

# Transnational Surrogacy and the Legal Vacuum: Rethinking Indian Regulation in a Globalized Reproductive Market

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## ABSTRACT

"Reproductive tourism," presents a complex web of legal and ethical considerations. The Ministry of Health and Family Welfare enacted "Surrogacy (Regulation) Act, 2021" hereinafter to be referred as "Surrogacy Act" on 25th December 2021, as India became a tourism hotspot for international surrogacy. The Surrogacy Act aims to regulate the surrogacy services in India by providing eligibility criteria for intending parents, intending woman and surrogate mother. To safeguard the interest of surrogate mothers, it provides for insurance coverage and necessary medical expenses in addition to prohibiting commercial surrogacy. It also regulates and supervises surrogacy procedures, registration of surrogacy clinics and legal status of a surrogate child. After the Act, India witnessed increase in the people travelling abroad for surrogacy. This article examines the challenges, with a particular focus on the Surrogacy Act and its impact on cross-border surrogacy arrangements. It analyses the motivations behind transnational surrogacy, the legal frameworks governing it in India, the ethical considerations involved and the potential consequences of the Indian legislation on international reproductive tourism. It argues that legal loopholes may inadvertently push the practice underground, underscoring the need for a comprehensive and globally harmonized approach to surrogacy.

**Keywords-** Surrogacy, Cross Border surrogacy, Transnational surrogacy, DNA testing, citizenship

## INTRODUCTION

Infertility can have profound social and emotional impacts on couples and individuals, making parenthood through alternative means a deeply significant pursuit.<sup>1</sup> The advancement of medical technology has led to development and innovation of surrogacy and assisted reproductive technology (hereinafter referred as "ART"). Both the technologies involve artificial insemination of embryos in the womb of the woman for the purposes of carrying a child.

The term surrogacy is derived from the Latin term "*Surrogatus*" which translates to a substitute or a person designated to act on behalf of another. In surrogacy, a woman lends her womb for carrying the child of an individual or a couple. According to Black's Law Dictionary, surrogacy refers to "*the process of carrying and delivering a child for another person*"<sup>2</sup>

Surrogacy is broadly categorised into traditional surrogacy and gestational surrogacy. In traditional surrogacy, the surrogate mother's egg is used which establishes a genetic relationship with the child, on the other hand gestational surrogacy involves an embryo created from the intended parents' or donors' eggs and sperm, thereby cutting all the genetic ties of child with the surrogate mother.<sup>3</sup>

<sup>1</sup> Allahbadia G.N and Kaur K., Accreditation, Supervision, and Regulation of ART Clinics in India—A Distant Dream? - PMC, PMC Home, <https://pmc.ncbi.nlm.nih.gov/articles/PMC3468249>

<sup>2</sup> Pedro Brandão et al., Commercial Surrogacy: An Overview, 44(12) Rev. Bras. Ginecol. Obstet. 1141 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9800153/pdf/10-1055-s-0042-1759774.pdf>.

<sup>3</sup> R.S. Sharma, Social, Ethical, Medical & Legal Aspects of Surrogacy: An Indian Scenario, 140 Suppl. 1 Indian J. Med. Res. S13 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/>.

Surrogacy, a complex and multifaceted method of assisted reproduction, involves intricate legal frameworks that vary widely across different jurisdictions. The legal environment around surrogacy intertwines with international human rights, parental rights, and physical autonomy of persons.<sup>4</sup>

Cross border surrogacy/ transnational surrogacy refers to situations where individuals or couples travel to another country for the purposes of availing surrogacy services in that country often seeking jurisdiction with lenient laws.<sup>5</sup>

### **The Indian Surrogacy (Regulation) Act: A Paradigm Shift**

The increasing accessibility of ART has fuelled the globalization of surrogacy. Intended parents generally seek surrogacy services in countries with more lenient regulations and lower costs. Thus, India became the tourism hotspot for surrogacy by international couples due to the absence of any legal framework on surrogacy in India.

Prior to the enactment of the 2021 Acts, ART and surrogacy clinics, along with banks, operated in accordance with the National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India, as issued by the Indian Council of Medical Research (ICMR). However, these guidelines lacked legal enforceability in the court of law. There were instances where the international parents after birth of the surrogate child abandoned the child in India which further fortified the need for a legislation.

Surrogacy was recognised for first time in the landmark case of *Baby Manji Yamada v. Union of India (2008)* the Supreme Court dealt with a complex surrogacy arrangement involving a Japanese couple and an Indian surrogate. Following the couple's divorce mid-process, the Japanese father sought custody of the child. Indian law at the time did not allow single men to adopt female children, creating a legal impasse. The Court, while not adjudicating on parentage, directed authorities to issue a passport and exit visa, highlighting the urgent need for a legal framework addressing custody and citizenship in cross-border surrogacy.

