SURROGACY UNDER THE SHADOW OF GLOBALIZATION

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Globalization is often seen from the viewpoint of the Global North, disregarding the perspectives of the Global South. This paper discusses cross-border surrogacy under the shadow of globalization by focusing on disadvantaged and exploited vulnerable people in developing economies. When Asian countries tackled and regulated overseas surrogacy, the hub for such activities was simply transferred to neighboring countries or a black market and continued its operation, jeopardizing rights of surrogates and the best interests of the resulting children. These problems stem from the lack of or divergent regulations and rules on surrogacy throughout various jurisdictions. This paper examines these points comparatively and discusses the Parentage/Surrogacy Project of the Hague Conference on Private International Law (HCCH) as a possible global response to the issues surrounding international surrogacy.

I. INTRODUCTION

Globalization is characterized by frequent cross-border movement of people, goods, services, capital, and information.

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** Abbreviations: ART = Artificial Reproductive Technology; CGAP = Council on General Affairs and Policy; ECtHR = European Court of Human Rights; HCCH = Hague Conference on Private International Law; IVF = In-Vitro Fertilization.

It is generally held to entail the erosion of state sovereignty, growing role of international and regional organizations, fragmentation of institutions, relevance of non-state actors, and legal pluralism.[1] This account of globalization is, however, primarily geared towards the Northern Hemisphere without due regard to developing economies in Asia, Africa and Latin America. This views globalization as a "top-down processes of diffusion of economic and legal models from the global North to the global South,"[2] possibly affirming developments at the cost of the developing countries. In fact, globalization, reshaped by COVID-19 and the war in Ukraine, has exacerbated the gulf between North and South, the rich and poor, the strong and weak, and affluent market economy and marginalized developing countries.

Arguably, the North-South divide inheres also in child protection, in a field where Prof. Linda Silberman has extensively published outstanding papers.[3] In the past, couples wishing to have children used adoption to transfer children from the Global South to the Global North.[4] To deter illicit practices and child trafficking, the 1993 Intercountry Adoption Convention of the Hague Conference on Private International Law (HCCH)[5] installed an effective control mechanism grounded on administrative cooperation between the sending and receiving states.[6]

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1. *See generally* Paul Schiff Berman, *Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative*, *in* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., 2020) (discussing the impact of globalization).

2. BOAVENTURA DE SOUSA SANTOS AND CÉSAR A. RODRÍGUEZ-GARAVITO, LAW, POLITICS, AND THE SUBALTERN IN COUNTER-HEGEMONIC GLOBALIZATION 2 (2005); *see also* Horatia Muir Watt, *Globalization and Comparative Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 599–602 (Mathias Reimann and Reinhard Zimmermann eds., 2d ed., 2019).

3. *See, inter alia*, Linda Silberman, *Cooperative efforts in Private International Law on behalf of children: the Hague Children's Conventions*, 323 RECUEIL DES COURS 261–477 (2006) [hereinafter *Conventions*]; Linda Silberman, *The Hague Children's Conventions: The Internationalization of Child Law*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE U.S. AND ENGLAND 589–617 (Sanford N. Katz et al. eds., 2000) [hereinafter *Internationalization*].

4. See the statistics at https://perma.cc/VRT5-EDWE.

5. HCCH Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, https://perma.cc/2NXV-339B.

6. *See Conventions*, *supra* note 3, at 430–464; *Internationalization*, *supra* note 3, at 606–15. The Intercountry Adoption Convention has gained 105 contracting states as of Dec. 19, 2023. They comprise both "receiving states"

The number of intercountry adoptions has, however, steadily declined due to a dropping birthrate and growing access to artificial reproductive technology (ART).[7] The problem has shifted to cross-border surrogacy, where intended parents go abroad to use procreation services and come home with children born through surrogates.[8]

In honor of Prof. Silberman, the underlying paper tackles issues of child protection in surrogacy cases from a comparative perspective. This study will indicate regulatory gaps between states, which may cause a "race to the bottom" in the Global South. While surrogacy occurs everywhere and the underregulated Global South includes Latin America and Africa,[9] this study focuses on Asia, where surrogacy has become a serious political and diplomatic issue and widely attracted attention in view of exploitation, poverty, gender gaps, and human rights violations. To combat illicit practices, the best avenue would be to strengthen domestic regulations in the country where surrogacy takes place, but this is still a long way off. As an alternative, it is a welcoming move that the HCCH Council of General Affairs and Policy (CGAP) decided in March 2023 to give the greenlight to the "Parentage and Surrogacy" Project and

(Western Europe, the U.S. and Canada) and "states of origin" (South Korea, China, Thailand, Vietnam, India, Columbia, Guatemala, Ethiopia, and Congo). For the status table, see https://perma.cc/N428-F5VJ.

