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BEYOND BORDERS: HARMONISING SURROGACY AND PARENTAGE RECOGNITION UNDER PRIVATE INTERNATIONAL LAW

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Abstract

The advancement of Assisted Reproductive Technologies (ART) has redefined the meaning of family, parenthood, and identity in the twenty-first century. Among these technologies, surrogacy has emerged as one of the most contested legal and ethical domains, particularly in its cross-border dimension. This paper analyses how international surrogacy arrangements have created legal ambiguities concerning the recognition of parentage, citizenship, and jurisdiction under Private International Law (PIL). The lack of harmonised regulation has resulted in inconsistent judicial outcomes, statelessness, and human rights challenges affecting both intended parents and children born through surrogacy.

Through comparative examination, the paper explores India's transformation from a global commercial surrogacy hub to a restrictive altruistic model under the Assisted Reproductive Technology (Regulation) Act 2021 and the Surrogacy (Regulation) Act 2021. It contrasts this with the European Union's rights-based framework, where the European Court of Human Rights and the European Commission's 2022 Proposal for a Regulation on the Recognition of Parenthood promote greater uniformity in cross-border parentage recognition. The study also highlights ongoing international initiatives led by the Hague Conference on Private International Law (HCCH) aimed at establishing a multilateral framework for surrogacy governance.

The paper argues that international harmonisation grounded in the principles of reproductive autonomy, mutual recognition, informed consent, and the best interests of the child is essential to ensure legal certainty, ethical integrity, and the protection of human dignity in global surrogacy practices.

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Keywords:

Surrogacy, Assisted Reproductive Technologies, Private International Law, Cross-Border Surrogacy, Parentage Recognition, Human Rights, Legal Harmonisation, European Union Law.

I. INTRODUCTION

The advancement of assisted reproductive technologies (ART) has transformed conventional notions of family and parenthood. Among these innovations, surrogacy has emerged as one of the most complex and debated practices, encompassing medical, ethical, and legal dimensions that transcend national boundaries. It enables individuals or couples who are unable to conceive naturally to have genetically related children through the assistance of a surrogate mother. Though it signifies medical progress and reproductive choice, surrogacy exposes legal voids across jurisdictions underscoring the urgent necessity for a coherent global legal framework.

Surrogacy involves multiple relationships between the surrogate and the intended parents, between biological and gestational motherhood, and between private reproductive choices and public regulation. When these relationships extend across borders, conflicts frequently arise concerning parentage, citizenship, and enforceability of surrogacy agreements. For instance, one jurisdiction may recognize a surrogacy contract as valid, while another may declare it void for being contrary to public policy.[1] Such inconsistencies often leave children born through cross-border surrogacy stateless or without legally recognized parents. The Indian Supreme Court's intervention in *Baby Manji Yamada v Union of India*[2] vividly illustrates this dilemma, where a child born to an Indian surrogate and Japanese parents was rendered stateless due to conflicting legal standards on parentage and nationality.

Despite the rapid globalization of reproductive services, international law has yet to establish a uniform response to surrogacy-related conflicts. The Hague Conference on Private International Law (HCCH) has acknowledged surrogacy as a pressing concern, yet no binding convention currently governs jurisdiction, choice of law, or recognition of foreign parentage orders.[3]

[1] K Trimmings and P Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7(3) *Journal of Private International Law* 627.
[2] Baby Manji Yamada v Union of India [2008] 13 SCC 518.
[3] Permanent Bureau of the Hague Conference on Private International Law, *Preliminary Report on the Issues Arising from International Surrogacy Arrangements (Prel Doc No 10, March 2012).*

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The Indian experience exemplifies this tension. From being the global hub of commercial surrogacy once valued at over USD 400 million annually[4] India has transitioned to a restrictive regime under the Surrogacy (Regulation) Act 2021, which permits only altruistic surrogacy for married Indian couples.[5] While the law aims to curb exploitation, it has been criticized for narrowing reproductive autonomy by excluding single individuals, LGBTQ+ couples, and foreigners.[6] In contrast, the European Union (EU) has adopted a more pluralistic, rights-based approach guided by jurisprudence of the European Court of Human Rights (ECtHR). In *Mennesson v France*[7] and *Labassee v France*[8], the ECtHR held that refusal to recognize foreign birth certificates of surrogate-born children violated Article 8 of the European Convention on Human Rights, which guarantees respect for private and family life.