In another case, a German couple faced challenges obtaining passports for twin children born via an Indian surrogate. As Germany did not legally recognise surrogacy, the children were left stateless. While the Gujarat High Court granted them Indian passports, the Supreme Court stayed the order and instead facilitated exit permits, allowing the German authorities to proceed with adoption. The case underscored the challenges posed by conflicting surrogacy laws and the risk of statelessness for surrogate-born children. The case highlighted the complexities of cross-border surrogacy and the challenges posed by differing legal frameworks.<sup>6</sup>

Therefore, through the notification the Ministry of Home Affairs prohibited foreign nationals, Persons of Indian Origin (referred as "PIO") and Overseas citizen of India card holders (referred as "OCI") from commissioning surrogacy in India.<sup>7</sup> The Department of Health Research confirmed and assented to the notification of the Home Ministry banning commercial surrogacy in India.<sup>8</sup>

The Parliament passed the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter to be referred as "ART Act") and Surrogacy (Regulation) Act, 2021 (hereinafter to be referred as "Surrogacy Act") which laid the foundation for regulating the services in India.

The ART Act is interlinked with the Surrogacy Act as the freezing of embryos/gametes/sperm/oocytes is permitted under the ART Act which can be used for the purposes of surrogacy either in India or outside India at

<sup>4</sup> Univ. of Chi. L. Sch., Glob. Hum. Rts. Clinic, Human Rights Implications of Global Surrogacy (2019), <https://chicagounbound.uchicago.edu/context/ihr/article/1009/viewcontent/>.

<sup>5</sup> S. Marinelli et al., The Legally Charged Issue of Cross-Border Surrogacy: Current Regulatory Challenges and Future Prospects, 300 Eur. J. Obstet. Gynecol. & Reprod. Biol. 41 (Sept. 2024), <https://www.sciencedirect.com/science/article/pii/S0301211524003439>.

<sup>6</sup> Jan Balaz & Anr. v. Anand Mun. & Ors., (2009) Gujarat High Court.

<sup>7</sup> Gov't of India, Min. of Home Affairs (Foreigners Div.), Circular No. 462, No. 25022/74/2011-F.1 (Vol. III), Grant of Visa to Foreign Nationals/OCIs for Commissioning Surrogacy in India withdrawn w.e.f. Nov. 3, 2015 (Nov. 3, 2015), <https://www.mha.gov.in/PDF/Other/surrogacy03112015.pdf>.

<sup>8</sup> Dep't of Health Research, Ministry of Health & Fam. Welfare, Notification No. 250211/119/2015-HR (Nov. 4, 2015)

any point of time by the person himself/herself or his heirs or legal guardian authorised by the person. To further supplement the Surrogacy Act, rules and regulations were passed in 2023 and 2024 respectively.

The Surrogacy Act emphasizes a restrictive, altruistic surrogacy model and imposes strict conditions on the eligibility of potential parents along with criminalizing commercial surrogacy arrangements. The intention to prohibit commercial surrogacy in India was to protect the right and interest of surrogate mother which became an alarming concern due to the increasing exploitation of surrogate mothers and human trafficking. The Surrogacy Act discusses on the key terms such as eligibility criteria for surrogacy by intending couples, intending woman and surrogate mothers. The law also establishes National Registry, National Surrogacy Board and State Surrogacy Board for regulating, supervising and monitoring and Surrogacy clinics and banks. The Surrogacy Act also provides for punishment and penalty for violation of the law.

The statute suffers in contemplating key legal issues such as rights of individuals, surrogate mother's safety, interplay of ART and surrogacy among others. Since, prohibition is imposed on all forms of surrogacy by LGBTQ, unmarried heterosexual couples, single man and single woman in India which has paved way for most Indians who are ineligible under the Surrogacy Act preferring to travel internationally where the laws are lenient or laws legalise international surrogacy without any restrictions.<sup>9</sup>

### **Regulating Surrogacy- Diverse Laws Across Jurisdictions**

Surrogacy a subject matter of universal concern is complex and unstructured due to diverse legislative framework across continents. In most of the European countries such as Spain, Germany, France have made both commercial and altruistic surrogacy illegal within its territorial borders. Similarly in United Kingdom, only altruistic surrogacy for UK citizens is legal and commercial surrogacy is banned. Extending to the West in USA the laws on surrogacy differs from State to State.<sup>10</sup>

