

Wombs Across Borders: Reproductive Tourism and the Dilemma of Stateless Children

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Abstract: *A result of the development of assisted reproductive technology and the varied legal landscape for surrogacy across the world, is cross-border surrogacy- often called reproductive tourism. Intended parents are increasingly travelling to jurisdictions with more tolerant or affordable surrogacy laws and regulations, leaving behind children born by surrogacy with competing national laws regarding parenthood, nationality, surrogacy. The most serious consequence of this legal discrepancy is statelessness: when a child has no legal citizenship. With a doctrinal and socio-legal approach, this paper explores the development of the law on surrogacy in India as well as in other jurisdictions, the landmark cases of Baby Manji Yamada v. Union of India and Jan Balaz v. Anand Municipality, and the international legal framework on nationality and statelessness, such as the Convention on the Rights of the Child and the Verona Principles. It claims that the right to a nationality of a child, under the international human rights law, is violated by the lack of harmonised rules and principles on parentage and citizenship in cross-border surrogacy and suggests the international legal harmonisation of rules on parentage and citizenship, the implementation of emergency documentation procedures and child-centred measures to prevent no child from being rendered stateless by factors outside their control.*

Keywords: Surrogacy; Reproductive Tourism; Statelessness; Citizenship; Children's Rights

1. Introduction

Children have always been seen as a source of continuity and hope and for couples experiencing infertility, assisted reproductive technology has made parenthood possible through surrogacy. Surrogacy is not a recent phenomenon, but the emergence of in-vitro fertilisation (IVF) in the late 20th century made it an available and more and more commercial alternative. The first legal challenges to the ethical and legal challenges of parentage, bodily autonomy and the potential of women and children being treated as objects-of-contract, were set forth in early cases like *In re Baby M* [1] and *Johnson v Calvert* [2]. Since then, there has been a wide range of response from states: countries like France and Germany ban surrogacy altogether; countries like the United Kingdom and Canada only allow for altruistic surrogacy; the Ukraine, Georgia and some U.S. jurisdictions have allowed for regulated commercial surrogacy; and India, which was once the world's top surrogacy hotspot, has banned most forms of commercial surrogacy with the Surrogacy (Regulation) Act, 2021 [3] after mounting concerns about exploitation and unregulated intermediation [4].

However, this worldwide mosaic of laws is what motivates reproductive tourism- when intended parents go to countries where surrogacy is legal, affordable or medically available, often because it is not available in their home country at all. Kindregan and White were among the first to warn as early as 2013 that this trans-border travel posed a unique risk to children which was unknown when surrogacy occurred domestically – that of leaving with no recognised nationality anywhere [5]. Nationality is determined differently in different states – by birth, by descent or by recognition of parentage – and a child born from an inter-national surrogacy can be denied citizenship in both countries, as the Indian

cases of *Baby Manji Yamada v Union of India* [6] and *Jan Balaz v Anand Municipality* [7] vividly demonstrate. The central risk of cross-border custody as identified by Field's pioneering scholarship on surrogate motherhood is that of nationality and statelessness, which brings into play obligations under international human rights law which states have been reluctant to keep to [8]; this paper argues that this is now the predominant risk in the cross-border context.

This paper seeks to examine the development of the Indian law on surrogacy in a doctrinal and socio-legal framework, compare it with its counterparts in other countries and analyse the suitability of the international legal system in the field of nationality and statelessness to prevent the statelessness of a child that is caused by any factor beyond his or her control.

2. Literature Survey

Since 2018, scholarship on cross-border surrogacy and statelessness has increased significantly, both in direct response to the development of the international surrogacy market, and because of the strengthening of domestic legislation in the so-called 'source states' of surrogacy providers, like India. Rajan places surrogacy-induced statelessness in the context of the *jus sanguinis/ jus soli* debate, and maintains that children born through international commercial surrogacy in nationality-by-descent states are exposed to a structural risk which has not yet been addressed by any of the human rights instruments that currently exist [9]. Indeed, as Jain writes in the *American Journal of International Law*, the phenomenon is not an accident of private contracting but a "manufacturing" of statelessness, which is foreseeable and can be largely avoided because of states' failure to coordinate parentage and nationality rules [10]. Su comes to the same conclusion by analyzing the cases,

stating that the three common sources of statelessness are the legality of the surrogacy, the identification of legal parents, and the clash between the nationalities' laws, and suggests an international convention, a special legal-parentage instrument, and a best-interests standard as ways forward, which follow the current Hague Conference on Private International Law's practices [11]. Although Article 7 of the Convention on the Rights of the Child (CRC) has been nearly universally ratified, it has not led to a consistent state practice with regard to nationality attribution in a surrogacy situation, and states need now to interpret it in conjunction with the Verona Principles of 2021 to ensure it will provide protection meaningfully, writes Iliadou in her 2024 study [12].

