

# PROPOSING AN INTERNATIONAL INSTRUMENT TO ADDRESS ISSUES ARISING OUT OF INTERNATIONAL SURROGACY ARRANGEMENTS

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## ABSTRACT

*This Note introduces the two kinds of surrogacy arrangements prevalent internationally, with a focus on commercial international surrogacy arrangements (ISAs). The Note discusses issues of stateless and parentless children arising from ISAs due to a web of conflicting national laws that creates loopholes and the absence of effective international regulations governing ISAs. The Note then analyzes domestic and international laws of various countries in four categories viz. nations that prohibit surrogacy arrangements, nations where surrogacy is largely unregulated, nations where surrogacy is expressly permitted, and nations with a permissive approach toward surrogacy including commercial surrogacy arrangements. The Note also explains the different ways by which countries determine parentage and nationality of their citizens. Finally, to resolve issues arising out of ISAs and to control the confusion and ambiguity created by various domestic laws, this Note proposes an international instrument and includes draft provisions of the same to streamline the various stands countries have on ISAs and to address both the ethical and legal issues arising out of them.*

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I. INTRODUCTION

The human desire to be a parent is fundamental to society, and surrogacy offers the opportunity of parenthood to those otherwise unable to bear a child.<sup>1</sup> Increasing globalization and advances in artificial reproductive techniques (ART) have opened new possibilities for infertile couples across the globe. Unfortunately, the road to surrogacy is crowded with legal, religious, ethical, political, and regulatory challenges. The pairing of a web of conflicting national laws generates loopholes and removes safeguards for surrogates<sup>2</sup> and intending parent(s)<sup>3</sup> and a lack of effective international regulations governing surrogacy agreements has given rise to fears of exploitation, breaches of autonomy, stateless children, and several other issues. Because of the rising challenges in this field, national governments are increasingly adopting anti-surrogacy laws, thus putting an end to many dreams of parenthood or prompting people to cross borders in search of options.

To resolve these difficulties and control the confusion and ambiguity created by various domestic laws, this Note proposes an international instrument to streamline the various stands nations have taken on International Surrogacy Arrangements (ISAs) and to address both the ethical and legal issues arising out of ISAs. A similar Hague Convention on inter-country surrogacy agreements has been proposed, but this

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1. MICHAEL WELLS-GRECO, *THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS* 35 (2016) (“Surrogacy, as a practice, covers a variety of situations where a woman carries and bears a child on behalf of someone else. The word ‘surrogate’ is likely to have its origin from a Latin word ‘surrogatus’, meaning a substitute, that is, a person appointed to act in place of another.”).

2. WELLS-GRECO, *supra* note 1, at xv (defining “surrogate” as the woman who carries and gives birth to the child).

3. *Id.* (defining “intending parents” as the parents who intend to raise the child; they may or may not be the genetic parents).

convention has not attained finality yet.<sup>4</sup>

## II. TYPES OF SURROGACY ARRANGEMENTS

A discussion of international surrogacy arrangements requires an explanation of the various types of arrangements. There are two general types of surrogacy arrangements: A) traditional or partial surrogacy; and B) gestational or full surrogacy.<sup>5</sup> In traditional surrogacy, eggs of the surrogate are used in the conception of the child.<sup>6</sup> The intending father may or may not be genetically related, depending upon whether the couple has used his sperm or that of a donor.<sup>7</sup> Usually, the surrogate is impregnated by *in vitro* fertilization (IVF) treatment using the semen of the intending father.<sup>8</sup>

In gestational surrogacy, IVF and embryo transfer (ET) are used to achieve pregnancy.<sup>9</sup> The ovum of the intending mother or of another woman is surgically removed, fertilized *in vitro*, and later transferred to the uterus of the surrogate mother.<sup>10</sup> This method is more popular for two reasons, *viz.* it provides an opportunity for an intending mother to have a child genetically related to her, and, by removing the genetic link between the surrogate and the child, this method leads to less emotional attachment of the surrogate to the child, thereby decreasing the risk of the surrogate refusing to relinquish the child.<sup>11</sup>

Traditional and gestational surrogacy can be further categorized into altruistic and commercial surrogacy.<sup>12</sup> In altruistic surrogacy arrangements, the surrogate receives no compensation for carrying and giving birth to a child, apart from the medical and other reasonable expenses incurred, whereas in commercial surrogacy arrangements a surrogate receives financial compensation or other consideration for her service beyond payment for reasonable expenses.<sup>13</sup> Commercial surrogacy is associated with profit-making, whereas altruistic surrogacy

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4. *The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Sep. 12, 2017).

5. WELLS-GRECO, *supra* note 1, at 37-38.

6. *Id.* at 37.

7. *Id.*

8. *Id.*

9. *Id.* at 38.

10. WELLS-GRECO, *supra* note 1, at 38.

11. *Id.*

12. *Id.*

13. *Id.*

is viewed as social service.<sup>14</sup>

III. ISSUES ARISING OUT OF INTERNATIONAL SURROGACY ARRANGEMENTS —  
PARENTLESS AND STATELESS CHILDREN

Surrogacy at the international level poses many troubling questions. Concerns over the rising issue of stateless children born out of ISAs, followed by other complex issues, such as commodification of women who are compelled into such arrangements due to poverty, have arisen, especially in developing countries.<sup>15</sup> Issues faced by intending parents, such as fighting a legal battle over custody or parentage of the surrogate child in a foreign land or homosexual couples struggling to obtain permission to enter into surrogacy agreements, are on the rise.<sup>16</sup> In this paper, however, I will focus on the rights, citizenship, and parentage of surrogate children followed by a proposal for an international instrument to maintain uniformity in executing ISAs.

Advancement of technology allows conception in new and different ways by breaking down the process to the very elementary level of gestation and conception.<sup>17</sup> This has paved the way for the growth of surrogacy at the international level, as options are available for obtaining sperm, eggs, and a viable womb from three different sources. Globalization and liberalization has driven the growth of the surrogacy market across borders. The international surrogacy market exists for two reasons: A) barriers to domestic surrogacy or other assisted reproductive options (evidenced by the pursuit of surrogacy in the United States by European and other international intending parent(s)); and B) cost savings (evidenced by the growth of surrogacy in lower-cost nations).<sup>18</sup> The average price paid to a surrogate in India is \$47,350, whereas a surrogate from California is paid \$100,000.<sup>19</sup> Couples are willing to take the risk of entering unregulated jurisdictions to save costs; however, a small percentage of couples prefers to spend the extra buck ensuring a legitimate and hassle-free process.

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14. WELLS-GRECO, *supra* note 1, at 38-39.

15. *See id.* at 43-44.

16. *Id.* at 13; *Parentage / Surrogacy Project*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Sep. 14, 2017).

17. *See* DEBORAH L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 85-88 (2006).

18. Richard F. Stofrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 301 (2005).

19. Helier Cheung, *Surrogate babies: Where can you have them, and is it legal?*, BBC NEWS (Aug. 6, 2014), <http://www.bbc.com/news/world-28679020>.

Unregulated cross-border surrogacy arrangements result in parentless and stateless children.<sup>20</sup> If an intending couple attempts to evade the scrutiny of a home country with strict familial norms by crossing the border, the home country may not legally recognize the child as the “legitimate” offspring of the parents, even when the child is the genetic offspring of the parents.<sup>21</sup> Thus, the child may be left with no parents and no nationality. This is referred to as the problem of the stateless child.<sup>22</sup>

The problem of the stateless child has grown steadily over the years. Non-recognition of the parent-child relationship causes serious consequences for the rights and welfare of the child, such as the child’s right to acquire a nationality.<sup>23</sup> This problem stands in stark contrast to a nation’s general obligation to ensure that children do not end up stateless, as enshrined in international covenants such as the Universal Declaration of Human Rights<sup>24</sup> and the International Covenant on Civil and Political Rights.<sup>25</sup> Even if the conceived child is eventually permitted to travel to the home country of the intending parent(s), the child may suffer from “limping” legal parentage and thus may be subjected to discrimination for all of his or her life.<sup>26</sup>

#### IV. DETERMINATION OF LEGAL PARENTAGE AND NATIONALITY

One of the major obstacles facing a consistent system for controlling international surrogacy agreements is the disparate methods used for determining parentage and nationality across different states.

