International surrogacy arrangements and statelessness

Sanoj Rajan

1. Introduction

Statelessness induced by international surrogacy is a comparatively new phenomenon that has emerged because of advances in Artificial Reproductive Technology (ART). Most births of children conceived through medically assisted reproductive techniques do not cause especial problems in the field of nationality laws. However, in cases of international surrogacy arrangements, there is a real risk of statelessness for children if there is a conflict in the surrogacy regime and the nationality laws of the surrogate mother’s country of nationality and that of the commissioning parents. This can mean that nationality cannot be attributed to the child in certain circumstances. Surrogacy, especially international surrogacy is prohibited, highly regulated, or actively discouraged by legal and regulatory bodies in most countries. The objectives of such restrictive laws are to avoid the exploitation of vulnerable women and children, prevent trafficking of women and newborns, and the circumvention of international adoption protocols. However, in some circumstances, these laws and regulations are creating statelessness amongst children born through international surrogacy arrangements.

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2. Definition of surrogacy and different types of surrogacies

Surrogacy is the process of one person carrying and delivering a child for another person. Such arrangements are made for various reasons, including medical conditions such as absence or malformation of the womb, recurrent pregnancy loss or repeated in-vitro fertilization implantation failures in the genetic mother. Sometimes there are non-medical reasons, such as aesthetic or other reasons of convenience, for hiring a surrogate mother.

Surrogacy is classified according to the nature of the contract and relationship between the stakeholders. Traditional surrogacy is the earliest form of surrogacy in which the egg of the surrogate mother and the sperm of either the commissioning father or a donor are used in fertilization; needless to say, in these cases the child is genetically related to the surrogate mother. More recently, as scientific and medical technology has advanced, the role of the surrogate mother has been reduced to that of carrying the embryo in her womb during pregnancy and delivering the child. This type of surrogacy is known as ‘gestational surrogacy’, and the egg is either procured from the commissioning mother or an egg donor and is fertilized in vitro (IVF), and implanted in the surrogate’s womb. Hence in gestational surrogacy, the surrogate mother is not genetically related to the baby.

Gestational surrogacy can be further classified on the basis of the money involved in the surrogacy arrangement. In altruistic surrogacy, the surrogate receives no financial reward for her pregnancy except the medical and nutritional expenses incurred during the pregnancy. In commercial surrogacy there is a financial reward paid to the surrogate in addition to the regular expenses.

3. Parenthood of surrogate children

Traditionally, parenthood involves three components: 1) an intention or willingness to have a child; 2) genetic consanguinity; and 3) giving birth to and raising a child. Hence, in ordinary parlance, parenthood involves only two parents. In the case of surrogacy, however, parenthood...
may involve up to three different mothers and up to three different fathers depending on the facts and national legal regimes involved. In most legal systems, motherhood is assumed only when a person gives birth to the child. Hence the surrogate mother is considered a legal mother in many countries, by operation of law. For instance, a British couple making a commercial surrogacy arrangement abroad would find that British law regards the surrogate and her husband as the legal parents and not the commissioning British couple under the Human Fertilisation and Embryology Act 1990.4

On the other hand, the commissioning parents will become the legal parents, irrespective of their genetic connection to the child, if their country and the surrogate mother’s country have legalized surrogacy. For example, if a US citizen from California commissions a surrogate baby in Ukraine: as both countries have legalized surrogacy, the commissioning parents become legitimate parents irrespective of any genetic connection. If there is a genetic relationship between the commissioning parents and child, then, in most of the countries where jus sanguinis is followed, the commissioning parents will automatically become legal parents without any surrogacy enabling laws.

Another category of people who may assume parentage in surrogacy arrangements are the ‘gamete donors’ who are neither the surrogate mother nor the commissioning parents but are the genetic parents who donate sperm and eggs. However, the role of gamete donors as parents comes to light only if they have not donated anonymously and are proved to have a genetic connection with the child. Usually surrogacy arrangements across the world require the donors to be anonymous, thus reducing any possible confusion.

4. Nationality of surrogate children

Usually, children have the same nationality as their parents and this also corresponds to their country of birth. However, just as there are difficulties in determining legal parenthood in cases of international surrogacy, there are also challenges in respect of the determination of

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4 See Re X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (Eng.); See also Mark Henaghan, “International Surrogacy Trends: How Family Law is Coping” (2013) Australian Journal of Adoption Vol. 7 No.3.
nationality because different jurisdictions have different approaches. Hence, determination of nationality also becomes complicated, as nationality is determined by parentage and/or by place of birth. Nationality laws are often interpreted in such a way as to exclude commissioning parents from becoming legal parents of a child born overseas via surrogacy, especially in cases of commercial surrogacy, unless the country has legalized commercial surrogacy. To analyse this problem in detail, the countries are categorized according to their legal regime on surrogacy.

