
CROSS–BORDER SURROGACY AND CONFLICT OF LAWS: A STUDY OF PARENTAGE AND NATIONALITY ISSUES

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ABSTRACT

The concept “Surrogacy” has now emerged as one of the complicated issues over the boundaries. This technically comes under private international law. Moreover, different countries have different laws for these assisted reproductive technologies like surrogacy. Because of these differences, many prospective parents migrate to other countries where the laws are more suitable and flexible for them to have a child through surrogacy. As like the coin has two sides, this practice similarly has a concern that it may bring out a serious legal problem. These include the major issues such as deciding that who the legal parents are, whether the foreign court’s judgments will be binding in another country, and which country will give the child citizenship. These disputes always arise when the commissioning parents return to their home country after surrogacy and claim a legal recognition of their parental status. Once, India acts as a hub for international commercial surrogacy. But now it brought stricter regulations and grab control of it through Surrogacy (Regulation) Act, 2021. Because, still countries face legal confusion exists on each other. This continues to cause a risk that some children may not get citizenship. This paper examines about cross border surrogacy using the lens of private international law. It delves into the legal developments in India and other countries, and it agrees that there should be common international rules to protect the child’s welfare in its best interests while also respecting each country’s authority to make its own laws.

Keywords: Cross border surrogacy, Conflict of laws, Parentage, Nationality, Statelessness, Private international law, India.

Introduction:

Modern medical science has now made it possible for the people and prospective couples to become parents through these advanced reproductive technologies. Surrogacy is one of such option, where the women who carries the child may not be the biological mother (who plans to raise a child). This arrangement happens means, it will automatically bring a conflict over laws. Private international law governs the legal disputes which across national borders and also involves more than one law system. It ascertains that which court has a jurisdiction, which country's law should apply on the case, and whether a judgement binding in one country will be recognized and enforced in another country legally or not. Thus cross-border surrogacy brings out all of these complex legal issues into naked view.

The core legal problems which involve here is deciding that who will be legally considered as a child's lawful parents and which country will grant the citizenship of the child. These questions majorly brought everything into trouble and raise complex issues because surrogacy laws differ widely across nations. Certain countries may permit commercial surrogacy methods, but few were not. Others may only allow altruistic arrangements and many of the countries may ban it altogether as a whole. As a result of these differences, a child who is legally born in one country may or may not get the same recognition and lawful acceptance in another country.

This paper explores that how this conflict of laws will operate in cross border surrogacy disputes and examines whether the existing legal approaches truly will provide an adequate protection for children's rights at its best interests.

Overview of surrogacy and its implications:

Surrogacy is a reproductive process where a woman carries and gives birth to a baby for another couple, those are known as intended parents. Actually, it is helpful for the couple who are not capable to become parents naturally or those who had medical complications and cannot safely carry a baby on womb during pregnancy. Through the advancement of these Assisted Reproductive Technologies, specifically in in vitro fertilization, now surrogacy is widely used across the countries.

There are two types of surrogacy. One is traditional surrogacy, where the surrogate mother's

own egg is used in the process. In this case, the surrogate mother is genetically related to the child. The other one is gestational surrogacy, where an embryo is developed through an IVF process using the egg and sperm of an intended parents i.e donors is placed in the surrogate mother's womb. In this case, there is no genetically connection of surrogate mother with the child.

Ethical, Legal and Social Dimensions of Cross-Border Surrogacy:

Cross-border surrogacy creates many ethical, legal and social concerns, especially in the case where the surrogate mother and intended parents are from different countries. One of the main ethical issues is the commercialization of childbirth, where having a baby may be treated like a paid service one. There are also many concerns raising, which is about that there are possibilities of exploitation of surrogate mothers, especially when a woman from poorer backgrounds become a surrogate for the wealthy couple from other countries. This situation may create an imbalanced relationship power between the intended parents and the surrogate mother.

From a legal perspective, there is surely a difference in acceptance of surrogacy laws from one country to another. Some countries allow and regulate the concept of surrogacy, while the others completely restrict it. Because of these differences, cross-border surrogacy often creates a problem relate to the legal parentage and nationality of the child. If a baby born in one country through surrogacy means may face difficulties in obtaining a citizenship and legal recognition of prospective parents in another country.