Countries such as Netherlands, Ireland, Belgium and Czech Republic without any governing legislation on surrogacy, the surrogacy arrangement is considered to be unenforceable.<sup>11</sup> This practice, indirectly makes surrogacy illegal. On the contrary, Italy has banned surrogacy for Italians not only in Italy but also outside the country.<sup>12</sup>

Indeed, jurisdictions like Ukraine, Canada, Georgia, California and Mexico have gained prominence as destinations for fertility tourism due to relaxed laws that allow foreign nationals to engage in surrogacy arrangements.<sup>13</sup> Additionally these countries permit heterosexual as well as homosexual couples and singles without any restrictions and limitations. However, the ongoing conflict in Ukraine has significantly disrupted the surrogacy industry, raising concerns about the protection of children, surrogates, and intended parents.<sup>14</sup>

In the East, Asian countries such as China, Indonesia, Cambodia, Macau and Taiwan regulate surrogacy through administrative regulations<sup>15</sup>. In China surrogacy is banned by virtue of Article 3 of the Chinese Administrative Measures on Human Assisted Reproductive Technology, enacted in 2001, prohibits medical institutions and

<sup>9</sup> Ankita Upadhyay, Restricted by Surrogacy Laws, Indians Are Going Abroad to Become Parents, Indian Express (Apr. 2, 2024), <https://indianexpress.com/article/health-wellness/surrogacy-indian-law-restriction-abroad-parents-9245901/>.

<sup>10</sup> The U.S. Surrogacy Law Map, Creative Fam. Connection (Jan. 14, 2025), <https://www.creativefamilyconnections.com/us-surrogacy-law-map/>.

<sup>11</sup> Supra note 5.

<sup>12</sup> Dafni Lima, Italy's Ban on International Surrogacy Is Part of a Drive Towards an Ultra-Conservative Idea of Family, The Conversation (Nov. 20, 2024), <https://theconversation.com/italys-ban-on-international-surrogacy-is-part-of-a-drive-towards-an-ultra-conservative-idea-of-family-243069>.

<sup>13</sup> N. Chhagani, Countries Where Surrogacy Is Legal (International Surrogacy 2024), IVF Conceptions (2024), <https://www.ivfconceptions.com/countries-where-surrogacy-is-legal/>.

<sup>14</sup> Supra note 5

<sup>15</sup> Elizabeth H. Aguilin-Pangalangan, Surrogacy in Asia, in Research Handbook on Surrogacy and the Law 345 (Paula Gerber ed., Edward Elgar Publ'g 2024), <https://doi.org/10.4337/9781802207651.00029>.

professionals from engaging in any form of surrogacy. Violations of this regulation result in penalties imposed on the offending institutions.<sup>16</sup>

South Korea has no specific rules or regulations on surrogacy but South Korean Society of Obstetrics and Gynaecology issued Ethical Guidelines on ART in January 2011. However, they are non-binding and unenforceable in nature. Additionally, Article 23 (3) and Article 66 of The Bioethics and Safety Act regulates and penalises the buying and selling of gametes.<sup>17</sup>

In India, after the enactment of Surrogacy Act, 2021 only gestational surrogacy in altruistic form is permitted to Indian citizens only thereby banning commercial surrogacy and all forms surrogacy to international parents. However, it is pertinent to note that Overseas citizen of India, Persons of Indian Origin and Non- Residents of India are permitted to avail surrogacy services in India.

### **Transnational Surrogacy by Indians- Analysis of Legal Implications**

Mostly countries with restrictive laws witness its citizens seeking surrogacy abroad, which has given rise to a phenomenon known as “fertility tourism”.<sup>18</sup> It is the intended parents who travel to countries with more favourable legal, economical and medical environments, hoping to sidestep domestic restrictions. The Surrogacy Act is a competent and effective legislation but it lacks the vision of possibility of misuse of loopholes. This creates ambiguity on pertinent issues of surrogacy by persons domiciled in India travelling abroad for surrogacy which will open floodgates for judicial interpretation and consequential amendments.

After the banning of commercial surrogacy, India witnessed that a burgeoning number of Indians are travelling to jurisdictions like the US, Canada, Mexico, Colombia and in east Europe including Georgia for surrogacy.<sup>19</sup> However, this practice brings its own set of legal and ethical dilemmas, such as violations of domestic laws and human rights, discrepancies in parental rights, citizenship issues for the new-borns, and potential exploitation of surrogate mothers in countries with less regulatory oversight.

The Surrogacy Act specifically prohibits LGBTQ couples, single man and unmarried woman from availing surrogacy services in India. It further restricts eligible intending couple for availing surrogacy on the fulfilment of the condition of gestational medical condition which leads to impossibility of conception through natural and ART means. It does not specifically permit any surrogacy arrangement agreement due to the nature of surrogacy being altruistic surrogacy. Additionally, it regulates and limits its jurisdiction to actions of the parties within the territory.

