

THE HUMAN RIGHTS OF A STATELESS SURROGATE-BORN CHILD IN
SPECIFIC RELATION TO ACCESS TO THE RIGHT OF NATIONALITY AND
THE BEST INTEREST PRINCIPLE OF A CHILD AS CONTEMPLATED UNDER
THE UN CONVENTIONS ON THE RIGHTS OF THE CHILD (CRC)^{*}

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Abstract

It remains steadily in vogue the practice of surrogacy in some advanced climes where often by a legal agreement, a woman concedes to become pregnant for another, carries the pregnancy to due term, and gives birth to a child or children all of this for another person (s) who ultimately becomes the parent (s) or commissioning parent (s) of the newborn child or children. International surrogacy arrangement has become one perennial sort of an issue that has surfaced within the past decades. Its consistent practice in some climes and the persistent non-interference by State Parties renders the fate and continued freedom of a surrogate-born child at the mercy of being Stateless.

This paper is thoroughly kindled by the writer's keen interest in this area of concentration and thus undertakes to examine the critical aspects of international surrogacy arrangement, Statelessness as product of international surrogacy arrangement and how it affects the nationality right

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and best interest of the child, and how as well these rights help in the optimization of their protection.

The author concludes by proposing the reformation of domestic legislation as a way of regulating the Stateless surrogate child. That State Parties observe the best interest of the child and that the ascertainment of the nationality right as contemplated under the *CRC* is better coordinated to address the Stateless surrogate child by States Parties complying strictly with the spirit and letter of the Convention.

Keywords Stateless Persons, Nationality Right, Best Interest Principle, Surrogate-born Child, Statelessness

1. Introduction

Recent decades have experienced a growing number of cases of Stateless children, especially those resulting from international surrogacy arrangements. Current discussions in the *First Global Forum on Statelessness* indicate the need for more confabulations among key stakeholders and practitioners and also the utilization of the *UNHCR* guidelines on the burning issue.¹ The writer argues that due to the transcending power of the human rights regime, Stateless surrogate children are entitled to enjoy the equivalent right to nationality and their interest best secured as anyone in the host country, as well as the necessary protection due them by reason of their status as children.

Furthermore, it is no doubt a well-known truth to assert that Stateless surrogate-born children are at a serious disadvantage owing to their status, particularly their inability to access basic rights and enjoy same to the fullest capacity and extent. As a result of this bleak development, the international community and well-meaning agencies have striven to address the issue of Statelessness through various endeavours, ranging from providing relevant guidelines to frame working proposed global action plans.

This thesis provides a brief background of an international surrogacy arrangement and how Statelessness has emerged therefrom. Also explored are the bases for surrogacy, the relevant and specific human right issue arising out of those circumstances and how the *Convention on the Rights of the Child (CRC)*² addresses these issues in enhancing the rights of Stateless surrogate-born children and optimizing their protection. The principal issue of rights and protection of children born out of surrogacy will not be

¹ UN High Commissioner for Refugees (UNHCR), 'First Global Forum on Statelessness: New Directions in Research and Policy Key Outcomes' (6 October 2014) <<http://www.refworld.org/docid/555de2af4.html>> accessed 6 May 2017

² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

sufficiently addressed if keen consideration is not had to the conception of surrogacy and how it results in Statelessness.

1.1 Statelessness as Product of International Surrogacy Arrangement

The process or arrangement whereby a person carries and delivers a child on behalf of another person is termed surrogacy.³ This concept has been integrated as one of many ways of generating income in some developing countries. As a rule, the arrangement does not just spring from the thoughts of men as such to so have another conceive for the other rather takes place as a result probably of a malformation in the womb, a recurring pregnancy loss, among others reasons.⁴ In India, commercial surrogacy thrives and accounts for the highflying medical tourism, generating around \$6 billion and 450,000 tourists annually at least in the last decade.⁵ It is estimated that over 25,000 children have been born through surrogacy arrangements, while more than half of these figures currently live in various parts of the West.⁶

The couple or individual who requests that another person (called the surrogate) carry a child on their behalf may be termed the intending parent (s) or the commissioning parent (s). There are basically two (2) types of surrogacy arrangements. The first is the traditional surrogacy where the surrogate mother is regarded as the genetic mother who provides the ovum