5. Legal challenges

Statelessness issues arise in international surrogacy arrangements when the commissioning parents are from a country where it is prohibited to commission commercial surrogacy in another country. The laws relating to parentage and nationality usually preclude the commissioning parents from becoming the legal parents of the child born in a foreign country via surrogacy. If the surrogate mother’s country also fails to recognise her as the parent because surrogacy is a valid legal act, and if unconditional jus soli provisions are not in place, the child will end up stateless. There are also other reasons for surrogacy-related statelessness. Analysis of cases from various jurisdictions reveals that statelessness arising out of surrogacy could arise due to a combination of any two or more of the situations below:

- **Denial of nationality of children by the Commissioning parents’ country because of laws prohibiting or restricting surrogacy.** In this category of cases the commissioning parents from a country, where surrogacy or commercial surrogacy is restricted or prohibited (Categories B and C above respectively), commission a baby in another country. Subsequently, they try to take the baby back to their country but are blocked because of strict anti-surrogacy laws. The surrogate child becomes stateless if the surrogate mother’s country also denies the child nationality because the law permits surrogacy there. There are many cases to illustrate this situation, such as Jan Balaz v Anand

5 Ibid, Henaghan (n 7).
CHAPTER 11: SAFEGUARDS AGAINST CHILDHOOD STATELESSNESS

<table>
<thead>
<tr>
<th>Category A: Commercial surrogacy is legally permitted</th>
<th>Category B: Commercial surrogacy is restricted but altruistic surrogacy is usually allowed</th>
<th>Category C: Surrogacy is entirely prohibited</th>
</tr>
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<tbody>
<tr>
<td>India*, Ukraine, Russia, Panama, Thailand and some states in the USA such as California and Florida.</td>
<td>Canada, UK, Australia, New Zealand, Israel, and the Netherlands.</td>
<td>France, Italy, Germany, China, Japan, Switzerland, Greece, Spain, and Norway.</td>
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These countries have adopted laws to enable a surrogate-born child to get citizenship from the commissioning parents. For example, India and Ukraine issue birth certificates in the commissioning parents’ names bestowing parentage on the commissioning couple and severing the claims of the surrogate mother and her husband to parentage. In such cases surrogate-born children are not automatically citizens of their country of birth. However, in a considerable number of cases the countries of the receiving commissioning parents, have denied recognizing children born to surrogate mothers outside their borders as citizens; and thus issues of statelessness have arisen for surrogate-born children.6

In these countries, altruistic surrogacy is allowed, but commercial surrogacy is prohibited. In Australia, commercial surrogacy is banned except in the Northern Territory.9 Britain has substantively similar rules regarding citizenship and illegalizes payment for surrogacy beyond reasonable expenses.10 Canada and New Zealand both passed laws in 2004 prohibiting commercial surrogacy.11 Israel’s Surrogacy Law was passed in 1996 and is highly controlled through a Board of Approval for Surrogacy Agreements. Commercial surrogacy needs to be approved by the Board. Same sex commissioning arrangements are not allowed, and there is no mention of international surrogacy arrangements.12

In the case of countries that have passed anti-surrogacy laws to control their nationals on moral and policy grounds, there has been a refusal to grant nationality to surrogate-born children. This is applicable even when the child is the genetic offspring of a national. For example, in France, surrogacy is illegal,13 and France refuses to recognize parentage or to give nationality to around 400 children born each year as a result of French nationals entering into surrogacy arrangements with surrogate mothers in the United States, Ukraine or India.14 However, most of these countries with prohibitive or restrictive surrogacy laws have provided parentage certificates or nationality to surrogate children on an ad hoc basis on the principle that it is in the child’s best interest.15

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6 The Indian Parliament has passed a national legislation which prohibits commercial surrogacy on August 24, 2016, this is yet to be notified in the official gazette which will make it enforceable. Once it come into effect India will fall under category B, and till that time it is to be read along with the Category A. See the Assisted Reproductive Technology Bill, 2016, India.


13 Article 16-7 of the French Civil Code (1804).


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Municipality,\textsuperscript{16} Re: L(A minor) UK,\textsuperscript{17} the Mennesson Case,\textsuperscript{18} The Volden Case,\textsuperscript{19} and the Le Roches case.\textsuperscript{20}

- Denial of nationality by the surrogate mother’s country, because of acceptance of surrogacy as legal.