Comparative and regional analysis has advanced as well. While protecting a child's right to identity, Valc's review of the European Court of Human Rights' jurisprudence between *Mennesson v France* [13] and *Paradiso and Campanelli v Italy* [14] indicates that the Court does not go so far as to require that foreign parentage documents be recognised, and so the underlying nationality risk remains even when a child's private life is protected. UNICEF's guidance on the prevention of statelessness in 2022 also cites the fact that international surrogacy arrangements are accompanied by acute statelessness risk when intending parents are from a state that does not permit surrogacy and advises permitting states to restrict access to intending parents from states that do not permit surrogacy [16].

The Surrogacy (Regulation) Act, 2021 has received a significant amount of criticism after its enactment on the Indian side. Mondal sees India's withdrawal from surrogacy as a textbook example of "biocitizenship," and believes that the state's withdrawal from the field has not ended the threat of statelessness, but rather shifted it to children with pre-2021 surrogacy arrangements where the question of legal status remains unresolved [17]. Banerjee and Kotiswaran, in their article in the *Indian Law Review*, argue that this ambivalence towards surrogacy as a form of labour extends straight to the citizenship and parenthood gap that the surrogate-born child eventually occupies [18]. Based on the results of interviews conducted through fieldwork, Debnath concludes that neither the altruistic-only approach has abolished cross-border and underground commercial arrangements, nor has it eliminated the parentage ambiguity that gives rise to statelessness. The fieldwork done by Debnath in the form of interviews leads Debnath to the conclusion that the altruistic-only approach does not eliminate the cross-border and underground commercial arrangements, nor does it eliminate the parentage ambiguity which creates statelessness [4]. In India, Cambodia and Nepal, surrogacy has been successively banned and the very same countries in which it was once permitted, Georgia and Ukraine, are nationality-by-descent states that lack a clear framework to validate the claims of foreign intended parents, as was the case in *Jan Balaz*. As the countries of India, Cambodia and Nepal have taken a swing at curbing surrogacy, it's the same jurisdictions (Georgia and Ukraine) where surrogacy was once permitted that are now becoming nationality-by-descent countries, lacking in a clear framework for establishing that an intended parent is truly a foreign intended parent, as *Jan Balaz* was. Choudhury's 2025 study [20] has most recently contended that, although the Hague Conference has made some progress in its feasibility

report 2022, it has not yet provided sufficient safeguards for a child's nationality and continues to give too much discretion to private intermediaries.

This recent literature comes to two conclusions on which this paper draws: first, statelessness is not an isolated problem of individual cases, but a structural, predictable outcome of uncoordinated national parentage and nationality systems; and second, neither unilateral domestic statelessness prevention, as implemented in India, nor regional human-rights adjudication, as in the European Court of Human Rights, has led to a lasting solution, thereby strengthening the argument for the international harmonisation measures suggested in Part VII of this paper.

3. Problem Definition

When intended parents from one state sign up with surrogate parents in another state, there is legal uncertainty as to the child's nationality, citizenship and legal parentage. Children of cross-border surrogacy are often without any legal attachment to any state because the commissioning parents' home state may not recognise the transaction or legal rules of parentage may not exist to connect the two states. Such statelessness deprives a child of a passport, health care, education, stable legal identity, and is a clear violation of international human rights law, wherever parentage and citizenship is not clearly and consistently recognised across borders. This paper discusses the particular lacuna between the domestic framework of surrogacy in India, the comparative national laws and international laws designed to prevent statelessness.