³ Institute on Statelessness and Inclusion (ISI), 'The World's Stateless Report 2017' (Oisterwijk, ISI 2017), 375 <<http://www.institutesi.org/worldsstateless17.pdf>> accessed 1 June 2018

⁴ *ibid*

⁵ Sanoj Rajan, 'Ending Statelessness arising out of Surrogacy in India: The Latest Developments' (*European Network on Statelessness*, 21 April 2017) <<http://www.statelessness.eu/blog/ending-statelessness-arising-out-surrogacy-india-latest-developments>> accessed 29 May 2018

⁶ *ibid*

and gestates the child.⁷ The process simply involves the fertilization of the egg of the surrogate mother and the sperm of a donor.

Advancement in medical technology ushered in the second type of surrogacy; gestational surrogacy. This type of surrogacy prompts the surrogate mother to gestate the child where both the ovum and sperm though obtained from either the intended parents or third-party donors; she is nonetheless by such act genetically related to the child.⁸ Accompanying the foregoing advancement is the consequences of the dichotomy between the legitimacy of surrogacy and national laws and as well the impact of the likelihood of Statelessness.⁹ In other words, surrogacy, particularly of international nature have occasioned difficulty in determining the nationality of most surrogate children,¹⁰ save the relevant laws applicable to both the country of '*commissioning parents*' and that of the surrogate mothers are in agreement.¹¹ Such type of surrogacy services put the surrogated child at risk of being Statelessness or being Stateless.

1.1.1 Various Circumstances Causing Statelessness in International Surrogacy Arrangement

Considered under this heading are several circumstances that have rendered many a mammoth number of children born through surrogacy, Stateless. These circumstances give rise to the challenges on the right to

⁷ Caitlin Pyrc, 'Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem,' (2016) *Indiana Journal of Global Legal Studies* <<http://www.repository.law.indiana.edu/ijgls/vol23/iss2/19>> accessed 31 May 2018

⁸ Caitlin (n 7)

⁹ Institute on Statelessness and Inclusion (ISI), 'The World's Stateless Report 2017' (Oisterwijk, ISI 2017), 375

¹⁰ *ibid* 376

¹¹ *Re X & Y (Foreign Surrogacy)* [2008] EWHC (Fam) 3030 (Eng.); Also Mark Henaghan, 'International Surrogacy Trends: How Family Law is Coping' (2013) *Australian Journal of Adoption* <<http://www.nla.gov.au/openpublish/index.php/aja/article/viewFile/3188/3713>> accessed 1 June 2018

nationality and the right to family existence. The conflict in the nationality laws, family laws on parentage to boots existing policies on surrogacy, between the countries of surrogate mother and that of the commissioning parent, constitutes one of the circumstances. This statement of the issue was manifested in a number of cases including and with particular reference to the *Volden case*,¹² where a Norwegian woman, Kari Ann Volden, battled for years to establish the nationality of twin children born through surrogacy. The contextual tale was that Volden, scourged with premature ovarian failure proceeded to Mumbai in 2009 to have a child through surrogacy. With the help of an Indian egg donor and a Scandinavian sperm donor, a tailored embryo was formed and implanted into a surrogate's womb. The outcome resulted in the birth of a pair of twins. However, the Norwegian government refused to recognize Volden as the legitimate mother since 'egg donation was prohibited and considered a criminal offence' under the Norwegian law.¹³

There are instances where the country of the surrogate mother accepts the surrogacy as legal and acknowledges the commissioning parent's nationality on the child.¹⁴ In such a situation, some stubborn difficulties occasioning Statelessness may still arise. That is, where there is a strict anti-surrogacy law in the country of the commissioning parent, the surrogacy arrangement may still die a natural death, leading to the child being Stateless.¹⁵ This position was exemplified in the case of *Baby Manji Yamada v. Union of India and Another*,¹⁶ where the commissioning parents, Ikufumi and Yuki Yamada, travelled to India in 2007 and had a surrogacy arrangement with the fertility specialist Dr Nayna, through a married Indian

¹² Sumitra Debroy, 'Stateless twins live in limbo' (*The Times of India*, 2 February 2011) <<http://timesofindia.indiatimes.com/city/mumbai/Stateless-twins-live-in-limbo/articleshow/7407929.cms>> accessed 26 May 2018