It also raises social concerns. As the surrogacy challenges the traditional ideas of motherhood and the family relationships. There are questions arise about that whether the parenthood is based on genetic connection or childbirth or social responsibility. In addition to it, health and financial aspects also to be considered. Surrogacy is a slightly semi artificial form of giving birth the child, it may impose any kind of complications or health risks to the surrogate mother and the child. It also requires large financial costs, including the medical expenses, legal fees and compensation. Therefore, it needs a proper regulation and international cooperation to handle this case safely with the clear protection the surrogate mother, the child and the intended parents in cross-border arrangements.

Conceptual Framework of Private International Law in Cross-border Surrogacy:

Private International Law provides us only the legal framework for resolving the disputes which involves more than one national legal system. Rather than design a single substantive family right, it decides that which country's law should supervise the particular issue. In the circumstance of cross-border surrogacy, this function becomes more of essential because it may connect with multiple jurisdictions in a plane.

In this case, there are several factors are to be considered when deciding a particular legal system. This must cover the place where the child is born, the nationality or citizenship of the prospective parents, the habitual residence of the surrogate mother and the country where medical process such as in-vitro fertilization are into and the place where the surrogacy agreement is finalized. Each one of the segments may link the bridge to different legal systems and making legal determination more and more complex.

Historical conflict of laws principles in the family law often relies on the factors such as domicile/ nationality. However, in cross-border surrogacy questions these customary rules. In many of the surrogacy treatments, the genetic parents, the gestational carrier and the intended parents may all be situated in different jurisdiction. This division of biological, gestational and social parenthood promotes uncertainty in deciding of legal parentage and jurisdiction.

Another important issue which relates to the recognition and enforce-ability of surrogacy. While some of the countries regulate legally and permit the surrogacy matters whereas others restrict and prohibit from such agreements which is void on grounds of public policy. These variations will generate difficulties when the parties attempt to enforce a surrogacy across the national boundaries. As a result of it, Private International Law must balance the contractual freedom with ethical and legal concerns where the public policy considerations also need to protect the right contractual freedom born child.

Determination of legal parentage in Cross-border surrogacy:

Traditional or Customary approach to parenthood:

Over a period of time, the law follows a rule which is came from Roman law derived from a Latin phrase '*mater semper certa est*'¹ which means 'the mother is always certain'. This

¹ [https://www.fertstert.org/article/S0015-0282\(18\)32030-2/fulltext](https://www.fertstert.org/article/S0015-0282(18)32030-2/fulltext)

principle says that the woman who gives birth to the child is considered a legal mother. It is considered as a customary practice of traditional families; it worked well from that time because the woman is considered as a genetic and social mother of that born child.

But whereas the modern technologies inverted this situation. As such the tremendous development of assisted reproductive systems, the concept of motherhood is classified upon different roles. That is, genetic mother, gestational mother and an intended mother. Sometimes all these roles divide between different woman. Because of this kind of confusion, the concept of traditional rule did not able to give a fair or justice solution. This circumstance becomes more complex in cross-border surrogacy because of the persons involve in this procedure may belongs to different countries.

As known about their difference in acceptance of surrogacy laws in world wide. Some may prohibit. Few countries recognize surrogate mother as a legal parent while others only recognize intended parents as a legal one. In refer to this, it is quite hard to decide the legal parents of the child. This uncertainty affects in major situations. For this reason, many legal scholars are questioning about this approach is still suitable in cases involving modernized systems.

Indian Judicial experience:

India played a vital role on the global discussions of surrogacy. Because, for a period of years it faces a lot of backdrops in surrogacy arrangements due to the absence of clear rules. One of such is, comparatively India has a low cost of medical charges and lack of legal rules which attracted foreign couples who wish to undergone surrogacy.

A landmark case *Baby Manji Yamada V. Union of India*², a Japanese couple entered into a surrogacy arrangement in India. During pregnancy, the couple separated due to personal issues where the intended mother refused to accept the child after birth. Which leads a baby in uncertain situation. There is dispute in accepting a baby under surrogacy because of Japanese law, it arises a question of child's citizenship and parentage under law. The Supreme Court of India also did not able to decide a fair justice in this issue of legal parentage because of the clear gap of surrogacy laws in India which need a proper regulation in order to protect a child

² Baby Manji Yamada v. Union of India, (2008) 13 S.C.C. 518 (India).
<https://karavadi.in/baby-manji-yamada-vs-union-of-india-air-2009/>

born under such arrangements.