The Citizenship Act, 1955 governs the ambit of obtaining Indian citizenship. It states that for obtaining citizenship by descent of a minor child born outside India following procedure has to be followed-

*“A person may submit an application for registration of birth of his minor child born outside India in terms of sub-section (1) of section 4 in Form I to the Indian consulate in the country, where such child was born, together with a declaration that the child does not hold the passport of any other country. Additionally, it gives a list of documents that needs to be submitted along with the application which is as follows: -*

- *A copy of the birth certificate of the child*

<sup>16</sup> United Nations Population Fund (UNFPA), Terms of Reference for National Consultant: Reproductive Health Training (Mar. 2024), [https://china.unfpa.org/sites/default/files/vacancies/terms\\_of\\_reference\\_10.pdf](https://china.unfpa.org/sites/default/files/vacancies/terms_of_reference_10.pdf)

<sup>17</sup> O.-J. Kim & B.-H. Lee, South Korea, in Eastern and Western Perspectives on Surrogacy 449 (Olinda Timms & Kirsty Horsey eds., Intersentia 2019), <https://doi.org/10.1017/9781780688633.0>.

<sup>18</sup> V. Piersanti et al., Surrogacy and “Procreative Tourism”: What Does the Future Hold from the Ethical and Legal Perspectives?, 57(1) Medicina (Kaunas) 47 (2021), <http://dx.doi.org/10.3390/medicina57010047>.

<sup>19</sup> Express View on Indians Seeking Surrogacy Abroad: For Love of a Child, Indian Express (Apr. 5, 2024), <https://indianexpress.com/article/opinion/editorials/express-view-on-indians-seeking-surrogacy-abroad-for-love-of-a-child-9252032/>.

- A copy of the passport of both the parents
- A copy of the certificate of Indian citizenship if acquired by registration/naturalization
- A copy of the marriage certificate of the parents
- Declaration letter that the child does not hold the passport of any other country.<sup>20</sup>

However, the Surrogacy Act undermines the situation when ineligible persons travel outside India for availing surrogacy services. To understand the effect of the ambiguity, some probable illustrations are drawn: -

### Illustration I:

Ms. A and Mr. M, an Indian couple in a live-in relationship for five years, travel to California for surrogacy, which is prohibited for them under India's Surrogacy (Regulation) Act. California law permits international intended parents and allows pre-conception surrogacy agreements with court-issued parental orders. A and M are named as legal parents on the child's birth certificate.

Upon the child's birth, they seek entry and citizenship for the child through the Indian embassy. Two outcomes arise:

1. Embassy refuses entry and citizenship, citing incomplete documentation—denying recognition of the surrogacy arrangement.
2. Embassy grants entry and citizenship, which effectively bypasses Indian surrogacy restrictions and indirectly legitimises such arrangements for otherwise ineligible couples.

### Illustration II:

Mr. A and Mr. B, a gay Indian couple travel to California for the purposes of availing surrogacy services. Healthy twins are born to Mr. A and Mr. B through surrogate mother Ms. L. The parental order is issued in favour of Mr. A and Mr. B as biological parents of the child. The sperm of Mr. B and donor oocytes was used for surrogacy. Either Mr. A can apply individually or together with Mr. B for the citizenship of the twins with the Indian embassy in California.

### Consequential Effect of the Illustrations

- i. In First possibility of both cases, the couples would not be able to submit the copy of marriage certificate which would lead to refusal by the embassy. Additionally, it is also pertinent to note that the personal laws in India does not make registration of marriage mandatory.
- ii. In second possibility of both cases, it will indirectly facilitate the ineligible persons under the Surrogacy Act which will violate the fundamental principle of law i.e "*quando aliquid prohibetur ex directo, prohibetur et per obliquum*" which is understood as "*when anything is prohibited directly, it is also prohibited indirectly*".<sup>21</sup>

Additionally, after granting permit to entry and citizenship, if the couple later on separates and files a case in the Court for claiming custody of the child then it will raise further legal complications as presently there is no legal framework which governs this issue under such circumstances. However, arguments can be raised that by

<sup>20</sup> Indian Citizenship Online, Government of India, Ministry of Home Affairs (accessed June 20, 2025), <https://indiancitizenshiponline.nic.in/initial?formcode=09>.

<sup>21</sup> Dr. Syed Asima Refayi, Relations Between the Union and the States, in Constitutional Law I, Unit 3 (Univ. of Kashmir, Faculty of Law), [https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Constitutional Law I pith and substance Unit III.pdf](https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Constitutional%20Law%20I%20pith%20and%20substance%20Unit%20III.pdf).



permitting the child and the couple to enter in India subsequently granting citizenship to the child on the basis of such parental orders it will be implied acceptance of a relationship as well as surrogacy. Thus, the judiciary will be posed with a very serious and intense issue for determining the custody of a child.