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20. WELLS-GRECO, *supra* note 1, at 7.

21. *See id.* at 83 (discussing one example).

22. HAGUE CONFERENCE ON PRIVATE INT’L LAW, A PRELIMINARY REPORT ON THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Prel. Doc. No. 10, ¶ 1 (Mar. 2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf> [hereinafter HCCH Preliminary Report].

23. *See id.*

24. Article 15 of the Universal Declaration of Human Rights states that “(i) everyone has the right to a nationality and (ii) no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

25. Article 24 of the 1996 International Covenant on Civil and Political Rights provides: “Every child shall be registered immediately after birth and shall have a name . . . Every child has the right to acquire a nationality.”

26. HAGUE CONFERENCE ON PRIVATE INT’L LAW, BACKGROUND NOTE FOR THE MEETING OF THE EXPERTS’ GROUP ON THE PARENTAGE/SURROGACY PROJECT 5 (Jan. 2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf>.

A. *Legal Parentage*

One approach for determining legal parentage is the application of the relevant private international law rules of the country (or *lex causae*), most often those laws relating to “recognition.”<sup>27</sup> In some nations, different rules may be applicable depending upon whether the intending parent(s) seek recognition of a birth certificate (confirmation of a legal “fact”), an acknowledgement of paternity (a legal “act”), or a judgment.<sup>28</sup> However, a number of cases illustrate that, no matter whether recognition is sought of a legal act, fact, or judgment, a strict application of these private international law rules may often, in an international surrogacy context, lead to non-recognition of the legal parentage of an intending parent (in particular, legal maternity) due to a “public policy” exception existing in the country of the intending parents even if parentage is established under the foreign law, *i.e.*, the law of the country of the surrogate mother.<sup>29</sup>

Legal parenthood can be established *ex lege*, which means that parenthood does not need juridical action to be established. It occurs due to certain actions such as giving birth, genetic paternity, marrying the mother, etc.<sup>30</sup> For instance, giving birth forms the basis for legal maternity in most legal systems.<sup>31</sup> Another approach is for parentage to be viewed as a matter of fact, rather than a conclusion of law.<sup>32</sup> The foreign birth certificate may therefore carry no weight beyond providing factual evidence as to the conclusion regarding legal parentage

27. WELLS-GRECO, *supra* note 1, at 63.

28. For example, this is the case in Belgium and the Netherlands. See CODE CIVIL [C. CIV.] art. 6 (Belg.); Art. 1:200 BW (Neth.); HAGUE CONFERENCE ON PRIVATE INT’L LAW, QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (Apr. 2013), <https://assets.hcch.net/upload/wop/gap2014pd3nl.pdf>, <https://assets.hcch.net/upload/wop/gap2014pd3be.pdf>.

29. WELLS-GRECO, *supra* note 1, at 73.

30. *Id.* at 63

31. *Id.*

32. For example, Ireland, New Zealand, the United Kingdom, and Israel, to date, could be said to fall within this grouping because no weight is placed on the foreign birth certificate. Instead, DNA testing of the intending parents is undertaken, and registration and acquisition of nationality is permitted only if a genetic link is established with one of the intending parents. See Maebh Harding, *Ireland*, in INTERNATIONAL SURROGACY AGREEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 224 (Katarina Trimmings & Paul Beaumont eds., 2013) [hereinafter INTERNATIONAL SURROGACY AGREEMENTS]; Sharon Shakargy, *Israel*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra*, at 242; Claire Achmad, *New Zealand*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra*, at 305; Michael Wells-Greco, *United Kingdom*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra*, at 369.

reached under the foreign law.<sup>33</sup> Moreover, in some of the nations that take this approach, internal legislation concerning the determination of parentage specifically states that it will apply no matter where the child is born (*i.e.*, the internal law is expressly stated to have extraterritorial effect).<sup>34</sup>

### B. Nationality

One approach to determining nationality is for countries to apply their internal law to decide the nationality of the child. Generally, such laws provide for nationality “by descent,” where one of the child’s legal parents is a national of the country.<sup>35</sup> The relevant state authorities will thus need to determine the question of legal parentage to determine if the child can be granted a passport.<sup>36</sup> In contrast, in a minority of countries that determine nationality using their internal law, genetics determines whether the child acquires nationality.<sup>37</sup> If a genetic link can be established between an intending parent and the child, that intending parent is considered the parent for nationality purposes (whether a legal parent under internal law or not), and, if the intending parent is a national of the country, they will be able to pass on nationality “by descent.”<sup>38</sup>

## V. ANALYZING DOMESTIC AND INTERNATIONAL LAWS OF VARIOUS COUNTRIES REGARDING SURROGACY

Various approaches to surrogacy exist within countries’ internal laws and policies.<sup>39</sup> Several nations have introduced surrogacy-related legis-

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33. For example, the Israel Ministry of Interior has confirmed that foreign birth certificates do not suffice for proving parenthood. See Shakargy, *supra* note 32, at 242.

34. See Achmad, *supra* note 32, at 304-05, 310 (New Zealand).

35. See, e.g., Code de la nationalité belge [Belgian Nationality Act] of June 28, 1984, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 28, 1984, 35, art. 8; Staatsangehörigkeitsgesetz [StAG] [Nationality Act], as amended, § 3, number 1, § 4, translated in [http://eudocitizenship.eu/NationalDB/docs/GER%20Nationality%20Act%20\(1913,%20as%20amended%201999,%20English\).pdf](http://eudocitizenship.eu/NationalDB/docs/GER%20Nationality%20Act%20(1913,%20as%20amended%201999,%20English).pdf) (Ger.); Gerd Verschelden & Jinske Verhellen, *Belgium*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 76; Susanne L. Gössl, *Germany*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 139.

36. This could be consular authorities abroad, or, if the child has travelled into the country on a foreign passport, it may be the relevant authorities in the receiving nation. It may be that an initial travel document (or *laissez-passer*) is granted in the first instance.

37. See Shakargy, *supra* note 32, at 242 (Israel).

38. See *id.*

39. See generally HCCH Preliminary Report, *supra* note 22.

lation recently,<sup>40</sup> and several others have prepared draft bills, some pending approval in their parliaments. Numerous laws and policies at the domestic level have led to uncertainty and ambiguity at the international level when interpreting the terms of an ISA. Countries can be divided into four categories based on their perceptions and domestic laws regarding surrogacy.

A. *Nations that Prohibit Surrogacy Arrangements*

In some countries, surrogacy arrangements are expressly prohibited by law.<sup>41</sup> This approach is generally based on a policy perspective which views such agreements as a “violation of the child’s and the surrogate mother’s human dignity,” reducing them to commodities for trade.<sup>42</sup> In these nations, entering into a surrogacy arrangement will attract criminal sanctions for the parties involved, intermediaries, and/or medical institutions facilitating the arrangement.<sup>43</sup>

40. Sushmi Dey, *Govt introduces Surrogacy (Regulation) Bill, 2016 in Lok Sabha*, TIMES INDIA (Nov. 21, 2016), <http://timesofindia.indiatimes.com/india/Govt-introduces-Surrogacy-Regulation-Bill-2016-in-Lok-Sabha/articleshow/55547454.cms>.