Another important case '*Jan Balaz V. Anand Municipality*'³, For German parents, twin babies were born in Gujarat. The issue arises in this case about the nationality of the children. Because German law did not recognize surrogacy, similarly Indian law was also unsure about to give an Indian citizenship to the children. Because of this conflict of laws, the twins faced a risk of being stateless. This case clearly shows the legal parentage and nationality problems as when different countries follow different rules. It insists that legal parentage is essential to protect the child's identity and legal rights.

European Judicial Developments:

Even European courts also faced the similar issues about disputes in recognizing surrogacy; there are lot of cases registered in *European Court of Human Rights (ECHR)*.

In *Mennesson V. France case*,⁴ In U.S, a French couple had children through surrogacy and had a legal identity as their children in U.S. Also, the children had a biological connection with the father, even though the French authorities refused them to give a legal parentage identity in France. Because of this issue, the children faced a legal problem about their status in France. As per Article 8⁵ of ECHR held that this refusal violates the children's right to respect for private life. The court underlines that a child's legal identity is bind with the legal parentage. If a law refuses to accept the surrogacy means, it may affect the child's identity and social status. A similar kind of decision is given in the following case too, *Labassee V. France*.⁶ These results shows that if one country choose to prohibit surrogacy means it may affect the rights and welfare of the children who are born through surrogacy arrangements.

Conflict of laws perspective:

From the view of Private International Law, deciding legal parentage in cross-border surrogacy means deciding that which country's law should apply the case. One way is to apply the law

³ Jan Balaz v. Anand Municipality, Special Civil Application No. 3020 of 2008 (Guj. H.C. Nov. 11, 2009). <https://www.casemine.com/judgement/in/56b48efa607dba348fff6a16>

⁴ Mennesson v. France, App. No. 65192/11, Eur. Ct. H.R. (June 26, 2014). <https://legallibrary.crin.org/mennesson-v-france/>

⁵ Article 8(European convention on human rights) <https://fra.europa.eu/en/law-reference/european-convention-human-rights-article-8-0>

⁶ Labassee v. France, App. No. 65941/11, Eur. Ct. H.R. (June 26, 2014). <https://caselaw.statelessness.eu/caselaw/ecthr-labassee-v-france-6594111>

of the region where the child is born known as *Lex Loci Actus*.⁷ Because in general, where baby is born is the region which is entitled to give birth certificate. However, the parentage may not be recognized in the country where the intended parents live. The second way, is that to apply the law of the nationality of the intended parents. It helps the child to get the legal recognition in the country where the child will grow up. But it may result in the conflict of law in the country where the surrogacy took place. And a third way is that, the law of the child's habitual residence. This only focuses on the country where the child will live and build social connections. This is purely a futuristic view and thus not all countries follow this rule.

As these methods may lead to different results, courts often want to follow the child centric approach. Thus, judges also follow the best interests of the child, making sure the following things (legal identity of the child, legal parentage, and access to the citizenship and legal protection of the child).

Recognition of Foreign Judgments:

As popularly known that in cross-border surrogacy cases, one major question arises that whether a decision made by country should be accepted by another country or not. This issue emerges when more than one country involves in a case. For example, a court in U.S gave an order before the child was born stating that the intended parents are considered as a legal parent of the child. But when they returned to their country which does not allow surrogacy. Here, the question arises whether the country's court would accept the foreign court's judgement.

In general, that private international law only allows the foreign judgments if the fundamental conditions are satisfied. First, the foreign court has the proper authority to decide and it should be legally fair to everyone in the case. And it must also satisfy the condition of public policies. It always becomes the major issue because some countries did not recognize the surrogacy arrangements in their legal system. However, courts are also now evolving as per the modern approaches. Courts are basically focused on the child's interest rather than dealing with the surrogacy conflict of laws. If the foreign judgments did not recognize means, the child may face the problems of uncertainty. But now, many countries are recognizing such things as intended to protect the child's best interests. Slowly, private international law adapting the nature of challenges created by these cross-border surrogacy issues while trying to protect the

⁷ <https://conflictoflaws.net/2022/the-french-project-for-a-private-international-law-code-a-debate-at-the-comite-francais/?print=print>

rights and interests of the child.

Nationality and Statelessness:

Nationality is the legal bridge between a person and a country. It projects that the belongs to the particular state and entitled to receive the rights and protection of the respective state. Without this essential nationality, the child may suffer from the difficulties of day-to-day life things, and basic rights etc. The conflict of laws arises when more than one country involves in the cross-border disputes. Some countries follow the principle of *Jus Sanguinis*,⁸ which means that citizenship is given to the child based on the nationality of the parents rather than based on the place of birth. In such situation, the country where the child is born may not give nationality to the child. This happens because the intended parents are not recognized as legal parents. So, the child is not recognized as their citizen. At the same time, parent's home country also refuses to accept the child's nationality. This urges to think about that, when both country refuse to give nationality means it may result the child becomes stateless.