- iii. In second illustration, in addition to the abovementioned possibilities, there will be an additional difficulty faced by the embassy. The Supreme Court in its landmark judgment stated that LGBTQ marriages are not recognised in India, as such marriages can neither be governed by personal law nor by special marriage act, 1954.<sup>22</sup> The court stated that fundamental rights under Article 19 of the Constitution cannot be extended to include right to marry. Though the judgment received huge criticism, it is still a force of law and cannot be overlooked. Thus, the Embassy could not act in violation of the judgment to give citizenship to a surrogate child.

Further, there is no clarity, issued by the Indian Ministry of Immigration and Ministry of Health and Family Welfare on the procedure to be complied such as documentation, visas category, permissions of concerned authorities to travel abroad for surrogacy. Since the departments have neither provided for a specific category of form to be filled in cases of cross border surrogacy nor clarified that it is within the ambit of medical visas, it will further complicate the scope of surrogacy. Additionally, there are no express or implied instructions issued by the departments on requirements for disclosures in cases of cross border surrogacy.

To seek clarity on the procedure and documentation, the author filed an RTI<sup>23</sup> application with the concerned departments on 22/07/2024 and 20/08/2024. In reply dated 16/08/2024 and 04/09/2024, the departments stated that it does not have information to furnish. Thus, it is rightful to state that the departments themselves do not have the clarity on the subject matter which puts Indians applying for cross border surrogacy in a limbo.

However, if the present situation persists and no guidelines are issued, then the concerned embassy would issue medical B-2 visas to ineligible persons for cross surrogacy. This will be in contradiction of the existing legal framework thereby legalising an illegal act. It further raises serious legal concern on the legal status of the child, custody of the child and intestate succession. In contrast, if it does not permit visas to ineligible persons for surrogacy it will go beyond the scope of the enacted legislation on surrogacy and will act in violation of the fundamental rights provided under the Indian constitution. Thus, it is essential that the ministry must specifically clarify its position on visas for surrogacy. The author suggests that a clarity may be issued by the Ministry stating that such cross-border surrogacy cannot be permitted by amending the Surrogacy Act.

India may adopt a policy on transnational surrogacy similar to USA which categorically specifies that US citizenship will not be given to a surrogate child born to US citizens but not genetically related to both or either of the intended parents. Further, it also lays down that for obtaining citizenship the parents need to apply to Consular Report of Birth Abroad (CRBA).<sup>24</sup> The parents need to provide evidence of conception and birth of the child, gestational connection with the parents, identity and citizenship and physical presence in US of parents before child's birth and legal status as the child's parent under the local law. To obtain U.S. citizenship at birth through surrogacy, at least one parent must meet the following conditions:

- A U.S. citizen father who is the genetic parent, or
- A U.S. citizen mother who is either the genetic mother or the gestational and legal mother (i.e., who carried and gave birth to the child), or

<sup>22</sup> Supriyo Supriya Chakraborty & Anr. v. Union of India, 2023 SCC OnLine SC 1348 (India), decided Oct. 17, 2023.

<sup>23</sup> Right to Information Act 2005 entitles an Indian citizen to get information from public authorities. <https://rti.gov.in/>

<sup>24</sup> Consular Report of Birth Abroad (CRBA) Checklist, U.S. Embassy & Consulates in Mexico (last updated July 10, 2024), <https://mx.usembassy.gov/consular-report-of-birth-abroad-crba-checklist-lista-de-verificacion-para-cita-de-informe-consular-de-nacimiento-en-el-exterior-crba/>

- A U.S. citizen spouse of a parent with a genetic or gestational link, provided both parents are married at the time of birth and can show evidence of a parental relationship (e.g., medical, tax, or school records).

If these conditions are not met, the child does not acquire U.S. citizenship at birth but may still qualify under Section 309 of the Immigration and Nationality Act, subject to additional criteria.<sup>25</sup>

Thus, US considers DNA testing as the best way to establish the genetic and biological relation of the child with the parents. Unfortunately, India neither provides any guidelines to Indians who are travelling abroad for surrogacy whether it is permitted or not. It also fails to provide the procedure for necessary requirements for bringing the surrogate child in India and whether the genetic relationship is mandatory to be proved for admitting the child as an Indian citizen.

