

SURROGACY AND INTERCOUNTRY ADOPTION: THE CRITIQUES OF INTERCOUNTRY ADOPTION AND NECESSITY FOR IMPLICATION OF INTERNATIONAL REGULATION ON SURROGACY

Abstract

Surrogacy and intercountry adoption are two areas of family law that can involve multiple legal systems due to their cross-border nature. Private international law (also known as conflict of laws) provides the legal framework for these situations by addressing issues such as jurisdiction, applicable law, and recognition of foreign judgments. Surrogacy is an arrangement where a woman consents to bear and give birth to a baby on behalf of another individual or couple who will raise the child. Intercountry adoption refers to the adoption of a child from another country by a person or couple who are not citizens or residents of that nation.

Private international law plays an important role in regulating surrogacy and intercountry adoption, particularly in cases where there are conflicting laws and regulations between the countries involved. It may determine which country's laws govern the agreement or adoption, which court has jurisdiction over any disputes that arise, and how the agreement or adoption is recognized and enforced in different countries. The laws and regulations governing surrogacy and intercountry adoption vary widely between countries, and it is important to seek legal advice and guidance when considering these options. It helps to make sure that these intricate transactions are carried out in a manner that respects the rights of all parties concerned and is compliant with the legal systems of the nations involved. Concern over the potential exploitation of women and children has grown, as technology has advanced, and the practice has become more widespread.

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As a result, there have been multiple efforts to formulate an international convention on surrogacy. Surrogacy is a highly contentious issue that has been subject to much debate in recent years. There is an increasing need for an international convention on surrogacy to complement previous efforts on intercountry adoption.

The main aim of this paper is to understand the necessities and reasons why an international convention on surrogacy is necessary, the limitations of the existing legal frameworks, and the potential benefits of such a convention. In this paper, I will examine how private international law applies to surrogacy and intercountry adoption. In order to emphasize the need for international action through setting up new international conventions. I will compare the current efforts to develop an international convention on surrogacy to previous initiatives to enhance an international convention on intercountry adoption. I will also discuss some recent surrogacy cases and problems in order to demonstrate the need for regulation. Comparison and contrast of adoption and surrogacy is then discussed, and the common criticisms of international adoption are summarized. Additionally, from a perspective of India. Finally, the conclusion and some suggestions.

Keywords: Surrogacy, Intercountry Adoption, and regulations.

I. INTRODUCTION

- 1. Surrogacy:** The procedure of using a woman to carry a child for the benefit of another person or couple (the intended parents) is known as surrogacy. The surrogate may carry an embryo made with the genetic material of the intended parents or a donor, or she may be the biological mother of the child. A complicated process, surrogacy entails legal, medical, and ethical considerations, especially when parties from other nations are involved. The legal regulation of surrogacy varies widely across jurisdictions. In some countries, surrogacy is illegal, while in others it is permitted with varying degrees of regulation. In addition to legal issues, surrogacy can raise ethical and moral questions, particularly when it involves the commercialization of reproductive services. Some countries prohibit or restrict commercial surrogacy, while others permit it under certain conditions. Internationally recognized legal frameworks for surrogacy exist in some nations, including the United States. Other nations, such as France and Germany, on the other hand, have stringent legal frameworks that can make it challenging or impossible for intended parents to join into a surrogacy agreement.

When a surrogacy arrangement involves parties from different countries, private international law may be invoked to determine which legal system will apply. In general, the law of the country where the surrogate gives birth will govern the parent-child relationship, including issues such as legal parentage, custody, and support. However, this is not always the case, and the application of the law can vary depending on the circumstances. Private international law does not typically address these ethical concerns, but they may influence the application of legal rules and regulations.

- 2. Intercountry Adoption:** Intercountry adoption is another area of family law that can involve private international law. It is the process by which a child from one country is adopted by individuals or couples from another country. Intercountry adoption can give children who might otherwise have uncertain futures a loving and secure family, but it also brings up difficult ethical and legal concerns.

Across jurisdictions, there are significant differences in the laws governing intercountry adoption. Intercountry adoption is governed by established legal systems in some nations, including the United States, which are acknowledged globally. In contrast, other countries have restrictive laws that may make it difficult or impossible for children to be adopted by foreign nationals.

When an intercountry adoption involves parties from different countries, private international law may be invoked to determine which legal system will apply. The law of the country where the child is located will typically govern the adoption process, including issues such as eligibility criteria, consent requirements, and adoption procedures. Private international law can also address issues such as jurisdiction, applicable law, and recognition of foreign judgments.

II. THE COMPARISON OF THE CURRENT EFFORTS TO DEVELOP AN INTERNATIONAL CONVENTION ON SURROGACY TO PREVIOUS INITIATIVES TO ENHANCE AN INTERNATIONAL CONVENTION ON INTERCOUNTRY ADOPTION

The effort in order to create an International Convention on Surrogacy is still ongoing and has not yet resulted in a comprehensive agreement. The process through which parents from different countries adopt a child is referred to as intercountry adoption. The practice gained prominence in the mid-20th century, as advances in transportation and communication made it easier for families to adopt children from other countries. However, as the practice became more widespread, concerns began to emerge over the protection of children's rights and the regulation of adoption agencies.