¹³ Sumitra (n 12); also *Jan Balaz v. Anand Municipality and 6 ors*, Air 2010 Guj 21

¹⁴ ISI (n 3) 379

¹⁵ *ibid* 381

¹⁶ *Baby Manji Yamada v Union of India and Another* [2008] 13 SCC 518

woman Pritiben Mehta.¹⁷ However, as Baby Manji was born, Ikufumi attempted to return with Baby Manji to Japan, their home State but was refused entry since the Japanese Civil Code only recognized the woman who gives birth to the baby as the legitimate mother.¹⁸ On getting to India, the Indian government refused to grant passport and birth certificate to baby Manji as the parental section requested the signature of both parents, which in Baby Manji's case, only the father Ikufumi was available.¹⁹

Another common situation occurs in cases where either of the parties to the surrogacy arrangement decides not to go ahead with it. In such case, the commissioning parents may refuse to take the child.²⁰ This could be due to some 'breach or changes in the terms of the surrogacy contract,' such as genetic mixed-up, birth defects,²¹ or owing probably to marital issues (such as getting divorced, etc.) between the commissioning parent. Under such circumstance, the surrogate child is left with the surrogated mother and the legal identity of the surrogated child may not be established as such, thus bringing about the irrepressible challenge of Statelessness of the surrogate born child.²² A similar circumstance may occur by inducement by the surrogate mother who may refuse to let go of the surrogate child.²³ A case in point was the matter between *D v. L (Minors)*

¹⁷ Kari Points, 'Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji' <https://kenan.ethics.duke.edu/wp-content/uploads/2012/08/BabyManji_Case2015.pdf> accessed 30 May 2018

¹⁸ Brasor Philip, 'Surrogate Path for Dads not always as easy as for Ricky' *The Japan Times* (31 August 2008) <https://www.japantimes.co.jp/news/2008/08/31/national/media-national/surrogate-path-for-dads-not-always-as-easy-as-for-ricky/#.W_rNbuhKiMo> accessed 25 November 2018

¹⁹ Kari (n 17)

²⁰ ISI (n 3) 379

²¹ UN General Assembly (n 2)

²² ISI (n 3) 379

²³ ibid 380

(*Surrogacy*),²⁴ where the commissioning parents did not get the consent of the surrogate mother even after the child has attained six (6) weeks old. Circumstances like the foregoing are particularly prevalent in countries where strong anti-surrogacy law exists and the surrogate mother recognized as the mother of the surrogate child.²⁵ Another instance is where the country of the surrogate mother recognizes the commissioning parents as the actual parents. Such a case usually renders the surrogate child Stateless.

Finally, Statelessness may arise from cases where the commissioning parents are homosexuals. Under such situation, proving the affinity with the child or nationality so as to help the child escape Statelessness may prove knotty. There was a case wherein an Israeli court refused a paternity test to initiate the process of citizenship for twins born through surrogacy arrangement to a homosexual couple.²⁶ The court had ruled that it lacked the authority to so approve the paternity test that would permit the children Israeli citizenship. International law recognizes the authority of States to choose its own citizen and from the above one can safely posit that much of the discretion lies in the power of the relevant States and sometimes the employment of such discretion may result in Statelessness as there is no obligation as such under international law mandating States to grant nationality unconditionally. However, with the above cases and reports, this writer argues that the human right law is capable of transcending these barrier fronts and that States should enhance the rights to grant protection under specific human right regime.

To be examined shortly is whether there are adequate remedies within the human rights regime especially the Convention on Rights of Children in enhancing the rights and protection of children who have been

²⁴ *D v. L (Surrogacy)* [2012] EWHC LG31 (Fam)

²⁵ ISI (n 3) 381

²⁶ Harinder Mishra, 'Israeli gay couple to take surrogate twins home' *The Indian Express* (Jerusalem, 28 May 2010) < <http://archive.indianexpress.com/news/israeli-gay-couple-to-take-surrogate-twins-home/624650/> > accessed 25 November 2018

rendered Stateless by reason of surrogacy arrangements. Furthermore, how the regime can be coordinated to enhance the rights and protections of the surrogate Stateless children is also properly spoon-fed in the next examination.