4. Methodology/ Approach

This study uses a doctrinal and analytical approach. It highlights the history of the law on surrogacy and reviews some significant Indian, U.S., French and European Court of Human Rights decisions on the matter, as well as the current statutory frameworks and international treaties on nationality and statelessness. Primary sources consist of Indian legislation, reported case law and international conventions, whereas secondary sources consist of peer-reviewed literature published from 2018 to 2025 (as discussed in Part II above), including earlier foundational literature. Empirical material and interview data was not gathered, merely analysed from published legal documents and secondary literature.

5. Results & Discussion

1) *Forms of Surrogacy and the Global Patchwork of Laws*
Surrogacy comes in a variety of forms, determined by biology, purpose and legalisation. The fee for traditional surrogacy is high, and as *In re BabyM* demonstrated, it is also the genetic and gestational mother and thus carries the acute risk of custody disputes on public-policy grounds as occurred in a New Jersey court in the case of *In re BabyM* [1]. IVF technology can prevent this and is the most common form of surrogacy in most states that allow surrogacy, such as the overwhelmingly gestational surrogacy industry in pre-2021 India, where the surrogacy industry was predominantly conducted with foreign intended parents [21].

Commercial surrogacy or altruistic surrogacy is another distinction and is the difference between a surrogate who is paid to act as a surrogate and one who is not paid to act as a surrogate. Between approximately 2002 and 2015, India was the global center of commercial surrogacy, until allegations of exploitation and abandonment led to a ban on foreign commercial surrogacy, and ultimately the almost complete ban under the Surrogacy (Regulation) Act, 2021 [3],[4]. There are significant differences in how jurisdictions are addressing surrogacy arrangements as well: In France and Germany, all surrogacy arrangements are prohibited as against the dignity of the human person; in California, surrogacy agreements are considered 'gestational' and are enforceable from the outset, thus intended parents are legal parents from the moment of conception; and in the United Kingdom, parenthood is only transferred through a post-birth parental order. This patchwork is not merely the work of a technical curiosity: the Germans in Jan Balaz were refused passports for two years due to Germany's refusal to accept the rules of the surrogate's country as governing over them, and its refusal to accept the intended parents as legal parents at all [7].

2) Levels of Cross-Border Surrogacy: Parentage, nationality and ethical conflicts.

Parentage conflicts are amplified by cross-border surrogacy, also known as reproductive tourism, in which intended parents travel to a foreign country where surrogacy is legal and/or cheaper to arrange. In certain jurisdictions, the birth mother is considered to be the legal mother whether or not she gave birth, based on this principle, the French Court of Cassation has ruled that surrogacy contracts are invalid, citing the absence of genetic connection between the birth mother and the child as the reason for this [22]. In contrast, other jurisdictions, such as California, acknowledge intended parentage from the beginning, and this is the most significant factor in citizenship controversies in inter-jurisdictional situations, as Pyrcie argues [23]. Normally citizenship is acquired by either of the principles of *jus soli* or *jus sanguinis*, but surrogacy arrangements quite routinely subvert both: a child born in a *jus sanguinis* state to foreign parents can acquire neither the nationality of the birth state, as the surrogate is not the recognised parent, nor the nationality of the parents' state, because that state does not recognise the surrogacy arrangement at all. This is the vacuum that the Jan Balaz twins fell into and the vacuum that the twins born to Norwegian intending mother fell into in 2010, when Norway denied the twins passports and India denied them nationality, leaving them stateless for almost two years [7].

The moral issues raised with the legal battles are exploitation versus empowerment, the sale of children, unequal access for rich intended parents and- too rarely mentioned- the best interests of the child, who is the only one who suffers from the consequences of adult contracts. When the COVID-19 pandemic struck, it made it very clear that this system is fragile: Borders were closed, and hundreds of surrogate-born children found themselves in India, Ukraine and Georgia because they had not been able to reach their intended parents, and that these children are regarded not as rights-bearing people entitled to nationality and care, but rather as mere objects of private contract.

3) The Problem of Statelessness

The international law defines two types of statelessness: *de jure* statelessness, which occurs when a person is not recognized as a national under the laws of the State, and *de facto* statelessness, which happens when nationality exists in principle, but is not established or cannot be obtained due to bureaucratic or documentary obstacles. These both are regular results of cross-border surrogacy. Some of the reasons are: legal parentage disputes according to conflicting laws, clinics and embassies failing to document parentage, and in extreme cases, abandonment of children who fall into legal conflicts over parentage [9],[10]. The consequences are serious and long-lasting: denial of the right to identity guaranteed by Article 7 of the CRC [24] is accompanied by deprivation from education and health care, increased risk of trafficking and illegal adoption, and permanent psychological trauma from not being recognised as a having a nationality or community of belonging.