Efforts to establish an international framework for intercountry adoption began in the 1980s and culminated in the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. This convention established a set of principles to guide intercountry adoption, including the requirement that it serves the best interests of the child, and that intercountry adoptions are carried out in a transparent and ethical manner.

Similarly, efforts to establish an international convention on surrogacy have been ongoing since the early 2010s. In 2015, the Hague Conference on Private International Law released a report on the legal issues surrounding surrogacy, highlighting the need for an international framework to protect the rights of surrogates and children. Since then, several countries have taken steps to regulate surrogacy, and there have been multiple international conferences and meetings to discuss the issue.

However, the path toward an international convention on surrogacy has been more fraught with challenges than that of intercountry adoption. One reason for this is the relatively recent emergence of surrogacy as a global issue. Compared to adoption, it is a relatively new practice, and there is less international consensus on the proper way to regulate it. Furthermore, there is significant disagreement over the ethical considerations of surrogacy. Opponents argue that it is inherently exploitative, as it relies on the bodies of women and low-income populations. Proponents of surrogacy contend that it offers a valuable service to aspiring parents who are unable to conceive naturally. Efforts to regulate surrogacy at the international level face significant challenges, including differences in cultural and legal norms, ethical considerations, and the complexity of the surrogacy process itself. Despite the challenges, there are ongoing efforts to create an international convention on surrogacy. Some countries have already banned or heavily regulated surrogacy, while others have taken a more permissive approach. An international convention could help to create a more level playing field and ensure that surrogacy takes place in a way that respects the rights of all parties involved. Nevertheless, some organizations and countries are working to create a framework for international cooperation and regulation of surrogacy, and it remains to be seen whether a comprehensive convention will be agreed upon in the future.

III. RECENT SURROGACY CASES AND DILEMMAS

There is a pressing need for international regulation to address the inconsistencies in laws across countries, which can lead to the exploitation of children born via surrogacy and the mothers who act as surrogate parents. The case studies in the essay demonstrate the complexity of surrogacy agreements. These cases demonstrate how the commercialization of surrogacy can lead to exploitation, as well as the difficulties in determining legal parentage when crossing international borders.

Recent Surrogacy Cases have Highlighted the Need for International Regulation

- 1. The Case of Baby Gammy (Thailand-Australia):** In this case, an Australian couple commissioned a surrogacy arrangement in Thailand, but left behind their baby with Down syndrome and a heart condition. The case raised questions regarding the subject of surrogate mother exploitation and the lack of regulation in the surrogacy industry in Thailand. It also highlighted the requirement for global guidelines to safeguard the welfare and rights of children born through arrangements for surrogacy.
- 2. The Patel surrogacy case (US-India):** In this case, a US-based Indian couple was charged with human trafficking after it was discovered that they had abandoned one of the babies born through a surrogacy arrangement in India. The case raised questions concerning the unregulated surrogacy industry in India and the mistreatment of surrogate mothers. It also emphasized the requirement for global norms to safeguard surrogate mother's rights and welfare.
- 3. The Baby Manji Yamada Case (India-Japan):** included a Japanese couple who paid an Indian surrogate; nonetheless, the infant was left without a state because neither the Indian nor the Japanese governments would give citizenship or issue the child a passport.

The incident demonstrated the requirement for global norms to guarantee the legal acceptance and defense of children born through surrogacy agreements.

These situations highlight the necessity of international regulation to regulate the surrogacy market and safeguard the rights and welfare of all parties, including surrogate women, intended parents, and the children born through surrogacy. Surrogacy is currently governed in many ways around the globe. Due to their comparatively low cost, several nations, like India and Ukraine, have become popular surrogacy destinations due to their comparatively inexpensive costs and weak regulations, for surrogacy. Other nations, including France and Germany, have outright outlawed surrogacy. The absence of universal regulation has created moral and legal ambiguities and emphasizes the need for international cooperation to create global norms and guidelines for surrogacy.

IV. COMPARISON AND CONTRAST OF ADOPTION AND SURROGACY

Both adoption and surrogacy are various ways to establish a family. While surrogacy includes a woman carrying a pregnancy on behalf of another person or couple who will be the child's biological parents, adoption entails taking in a child who is not biologically connected to the adoptive parents and raising the child as their own.

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1. There are Some Similarities between Adoption and Surrogacy, such as:

- **Both Involve Legal Processes:** Both adoption and surrogacy involve legal processes, including contracts and agreements between parties, to establish the legal parentage and custody of the child.
- **Both can be Emotionally Challenging:** Adoption and surrogacy can both be emotionally challenging for all parties involved, including adoptive parents, birth parents, and surrogate mothers.
- **Both can be Expensive:** Both adoption and surrogacy can be expensive, with costs ranging from legal fees to medical expenses.

