of surrogacy defeats, thereby challenging the parenthood particularly the legal motherhood. Surrogacy entirely defeats the core concept of legal motherhood which is backed by three significant factors; gestation, genetics and the intention to parent. Thus, based of biology, in surrogacy there are chances of multiple claims of parenthood. The gestation and birth, the genetics being the persons who contribute the male and female gametes and the intention being the person who conceives with the intention to raise the child.³⁴

In view of this situation, various alternative approaches towards the determination of legal parentage was developed by courts and legislatures from various jurisdictions. The most remarkable approaches were the “genetics” test³⁵ and the “intent” test.³⁶ However countries like the UK³⁷ continued to follow the traditional rules of the surrogacy cases to determine the parentage, i.e, the gestational test. Thus, it may be concluded that since different countries deed different approaches to fit their respective countries laws in determining the parentage, it created a conflict and oftentimes a contradiction between the jurisdictions with respect to

³³ European Parliament, Directorate General for Internal Policies, 2010. *Recognition of Parental Responsibility: Biological Parenthood vs. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the Member States? Need for EU Action?* Brussels: European Parliament.

Lowe, N., 2009. *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital and Non-marital Partnerships and Cohabitation*. Report for the Committee of Experts on Family Law, CJ-FA (2008) 5. Strasbourg: Council of Europe.

The Amphill Peerage [1977] AC 547.

³⁴ Ministry of Attorney General Justice Services Branch, Civil and Family Law Policy Office, 2007. *Family Relations Act Review: Discussion Paper*. British Columbia: Ministry of Attorney General.

³⁵ *M v An t-Ard-Chláraitheoir* [2013] IEHC 91 (High Court, Ireland).

M.R. and D.R. (suing by their father and next friend O.R.) &ors v An t-Ard-Chláraitheoir&ors [2014] IESC 60 (Supreme Court, Ireland).

Caffrey, S., 2013. Surrogacy and the Right to Register as a Parent. *Medico-Legal Journal of Ireland*, 19(2), pp.34–39.

³⁶ *Johnson v Calvert* (1993) 5 Cal.4th 84, 851 P.2d 776 (California Supreme Court).

Buzzanca v Buzzanca (1998) 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (California Court of Appeal).

California Family Code, § 7960(c).

Horsley, K., 2010. Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements. *Child and Family Law Quarterly*, 22(4), pp.449–471.

³⁷ United Kingdom, 2008. *Human Fertilisation and Embryology Act 2008* (c.22), London: The Stationery Office.

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legal statutes when it involves cross-border surrogacy.³⁸ This leads to uncertainties in parentage or maternity conflicts and an uncertain parent-child relationship.

Two significant private international law principles which play important roles in guiding how to determine the parentage are Lex domicile and Lex loci celebrationis. When it comes to personal status and family relations, Lex domicile plays a role determining the status of the individual. The parentage may not be recognised at home country, if surrogacy is illegal in the country of the intending parents even if the child is born through legal contracts.³⁹ While in assessing the formal validity of the foreign surrogacy agreements, it's often Lex loci celebrationis which is used in the marriage law.⁴⁰ Yet its application in conflicts of parentage is guarded and since parentage is more about the status of the requirements and not contracts, this remains a secondary principle. The conflict arises when the home country doesn't recognise or follows different rules while the surrogacy country recognises the intending parents as legal parents. There comes in application a guiding maxim "mater semper certa est" which means "the mother is always certain".⁴¹ This is common in civil law jurisdictions.

There are two dimensions to be navigated in parentage problems in a cross-border surrogacy. First, attainment of legal parentage in the surrogate country and second, transfer of the legal parentage to the country of their intending parents. Mere acceptance and declaration in the surrogate country that the intending parents are the legal parents does not eventually make them so in the intending parents country. Because this often leads to statelessness if the intending parent's country doesn't recognise the foreign agreement. This the intending parents are required to seek the recognition in their home country of the agreement regarding the confirmation of the status of the child through recognition of legal parentage. And this recognition approach differs in common law and civil law systems.⁴² As discussed previously, the civil law countries often have a normative approach based on principlism. It follows relevant private international law principles, recognises foreign judgments, legal facts

³⁸ Hague Conference on Private International Law, 2016. *Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy*, February 2016, The Hague: HCCH.

³⁹ European Parliament, Directorate General for Internal Policies, 2010. *Recognition of Parental Responsibility: Biological Parenthood vs. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Agreements*. Brussels: European Parliament.

⁴⁰ *International Surrogacy and the Conflict of Laws*. *Law Quarterly Review*, 129, pp.196–199.

⁴¹ Beaumont, P. and Trimings, K., 2013. *International Surrogacy Arrangements: Legal Regulation at the International Level*. Oxford: Hart Publishing.

⁴² Hague Conference on Private International Law, 2012. *The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, March 2012, at [35]-[41].

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and juridical acts, and follows the relevant foreign law if there's an absence of any judgement to recognise.