As per International law, every child must get a nationality. For example, Convention on the rights of the child⁹ says that every child has the right to be named and nationality from their birth. This may get affected if the country refuses to recognize the child's status. Because of these ongoing problems, the Hague Conference on private international law¹⁰ discusses about the parentage and surrogacy problems in international situations. The main aim is to develop the better legal solutions arising through this cross-border surrogacy disputes. Although still we don't have the international convention to solve these disputes, thus ongoing discusses purely aware of these issues and have the interest in protecting the rights and identity of the child.

India's legal position on Cross-Border Surrogacy:

It's been a period of time for India's approach to surrogacy had changed over. In early period, specifically before 2015, India recognizes commercial surrogacy. Many foreign couples came to India for surrogacy because medical process is so cheaper and treatments were so advanced.

⁸ <https://ccsenet.org/journal/index.php/ilr/article/view/21666>

⁹ Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3. <https://www.unicef.org/child-rights-convention>

¹⁰ Hague Conf. on Priv. Int'l L., The Parentage/Surrogacy Project (2023). <https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf>

However, there was no proper set of regulation to handle the surrogacy disputes in India. Because of this, there are plenty of concerns arises in exploitation of poor women and the born child. And also, there are lot of legal issues about the legal parentage and the nationality of the born child. In order to deal with these problems, India established the *Surrogacy (Regulation) Act, 2021*.¹¹ This law bans the commercial surrogacy only allows altruistic surrogacy. In this altruistic surrogacy, the surrogate mother does not receive any money other than medical expenses and insurance. And it is recognizable only for eligible Indian couples not for foreign couples to enter in surrogacy arrangements in India.

Even though the law tries to prevent any kind of exploitation in India, it arises the question of cross-border surrogacy. If India couples went to other countries for commercial surrogacy means the recognition of the child in India is questionable. It may affect the legal status of the born child.

Comparative global approaches:

As known that it is important to understand about the different countries control and regulate the surrogacy under cross-border surrogacy and conflict of laws. Every country has its own legal system and cultural values, so the rules of surrogacy also differ. Because of this, problems arise. This creates a confusion of legality of the born child and intended parent's parentage.

In the United States, Surrogacy laws are not same as the neighbouring countries. Because each country has the right to make its own rules and regulations. Some may recognize while others prohibit them. For example: California which has strong surrogacy laws. Here, the courts can issue a pre-birth order in surrogacy cases.¹² This means that the intended parents are considered as legal parents even the child is yet to born. Thus, the baby's name can be written on the child's birth certificate immediately. This system is around the certain states of United States only. However, the problem occurs once the parents return back to their country which does not accept the surrogacy laws within U.S.

In U.K, Surrogacy is regulated by the *Human Fertilization and Embryology Act, 2008*.¹³

¹¹ Surrogacy (Regulation) Act, 2021, No. 47 of 2021, India Code
<https://www.freelaw.in/legalarticles/The-Surrogacy-Regulation-Act-2021>

¹² US surrogacy law (California)
<https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1>

¹³ UK Surrogacy law under Human Fertilization and Embryology Act, 2008.
<https://www.nuffieldbioethics.org/wp-content/uploads/Surrogacy-law-in-the-UK-ethical-considerations.pdf>

According to this act, the woman who gives birth to the child is termed as mother, even though she is a surrogate. The intended parents have to get a legal right from the court as they are the legal parents of the born child. This law prohibits the commercial surrogacy and there only reasonable expenses must be paid to the surrogate. If the surrogacy occurs in another country, the UK courts carefully look on the case before granting the parental order to ensure the child's welfare and status.

Countries like Germany and France¹⁴, which follows the traditional laws more of stricter rules on surrogacy. This did not clearly allow the commercial surrogacy because they believe that it violates the dignity of the woman and turn the childbirth into a business. This is the actual reason for the countries which does not recognize the surrogacy arrangements. Later, decisions of the European Court of Human Rights promote certain changes. The court stands on the child's identity and stable life to be protected. After this, France began to recognize the surrogacy in cross-border cases also.