There is another major challenge posed by the existing law. The ART Act permits individuals and couples to freeze and store their gametes/sperm/oocytes with ART Banks. The Surrogacy Act u/s. 3(vii) states that-

*“No surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist, intending couple or any other person shall store a human embryo or gamete for the purpose of surrogacy:*

*Provided that nothing contained in this clause shall affect such storage for other legal purposes like sperm banks, IVF and medical research for such period and in such manner as may be prescribed;”*

In contradiction, any person who has cryo-preserved its gametes/sperm/oocytes is permitted to transfer the frozen gametes/oocytes/sperm within or outside India for purposes of IVF or surrogacy<sup>26</sup> with the permission of the Indian Department of Health Research. The procedure comprises of screening and processing of the application by the department. The department may also seek recommendations of the Expert Members of the Board and final decisions on the applications are given by the National Board.<sup>27</sup> The application may be rejected if it is not for personal use of own gametes under the ART Act.<sup>28</sup>

Therefore, an individual can legally freeze its sperm/oocyte and transfer it to foreign jurisdiction stating for personal use through surrogacy which is permitted within the law of the land. Thus, it further complicates and tangles the cross-border surrogacy concern which indirectly implies that the legislation does not create any restriction on cross border surrogacy and may open exit doors to ineligible persons. The authors believe that this will defeat the purpose and intention of legislature in enactment of surrogacy Act.

There are multiple instances and cases where persons have travelled to foreign country for availing surrogacy services in Canada, US due to the restrictions imposed in the domiciled State. One of the well-known cases is of Zheng Shuang, who is a Chinese celebrity. She travelled to US and hired a surrogate mother there. She was mother of twins but abandoned the surrogate babies. Upon this case being discussed widely on media, she stated that she did not violate China's laws and respected local laws while residing abroad as surrogacy was prohibited in China and she sought for surrogacy in US where it was permitted was in this case where it was highlighted that how people make use of the legal loopholes of domestic legislation.<sup>29</sup>

<sup>25</sup> Assisted Reproductive Technology (ART) and Surrogacy Abroad, Travel.State.Gov (last updated Oct. 31, 2024), <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html>

<sup>26</sup> Assisted Reproductive Technology (Regulation) Amendment Rules, 2023, R. 19

<sup>27</sup> Ministry of Health & Fam. Welfare, Advisory Regarding Permission for Transfer of Own Embryos/Gametes Within or Outside India for Personal Use Under Section 29 of the ART Act, 2021, U.11019/01/2024-HR (Jun. 28, 2024), Gazette of India, Pt. II, Sec. 3, <https://artsurrogacy.gov.in/public/fornt/assets/images/Notifications/rules/Advisory%20reg.%20permission%20for%20transfer%20of%20embryos%20&%20gametes.pdf>

<sup>28</sup> Assisted Reproductive Technology (Regulation) Act, 2021, § 29

<sup>29</sup> Yue Liu et al., Perspectives on Surrogacy in Chinese Social Media: A Content Analysis of Microblogs on Weibo, 95 Yale J. Biol. Med. 305 (Sept. 30, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9511951/>

## Surrogacy Paves Way to Human Rights Violation

In landmark case of *Paradiso and Campanelli v. Italy*<sup>30</sup> a profound legal question surrounding the recognition of parental rights in international surrogacy arrangements, where domestic law may conflict with legal determinations made abroad was discussed. When the Italian authorities refused to acknowledge parent-child relationship after discovering that the surrogate-born child had no genetic link to the intended parents, the child was placed in alternative care, raising critical questions about family ties and the intersection of national sovereignty with cross-border legal recognition of surrogacy.<sup>31</sup>

It is important to understand an existing tension between any state's prerogative, for that matter, to control family law and its obligations under international human rights law; yet in this case-the refusal of the Grand Chamber of the European Court of Human Rights to recognize *de facto* family ties, contrary to the Chamber's initial judgment, illustrates the inherent complexity of such cases, where *favor filii* (the best interests of the child) intersects with state concerns over the circumvention of domestic laws via international surrogacy arrangements.<sup>32</sup> These human rights challenges are discussed below:-

### Parentage and Citizenship: Navigating Legal Limbo

Nationality is not merely a legal status; it is a lifeline connecting individuals to the rights and protections afforded by their country of origin. It serves as the foundation for the enjoyment of a vast array of fundamental human rights, including access to education, healthcare, and the judicial system. For children born through surrogacy, nationality is not just a legal requirement but a critical factor in ensuring their identity, security, and sense of belonging. Yet, in cross-border surrogacy arrangements, where the laws of the surrogate mother's country may conflict with those of the intending parents' nation, the child can easily fall through the cracks, left in a precarious limbo of statelessness.