In this category, the surrogate mother’s country recognizes the surrogate born child as the legitimate child of the commissioning parents and a national of the commissioning parents’ country. This assumption arises because of the pro-surrogacy laws in those countries and comes under Category A as discussed above. In such cases, the surrogate child becomes stateless if the child cannot be taken to the commissioning parents’ country for various reasons. The Jan Balaz case,\textsuperscript{21} Baby Manji Case,\textsuperscript{22} Re: IJ (A Child) and Re: X&Y (Foreign Surrogacy),\textsuperscript{23} The Volden Case (India-Norway),\textsuperscript{24} and Le Roches case (France-Ukraine) refer to such situations.\textsuperscript{25}

- Refusal by the commissioning parents to take the child back to their country.

There have been occasions when the commissioning parents, or one of them, have failed to take custody of the surrogate children. The reasons for this vary, including divorce, genetic mix-up, the surrogate child having abnormalities, etc. Examples are Baby Manji Yamada v Union

\begin{itemize}
\item \textit{D v L(Minor)} [2010] EWHC 3146 (Fam).
\item \textit{Affaire Mennesson v France} App no. 65192/11(ECHR, 26 June 2014). See also \textit{Affaire Labasse v France} App no. 65941/11 (ECHR, 4 December 2003)
\item See generally Sumitra Deb Roy, “Stateless Twins Live in Limbo” \textit{The Times of India} (India, 2 February 2011).
\item See Kateryna Grushenko, “French Couple’s Desire for Child Brings Trouble” \textit{Kyiv Post} (15 April 2011).
\item \textit{Re X & Y (Foreign Surrogacy),} [2008] EWHC (Fam) 3030 (Eng).
\item Sumitra Deb Roy, “Stateless Twins Live in Limbo” \textit{The Times of India} (India, 2 February 2011), n19.
\item Law Library of Congress (n 13).
\end{itemize}
of India, The Canadian Twins Case, and The case of Gammy. In such contexts, the child will remain in the surrogate mother’s country where he or she will likely also remain stateless if that country has surrogacy enabling laws which recognise the commissioning parents, rather than the surrogate mother as the child’s legal parents.

- **Denial of consent by the surrogate mother, even though there is no genetic relationship.**

In some instances, surrogate mothers are reluctant to give consent to hand over the child to the commissioning parents. If the child remains in the country of the surrogate mother, her or she will remain stateless if the country legalizes surrogacy as per Category A discussed above. In D and L (Minors) (Surrogacy) (an Indian case) the commissioning parents were not able to get consent from the surrogate mother even six weeks after the birth of the surrogate child.

- **Specific legal prohibitions on surrogacy arrangements for same-sex couples.**

The Goldberg Twins was a unique Israeli case where a lower court denied paternity tests of the infants who were born to a gay couple claiming that the court was not authorized to rule on the matter. The judge declared that the court could not pass judgment on children who were not in Israel and whose affinity to Israel had not been proven. However, the issue was solved by the involvement of the higher court and Knesset later.

From the above discussions, it is clear that statelessness arising out of international surrogacy arrangements occurs when the commissioning parent(s) from a country that has banned or restricted surrogacy

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29 D v L (Surrogacy) [2012] EWHC 2631 (Fam).
contract with a surrogate mother from a country that has legalized surrogacy. In such cases, the commissioning parents’ country can deny the nationality of the surrogate child for the following reasons:

- The country’s anti-surrogacy laws expressly prohibit, as a deterrent to discourage surrogacy, recognition of the surrogate parents as the child’s parents
- The nationality laws exclude these children because of *jus sangunis* and *jus soli* principles, i.e. the child was neither born to the commissioning mother nor was born in her country’s territory (or the countries in question do not apply *jus soli*). This condition is aggravated when there is no genetic connection between the surrogate child and the commissioning parent(s);
- In very rare cases it may be due to other legal issues such as restrictions on homosexual relationships or the requirements for valid marriages.

The surrogate mother’s country might also deny citizenship because:

- The country’s legal surrogacy regime assumes and accords the parentage only to the commissioning parents and not to the surrogate mother;
- The surrogate mother’s country might not have a nationality law provision for granting citizenship to children abandoned by the commissioning parents or who otherwise get trapped in the surrogate mother’s country.