41. Countries which appear to be in this category include: the People’s Republic of China, Zhengxin Huo, *The People’s Republic of China*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 93 (citing the Administrative Measures of Assisted Human Reproductive Technology, Order of the Ministry of Public Health of the People’s Republic of China, No. 14 of 2001, February 22, 2001); France, CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 16-17 (Fr.); Germany, Embryonenschutzgesetz [ESchG] [The Embryo Protection Act], Dec. 13, 1990 BGBL I at 2746, § 1 (Ger.), Adoptionsvermittlungsgesetz [AdVermiG] [Adoption Placement Act], July 2, 1976, BGBL I at 1762, §§ 13c, 13d, 14b (Ger.), BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1591, *translated in* [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5504](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5504) (Ger.); Switzerland, FORTPFLANZUNGSMEDIZINGESETZ, [FMEDG] [Reproductive Health Law], Dec. 18, 1998 (Switz.) (forbidding surrogacy and punishing clinicians who arrange for surrogacy); and the United States, of which sample jurisdictions include the District of Columbia, D.C. CODE §§ 16-401 to 16-402 (2017). *See also* WELLS-GRECO, *supra* note 1, at xv (“In some States, such as Austria and Norway, egg donation is prohibited. This amounts to an effective prohibition of gestational surrogacy which always involves egg donation, either from the intending mother or a third party.”).

42. HCCH Preliminary Reports, *supra* note 22, ¶ 10.

43. Examples include the People’s Republic of China, Huo, *supra* note 41, at 94 n.5 (citing Article 22 of the Administrative Measures, which provides for criminal liabilities, but states that any action pertaining to surrogacy is not criminally liable, creating a loophole in the law); Germany, Embryonenschutzgesetz [ESchG] [The Embryo Protection Act], Dec. 13, 1990 BGBL I at 2746, § 1 (Ger.), Adoptionsvermittlungsgesetz [AdVermiG] [Adoption Placement Act], July 2, 1976, BGBL I at 1762, §§ 13c, 13d, 14b (Ger.); France, CODE PÉNAL [C. PÉN.] [PENAL CODE] arts. 227-13, 511-24 (Fr.); and Switzerland, FORTPFLANZUNGSMEDIZINGESETZ, [FMEDG] [Reproductive Health Law], Dec. 18, 1998 (Switz.).



Further, surrogacy arrangements reached in contravention of a nation's prohibition are legally void and unenforceable. This means that the general rules concerning legal parentage will apply to any child born as a result of such an arrangement. Generally, the gestational surrogate mother will be considered the legal mother, and often this is not contestable.<sup>44</sup> While adoption may be a route for an intending mother to acquire legal parentage in some countries, this can be far from straightforward. Nations sometimes have laws prohibiting the adoption, especially in cases where the prospective adoptive parents take part in a surrogacy arrangement that is unlawful or contrary to public policy.<sup>45</sup> The legal father usually will be presumed to be the surrogate mother's husband if she is married.<sup>46</sup> However, depending upon the country, a father may be able to contest this presumption by bringing court proceedings to establish his legal paternity.<sup>47</sup> The prohibition on surrogacy may be thought to have eliminated the practice of surrogacy within these nations. But, unfortunately, that has given rise to a thriving "underground" surrogate business.<sup>48</sup>

France serves as an example of a country where surrogacy agreements are generally prohibited. Article 16-7 of the Civil Code of France states: "Any agreements relating to procreation or gestation for a third party are void."<sup>49</sup> The *Cour de cassation*, in a domestic surrogacy case, decided that any arrangements, even altruistic ones, under which a woman agrees to conceive and bear a child in order to give it up at birth are contrary to two public-policy principles.<sup>50</sup> These public-policy principles are that: (A) the human body cannot be subject to private agreements or traditional contract law because it is not a thing that can be traded (in French, "*l'indisponibilité du corps humain*"); and (B) the legal status of people cannot be subject to private agreements or traded

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44. Examples include Germany, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1591, translated in [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5504](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5504) (Ger.), and Switzerland, FORTPFLANZUNGSMEDIZINGESETZ, [FMEDG] [Reproductive Health Law], Dec. 18, 1998 (Switz.). This is based on Roman law—the principle of *mater semper certa est*.

45. Gössl, *supra* note 35, at 137.

46. *Id.* at 136.

47. *Id.*

48. Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Surrogate Motherhood*, N.Y. TIMES (Aug. 2, 2014), [https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html?\\_r=0](https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html?_r=0).

49. CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 16-17 (Fr.).

50. Louis Perreau-Saussine & Nicolas Sauvage, *France*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 120.

(in French, “*l’indisponibilité de l’état des personnes*”).<sup>51</sup>

Article 227-13 of the French Penal Code states that any act that constitutes stimulating birth or concealing birth in such a way that it modifies the civil status of the child concerned, such as identifying someone other than the birth mother as the legal mother of the child, amounts to an offense and is punishable by imprisonment of up to three years and a fine of up to €45,000.<sup>52</sup> Additionally, conducting any medically-assisted reproductive activities (including surrogacy) is illegal under the Public Health Code and may amount to imprisonment of up to five years and a fine of up to €75,000 under Article 511-24 of the Penal Code.<sup>53</sup> These laws make clear that surrogacy of any kind is prohibited in France.

In a 2011 French case,<sup>54</sup> after the child was born, under the contractual terms, the legal mother (also the surrogate mother) legally gave up her parentage to the intending father, who could not get the required travel documents from the French authorities in India, as it would be contrary to the French public policy to recognize parentage arising out of surrogacy.<sup>55</sup> Because the legal mother had given up her parentage, the Indian authorities could not give Indian citizenship to the child; as a result, the child became stateless.<sup>56</sup> Subsequently, in a decision dated May 4, 2011,<sup>57</sup> the *Conseil d’Etat* provided the child with *laissez-passer*<sup>58</sup> because the father could show the biological connection to the child with a confirmed DNA test.<sup>59</sup> Failure of the intending father to show his biological connection would have left the child stateless, much to the contradiction of international treaties protecting child rights to which France is a party.<sup>60</sup>

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51. *Id.*

52. *Id.* at 121.

53. *Id.*

54. *Id.* at 122.

55. Louis Perreau-Saussine & Nicolas Sauvage, *supra* note 50, at 122.

56. *Id.*

57. CE juge des référés, May 4, 2011, requête N°348778.

58. A “*laissez-passer*” is a provisional measure, usually used in case of loss of travel documents, allowing one-way entrance on the presumption that the person concerned is a French national. Perreau-Saussine & Sauvage, *supra* note 50, at 122-23.

59. *Id.* at 123.

60. These treaties include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the United Nations Convention on the Rights of the Child (UNCRC), etc.

## B. Nations Where Surrogacy is Largely Unregulated

Countries where surrogacy is largely unregulated share certain common characteristics.<sup>61</sup> In such nations, the legal status of the child born because of any arrangement will be determined by the general laws concerning legal parentage.<sup>62</sup> These rules are often like those in countries that expressly prohibit surrogacy arrangements, with the same inherent difficulties for intending parents. The unenforceability of the contract also means that the intending parent(s) must often rely on the continuing consent of the legal, surrogate mother to secure their parental rights. In some of these nations, legislation concerning surrogacy is currently being considered.<sup>63</sup>

However, not all countries are the same, and some have different ways of regulating or interpreting surrogacy arrangements. For instance, some nations provide no express prohibition in law concerning surrogacy arrangements in general.<sup>64</sup> In others, surrogacy arrangements are either expressly, or under general legal principles, void and unenforceable in terms of their main clause (*i.e.*, the obligation of the surrogate mother to surrender the child to the intending parent(s) following the birth).<sup>65</sup> In some other countries, commercial surrogacy is prohibited through either express criminal-law provisions or because such an arrangement would contravene other general criminal-law provisions, for example, those relating to child trafficking.<sup>66</sup> Generally, the precise conditions for treatments are left to the individual medical institutions, but medical institutions facilitate altruistic surrogacy arrangements in the majority of the nations.<sup>67</sup>

Brazilian law is an example of a system that leaves surrogacy agreements largely unregulated. In the Brazilian legal system, neither the

61. For example, this approach is taken by countries including, but not limited to: Argentina, Belgium, Brazil, the Czech Republic, Ireland, Japan, Mexico, the United States (sample jurisdictions include Michigan and New York), and Venezuela.