4) India's Legal Development and International Regime

The regulatory path in India has shifted from the unregulated grey zone with only non-binding ICMR guidelines from 2005 to the unenacted Draft ART (Regulation) Bill, 2010, which had envisaged the risks of statelessness as it required that citizenship be guaranteed by an embassy in another country when a child was born through ART, to the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021, which, taken together, preclude commercial surrogacy, limit altruistic surrogacy to Indian married couples and prohibit foreign nationals, OCI cardholders and persons of Indian origin from seeking ART services in India.

Internationally, the Universal Declaration of Human Rights states that "everyone has the right to a nationality" [26]. The Convention Relating to the Status of Stateless Persons of 1954 and the Convention on the Reduction of Statelessness of 1961 contain general state obligations to prevent and reduce statelessness, while the CRC mandates that all children be registered at birth and must acquire a nationality, explicitly engaging statelessness in Article 7(2) of the CRC where a child would otherwise be stateless [24]. The 2021 Verona Principles include specific, although not binding, guidance that children born by surrogacy should be granted nationality without delay, regardless of the circumstances of their birth [29]. However, key states involved in surrogacy, such as India, Russia and the United States, are not signatories to the Convention of 1961, and the recent feasibility study on legal parentage by the Hague Conference, although a positive move, hasn't yet resulted in a legally binding document [30]. The consequence is that the harmonisation of the domestic regulation of surrogacy as it exists in each State, and of the nationality of children born as a result of surrogacy, with an international mechanism to ensure a child's nationality is constantly lacking, as the Baby Manji Yamada case showed when Japanese nationality law and Indian rules on adoption clashed and the child was rendered stateless for months [6].

6. Conclusion

Cross-border surrogacy: a medical miracle and a legal nightmare. Assisted reproductive technology provides concrete avenues to parenthood, but in the context of cross-border, it leaves children vulnerable to a real risk of statelessness due to the lack of coordination of the national rules governing parentage, citizenship and recognition of surrogacy. Involving children in such circumstances, such as the cases of Baby Manji Yamada [6] and the Jan Balaz twins [7] and Paradiso and Campanelli v Italy [14] is not their fault. The absence of clear laws regarding parentage and citizenship in cross-border surrogacy, as confirmed in this study, breaches the right to nationality of the child, in particular under Article 7 of the CRC [24]. Enforcement of CRC has been weak and India's own statute of 2021 prohibiting statelessness, while welcome, does not necessarily help those children who were stateless under earlier laws, or those who remain so under current laws in other countries. There is still a long way to go in terms of international cooperation, harmonisation of laws, and child-centred approaches.

7. Future Scope

There are five directions of future research and reform. First, international legal harmonisation: ongoing efforts at a binding instrument on legal parentage through the work of the Hague Conference which promotes the automatic and cross-border recognition of surrogate-born children [30]. Second, emergency protocols: processes to be followed in issuing temporary travel documents and provisional recognition of parentage in conjunction with the embassies and fertility clinics, so as to prevent extended separation of children from intended parents. Third, embed a best interests standard for all parentage and citizenship decisions, to prevent the objections of public policy to surrogacy from infringing on the basic right of children to identity, nationality and family life. Fourth, regulatory transparency, which calls for clinics and intermediaries to inform intending parents about citizenship and legal dangers prior to an arrangement. Fourth, regulatory transparency, which involves letting intending parents know about legal dangers and citizenship before an arrangement starts. Fifth, child-centric safeguards such as temporary nationality or identification documents to enable children to access healthcare, education and social services and to protect them while waiting for parentage determination, have been recommended by Cook for further empirical testing and implementation in a dedicated statelessness-prevention protocol, based on existing refugee status-determination protocols [31]. The doctrinal analysis offered here would be greatly enriched if the status of the children who had been conceived as a result of the earlier commercial-surrogacy regime in India can be followed over time, as well as the status of the children being born in the new destination states of Georgia and Ukraine.

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