2. However, there are also Significant Differences between Adoption and Surrogacy, Including:

- **Biological Connection:** In surrogacy, the child is biologically related to one or both of the intended parents, while in adoption, the child is not biologically related to the intended parents.
- **Involvement of Birth Parents:** In adoption, the birth parents may or may not be involved in the child's life, while in surrogacy, the surrogate mother is typically involved in the pregnancy and birth process but has no legal rights to the child.
- **Legal Status:** Surrogacy often entails establishing the intended parent's legal rights to the child, whereas adoption is a legal process that typically requires the termination of the birth parent's legal rights to the child.

V. CRITIQUES OF INTERCOUNTRY ADOPTION IN GENERAL INCLUDE CONCERNS

- 1. Exploitation of Birth Parents:** Some argue that intercountry adoption can lead to the exploitation of birth parents in developing countries, who may be coerced into giving up their children due to poverty or lack of access to resources.
- 2. Cultural Disruption:** Intercountry adoption can lead to the disruption of the child's cultural identity, as well as the culture and community of their birth country.
- 3. Corruption and Fraud:** Intercountry adoption has been associated with corruption and fraud, such as the trafficking of children or falsification of documents.
- 4. Lack of Support for Adoptive Families:** Adoptive families may not receive the support they need, such as counseling and resources to help them navigate the challenges of adoption.

Intercountry adoption from India has been subject to a range of critiques and concerns. Here are some of the major critiques of intercountry adoption in general in relation to India more or less it is similar to the concerns in general:

- 5. Lack of Informed Consent:** There have been concerns that birth parents in India may be

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forced or deceived into giving up their children because they do not fully comprehend the repercussions of intercountry adoption.

6. **Corruption and Trafficking:** Intercountry adoption from India has been associated with corruption and trafficking, including the falsification of documents and the abduction of children.
7. **Cultural Disruption:** Intercountry adoption can lead to the disruption of the child's cultural identity, as well as the culture and community of their birth country.
8. **Poor Screening and Monitoring:** There have been concerns about poor screening and monitoring of adoptive families, which can lead to the placement of children in inappropriate or unsafe environments.
9. **Lack of Accountability:** There have been concerns that intercountry adoption agencies and governments are not held accountable for their actions and that there is a lack of transparency in the adoption process.
10. **Over-Reliance on Intercountry Adoption:** Some argue that intercountry adoption is not a sustainable solution to the problems faced by orphaned or abandoned children in India and that more resources should be devoted to supporting families and communities.

These critiques highlight the need for greater regulation and transparency in intercountry adoption from India, as well as a more nuanced understanding of the complex social, cultural, and economic factors that contribute to the placement of children for adoption.

VI. SUGGESTIONS AND CONCLUSION

The possibility of exploiting and abusing weak people, especially women and children, is one of the main concerns associated with surrogacy and intercountry adoption. In some cases, surrogacy arrangements may be coerced or exploitative, and intended parents may seek to take advantage of economic disparities to secure reproductive services. Similarly, intercountry adoption can sometimes involve the trafficking of children or the coercion of birth parents. These issues raise important ethical and moral questions about the appropriateness of these processes and the responsibilities of individuals, governments, and international organizations to prevent exploitation and abuse.

Another concern with surrogacy and intercountry adoption is the legal uncertainty and inconsistency that can arise when different legal systems are involved. Private international law provides a framework for addressing these issues, but it can be complex and difficult to navigate, particularly when different countries have different legal frameworks for regulating surrogacy and adoption. Confusion may result from this and legal disputes and may lead to situations where children are left in legal limbo or intended parents face unexpected legal hurdles.

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Additionally, Concerns exist regarding the effects of surrogacy and intercountry adoption on cultural identities and family relationships. Intercountry adoption, in particular, can involve the removal of children from their birth culture and the creation of transnational families, which can raise questions about cultural identity and belonging. Similarly, surrogacy can challenge traditional notions of motherhood and the importance of biological ties in defining family relationships.

Finally, there are debates about the appropriate regulatory framework for surrogacy and intercountry adoption. Some countries, the United States, for example, have relatively permissive legal frameworks for surrogacy and adoption, while others, such as France and Germany, have more restrictive laws. Some argue that more stringent regulation is necessary to uphold the legal rights of surrogates, children, and prospective parents, while others contend that such regulation can be overly restrictive and may limit access to these processes for those who need them.

VII. CONCLUSION

In conclusion, surrogacy and intercountry adoption are complex topics that raise a range of legal, ethical, and moral issues. While both processes offer the possibility of creating or expanding a family, they also involve significant risks and challenges, particularly when they involve parties from different countries. As such, consider the effects on all parties involved, including surrogates, intending parents, natural parents, and children. It's critical to handle these matters with caution and respect. It seems clear that a global surrogacy treaty is necessary. A convention of this kind might offer a thorough and consistent legal framework for surrogacy agreements that upholds the rights and interests of all parties. It could also help to promote greater predictability and certainty in surrogacy arrangements and facilitate greater international cooperation and collaboration. Therefore, it is essential that policymakers, legal experts, medical professionals, and other stakeholders work collaboratively to develop a robust and effective international convention on surrogacy.

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