62. See de Alcantara, *in* INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 249.

63. See, *e.g.*, Eleonora Lamm, *Argentina*, *in* INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 6.

64. See, *e.g.*, Monika Pauknerová, *Czech Republic*, *in* INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 105; Marcelo de Alcantara, *Japan*, *in* INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 248.

65. See, *e.g.*, Steven H. Snyder, *United States of America*, *in* INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 390-91 (Michigan and New York).

66. See, *e.g.*, FORTPFLANZUNGSMEDIZINGESETZ, [FMEDG] [Reproductive Health Law], Dec. 18, 1998 (Switz.).

67. HCCH Preliminary Report, *supra* note 22, ¶ 13; see, *e.g.*, de Alcantara, *supra* note 64, at 249 (in Japan, only one doctor openly offers surrogacy services).

constitution nor the civil code makes any reference to surrogacy of any kind.<sup>68</sup> The only resolution which governs surrogacy nationally was enacted by the Federal Medical Board (*Conselho Federal de Medicina*, CFM)<sup>69</sup> which allows gestational surrogacy.<sup>70</sup> These regulations allow the clinics and reproductive service centers to use assisted reproductive techniques to create a surrogacy situation, subject to two conditions: (i) the surrogate and the intending mother must be close relatives (first- or second-degree relatives); and (ii) the intending mother must have a medical condition that prevents her from carrying the child or getting pregnant.<sup>71</sup> Additionally, the intending mother must also be the egg donor.<sup>72</sup> Hence, the above-mentioned requirements make gestational surrogacy the only kind allowed by the Brazilian rules. Private surrogacy arrangements with commercial purposes are not permitted in Brazil.<sup>73</sup> There is little Brazilian jurisprudence available on the subject because, to this date, neither the Superior Court of Justice nor the Supreme Court has been asked to rule on the issue of surrogacy.

Although the Brazilian legal system recognizes only gestational surrogacy, there are loop holes/open ends in it. The Brazilian Constitution explicitly forbids legal distinction among children based on their origin: “[c]hildren born inside or outside wedlock or adopted shall have the same rights and qualifications, any discriminatory designation of their filiation being forbidden,”<sup>74</sup> thus bringing children born out of alternative reproduction technology (ART) procedures within its ambit and entitling them to equal recognition and affiliation.

Though the Brazilian Constitution forbids legal distinction of children irrespective of their origin, the family law of Brazil applies only to permanent residents of Brazil, which includes foreigners.<sup>75</sup> So, if intending parent(s) who have Brazilian citizenship but are domiciled abroad have a child in their domicile country, the applicable law governing the surrogacy arrangements will not be Brazilian law, but rather the local law of their domicile country. In such a situation, the

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68. Nadia de Araujo, Daniela Vargas & Leticia de Campos Velho Martel, *Brazil*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 85.

69. CFM is a federal agency and has the power conferred by law, to regulate the medical profession. Hence, its regulations are binding. *Id.* at 85 n.1.

70. Resolução CFM No. 1,957 de 15 de Dezembro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 6.1.2011 (Braz.); Araujo, Vargas & de Campos Velho Martel, *supra* note 68, at 85.

71. Araujo, Vargas & de Campos Velho Martel, *supra* note 68, at 87.

72. *Id.*

73. *Id.*

74. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 227, para. 6 (Braz.).

75. Araujo, Vargas & de Campos Velho Martel, *supra* note 68, at 91.

commercial surrogacy arrangement may be either legal or illegal per the *locus regit actum* rule.<sup>76</sup> If the arrangement is illegal per the local laws of the domicile country and if the information about the surrogacy arrangement is revealed at the time of registration (by the intending mother) before the consulate or registry, the child will be denied registration of birth.<sup>77</sup>

Furthermore, nationality can be assigned in two ways in Brazil: *ius soli* or *ius sanguinis*.<sup>78</sup> A child born in the territory of Brazil will gain Brazilian nationality under *ius soli*. Alternatively, if a child has a parental link with a Brazilian national at the time of birth, the child, even if born abroad, can gain Brazilian nationality via the *ius sanguinis* rule as enshrined in Article 12, I, C of the Brazilian Constitution.<sup>79</sup> But, if the intending parent(s) fail to prove their parental link in the registration certificate to a child born out of a surrogacy arrangement abroad, the child will be given the nationality of the “gestational mother or the country of birth.”<sup>80</sup> This makes obtaining Brazilian nationality for a child born abroad to non-Brazilian intending parent(s) impossible via the *ius sanguinis* rule.<sup>81</sup>

### C. Nations that Expressly Permit and Regulate Surrogacy

The trend of expressly allowing, but regulating, surrogacy arrangements is growing across the globe.<sup>82</sup> These kinds of countries expressly permit surrogacy arrangements that are conducted in accordance with the local laws, *e.g.*, laws permitting only altruistic surrogacy arrangements, and enable the child to be legally affiliated to the nation of birth or to that of its parent(s).<sup>83</sup> In some countries, entering into a surro-

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Araujo, Vargas & de Campos Velho Martel, *supra* note 68, at 92.

81. *Id.*

82. HCCH Preliminary Report, *supra* note 22, ¶ 16. The trend is “growing” because many of these countries have enacted this legislation within the past ten years. For example, see Australia, *Surrogacy Act 2010* (Qld) (Austl.), Canada, Assisted Human Reproduction Act, S.C. 2004 (Can.), Hong Kong, Human Reproductive Technology Ordinance, (2007) Cap. 561 (H.K.), and Greece, ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 8:1455-60 (Greece). See also HCCH Preliminary Report, *supra* note 22, ¶ 16 n.60; *As demand for surrogacy soars, more countries are trying to ban it*, THE ECONOMIST (May 13, 2017), <https://www.economist.com/news/international/21721926-many-feminists-and-religious-leaders-regard-it-exploitation-demand-surrogacy>.

83. HCCH Preliminary Report, *supra* note 22, ¶ 16; see, *e.g.*, Shakargy, *supra* note 32, at 231 (Israel).

gacy arrangement not in accordance with the local laws can amount to a criminal offense.<sup>84</sup>

The legislation in these countries is of two kinds. The first applies to a process of “pre-approval” of surrogacy arrangements, whereby the prospective intending parent(s) and the surrogate mother must present their arrangement to a body, either a court or a committee established for this purpose, for approval before proceeding with any medical treatment.<sup>85</sup> The bodies are required to verify that the legislative conditions have been met.<sup>86</sup> The second group of legislation applies to *ex post facto* surrogacy arrangements where the intending parent(s) need to follow a set procedure established under law to obtain legal parentage of the surrogate child.<sup>87</sup> Unlike the first group, here the process consists of a “retrospective consideration” of whether an arrangement meets all the legal requirements post-birth, in order to get a legitimate “parenthood order” that transfers legal parentage to the intending parent(s).<sup>88</sup>

The trend across these nations is to permit only altruistic surrogacy arrangements,<sup>89</sup> where, largely, the intending parent(s) are permitted to pay “reasonable expenses” to the surrogate.<sup>90</sup> An exception is Israel, where the legislation permits the committee that pre-approves surrogacy arrangements to allow monthly “compensation payments” to the surrogate for “pain and suffering” and “reimbursement for her expenses,”<sup>91</sup> which are subject to the discretion of the parties and

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84. HCCH Preliminary Report, *supra* note 22, ¶ 16. In some nations, for example, Greece and Israel, entering into any arrangement that is not compliant with the legislation will amount to a criminal offence; in other countries, for example, Australia, criminal liabilities are limited to entering into or brokering a commercial arrangement. *Id.* ¶ 16 n.62.