7. Robert Magnus, *Die Neuregelung des Internationalen Privat- und Verfahrensrechts der Adoption*, 42 IPRax 552 (2022).

8. *See generally* Karen Smith Rotabi & Nicole F. Bromfield, From Intercountry Adoption to Global Surrogacy. A Human Rights History and New Fertility Frontiers 121–29 (2017); *see also* Andrea Whittaker, International Surrogacy as Disruptive Industry in Southeast Asia 6–10 (2019).

9. Due to the lack of or insufficient regulation on surrogacy, Latin American countries like Argentina, Bolivia, Peru, and Venezuela have become popular destinations of "procreation tourism" in the last decade. *See, inter alia*, Gloria Torres, Anne Shapiro, & Tim K. Mackey, *A Review of Surrogate Motherhood Regulation in South American Countries: Pointing to a Need for an International Legal Framework*, BMC Pregnancy and Child Birth, Jan. 2019, at 3–12; Surrogacy in Latin America (Nicolás Espejo-Yaksic, Claire Fenton-Glynn, & Jens M. Scherpe eds., 2023). In Africa, this has been the case with Nigeria, Kenya, and Ghana, whereas South Africa has a strict regulatory framework in place. *See* Tania Broughton, *Surrogacy Growing in Africa*, Afr. Legal Apr. 10, 2019, https://perma.cc/4ATR-Z8ZM; Julia Sloth-Nielsen, *Surrogacy in South Africa*, *in* Eastern and Western Perspectives of Surrogacy 185–201 (Jens M. Scherpe, Claire Fenton-Glynn, & Terry Kaan eds., 2019).

mandated the establishment of a Working Group.[10] Yet, caution is required as certain limitations may inhere in this project.

II. "Procreation Tourism" and the Vulnerable

A. *Background in India*

The fertility in human beings is a biological necessity to preserve and protect the species. Childbirth may be encouraged by the government to sustain economic growth and enhance state power. In traditional, patriarchal society in Asia grounded on consanguinity, infertile women were cursed, allowing husbands to have a mistress or marry again and again until a wife bore a child.[11] The inability to reproduce was a social stigma due to the lack of a male heir and disruption of family lineage.[12] It arguably contrasts with Western societies, where, at least today, reproduction is more of an individual choice and relates to the pursuit of happiness.[13]

From around 2000 until recently, India was, together with Thailand, the most favored destination of "procreation tourism" in the Global South.[14] Infertility clinics operated as "baby-making factories," attracting intended parents by excellent

10. HCCH Council General Affairs & Policy, *Conclusions & Decisions,* paras. 3–8 (Mar. 2023), https://perma.cc/2XCZ-76U8.

11. For discussions on traditional patriarchal family structures in Asia, *see* Chie Nakane, Kazoku no Kôzô. Shakai Jinruigaku-teki Bunseki [Structure of Families. A Socio-Anthropological Analysis] 33–67 (1970) (comparing the horizontal structure of extended or joint family in India and the vertical structure of patrilineal family in Japan, while pointing out the importance of maintaining the family lineage in both societies); Yôzô Watanabe, Kazoku to Hô [Family and Law] 29–40 (1973) (discussing the patriarchal family structure in pre-World War II Japan); Katsuhiko Oka, "Kazoku" to iu Kankoku no Sôchi. Ketsuen-shakai no Hôteki na Mechanism to sono Henka [Institution named "Family" in Korea. Legal Mechanism of a Consanguineous Society and its Developments] 9–10, 15–20 (2017) (discussing the millennium-long patrilineal clan system deriving from ancestors and the focus on masculine heirs in Korea).

12. Neha Bahl & Vaibhav Goel Bhartiya, Law and Policy on Surrogacy: A Socio-Legal Study in India. Legislative Study on Surrogacy in India 2–6 (2022).

13. For the U.S. policy to protect reproductive rights, see *Reproductive Justice,* U.S. Dep't Justice, https://perma.cc/AP6J-9L3R.