In contradiction, the law of forum or known as Lex fori shall apply in common law countries to establish parentage in cases of cross-border surrogacy, thus when the child is born outside the jurisdiction of the parent's home.⁴³ It is expressly stated by the relevant domestic law of the UK, that this is extraterritorial in nature which thus means, it shall apply regardless of the child being born within or outside the jurisdiction of the intending parents.⁴⁴ The guidance issued by the UK Border Agency states that, "anyone considering entering into an inter-country surrogacy arrangement must remember that if they reside in the United Kingdom, they are subject to United Kingdom law and the definitions which underlie it."⁴⁵

Legal motherhood is very contentious in surrogacy instances. In certain countries, that include as France and Germany, the surrogate is regarded as the legal mother by default given that she gave birth to the kid, regardless of genetic relationship.⁴⁶ This legal assumption is high in civil law countries that value gestation above genetics or purpose. Legal fatherhood is often ascribed depending on the intention of fathering or a genetic relationship, although legal frameworks differ.⁴⁷ In many countries, if the father is biologically related and stated on the birth certificate (and the surrogate mother is not married), he may be regarded as the legal father.⁴⁸ However, PIL meets a significant hurdle when the intended parents seek acknowledgement of their parenthood in their native nation. The intended parents may be named on the foreign birth certificate issued by the surrogate's nation, but this recognition is not guaranteed in the intended parents' country. For example, regardless of foreign papers, UK courts require a Parental Order to transfer legal parental rights from the surrogate to the intending parents.⁴⁹

⁴³ Human Fertilisation and Embryology Act 2008 (HEA 2008), discussed *infra*.

⁴⁴ Human Fertilisation and Embryology Act 2008, section 33(3)
Status of Children Act 1969 (New Zealand), section 5(3).

⁴⁵ Home Office, UK Border Agency, *Inter-country Surrogacy and the Immigration Rules*.
Irish Ministry for Justice, Equality and Defence, *Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy Arrangements Entered into Outside the State*, p.

⁴⁶ Trimmings, K., and Beaumont, P., "International Surrogacy Arrangements: Legal Regulation at the International Level," *Hart Publishing*, 2013, p. 439.

⁴⁷ Pennings, G., "Reproductive Tourism as Moral Pluralism in Motion," *Journal of Medical Ethics*, 27, no. 5 (2001), pp. 337–341.

⁴⁸ Beaumont, P., and Trimmings, K., "Recent Jurisprudence on International Surrogacy Arrangements: The Need for Global Regulation," *International Journal of Family Law* (2014), pp. 231–249.

⁴⁹ Human Fertilisation and Embryology Act 2008, s 33(1).

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The acquiring of citizenship in India is governed by the Indian Nationality Act of 1955.⁵⁰ India adopts the concept of *jus sanguinis*, which states that nationality is determined by lineage rather than place of birth.⁵¹ According to Section 3 of the Act, any child born in another country to Indian parents is immediately an Indian citizen. However, the nationality of a child delivered to foreign parents via surrogacy can be an intricate issue. If an Indian citizen has a surrogacy arrangement overseas, the child may obtain Indian nationality at birth under the rules of the Indian Nationality Act. However, the child's nationality may still be questioned if the surrogate mother is not an Indian citizen or if the overseas surrogacy arrangement does not explicitly define the child's nationality.

The United Nations Convention on the Rights of the Child (UNCRC)⁵² emphasises a child's right to an identity, including nationality. Article 7 of the UNCRC provides that a child must be registered immediately following birth and have the right to nationality. It reinforces the child's right not to be stripped of their identity, especially their nationality. International law mandates that all nations endeavour to ensure that children born via surrogacy are accorded nationality, but in reality, disparities persist.⁵³ The UNHCR (United Nations High Commissioner for Refugees) expressed concern over statelessness caused by cross-border surrogacy and recommended explicit international agreements to prevent such occurrences.⁵⁴ However, without a common international arrangement for surrogacy, the system of law is divided, and children born in these kinds of relationships may face nationality issues.

The Surrogacy (Regulation) Act, 2021, marks a significant milestone in regulating surrogacy in India.⁵⁵ The Act defines "altruistic surrogacy" as the only permissible form of surrogacy, allowing surrogacy only for Indian married couples and prohibiting commercial surrogacy.⁵⁶ It outlines the rights and responsibilities of the surrogate mother, the intending parents, and

⁵⁰ Indian Nationality Act, 1955, s 3.

⁵¹ Chawla, K. R., *International Human Rights and the Right to Nationality* (New Delhi: Gyan Publishing, 2012), pp. 55–57.

⁵² United Nations Convention on the Rights of the Child, 1989, art. 7.

⁵³ UNHCR, "Guidelines on Statelessness No. 4: Ensuring the Right to Nationality," 2012, [10].

⁵⁴ UNHCR, "Statelessness and Cross-Border Surrogacy," 2015, [15].

⁵⁵ Surrogacy (Regulation) Act, 2021, s 2.

⁵⁶ Surrogacy (Regulation) Act, 2021, s 4.