Statelessness for a child born of surrogacy is more than an administrative oversight—it is a denial of dignity, identity, and future opportunities. Without a nationality, a child becomes invisible in the eyes of the state, deprived of basic services and protections<sup>33</sup>. For the surrogate mother, too, nationality-related challenges can emerge, especially if the arrangement involves multiple jurisdictions. These conflicts often result in protracted legal battles, delays, and emotional distress for all parties involved.

Recognizing these risks, international human rights law imposes clear obligations on states to safeguard the right to nationality for every child. The Human Rights Committee, in its General Comment No. 17, underscores that states are required to "*adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [or she] is born.*" This imperative is not a mere policy suggestion; it is a binding obligation rooted in the principles of human dignity and equality.

In the context of surrogacy, the issue of nationality becomes even more complex when national laws diverge on the legal recognition of parentage. For instance, some prohibitionist states refuse to recognize parent-child relationships established abroad through surrogacy arrangements. Such refusals can result in children being denied not only a nationality but also a legal identity, effectively stripping them of their place in society.

This was highlighted in the cases of *Mennesson*<sup>34</sup> and *Labassee*<sup>35</sup>, where the European Court of Human Rights held that child's right to respect for private life under Article 8 of the European Convention on Human Rights

<sup>30</sup> *Paradiso & Campanelli v. Italy*, App. No. 25358/12 (Eur. Ct. H.R. Grand Chamber Jan. 24, 2017).

<sup>31</sup> *Ibid*, para. 5

<sup>32</sup> *Supra* note 35, para. 21, 40

<sup>33</sup> U.N. High Comm'r for Refugees (UNHCR), Guidelines on the Definition of a "Stateless Person" Under Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons (Feb. 20, 2012), <https://www.unhcr.org/refworld/docid/4f4371b82.html>. See also U.N. High Comm'r for Refugees (UNHCR), Guidelines on Procedures for Determining Statelessness (Apr. 6, 2020), <https://www.unhcr.org/refworld/docid/4f7dafb52.html>.

<sup>34</sup> *Mennesson v. France*, App. No. 65192/11 (Eur. Ct. H.R. June 26, 2014).

<sup>35</sup> *Labassee v. France*, App. No. 65941/11 (Eur. Ct. H.R. June 26, 2014)



was violated by France. The French authorities had refused to recognize parent-child relationships that had been legally established in the United States, leaving the children in legal limbo. The Court emphasized that the children's best interests and their right to a legal identity outweighed France's policy objective of deterring its citizens from engaging in surrogacy abroad.

Such cases reveal a crucial tension in surrogacy laws: the balance between national sovereignty and the rights of the child. While states may seek to regulate or prohibit surrogacy in line with domestic values, they must not do so at the expense of the child's fundamental rights. Legal identity, rooted in nationality, is an essential element of personhood, and its denial constitutes a violation of human dignity.

For children born through surrogacy, nationality is more than a legal formality—it is the key to unlocking a world of rights and opportunities. For states, ensuring this right is not only a legal obligation but also a moral imperative. The task requires careful cooperation among nations to harmonize laws, streamline processes, and prioritize the best interests of the child above all else.

### International Policy Position & Way Forward

The UNESCO Universal Declaration on the Human Genome and Human Rights, endorsed by the UN General Assembly in 1998, enshrines the principle that every individual is entitled to dignity and rights, irrespective of their genetic characteristics under article 2.<sup>36</sup> This principle establishes a clear ethical foundation against the commodification of human life or the reduction of human identity to genetic traits. In the context of surrogacy, particularly arrangements that pre-plan the separation of a child from the birth mother before conception, such actions raise profound concerns about the child's inherent dignity. The deliberate creation of circumstances where a child's best interests, including their emotional and physical wellbeing, are secondary to adult desires, can be viewed as a violation of this principle. This practice potentially treats the child not as an autonomous individual but as the subject of a commercial or contractual transaction.

Further, the Convention on the Rights of Persons with Disabilities (CRPD) reiterates the obligation to prioritize the best interests of children, including children with disabilities, in all actions affecting them. It emphasizes that these interests should be a primary consideration. Surrogacy arrangements may involve the pre-selection of embryos or even the termination of pregnancies based on genetic characteristics, a practice that arguably violates this principle by introducing discriminatory standards that compromise the rights and dignity of children with disabilities. Such practices also intersect with broader concerns about eugenics, where genetic traits are selected or discarded, further marginalizing those who do not meet pre-determined genetic "standards."