85. Shakargy, *supra* note 32, at 231-32.

86. *Id.* at 232.

87. HCCH Preliminary Report, *supra* note 22, ¶ 17; *see, e.g., Surrogacy Act 2010 (Qld)* (Austl.); Assisted Human Reproduction Act, S.C. 2004 (Can.); ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 8:1455-60 (Greece).

88. HCCH Preliminary Report, *supra* note 22, ¶ 17.

89. *Id.* ¶ 18.

90. *Id.* “Depending upon the particular State, such expenses may be undefined (*e.g.*, the United Kingdom) or may be expressed to include, for example, medical, counseling and/or legal expenses (*e.g.*, Australia . . .) and, in a few States, “loss of income” (*e.g.*, Greece (and this may even be paid where the surrogate was previously unemployed)).” *Id.* ¶ 18 n.69; *see also Snyder, supra* note 65, at 378; *Surrogacy Act 2010 (Qld)* (Austl.); *Assisted Reproductive Treatment Act 2008* (SA) (Austl.).

91. HCCH Preliminary Report, *supra* note 22, ¶ 18.

indirectly the committee.<sup>92</sup>

Furthermore, the eligibility criteria for surrogate mothers and intending parent(s) differs with each country and its laws, especially as to surrogate mothers.<sup>93</sup> These vary across countries but include requirements as to: age;<sup>94</sup> satisfactory completion of medical and psychological screening; already having a child; civil status;<sup>95</sup> and receipt of independent legal advice.<sup>96</sup> Additionally, some nations consider the inability of the intending mother to conceive<sup>97</sup> or sexual orientation of the intending parent(s).<sup>98</sup>

Intending parent(s) of surrogacy arrangements in countries that regulate the entire process usually are automatically regarded as the “legal parents of the child from the moment of birth.”<sup>99</sup> One exception, however, is Israel, where the intending parent(s) need to apply for a “parenthood decree” within seven days of the birth of the child.<sup>100</sup>

Israel is an example of a country that expressly permits and regulates surrogacy. Surrogacy is regulated in Israel under the Embryo Carrying Agreement Act (Agreement Authorization & Status of the Newborn Child), 5756-1996.<sup>101</sup> This act is the only legal framework governing surrogacy, and any arrangement not in consonance with the Act will be deemed to be a criminal offense.<sup>102</sup> Per the Act, surrogacy agreements must be approved by a state-appointed committee composed of seven members: three physicians, a clinical psychologist, a social worker, a public representative who is a jurist by training, and a person of the

92. HCCH Preliminary Report, *supra* note 22, ¶ 18 (citing Shakargy, *supra* note 32, at 231-46).

93. HCCH Preliminary Report, *supra* note 22, ¶ 20.

94. *Id.* (citing Australia, Israel, and South Africa); *see, e.g., Surrogacy Act 2010 (Qld)* (Austl.); Shakargy *supra* note 32, at 236 (in Israel, a surrogate must be between 22 and 38 years); Regulations Relating to Artificial Fertilisation of Persons, GN 1165 of GG 40312 (15 Aug. 2016).

95. HCCH Preliminary Report, *supra* note 22, ¶ 20; *see, e.g., Shakargy, supra* note 32, at 236 (in Israel, a surrogate must be unwed, but this can be waived by committee if no other solution can be found).

96. HCCH Preliminary Report, *supra* note 22, ¶ 20; *see, e.g., Surrogacy Act 2008 (WA)* s 17(c) (Austl.).

97. HCCH Preliminary Report, *supra* note 22, ¶ 20; *see, e.g., Konstantinos A. Rokas, Greece, in INTERNATIONAL SURROGACY AGREEMENTS, supra* note 32, at 145; Shakargy, *supra* note 36, at 235.

98. HCCH Preliminary Report, *supra* note 22, ¶ 20.

99. *Id.* ¶ 21.

100. Rokas, *supra* note 97, at 148.

101. Shakargy, *supra* note 32, at 231.

102. *Id.*; Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law, 5756-1996, SH No. 1577, §§ 2(1), 7 (Isr.).

clergy of the parties' religion.<sup>103</sup> Three of the members must be males, and three must be females.<sup>104</sup> The committee examines the medical evaluations demonstrating the intending mother's inability to carry a pregnancy, medical and psychological evaluations demonstrating all the parties' compatibility with the process, and a psychologist's or social worker's confirmation that the intending parent(s) have received adequate counseling, including regarding other parenting options, before the committee decides whether the case is fit for entering into a surrogacy arrangement.<sup>105</sup> The committee guidelines operate as the de facto law, listing clauses that any surrogacy agreement must incorporate and adhere to.<sup>106</sup>

As religious law is the personal law that is used in Israel, it was a key influence on the Embryo Carrying Agreement Act.<sup>107</sup> Under the Act, as per Jewish religious law, the surrogate is the natural legal parent of the child.<sup>108</sup> Religious law looks down upon a child born outside of wedlock, labeling such a child as "Mamzer."<sup>109</sup> Therefore, it is essential that the surrogate not be married, else the surrogate child (usually born using the sperm of the intending father) will be labeled Mamzer.

Another rule states that the surrogate must not be a blood relative of the parents; the natural outcome of this rule is that use of commercial surrogacy is practically inevitable.<sup>110</sup> The state committee approves monthly compensation payments to the surrogate for pain and suffering, in addition to the medical expenses and other expenses incurred, thereby giving the arrangement a commercial color.<sup>111</sup> Legal parenthood of a child born out of surrogacy is determined only by a court order, through which the surrogate child is considered the legal child of the intending parent(s).<sup>112</sup>

In Israel, there is no official law regarding foreign surrogacy, however, and currently Israel does not recognize foreign surrogacy arrange-

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103. Shakargy, *supra* note 32, at 231-32; Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law, 5756-1996, SH No. 1577, § 3(a) (Isr.).

104. Shakargy, *supra* note 32, at 232.

105. *Id.*

106. *Id.*

107. *Id.* at 236.

108. *Id.*

109. Shakargy, *supra* note 32, at 236. Mamzer, as well as his descendants, are not allowed to marry any Jew except for a Mamzer. *Id.* at 236 n.47.

110. *Id.* at 236.

111. *Id.* at 238.

112. *Id.* at 239.



ments.<sup>113</sup> All children born abroad to Israeli parents are entitled to enter Israel and receive Israeli citizenship based on their genetic connection with their parents;<sup>114</sup> furthermore, foreign birth certificates do not suffice for proving parenthood.<sup>115</sup> Therefore, in order to grant Israeli citizenship, the Ministry of Interior requires that parenthood be proven by genetic testing and that the actual testing be done in Israel, although the sample may be retrieved from abroad.<sup>116</sup> Once a genetic relationship is established, the surrogate child is considered the natural child of the intending parent(s), is registered accordingly, and surrogacy is disregarded.<sup>117</sup> In the event the surrogate child born abroad has no genetic link with the parent, he shall be not be recognized as a child of the intending parent(s) by the Israeli court. If the child is born in a country that does not recognize nationality based on *lex soli*,<sup>118</sup> a legal principle that a person's nationality at birth is determined by the territory within which he or she was born, and the surrogate mother gives up her legal parenthood over the child, the child will be left stateless.