1.1.1.1 The Convention on the Rights of the Child (CRC) in Resolving Statelessness Caused by Surrogacy

The term Statelessness is and has never been in the best interest of a child.²⁷ *Article 7 of the CRC* obliges States Parties to recognize the right of every child to acquire a nationality, and to ensure the implementation of this right, particularly where the child would otherwise be rendered Stateless. *Article 3* of the said Convention provides and secures the principle of the best interests of the child, stating in effect that the child's best interests be assessed and taken into account as primary consideration in all actions or decisions that pertain to him or her, both in the public and private sphere. *Article 9* provides for the right of a child not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if contrary to the child's best interests. A community comprehension of *Article 3 and 7 of the CRC* is evidently manifested without a doubt in its mandatory tones that due compliance by States Parties to the CRC is a necessity.²⁸ Apart from the plethora of existing international and regional instruments on the right of every child to a nationality, there are also decisions of regional human rights courts and committees on the issue of an international surrogacy arrangement.²⁹

²⁷ Article 3 of the CRC

²⁸ It should be noted that Articles 3 and 7 are not the only relevant provisions, but may be considered as good examples

²⁹ ISI, 'Addressing the Right to a Nationality through the Convention on the Rights of the Child,' *A Toolkit for Civil Society*, June 2016
<http://www.institutesi.org/CRC_Toolkit_Final.pdf> accessed 29 May 2018

Furthermore, notwithstanding the fact that the *CRC* has been ratified by States world over, even amidst the very relevant and rich human right instruments and provisions and decisions, the Statelessness of a child or surrogate born child still persists as a major challenge. Preliminary findings of the *ISI World Stateless Report of 2017* revealed that neither the international human right law nor international law per se has clearly addressed the issue of Statelessness caused by surrogacy.³⁰ The same report also presented two likely solutions, both directed to international surrogacy. These solutions included a regulation of the international surrogacy arrangements under international law so as to prevent Statelessness while the other recommended better regulation of international surrogacy arrangements at the national level, to prevent similar outcome of Statelessness.³¹ However, as rightly indicated by the author, both of these levels would take time and require deadly commitment from the States.³²

1.1.1.1.1 Resolving Surrogacy Problems Leading to Statelessness

It is posited that "the best approach to the problem of international surrogacy rest largely with domestic regulation."³³ It is suggested that resort to domestic legislation must find a middle ground in which countries address the impacts of new technology without being restrictive that they force the market out of the country or into the black market.³⁴ Notably, a better option is for States to find a middle ground if the problem is to be largely curtailed at least to an extent. This feat apparently works out in

³⁰ ISI (n 3) 384

³¹ *ibid*

³² *ibid*

³³ Erin Nelson, 'Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy,' *Journal of Law, Medicine & Ethics*, 41 (2013): 240, 241-42, in Caitlin Pyrcce, 'Surrogacy and Citizenship,' 494

³⁴ Caitlin (n 8) 952

some States that have outright prohibition laws on commercial surrogacy but however permit altruistic surrogacy within the confines of the law.³⁵

Importantly, States are admonished to take into consideration the best interest of the child in line with *Article 3 of the CRC*, while a case of international surrogacy is determined. By so doing, although the rule of law would take its course, the chances of rendering another child Stateless is avoided or at least slim as not to allow the child suffer the offence of the parent. This was the position in *Mennesson v. France*,³⁶ a French case on nationality in the context of surrogacy, where the Court ruled that even though the children's parents had broken the law, since surrogacy is prohibited under French laws thereby causing the denial of certain elements of the children's identity, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.³⁷

Lastly, the writer suggests that besides revising the laws at the international scene, it is pertinent to also ascertain how the human rights can be better coordinated with the specific human rights regime, addressing specific issues as arising out of the situation of Statelessness resulting from surrogacy, and to take steps in bringing States to implement same. This would aid in restoring the status as well as the rights and protections of such children.