The contrast between restrictive and rights-based models highlights the need for harmonisation under Private International Law (PIL). Fragmented regimes erode legal certainty and family rights. This paper examines India, the EU, and the Hague Parentage Project to propose pathways for global recognition of parentage in surrogacy.

Ultimately, this paper situates surrogacy within Private International Law as a transnational legal challenge requiring coordinated reform. It advocates harmonisation through international cooperation and rights-based principles to build a fair and rights-compliant global framework for parentage recognition.

II. THE CONCEPT AND EVOLUTION OF SURROGACY

Concept And Classification of Surrogacy

Surrogacy, as a concept, signifies the voluntary act of a woman carrying and delivering a child for another person or couple. The term originates from the Latin *subrogare*, meaning to appoint as a substitute, signifying the separation of genetic and gestational motherhood within reproductive arrangements.[9] The modern legal definition extends beyond biological function; it encompasses contractual, ethical, and jurisdictional dimensions that determine the legal

[4] *Surrogacy (Regulation) Act, 2021"* (Aspire IAS, 29 October 2025).
[5] The Surrogacy (Regulation) Act 2021 (No 47 of 2021).
[6] Fiza Haque, 'Surrogacy Laws in India: A Critical Analysis of the Surrogacy (Regulation) Act 2021' (Lawful Legal, 23 May 2025).
[7] Mennesson v France [2014] App No 65192/11 ECtHR.
[8] Labassee v France [2014] App No 65941/11 ECtHR.
[9] Narender Kumar and Jyotsana Choudhary, 'The Concept of Surrogacy: Historical Origins and Contemporary Developments' (2024)

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status of both the surrogate and the intended parents.

Types Of Surrogacy:

Surrogacy arrangements are commonly categorised into several types based on genetic connection and financial arrangement.

(1) **Traditional Surrogacy**: also known as *partial* or *straight surrogacy* is one in which the surrogate's own egg is artificially inseminated with the sperm of the intended father or donor.[10] The surrogate thereby becomes both the biological and gestational mother of the child. This type of surrogacy, being the oldest, was prevalent before the advent of in vitro fertilisation (IVF).[11] However, because it creates a genetic link between the surrogate and the child, Traditional surrogacy is now rare because of its emotional sensitivity and the legal uncertainties it creates, particularly around parental custody.

(2) **Gestational Surrogacy**: also known as *full/host surrogacy* is now the predominant form. In this arrangement, an embryo created from the gametes of the intended parents or donors is transferred into the surrogate's uterus through IVF. The surrogate acts solely as a gestational carrier with no genetic connection to the child, providing a clearer legal framework for determining parentage.

(3) **Altruistic Surrogacy:** refers to an arrangement in which the surrogate receives no monetary compensation beyond medical and pregnancy-related expenses.[12] This model is regarded as ethically preferable in many jurisdictions, as it prevents the commercialisation of the human body.

(4) **Commercial Surrogacy:** involves payment or financial reward to the surrogate, beyond reimbursement of medical costs.[13] Though it was once legal and flourishing in India, it raised serious ethical concerns about exploitation and commodification of women, leading to its prohibition under the Surrogacy (Regulation) Act, 2021.

Historical Evolution

Surrogacy is not a modern invention; references to surrogate motherhood are found in ancient legal and religious texts. The *Book of Genesis* recounts how Sarah, wife of Abraham, requested

[10] Katarina Trimmings, 'International Surrogacy Arrangements: Legal Regulation at the International Level' (2011).
[11] K Rotabi and N Bromfield, 'Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers' (2017)
[12] Narender Kumar and Jyotsana Choudhary, 'The Concept of Surrogacy: Historical Origins and Contemporary Developments' (2024).
[13] ibid

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her maid Hagar to conceive a child with her husband, a primitive form of traditional surrogacy.[14] Similarly, in Hindu mythology, Balram is said to have been transferred from the womb of Devaki to that of Rohini, signifying early recognition of gestational substitution.[15] These early instances demonstrate that the idea of surrogacy is deeply rooted in human society, although modern science has drastically altered its method and legal significance.

The modern practice began to take shape in the late twentieth century. In 1980, the first formal surrogacy contract was drafted in Michigan, United States, and by 1985, the first successful gestational surrogacy was achieved.[16] A year later, the controversial *Baby M* case[17] arose when Mary Beth Whitehead, a traditional surrogate, refused to relinquish custody of the child to the intended parents. The New Jersey Supreme Court held the contract void as against public policy, raising fundamental questions about consent, parental rights, and the commodification of reproduction. Similarly, in *Calvert v Johnson* (1993)[18], the California Supreme Court upheld the parental rights of the commissioning couple, defining motherhood as resting on intent rather than biology. These early precedents marked a jurisprudential shift from genetic determinism to the intention-based theory of parentage.