#### D. Nations with a Permissive Approach to Surrogacy, Including Commercial Surrogacy

Laws in countries from this category: allow commercial surrogacy to be practiced; have procedures granting legal parentage to one or both intending parent(s); and do not have qualifications in terms of domicile or residency of the intending parent(s).<sup>119</sup> Reasons for adopting a

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113. *Id.* at 242.

114. Shakargy, *supra* note 32, at 242. Like the domestic law, the courts must pass an order on parenthood based on DNA tests. The issue of determining parenthood based on DNA tests is currently being contested in the Israeli court.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* The Citizenship Act, No. 57 of 1955, INDIA CODE (2017).

119. HCCH Preliminary Report, *supra* note 22, ¶ 26; *see, e.g.*, Usha Rengachary Smerdon, *India*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 187 (Surrogacy is largely unregulated in India with bills pending both at the State and Federal level regulating surrogacy such as Assisted Reproductive Technologies (Regulation) Bill 2010.); SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [Family Code] arts. 16(5), 51, 52 (Russ.); Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBRARY OF CONG.: GLOB. LEGAL MONITOR (Apr. 6, 2015), <http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/> (discussing the Thai Protection for Children Born Through Assisted Reproductive Technologies Act); Gennadiy Druzenko, *Ukraine*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 357 (discussing Article 281 of the Civil Code of Ukraine); HCCH Preliminary Report, *supra* note 22, ¶ 26 n.94 (stating that there is affirmative

permissive approach vary across countries and are largely determined by that nation's economy, public policy, culture, or an existing legal framework or lack thereof.<sup>120</sup> For example, commercial surrogacy flourished in India partly due to permissive laws and partly because people harnessed the country's potential to grow in "medical tourism."<sup>121</sup>

The common characteristics among these nations may result from legislation, judicial practice, an absence of regulation, or a combination of these.<sup>122</sup> Countries with legislation regulating surrogacy have eligibility criteria that must be fulfilled by the intending parent(s) or the surrogate in order to enter legally into a surrogacy arrangement.<sup>123</sup>

Legal parentage for the intending parent(s) in some of these nations may be immediately placed on the birth certificate following the birth if certain conditions are fulfilled, such as having the surrogate mother's consent.<sup>124</sup> By contrast, some countries issue a pre-birth order whereby the child will automatically be the legal child of the intending parent(s) at birth.<sup>125</sup> The rules on the enforceability of the surrogacy contract also vary across the nations, and, while in some countries the principle clause that requires the surrogate to hand the child over to the intending parent(s) and relinquish her rights would not be enforceable, in other countries it appears the clause may be enforceable.<sup>126</sup>

case law or legislation allowing commercial surrogacy in 18 states: case law—California, Maryland, Massachusetts, Ohio, Pennsylvania, South Carolina; statutes—Alabama, Arkansas, Connecticut, Illinois, Iowa, Nevada, North Dakota, Oregon, Tennessee, Texas, Utah, West Virginia).

120. HCCH Preliminary Report, *supra* note 22, ¶ 26.

121. *Id.* (citing Rupa Chinai & Rahul Goswami, *Medical visas mark growth of Indian medical tourism*, 85 BULLETIN WORLD HEALTH ORG. 164, 164 (2007) (In 2003, the finance minister called for the country to become a "global health destination.")).

122. HCCH Preliminary Report, *supra* note 22, ¶ 26. In India, there are non-binding guidelines concerning ART that also mention certain aspects relating to surrogacy. *Id.* ¶ 26 n.98 (citing INDIAN COUNCIL OF MEDICAL RESEARCH, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA (2005), [http://icmr.nic.in/art/Prilim\\_Pages.pdf](http://icmr.nic.in/art/Prilim_Pages.pdf)).

123. HCCH Preliminary Report, *supra* note 22, ¶ 26; *see, e.g.*, Protection for Children Born Through Assisted Reproductive Technologies Act (Thail.), [http://www.senate.go.th/bill/bk\\_data/73-3.pdf](http://www.senate.go.th/bill/bk_data/73-3.pdf).

124. HCCH Preliminary Report, *supra* note 22, ¶ 27. For example, India based legal parentage on the non-binding National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India and due to general practice.

125. *Id.* (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)).

126. HCCH Preliminary Report, *supra* note 22, ¶ 26; *see, e.g.*, India Const. art. 8; SEMEINYI KODEKS ROSSISKOI FEDERATSII [SK RF] [Family Code] art. 51 (Russ.) (establishing that the principle clause is not enforceable).

Prima facie flexibility in laws of these nations has turned them into hot spots for international surrogacy arrangements.<sup>127</sup> Unfortunately, the flexibility in law often misguides the intending parent(s) into hiring surrogates from these nations while oblivious to legal risks, such as the risk that acquiring legal parentage in these countries might not be recognized universally or in their own country.<sup>128</sup>

India is an example of a country that has adopted a very permissive approach to surrogacy agreements. India has never prohibited surrogacy, and the industry has been regulated by the promulgation of non-binding regulations by the medical community.<sup>129</sup> Absence of legislation dealing with surrogacy implies that India does not prohibit surrogacy; this theory was upheld by the Supreme Court of India in 2008, where the judge held that commercial surrogacy is not prohibited in India.<sup>130</sup> However, in 2015, the Supreme Court held that, due to an affidavit filed in the case by the Union of India, commercial surrogacy for foreign couples was not recognized under Indian laws.<sup>131</sup>

Currently, the Assisted Reproductive Technologies (Regulation) Bill 2010<sup>132</sup> is pending before the Indian parliament.<sup>133</sup> The draft bill lays down laws regulating the rights of surrogate mothers, intending parent(s), and surrogate children, as well as financial and contractual aspects of surrogate arrangements and other particulars incidental thereto.<sup>134</sup> The draft bill approves of altruistic surrogacy only where any possibility of earning profit will be eliminated.<sup>135</sup> In the meantime, non-binding National Guidelines for Accreditation Supervision and Regulation of ART Clinics in India, which are promulgated by the Ministry of Health and Family Welfare, the Government of India and Indian Council of Medical Research, and the National Academy of Medical Sciences in 2005, are in place.<sup>136</sup>

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127. HCCH Preliminary Report, *supra* note 22, ¶ 28.

128. *Id.*; *see, e.g.*, India Const. art. 8; SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [Family Code] art. 51 (Russ.).

129. Smerdon, *supra* note 119, at 187.

130. Yamada v. Union of India, (2008) 13 SCC 518 (India).

131. Union of India & Anr. v. Jan Balaz & Ors., (2015) SC (India); Nirmala George, *India's Lucrative Surrogacy Business Has Been Shut Down*, STARTRIBUNE (Dec. 24, 2015), <http://www.startribune.com/india-s-lucrative-surrogacy-business-has-been-shut-down/363333171/>.

132. Hereinafter referred to as "draft bill" for the purposes of this paper.

133. Smerdon, *supra* note 119, at 187.

134. *See id.*

135. *Id.*

136. *Id.* at 188.