These comparisons explain that the countries follow different kinds of approaches. Because of this diversity, cross-border surrogacy initiates legal conflicts which cannot be solved by domestic law alone. International cooperation is also needed to reform the clear rules in order to protect the rights of the child and the intended parents.

Critical Analysis:

Cross-border surrogacy arises the legal issues because different countries follow different rules and regulation of laws about the surrogacy arrangements. And it raises the questions, if the child born in another country may be entitled to know about the legal parentage and the nationality of the born child. This clearly shows the conflict of laws and interests.

One of the issues is state sovereignty. As known that every country has the own right to make its own rules and entitled to follow the same. Thus, few countries may not allow the surrogacy process as it may exploit the women or may commercialize the child birth. This is one of the main concerns of the state to recognize the surrogacy, even though it is recognized by other countries. That's why it results in multiple difficulties to the born child.

Another concern is about the reproductive autonomy. The intended parents choose cross-border

¹⁴ <https://evafertilityclinic.com/surrogacy-laws-in-different-countries/>

surrogacy, if they do not have children or if their country did not recognize surrogacy. While at the same time, the law should protect the surrogate mothers from any kind of exploitation especially they are vulnerable in nature. Similarly, the rights of the child also equally important. It is necessary to protect the child's identity and legal status.

Here, private international law tries to solve the problems by checking which country's laws will apply on the case and whether foreign decree is acceptable in surrogacy cases. Now, the principle is so broad in order to protect the best interests of the child even different courts interpret it differently.

India steps on the more restrictive approach in concern with the social and ethical visions. But, these strict rules make the intended parents to move other countries for surrogacy. This actually results in cross-border disputes instead of resolving the issues.

Suggestions and Recommendations:

The legal issues arise which are connected with the cross-border surrogacy says that there is strong requirement for international cooperation to create clear legal rules. When countries have different laws on surrogacy. It creates a legal parentage issue and the nationality of the child is in question. In order to reduce these problems, legal policy reforms have to be enacted properly. A needed reform is that to create an international convention of parentage under the framework of the *Hague Conference on Private International Law*. This convention helps all countries to act uniformly over the cross-border surrogacy cases. It would reduce the legal conflicts between different national laws.

One more suggestion is that, to use of minimum safeguard approach. The countries may accept the foreign surrogacy process once the fundamental needs are satisfied such as surrogate's mother consent, protection of her health, proper medical supervision etc. This protects the dignity of the surrogate mother parallel with the child's legal status. It is also essential to note that the child born through surrogacy are not let out without any disparities. Even if the countries are not legally binding on each other means also the child have to be taken care with citizenship, so it cannot be placed under any statelessness situation. Clear conflict of laws are also be considered. As courts may consider on the habitual residence of the intended parents with the judicial intervention to decide on the questions of parentage and recognition.

In the Indian context also, reforms are needed under the *Surrogacy (Regulation) Act, 2021*. India should explore the bilateral agreements with the other countries to address the acceptance of foreign surrogacy orders involving Indian citizens. Overall, these things are needed to protect the rights of the child, surrogate mother and the intended parents in these cases.

Conclusion:

Cross-border surrogacy is the prominent complex issue in family law and private international law. It actually arises when the intended parents travel to other country for the surrogacy arrangements. Legal issues arise because of difference in each countries rules and regulations. Some countries recognize surrogacy whereas others may not. Because of these differentialities, conflict of laws occurs regarding legal parentage and the nationality of the born child. The concern about parentage. If surrogacy happens in one country, the prospective parents are considered as a legal parents of the child. But if the process took place in other country means the case is completely different. In such situations, surrogate mother is treated as a legal mother under the country's law. This creates an uncertainty over the parentage. The other concern is about nationality. Nationality is a legal identity to the child and it gives access to the rights such as passport, education and healthcare. In cross-border surrogacy, a child may affect from getting the recognition of legal relationship. This may even lead to risk of being stateless. Courts are now focused on the child's best interests even in these disputes. This clearly increasing to protect the child's identity and family life by recognizing the surrogacy on foreign judgments.

In India, the *Surrogacy (Regulation) Act, 2021* put full stop on commercial surrogacy and approves altruistic surrogacy. As a result, India is no longer a hub for surrogacy. However, Indians also still face problems if the surrogacy happens in foreign states. Overall, cross-border surrogacy needs a reform in order with international cooperation. A balanced legal approach is needed to protect the rights and identity of the children with respect to the laws of the countries.