³⁵ Oireachtas Library & Research Service, 'Surrogacy, parentage, and citizenship: Ireland in the wider world,' *Spotlight*, No.3 (2013): 10-11

³⁶ *Mennesson v. France* ECHR, (Application No. 65192/11), 26 June 2014, paras 99 and 97. <<http://hudoc.echr.coe.int/eng?i=001-145179> (FR)> accessed 4 June 2018

³⁷ *Mennesson v. France* (n 42)

References

Legislations

Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 U.N.T.S. 175

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166 <<http://www.refworld.org/docid/3ae6b36618.html>> accessed 4 June 2018

Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990) <<http://www.refworld.org/docid/3ae6b38c18.html>> accessed 29 May 2018

Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969 <<http://www.refworld.org/docid/3ae6b36510.html>> accessed 29 May 2018

Organization of the Islamic Conference (OIC), *Covenant on the Rights of the Child in Islam* (OIC/9-IGGE/HRI/2004/Rep.Final, 2005) <<http://www.refworld.org/docid/44eaf0e4a.html>> accessed 29 May 2018

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

Cases

Baby Manji Yamada v Union of India and Another [2008] 13 SCC 518
 D v. L (Surrogacy) [2012] EWHC LG31 (Fam).
 Jan Balaz v. Anand Municipality and 6 ors, Air 2010 Guj 21.
 Mennesson v. France ECHR, (Application No. 65192/11),
 Re X & Y (Foreign Surrogacy) [2008] EWHC (Fam) 3030 (Eng.)

Government Publications

UN High Commissioner for Refugees (UNHCR), *First Global Forum on Statelessness: New Directions in Research and Policy Key Outcomes*, 6 October 2014, <<http://www.refworld.org/docid/555de2af4.html>> accessed 6 May 2017

Journal Articles

Henaghan M, “International Surrogacy Trends: How Family Law is Coping,” *Australian Journal of Adoption* Vol. 7 No.3 (2013):1 <<http://www.nla.gov.au/openpublish/index.php/aja/article/viewFile/3188/3713>> accessed 1 June 2018

ISI, ‘Addressing the Right to a Nationality through the Convention on the Rights of the Child,’ A Toolkit for Civil Society, June 2016 <http://www.institutesi.org/CRC_Toolkit_Final.pdf> accessed 29 May 2018

Institute on Statelessness and Inclusion (ISI), *The World's Stateless Report 2017* (Oisterwijk, ISI 2017), 375 <<http://www.institutesi.org/worldsstateless17.pdf>> accessed 1 June 2018

Nelson E, 'Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy,' *Journal of Law, Medicine & Ethics*, 41 (2013): 240, 241-42, in Caitlin Pyrce, "Surrogacy and Citizenship," 494

Oireachtas Library & Research Service, 'Surrogacy, parentage, and citizenship: Ireland in the wider world,' *Spotlight*, No.3 (2013) 10-11

Pyrce C, 'Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem,' *Indiana Journal of Global Legal Studies*, Vol. 23:2, Article 19(2016) : 925, 929
<<http://www.repository.law.indiana.edu/ijgls/vol23/iss2/19>> accessed 31 May 2018

Rajan S, 'Ending Statelessness arising out of Surrogacy in India: The Latest Developments,' (*European Network on Statelessness*, April 21 2017) <<http://www.statelessness.eu/blog/ending-statelessness-arising-out-surrogacy-india-latest-developments>> accessed 29 May 2018

Online

Points K, 'Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji' <https://kenan.ethics.duke.edu/wp-content/uploads/2012/08/BabyManji_Case2015.pdf> accessed on 30 May 2018

Newspaper articles

Debroy S, 'Stateless twins live in limbo' *The Times of India* (2 February 2011) <<http://timesofindia.indiatimes.com/city/mumbai/Stateless-twins-live-in-limbo/articleshow/7407929.cms>> accessed 26 May 2018

Mishra H, 'Israeli gay couple to take surrogate twins home' *The Indian Express* (Jerusalem, 28 May 2010)

<<http://archive.indianexpress.com/news/israeli-gay-couple-to-take-surrogate-twins-home/624650/>> accessed 26 April 2017

Philip B. 'Surrogate Path for Dads not always as easy as for Ricky.' *The Japan Times* (31 August 2008)

<https://www.japantimes.co.jp/news/2008/08/31/national/media-national/surrogate-path-for-dads-not-always-as-easy-as-for-ricky/#.W_rNbuhKiMo> accessed 25 November 2018