The complexities of cross-border surrogacy in resolving issues related to nationality and legal parentage were comprehensively acknowledged by the Hague Conference on Private International Law (HCCH) Council in 2010.<sup>37</sup> The HCCH Experts' Group on Parentage/Surrogacy emphasized that the absence of a standardized legal framework for establishing and contesting parentage across jurisdictions leads to a range of conflicting and problematic outcomes.<sup>38</sup> These challenges include ambiguities in determining paternity or maternity, immigration barriers for the child and parents, the risk of the child being rendered stateless due to uncertain nationality, and instances of abandonment. Moreover, such legal uncertainties often result in the lack of maintenance or support for the child, further compounding the vulnerabilities faced by children and families involved in cross-border surrogacy arrangements. This highlights the pressing need for an internationally coordinated approach to address these critical issues.<sup>39</sup>

<sup>36</sup> Universal Declaration on the Human Genome and Human Rights, UNESCO Gen. Conf., 29th Sess., Nov. 11, 1997.

<sup>37</sup> Council on Gen. Affs. & Pol'y of the Hague Conf. on Priv. Int'l L., Conclusions and Recommendations Adopted by the Council (Apr. 5–7, 2011), [https://assets.hcch.net/upload/wop/genaff\\_concl2011e.pdf](https://assets.hcch.net/upload/wop/genaff_concl2011e.pdf).

<sup>38</sup> Hague Conf. on Priv. Int'l L., Report of the February 2016 Meeting of the Experts' Group on Parentage / Surrogacy (Feb. 2016), <https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf>.

<sup>39</sup> Stellina Jolly, Cross-Border Surrogacy: Indian State Practice, in *The Regulation of Assisted Reproductive Technologies in Comparative Perspective* 175 (Jennifer Gunning & Isra Black eds., Springer 2017), <https://doi.org/10.1007/978-981-10-3458-99>.

International legal instruments collectively advocate for the universal protection of human dignity, the prioritization of children's best interests, and the prohibition of practices that commodify or devalue human life. A universal prohibition of such practices, including unregulated surrogacy and cloning, would align with these principles, ensuring that advancements in biotechnology and reproductive health remain firmly rooted in the ethical imperatives of equality, non-discrimination, and respect for human rights.

## CONCLUSION AND SUGGESTIONS

The non uniformity among the countries on surrogacy laws leads to the contravention of domestic legal framework for international parents travelling for surrogacy abroad. Thus, it is suggested that the countries should develop uniform guiding principles through international convention for surrogacy. In addition, it must provide clarity on intending international parents and legal status of surrogate children so as to protect the interest of child.

Italy has taken a step forward in addressing this legal concern pertaining to international surrogacy, by prohibiting surrogacy for its citizen in and outside Italy.<sup>40</sup> Thus to avoid any back door entries, India can prohibit transnational surrogacy adopted by ineligible persons so as to be in consonance with the existing legal framework on surrogacy. Further, the government needs to bring amendments to the exiting surrogacy act along with consequential and incidental notifications and guidelines to be issued to embassy of other jurisdictions on the above surrogacy framework adopted by the country.

The legislature further needs to regulate the transfer of gametes/sperm/oocytes outside India for the purposes of surrogacy. It also needs to further clarify that personal usage to be limited and applicable to natural conception or ART. It may exclude surrogacy from the ambit of personal use if it does not comply with the law of land. The said restriction must be strictly implemented upon Indians in the event they intend to return to India with the surrogate child born in violations of the Surrogacy Act.

Further, in cases of persons eligible under the Surrogacy Act availing transnational surrogacy abroad legislature needs to lay down rules and regulations on procedural requirements including visas category, documentation and necessary permissions to be obtained from the appropriate authority. The citizenship by descent documentation requirement becomes essential to be amended or modified with respect to child born through surrogacy outside India especially by intending couple or intending woman under the Surrogacy Act. The conditional requirement of copy of marriage certificate becomes futile when the intending woman is either a divorcee or widow. Thus, it is suggested to introduce a special form/ application and special documentation requirement for cross border surrogacy which is able to embrace the conditions in existing surrogacy legislation.

Like US, India can also lay down guidelines for establishing the genetic relationship of the child with the intended Indian Parents for the purposes of citizenship. This also helps to remove the child from the state of statelessness. Lastly, the long-awaited Surrogacy Act is still miles away to achieve its goals which defeats the intent and purpose of enactment of legislation from domestic and international perspectives. If the concern on cross border surrogacy is not addressed within time, it will act as catalyst for litigations. These legal lacunae will entangle the Judges, Medical professions, Advocates and Citizens in legal battle for years for the recognition of best interest of the child.

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<sup>40</sup> Mark Davies, Italy Surrogacy Ban: Couples Banned from Travelling Abroad to Seek Surrogate, BBC News (Oct. 16, 2024), <https://www.bbc.com/news/articles/c62rmv63069o>.