In India, the first recorded case of surrogacy occurred in 1994, and by the early 2000s, the nation had become a major destination for international surrogacy due to its advanced medical facilities and lower costs. According to UN reports, India's surrogacy sector generated hundreds of millions of dollars annually, supported by thousands of fertility centres nationwide.[19] However, this commercial boom also attracted criticism for its lack of regulation and potential exploitation of economically vulnerable women.

Legal And Institutional Evolution in India

The Indian Council of Medical Research (ICMR) issued guidelines in 2005 to regulate ART and surrogacy, but these lacked statutory force. In response to rising ethical and legal concerns, the Assisted Reproductive Technologies (Regulation) Bill, 2014 was introduced.[20] It mandated

[14] *The Holy Bible*, Genesis 16:1–4.
[15] Narender Kumar and Jyotsana Choudhary, 'The Concept of Surrogacy: Historical Origins and Contemporary Developments' (2024).
[16] *Creative Family Connections*, 'History of Surrogacy' (no date) accessed 20 October 2025.
[17] *Baby M* 109 NJ 396, 537 A2d 1227 (Supreme Court of New Jersey, 3 February 1988).
[18] *Johnson v Calvert* 5 Cal 4th 84 (Supreme Court of California, 20 May 1993).
[19] *Surrogacy (Regulation) Act, 2021"* (Aspire IAS, 29 October 2025).
[20] *Assisted Reproductive Technologies (Regulation) Bill* 2014 (India).

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registration of ART clinics, outlined rights of donors and surrogates, banned sex selection, and restricted surrogacy to married Indian couples, excluding foreigners. Though it lapsed, it laid the groundwork for later reforms.

Subsequently, the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 were enacted to create a uniform legal framework. The 2021 Acts collectively prohibit commercial surrogacy and restrict the practice to altruistic surrogacy for infertile Indian couples.[21] They mandate that the surrogate must be an Indian woman aged 25–35 years, married with at least one child of her own, and medically and psychologically fit to undertake surrogacy.[22] The legislation aims to strike a balance between preventing exploitation and acknowledging surrogacy as a lawful medical procedure. Nevertheless, the exclusion of unmarried individuals, LGBTQ+ persons, and foreigners has been criticised as regressive and inconsistent with constitutional principles of equality and autonomy.[23]

Ethical, Religious, And Psychological Dimensions

The ethics of surrogacy lie at the intersection of autonomy and vulnerability. Proponents view it as an exercise of reproductive freedom, enabling individuals to experience parenthood irrespective of biological limitations. Critics, however, argue that commercial surrogacy transforms women's bodies into sites of economic transaction, creating a "womb market" driven by global inequality.[24] The ethical debate therefore revolves around the tension between reproductive autonomy and the risk of exploitation.

Religious perspectives further complicate moral evaluations. The Catholic Church condemns surrogacy as morally impermissible because it dissociates procreation from the marital act.[25] Islamic law generally prohibits surrogacy to preserve lineage (*nasab*), while Jewish scholars have endorsed gestational surrogacy if both intended parents' gametes are used.[26] In Hindu tradition, surrogacy has been viewed as acceptable when it fulfils the social duty of procreation without violating principles of dharma.[27]

[21] ibid;*Surrogacy (Regulation) Act* 2021 (India).
[22] ibid
[23] Bibha Tripathi, 'Religious Perspectives on Surrogacy in India' (2018) 10(2) *Indian Journal of Ethics in Medicine* 54.
[24] ibid
[25] *Catechism of the Catholic Church*, para 2376.
[26] Marcia C Inhorn, 'Making Muslim Babies: IVF and Gamete Donation in Sunni-versus Shi'a Islam' (2006) 30 *Culture, Medicine and Psychiatry* 427.
[27] *Hindu Dharmashastra Commentary on the Mahabharata* (Book 1, Adi Parva)

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Surrogacy often fosters strong emotional ties and occasional conflicts. Although most participants maintain healthy relationships, some surrogates face brief emotional distress post-birth. Accordingly, the ICMR Guidelines and 2021 Acts require psychological counselling before any surrogacy arrangement.