6. International law provisions relevant to surrogacy related Statelessness

There are many provisions in International Human Rights Conventions which deal with nationality, including Article 15 of The Universal Declaration of Human Rights (UDHR), Article 24 of the International Covenant on Civil and Political Rights (ICCPR), Article 1 and 5 of the

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Convention on the Elimination of all forms of Racial Discrimination (CERD),\textsuperscript{33} Article 9 (2) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),\textsuperscript{34} Article 7 and 8 of the Convention on the Rights of the Child (CRC).\textsuperscript{35}

However, these instruments may not immediately provide all the answers with respect to preventing statelessness among children born out of international surrogacy arrangements. For example, Article 24(3) of ICCPR only guarantees a right to acquire a nationality, without any specification by which time this right has to be implemented. Articles 7 and 8 of CRC are very clear about the child’s right to acquire a nationality; however, the CRC neither indicates which nationality a child may have a right to, nor does it guarantee that nationality is acquired at birth. Although the Committee on the Rights of the Child has provided significant guidance in this respect,\textsuperscript{36} it has yet to deal in detail with the obligations of states parties in the context of international surrogacy arrangements. Hence, despite high accession rates, these conventions can fall short in practice.

Further, the provisions of the 1961 Convention,\textsuperscript{37} are also not fully attuned to preventing statelessness arising out of international surrogacy arrangements. For example:

1. Articles 1(1) and (2) (indirectly) provide for the child’s nationality to be from the surrogate mother’s state if he or she is born in its territory. However, in reality, if the country where the child is born has recognized surrogacy, then it recognises the commissioning parents as the child’s legal parents and may (wrongly, in some cases) assume therefore that a nationality is acquired by the child \textit{jus sanguinis} and fail to apply this safeguard;

\begin{footnotesize}

\textsuperscript{34} Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1961) 1249 UNTS 13 (CEDAW).


\textsuperscript{36} See for more information, \url{http://www.statelessnessandhumanrights.org/}.

\end{footnotesize}
2. As per Article 1(3) a child who is otherwise stateless and is born in wedlock in the territory of a Contracting State, shall acquire at birth that nationality through the mother. Here, the convention does not clarify to whose wedlock it refers – the surrogate’s or the commissioning parents’ – thereby causing confusion;

3. Article 1(4) and (5) and Article 4 provides that a Contracting State shall grant nationality to a child, if the nationality of one of his or her parents at the time of the child’s birth was that of the Contracting State mentioned above. This supports the child if the surrogate’s country rejected the child (for the aforementioned reasons) and the nationality of the commissioning parents could then be conferred. However, in many countries one needs to give birth to the child or have genetic connection to the child born to be defined as the child’s parent – which is not always the case in surrogacy. If the commissioning parents’ country has prohibited surrogacy, then the possibility of granting nationality could be low because they are not recognised as the legal parents – a problem which the 1961 Convention does not address.

7. Special efforts for international regulations on surrogacy

In April 2010, the Council on General Affairs and Policy of the Hague Conference on Private International Law invited the Permanent Bureau, the Secretariat of the Hague Conference responsible for researching issues undertaken by the Conference, to generate a report on the matter.\(^38\) Under this mandate, the Permanent Bureau of the Hague Conference on Private International Law is currently studying the private international law issues arising from the legal parentage or ‘filiation’ of children, as well as more specific issues in connection with international surrogacy arrangements through its Parentage/Surrogacy Project.\(^39\) The project is still not complete and will take more time to come up with concrete solutions for surrogacy-induced statelessness. Some commentators independent to this issue also

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suggest that an international convention be modelled on The Hague Adoption Convention.40

**8. Conclusion**

The International Conventions have been insufficiently effective in preventing statelessness arising out of international surrogacy arrangements and such cases of statelessness continue. However, the reasons for such statelessness can be attributed both to the norms governing the acquisition of nationality in the various countries as well as a lack of clear guidance from international law. There are two solutions for the effective prevention of statelessness arising out of international surrogacy. The first is by regulating international surrogacy arrangements under international law in order to prevent statelessness from arising from international surrogacy. However, this is a long process and requires commitment from states, as it touches upon the states’ sovereign right to determine nationality. The second is to proceed with better regulation of international surrogacy arrangements at national level, to prevent statelessness for children born in this context. Some countries like India have taken bold step towards this, by abolishing Commercial Surrogacy involving foreigners completely so as to avoid complications involving statelessness. However, commercial surrogacy options for Indian Citizens and Persons of Indian Origin is retained where such statelessness issues cannot arise as they are entitled to Indian Citizenship by default.41

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41 See Assisted Reproductive Technology Bill, 2016, India.