Lack of laws governing surrogacy has led to a plethora of cases at the international level involving extended custody battles, immigration issues, and stateless children. As per the guidelines, the “intending genetic” mother (either Indian or foreign) shall have her name on the birth certificate, obliging her with the rights of a “legal mother.”<sup>137</sup> But, if the foreign intending parent(s) state the surrogate as the legal mother due to genetic link on the birth certificate,<sup>138</sup> the child becomes Indian due to the biological connection with the surrogate mother, thereby making it difficult to obtain citizenship/travel documents that mirror those of the intending parent(s).<sup>139</sup>

In one case, an Israeli homosexual couple who entered into a surrogacy arrangement with an Indian woman were denied permission by the Family Court in Israel to proceed with a paternity test to prove that one of them was the biological father of the children because only heterosexual couples can enter surrogacy agreements in Israel.<sup>140</sup> After a legal battle before the Jerusalem family court and an appellate court, a paternity test was ordered by the court, subsequent to which the children were allowed to be registered by the Israeli Consulate in India as Israeli citizens.<sup>141 142</sup> This case illustrates the difficulties faced by intending parent(s) where nations have vastly disparate laws regarding surrogacy agreements.

#### VI. ADDRESSING THE ISSUE OF STATELESS CHILDREN VIA AN INTERNATIONAL AGREEMENT

Countries that have made a stand for or against the different forms of surrogacy have done so on different grounds and with varied outcomes, as discussed above in this paper. This has created an untenable situation in inter-country surrogacy agreements where neither the intending parent(s) nor the surrogate mothers receive firm guarantees or legal safeguards, but instead face a clash of national legislation, uncertainty regarding payments, threats of exploitation, and court

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137. See WELLS-GRECO, *supra* note 1, at 187-88.

138. This typically happens due not to lack of clear compulsory guidelines or legislative basis, but rather because of mere medical practices, which differ from clinic to clinic or state to state. See, e.g., WELLS-GRECO, *supra* note 1, at 188.

139. *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518 (India); *Jan Balaz v. Anand Municipality & Ors.*, AIR 2010 Guj. 21 (India).

140. Smerdon, *supra* note 119, at 210; Shakargy, *supra* note 32, at 235.

141. Shakargy, *supra* note 32, at 242; see also Ronen, *Gay father lands in Israel with twins*, YNETNEWS (May 28, 2010), <https://www.ynetnews.com/articles/0,7340,L-3895445,00.html>.

142. Smerdon, *supra* note 119, at 210.

proceedings and parental-rights conflicts after birth. Confusion arises over which country or which parents the child belongs to, making citizenship controversial and parenthood artificial. While the courts of several countries have taken steps to ensure the safeguarding of vulnerable children in these cases, more laws and/or regulations need to be enacted at the international level, such as those suggested by India or applied in Israel. Such laws and regulations would avoid confusion and legal interjection in ISAs. Banning commercial surrogacy does nothing to help this problem and creates the dangerous possibility that surrogacy would transfer to the black market, with unregulated touts offering cut-price deals in back streets. Just like other areas of trade, commercial surrogacy needs to be controlled by an internationally recognized regulatory framework with enforceable rules and policies so as to be practically and economically viable.

International regulation of surrogacy is a complicated matter and would require great cooperation and economic resources to implement. Transnational surrogacy agreements need a regulatory framework that is independent of the individual countries. In order to protect all parties involved and to equalize the regulatory disparity across the globe, one idea is to introduce a separate convention under the Hague Conference on Private International Law (the HCCH)<sup>143</sup> modeled on the existing Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption of 1993 (Hague Conference on Private International Law).<sup>144</sup> The draft convention would ensure that the contracting nations follow internationally recognized standards, with legal safeguards in the best interests of the surrogate, the intending parent(s), and the surrogate child. The draft convention would categorize countries based on their laws and stances on surrogacy so that couples, under protection of international law, can choose from these groups based on their own nationality and state laws.

As the 2012 HCCH Preliminary Report on the Issues Arising from International Surrogacy Arrangements states, “[t]he ultimate ‘need’ is therefore, for a multilateral instrument which would put in place structures and procedures to enable States to ensure that these obligations are being met in the context of this transnational phenom-

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143. A separate convention under The Hague Conference will be referred to as “draft convention” for the purposes of this paper.

144. Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51 (1998), 1870 U.N.T.S. 182 [hereinafter Convention on Protection of Children].

enon.”<sup>145</sup> The most important aspect of this legislative approach is the underlying recognition that ISAs exist and that nations need to cooperate when conflicts of law surrounding these arrangements arise. The legal issues that arise in ISAs are, in reality, conflict-of-law and comity problems that can arise in non-surrogacy contexts and are therefore more effectively addressed within a broader context than that of surrogacy. Hence, the draft convention should be developed with an eye to navigating the conflict of laws and comity problems in ISAs, with emphases on the establishment of a framework for international cooperation, on the need for substantive safeguards, and on procedures for courts and administrative authorities.<sup>146</sup> This includes seeking to eliminate “limping” legal parentage, ensuring children can acquire a nationality, ensuring their right to know their identity is secured, and putting in place procedures to protect them from harm. There is a real danger that the current situation is failing children by not providing these protections.

A few multilateral conventions exist that could address the issue of ISAs, such as the Adoption Convention,<sup>147</sup> but these are ineffective for governing ISAs because parenting and reproducing are two different processes. Adoption affords the adoptive parents the legal right to “parent” someone else’s child over whom they would otherwise not possess legal authority, whereas surrogacy is as close as it gets for intending parents(s) to beget an offspring with some genetic contribution of their own.<sup>148</sup>

Bilateral treaties instead of, or in addition to, the draft convention to regulate international surrogacy arrangements will not be very effective because: i) confusion will be created due to a plethora of disparate treaties governing ISAs from numerous countries, making it difficult for laymen (like intending parents) to understand and interpret the

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145. HCCH Preliminary Report, *supra* note 22, ¶ 48.

146. See Louise Anna Helena Ramskold & Marcus Paul Posner, *Commercial surrogacy: how provisions of monetary remuneration and powers of international law can prevent exploitation of gestational surrogates*, 39 J. MED. ETHICS 397 (2013).

147. Convention on Protection of Children, *supra* note 144.

148. AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, SEC. 112B, 10 (adopted on Feb. 8, 2016), [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/112b.html](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/112b.html). A few of the reasons why the Adoption Convention will be unsuitable to govern ISAs are: 1) permission of adoption by both the concerned countries, Convention on Protection of Children, *supra* note 144, art. 5; 2) priority of keeping the child in its nation of origin, Convention on Protection of Children, *supra* note 144, art. 4(b); and 3) consent of the birth mother, to be taken after the child is born, Convention on Protection of Children, *supra* note 144, art. 4(c)(4).

laws; ii) framing these bilateral treaties will take time because negotiations are inherently time consuming; iii) dismantling these numerous bilateral treaties would be difficult and could lead to further confusion if and when a comprehensive multilateral solution is reached; and iv) these treaties may cause further cost, delay, and heartache to intending parents who choose to pursue surrogacy.<sup>149</sup>

## VII. DRAFT PROVISIONS OF THE PROPOSED INTERNATIONAL INSTRUMENT

This section provides draft provisions of a proposed international instrument aimed at regulating international surrogacy agreements. Any proposed international instrument should be in the form of an international convention that can be adopted by the member states by ratification and who may subsequently modify, amend, or enact laws or promulgate ordinances and regulations in their respective countries in consonance with the convention. The main purpose of the convention is to bring clarity on the various stances that nations have taken on surrogacy and to provide a reference point to citizens across the globe on countries and their respective domestic surrogacy laws. This will control the confusion caused by the varied legal positions of countries, thereby controlling illegitimate commercial and altruistic surrogacy arrangements. An international convention will be more effective than a model law because for any international instrument to be successful on a topic so diverse and fragmented, it is imperative for nations to express their position on surrogacy internationally, thereby controlling confusion. Reference in terms of smooth application of the draft convention can be given to the Adoption Convention, which has attracted 89 contracting states. The Adoption Convention has been the most effective instrument in international protection of children. Special attention should be paid to ensure countries like the United States, India, Thailand, Russia, Greece, etc. become contracting states, as they are the most sought-after destinations for ISAs. The proposed language and text (in brief) of the draft convention could be along the following lines<sup>150</sup>:

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149. AM. BAR ASS'N, *supra* note 148, at 4-5.