Transnational Dimensions and the Role of Private International Law

Surrogacy's cross-border expansion has created complex legal questions involving jurisdiction, citizenship, and parentage. The principles of *jus soli* (citizenship by birthplace) and *jus sanguinis* (citizenship by bloodline) often conflict in determining the nationality of surrogate-born children. The *Baby Manji Yamada v Union of India*[28] case vividly illustrated these difficulties when a child born through an Indian surrogate to Japanese parents was rendered stateless following the parents' divorce. The Supreme Court intervened to facilitate the child's travel and subsequent adoption, exposing the urgent need for legislative clarity.

At the international level, the Hague Conference on Private International Law (HCCH) has acknowledged surrogacy as a pressing problem in cross-border family law.[29] Efforts are ongoing to draft a convention ensuring recognition of parentage and protection of children born through international surrogacy. Similarly, the European Commission's 2022 proposal on the recognition of parenthood aims to harmonise parental status across EU Member States.[30]

III. Comparative Legal Frameworks: India, the European Union, and International Efforts

Global surrogacy laws differ widely. India's restrictive model contrasts with Europe's rights-based, child-centred approach. This section analyses these contrasting frameworks, focusing on parentage, contract validity, and international human rights standards.

The Indian Legal Framework

India's surrogacy regime has evolved from liberal permissiveness to stringent regulation. In the early 2000s, India became the global hub of commercial surrogacy, often termed the "womb

[28] *Baby Manji Yamada v Union of India and Another* (2008) 13 SCC 518.
[29] Hague Conference on Private International Law, *Report on the Parentage/Surrogacy Project* (Preliminary Document No 1, November 2022).
[30] European Commission, *Recognition of Parenthood between Member States* (European Commission, 7 December 2022).

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capital of the world."[31] The ICMR Guidelines 2005 offered ethical oversight but lacked enforcement, allowing unregulated clinics and resulting exploitation.[32]

In response, the Assisted Reproductive Technologies (Regulation) Bill 2014 sought to institutionalise ART clinics and establish procedural safeguards.[33] Although it lapsed, its provisions laid the foundation for subsequent reforms. The twin enactments the Assisted Reproductive Technology (Regulation) Act 2021 and the Surrogacy (Regulation) Act 2021 represent India's most comprehensive legislative response.[34]

The Surrogacy Act prohibits commercial surrogacy and permits only altruistic arrangements by a married Indian woman (aged 25–35) who already has a biological child.[35] Intended parents must be Indian citizens, married for at least five years, and medically certified as infertile.[36] All contracts require authorisation from competent authorities and registrationn of ART clinics. Violations attract imprisonment up to ten years and fines up to ₹10 lakh.[37]

Although these measures curtail exploitation, critics argue they disproportionately restrict reproductive autonomy by excluding single parents, LGBTQ+ couples, and foreigners.[38]

Judicially, Indian courts have recognised surrogacy within constitutional parameters of personal liberty under Article 21. In *Baby Manji Yamada v Union of India*[39], the Supreme Court acknowledged surrogacy's legality and directed administrative facilitation for the stateless child. Similarly, in *Jan Balaz v Anand Municipality*[40], the Gujarat High Court treated surrogacy as a legitimate means of parenthood under private law. Yet post-2021, these precedents must be read subject to statutory limitations.

[31] S Brooks, *US Media Representations of Transnational Indian Surrogacy* (Wright State University, Doctoral Thesis, 2020).
[32] Trimmings K, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011)
[33] *Assisted Reproductive Technologies (Regulation) Bill* 2014 (India).
[34] ibid; *Surrogacy (Regulation) Act* 2021 (India).
[35] *Surrogacy (Regulation) Act* 2021 (India) s 4.
[36] ibid s 3
[37] ibid s 10
[38] Bibha Tripathi, 'Religious Perspectives on Surrogacy in India' (2018) 10(2) *Indian Journal of Ethics in Medicine* 54.
[39] *Baby Manji Yamada v Union of India and Another* (2008) 13 SCC 518.
[40] *Jan Balaz v Anand Municipality & Ors* (2010) AIR Guj 21.

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The European Union Approach

Unlike India's unitary framework, the European Union (EU) faces the challenge of reconciling diverse national laws under a shared human-rights regime. While countries such as Greece, the Netherlands, and Portugal permit altruistic surrogacy, others like France, Germany, and Italy continue to ban it altogether.[41] This regulatory mosaic causes acute difficulties for recognition of parentage across borders.