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the child.⁵⁷ The law also sets the framework for the creation of a National Surrogacy Board to regulate surrogacy practices.⁵⁸

The Act has specific provisions regarding the parentage of children born via surrogacy. Under the Act, the intending parents are recognized as the legal parents of the child, but the rights of the surrogate mother are also protected.⁵⁹ However, this law still faces challenges with respect to its alignment with PIL principles, especially when it comes to foreign surrogacy arrangements and cross-border legal issues.

Guardianship and parentage in Indian family law, specifically the Hindu Adoption and Maintenance Act of 1956 and the Guardians and Wards Act of 1890, are decided by a variety of circumstances, including the child's connection with the parents.⁶⁰ In surrogacy agreements, the Indian legal framework does not precisely define the parental liberties of foreign intended parents, resulting in ambiguity in cross-border surrogacy.

Surrogacy in the United Kingdom is severely controlled under the Surrogacy Arrangements Act of 1985⁶¹ and the Human Fertilisation and Embryology Act 2008.⁶² The UK exclusively allows altruistic surrogacy, which means that surrogate mothers cannot be monetarily rewarded beyond reasonable expenditures. Commercial surrogacy is forbidden. Parental orders are a key legal term in UK surrogacy law. The intended parents must file for a parentage order within six months of their child's birth.⁶³ The court then recognizes the intended parents as the child's parents and terminates the surrogate mother's legal rights. However, parental orders are only issued if the prospective parents satisfy certain requirements, such as being married or in a civil partnership.⁶⁴ When it comes to cross-border surrogacy contracts, UK courts normally do not accept them unless they are consistent with the country's local laws. To establish legal paternity in the United Kingdom, foreign intending parents must first go through a parental order process. For example, if the intended parent is a UK citizen but the surrogacy procedure took place in a nation where commercial

⁵⁷ Surrogacy (Regulation) Act, 2021, s 8-13.

⁵⁸ Surrogacy (Regulation) Act, 2021, s 15.

⁵⁹ Surrogacy (Regulation) Act, 2021, s 14.

⁶⁰ Hindu Adoption and Maintenance Act, 1956, s 11; Guardians and Wards Act, 1890, s 17.

⁶¹ Surrogacy Arrangements Act 1985; Human Fertilisation and Embryology Act 2008, s 33.

⁶² Human Fertilisation and Embryology Act 2008, s 33 (1).

⁶³ Human Fertilisation and Embryology Act 2008, s 54-56.

⁶⁴ Human Fertilisation and Embryology Act 2008, s 54(3).

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surrogacy is permitted, the UK courts may review the contract to ensure that it is compliant with UK legal rules.⁶⁵

Surrogacy regulations in the United States vary significantly by state, with California and Michigan taking opposite methods. California is well-known for its strong commercial surrogacy structure, which allows both altruistic and commercial surrogacy.⁶⁶ Commercial surrogates in California are capable of making a lot of money, and surrogacy agreements are usually legally binding.⁶⁷ Intended parents can get a pre-birth order through a California court, which grants them legal parental rights before the kid is born.⁶⁸ In contrast, Michigan prohibits surrogacy agreements and imposes criminal penalties for both surrogate moms and intended parents who engage in a surrogacy relationship.⁶⁹ Some states, such as New York and Illinois, have legal frameworks that allow for altruistic surrogacy, while others are more limited or outright forbidden.⁷⁰ Foreign surrogacy contracts can be recognized under US law if the intended parents fulfil state-specific requirements, such as getting a pre-birth order or going through the adoption procedure. However, the validity of these contracts is determined by the state where the child is born, as well as the state's surrogacy regulations.

Conclusion

The legal framework regarding the cross-border surrogacy arrangements and parentage disputes involve the overlapping of the private international law, family law, public policy and ethical considerations. As discussed throughout the article, the variance in the legal approach towards cross-border surrogacy agreements between various jurisdictions is a complex issue for both intended parents and surrogate mothers. As a consequence, it raised concerning questions on the nationality and citizenship of the surrogate-born.

Lack of uniformity is a recurring concern found in the paper. The lack of uniformity in recognition and enforcement of foreign surrogacy contracts. While some countries recognise and regulate, some reject and prohibit. This inconsistency leads to confusion in legal parentage.

⁶⁵ Hague Conference on Private International Law, "The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements," March 2012.

⁶⁶ California Family Code, § 7960 et seq.

⁶⁷ California Family Code, § 7962.

⁶⁸ California Family Code, § 7961.

⁶⁹ Michigan Penal Code, § 750.90.

⁷⁰ New York Domestic Relations Law, § 122; Illinois Compiled Statutes, 750 ILCS 47/10.

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Further it leads to another concern that is statelessness of the children afterwards. The lack of clear framework and guidelines on nationality and citizenship leaves the children without national identity and confusion in country of origin which complicates their future legal status and rights.

Furthermore, where surrogacy is not legal, or well-regulated, determination of legal parentage if surrogacy arrangements is performed in those countries leads to new challenges. The ambiguity remains; “who should be considered the legal parent?” This lack of clarity regarding the applicable law for determining parentage in cross-border surrogacy arrangements requires urgent consideration.



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