150. The draft shall address citizenship, nationality of surrogate children, and surrogacy arrangements. The draft does not discuss other points ancillary and incidental to international surrogacy arrangement such as child trafficking or exploitation of women. The basic idea of the text is derived from the outline of The Hague intercountry adoption convention and from the Convention on Protection of Children and cooperation in respect of inter-country adoption.

**Aim**

Every child, born naturally or out of a surrogacy arrangement, shall have the right to parents and a nationality, irrespective of his or her place of birth.

**Objective**

(i) Developing a system of “legally binding standards” governing and regulating ISAs as well as ensuring its stricter implementation; and (ii) establishing an inter-country network ensuring effective and timely communication between all the national and local jurisdictions involved.<sup>151</sup>

**Scope**

Taking an unconventional path, every member state will have the freedom to ratify only those sections of the draft convention that are suitable to their domestic laws and practices. This will ensure maximum participation despite vast discrepancies in domestic laws among the countries. Signing the draft convention will make the instrument a one-stop-spot for reference for intending parents exploring surrogacy options internationally.

In addition to the above, every child born out of an arrangement certified as made in accordance with this convention will have certainty regarding his parentage and nationality, which will be recognized by the respective national governments.

**Types of Surrogacy Arrangements**

The draft convention shall provide for all kinds of surrogacy arrangements, including altruistic and commercial surrogacy, and shall frame laws governing each of them separately so that nations have the freedom to ratify only those sections of the convention that are suitable to their respective domestic (and religious) laws.

**Competent Authorities, Associations, and International Surrogacy Arrangement Committees**

To establish a framework of cooperation and channels of communication between the concerned countries, signatory states shall establish a uniform system of communication. The convention shall establish a “Competent Authority” at the federal level of every state, which will be the center point for communication among the contracting states. The Competent Authority will be responsible for receiving applications and granting permission to the contracting parties of the ISAs. It shall also

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151. Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy*, in INTERNATIONAL SURROGACY AGREEMENTS, *supra* note 32, at 534.



be the administrative authority for providing ground support to the foreign intending parent(s) or the surrogate mothers. Functions of the Competent Authority shall be governed by an association based on a multi-stakeholder governance model, consisting of the government at the federal level, social-service groups, lawyers, and doctors, to avoid concentration of power in one hand. The Competent Authority will have the power to appoint a “Governing Committee.”

### **Governing Committee**

The Governing Committee will be the deciding authority on all applications of intending parents and interested surrogate mothers to enter into an ISA and shall do so efficiently, with decision times not exceeding eight weeks. The Governing Committee shall consist of seven members<sup>152</sup>: three doctors, one specializing in gynecology and specifically ART, one in obstetrics, and one in internal medicine; a clinical psychologist; a social worker; a lawyer; and a clergyman (if the state follows personal laws, *e.g.*, Israel). In addition, the Governing Committee shall have a set of detectives/agents who will investigate the backgrounds of the proposed parties to the ISAs, *i.e.*, the intending parent(s) and surrogates, as well as the clinics where treatments can be performed.

### **Panel of Surrogate Mothers**

The Governing Committee will have a panel of surrogate mothers who wish to rent their wombs, either for for-profit or not-for-profit purposes. An interested surrogate shall be within an established age bracket and a citizen of the contracting state through which she intends to apply to be a part of the panel. The surrogate shall be thoroughly investigated on her social, financial, psychological, family, and medical background,<sup>153</sup> and, subject to the surrogate’s meeting the standards laid down by the Governing Committee, the surrogate shall be put on the panel from which intending parents may choose their surrogate.

There shall be a uniform amount of wages fixed, world over, that shall be paid to the surrogate, apart from the medical expenses incurred (in the case of commercial surrogacy arrangements). The wages shall be revised on a regular basis, based on the market activities and economies of the respective contracting states.

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152. Shakargy, *supra* note 32, at 231.

153. For example, the surrogate must already have a child of her own and should not be allowed to have more than four children including her own, with a minimum gap of two years in between each child.

### **Intending Parent(s)**

Similarly, intending parents shall also meet financial, educational, social, psychological, and medical standards set out by the Governing Committees of both of the contracting states. The Governing Committees shall take all necessary steps required to ensure that the child is allowed entry (irrespective of the kind of surrogate arrangement entered between the parties) and is given the nationality of the intending parent(s). The required paperwork by the concerned governmental departments of the contracting states shall be obtained before issuance of visas to the intending parent(s). Once the application of the intending parent(s) is approved by both the contracting states, they shall be provided with a visa to enter the country of the surrogate mother for the sole purpose of executing the ISA.

### **Procedural Requirements**

Subject to satisfaction of the conditions listed by the Governing Committee, the parties shall be allowed to sign the ISA. The signatures shall be preceded and succeeded by counselling sessions for the intending parent(s) and the surrogate on their rights and liabilities arising from the contract. Subject to the parties agreeing to the contractual terms, the contract shall be signed.

### **Resolution of Disputes**

An international governing body responsible for coordination between respective Competent Authorities of countries, and for dispute resolution between nations subject to an ISA, shall be established. In the case of disputes, the issue shall be referred to the international governing body, and that body's decision shall be final and binding on both the contracting parties.

### **General Provisions**

The ISA shall address issues concerning offenses, legal obligations, disclaimers, determination of parentage, and nationality as if the intending mother and father should be the legal parents for all practical purposes right from the time of registration of birth in the hospital records. The intending parent(s) as well as the surrogate shall also be counseled on how to care for the surrogate child and how to build a healthy relationship with him/her to ensure holistic development and growth of the child.

## VIII. CONCLUSION

With the advent of technology and growing inability of intending parents to reproduce, demand for ISAs has been on the rise. To

counter the issues arising from them, countries, for example, India,<sup>154</sup> are trying to fix the issue at a local level; however, the international nature of these arrangements calls for a more global solution.<sup>155</sup> The current situation is failing to ensure protection of children's fundamental rights and interests.<sup>156</sup> It is therefore essential to establish a system to uniformly regulate ISAs. The draft convention aims to control the confusion and ambiguity caused by the numerous nations' laws that result in illegitimate surrogacy arrangements. The pre-approval system, as discussed above, will allow the countries concerned to agree in each individual case whether and under what conditions an arrangement can proceed. The draft convention, which derives inspiration from the laws and proposed legislation of countries such as Greece, Israel, and India, can therefore be described as a sophisticated domestic approach taken to the international level. Once the draft convention has been adopted and is subsequently functional, no exceptions should be allowed, and intending parents of member states involved in arrangements that do not comply with the convention should be denied any remedies.<sup>157</sup> However, to effectively control the increasing issues arising out of ISAs, countries should be encouraged to allow domestic surrogacy arrangements so that the intending parent(s) do not have to scout for options outside their country. This will also control the underground surrogacy market and protect surrogate mothers and children. Banning surrogacy arrangements cannot be an option because the desperation of humans to start a family overrides all risks, thus making laws prohibiting surrogacy pointless.

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154. With its Assisted Reproductive Technologies (Regulation) Bill, 2010, India intends to curtail the growing business of ISAs by allowing only altruistic surrogacy.

155. HCCH Preliminary Report, *supra* note 22, ¶ 64.

156. *Id.*

157. Trimmings & Beaumont, *supra* note 151, at 549.