The European Court of Human Rights (ECtHR) has played a decisive role in shaping an integrated, rights-oriented approach. In *Mennesson v France* and *Labassee v France*, the Court held that France's refusal to register foreign birth certificates of surrogate-born children violated Article 8 of the European Convention on Human Rights by infringing their right to identity and family life.[42] In *Paradiso and Campanelli v Italy*, however, the Grand Chamber reaffirmed the margin of appreciation doctrine, allowing Italy to deny recognition where public policy was at stake.[43]

Both the EU Charter and the UN Convention on the Rights of the Child uphold the child's best interests as fundamental, guiding the European Commission in balancing national autonomy with continuity of parentage.

IV. Policy Recommendations and Pathways for Harmonisation

Despite growing acceptance of surrogacy, regulation under Private International Law remains weak. Divergent laws from India's restrictions to the EU's right based model cause inconsistencies in parentage and child rights. This section offers policy recommendations founded on equity, autonomy, and cooperation to build a harmonised global framework.

Foundational Principles for Harmonisation

1. **The Best Interests of the Child** – The *Convention on the Rights of the Child* (1989) places the child's welfare at the core of family law.[44] Future surrogacy frameworks

[41] European Parliament, *Cross-Border Surrogacy Arrangements: Challenges and Legal Implications* (Policy Department for Citizens' Rights and Constitutional Affairs, 2022).
[42] Mennesson v France (2014) App No 65192/11 (ECtHR); Labassee v France (2014) App No 65941/11 (ECtHR).
[43] *Paradiso and Campanelli v Italy* (2017) App No 25358/12 (ECtHR).
[44] *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

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must ensure that recognition of parentage, citizenship, and custody decisions align with this guiding standard.

2. **Recognition of Reproductive Autonomy**– The *Universal Declaration of Human Rights* (1948) recognises the right of every individual to found a family.[45] This protection should extend to commissioning parents engaging in surrogacy, provided the arrangement is consensual and devoid of coercion.
3. **Mutual Recognition of Legal Parentage** – In line with the principle of comity of nations, parentage or surrogacy orders validly issued in one jurisdiction should be acknowledged in another, unless contrary to public policy.[46]

Implementation Pathways

To translate these principles into action, harmonisation must occur at national, regional, and international levels.

1. **National-Level Reforms:**
   - States should align reproductive and family laws with global ethical standards by:
   - Enacting clear legislation recognising surrogacy as a regulated means of family formation;
   - Establishing independent ART regulatory authorities;
   - Mandating pre-surrogacy counselling for all participants; and
   - Ensuring legal recognition of parentage to secure citizenship and inheritance rights. India's ART and Surrogacy Acts (2021) can serve as models if expanded to include single persons, same-sex couples, and foreign parents.
2. **Regional Cooperation**

   Regional bodies like SAARC and ASEAN should promote soft-law instruments and mutual recognition through:
   - Regional registries for parentage recognition;
   - Guidelines for cross-border ART practices;
   - Shared dispute-resolution mechanisms; and
   - Judicial cooperation among family courts.

   Such collaboration would bridge national gaps and promote culturally sensitive global harmonisation.

[45] *Universal Declaration of Human Rights* (1948) art 16.
[46] Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press 2010).

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V. Conclusion

Surrogacy represents one of the most intricate intersections of science, ethics, and law in the modern era. As assisted reproductive technologies continue to evolve, the absence of a coherent international framework has resulted in fragmented and often conflicting national regimes. These disparities not only create uncertainty for commissioning parents and surrogates but, most critically, jeopardise the rights and identity of children born through cross-border arrangements. The comparative study of India and the European Union underscore this imbalance. India's restrictive legislation, though aimed at preventing exploitation, limits reproductive autonomy and inclusivity. Conversely, the European Union's rights-based model, shaped by the jurisprudence of the European Court of Human Rights, offers a more balanced approach that prioritises the best interests of the child and recognises diverse family structures. Both, however, reveal the limitations of unilateral regulation in addressing transnational realities.

Harmonisation under Private International Law is therefore not merely desirable but essential. The principles of child welfare, reproductive autonomy, and mutual recognition of parentage must guide this process. National reforms, regional cooperation, and international instruments such as the Hague Parentage Project together can lay the foundation for a uniform global standard. Ultimately, surrogacy should be understood not as a challenge to traditional family structures but as an extension of human dignity and choice. A right oriented, ethically grounded, and internationally coordinated framework can ensure that surrogacy serves its true purpose the creation of families founded on care, consent, and equality rather than conflict or exploitation.