14. For India, *see* Mizuho Matsuo, Indo ni okeru Dairi Shussan no Bunka-ron: Shussan no Shôhin-ka no Yukue [Cultural Discourse on Surrogacy in India: Future of the Commercialization of Childbirth] 12–18 (2013); for Thailand, *see infra* III-B.

medical infrastructure, qualified doctors, English-speaking staff, and an abundance of poor women willing to undergo pregnancy or egg donation as a lucrative job.[15] The costs of surrogacy in India were reasonable (USD 25,000-45,000), compared with the United States (USD 100,000-225,000) and other countries.[16] Commercial surrogacy in India contributed to the national economy and was estimated to generate USD 2.3 billion per year by 2012.[17]

B. *"Manji" Case*

In India, there were initially only non-binding government guidelines on the operation of surrogacy.[18] The lack of regulations caused uncertainty as to the quality of services, pricing, provision of gametes, and legal parentage.[19]

In the "Manji" case,[20] in November 2007, the Yamadas, a Japanese couple, visited Akanksha Infertility and IVF Clinic in Anand, in the state of Gujarat, whose director Dr. Nayna Patel was well-known in Western media.[21] The clinic had over 100 surrogacy cases a year with a 35% success rate.[22] The Yamadas entered a surrogacy arrangement but divorced before a girl named Manji was born out of the couple's gametes in July 2008. Mr. Yamada came to India alone to take Manji home without success.[23] Absent clear-cut rules—although in a usual case the intended parents would have become legal parents at

15. *Id.*

16. For the estimated costs in India relative to developed countries including the U.S., see GITA ARAVAMUDAN, BABY MAKERS. THE STORY OF INDIAN SURROGACY 20 (Chiyoka Torii, trans., 2018) (2014); SHARMILA RUDRAPPA, DISCOUNTED LIFE. THE PRICE OF GLOBAL SURROGACY IN INDIA 5 (2015); Beth Braverman, *How Much Surrogacy Costs and How to Pay for It. Experts say the total cost can range from $100,000 to $225,000, so it's important to plan ahead*, U.S. NEWS (May 30, 2023), https://perma.cc/DPK6-236A.

17. RUDRAPPA, *supra* note 16, at 5.

18. Ministry of Health and Family Welfare of the Government of India, National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India (2005), approved by the Indian Council of Medical Research (ICMR), https://perma.cc/C2ZP-WZ63.

19. MATSUO, *supra* note 14, at 15–18.

20. *Baby Manji Yamada v. Union of India*, 13 SCC 518 (2008).

21. *Journey to Parenthood*, OPRAH WINFREY SHOW (2006), https://perma.cc/74FZ -SMVP.

22. MATSUO, *supra* note 14, at 32–33.

23. ARAVAMUDAN, *supra* note 16, at 114–17.

registration—the Indian authority neither granted the motherhood of Mrs. Yamada after divorce, nor the motherhood of the surrogate or the egg donor. Nor could Mr. Yamada alone qualify as the legal father.[24] On the other hand, the Japanese authority refuted legal parentage of the Yamadas, considering the surrogate giving birth to the child as the legal mother according to the rule "*mater semper certa est.*" (The mother is always certain).[25] Thus, Manji had neither Indian nor Japanese nationality or passport. After a struggle, the Municipality in Anand issued a birth certificate indicating solely Mr. Yamada as the genetic father in August 2008. Yet, he had to leave India due to his visa expiration, so his mother came to India to care for the baby.[26]

The grandmother petitioned to the Rajasthan High Court for a travel permit and issuance of a passport for Manji. In the meantime, NIDS-SATYA, an NGO for child welfare,[27] sought a *habeas corpus* order, claiming that Manji was a victim of illicit child trafficking. Ultimately, the Supreme Court of India decided on September 29, 2008 that, without having Indian nationality, Manji be granted a special permit to obtain a passport to travel to Japan.[28]

The "Manji" case demonstrates inherent risks of "procreation tourism" for the children and the intended parents. India declined to grant Indian nationality and passport to children born through surrogates. Yet, a number of receiving states like Japan, France, the U.K., Canada, and Australia refused to recognize legal parentage of the intended parents or hindered children from entering the country in the absence of genetic link and nationality by descent (*jus sanguinis*).[29] In a Canadian case, the intended parents were trapped in India for six years, as the Canadian authority declined a visa to one twin for lack of

24. *Id.*

25. Saikō Saibansho [Sup. Ct.] Apr. 27, 1962, 16(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1247; for further details on legal parentage under Japanese law, see Yuko Nishitani, *Japan*, *in* COMPARATIVE PARENTHOOD (Claire Fenton-Glynn ed., *forthcoming* 2024) (on file with author).

26. ARAVAMUDAN, *supra* note 16, at 117.

27. National Institute of Development Studies and Action, *Overview*, NIDS-SATYA, http://www.satyaanngo.org/who-we-are/about-satya-iswmr/overview/.

28. *Baby Manji Yamada v. Union of India*, 13 SCC 518 (2008); ARAVAMUDAN, *supra* note 16, at 118–19.

29. ARAVAMUDAN, *supra,* note 16, at 126–28, 208–10; for further details on comparative studies, *see infra* IV-B.

genetic link caused by the clinic mixing up sperms.[30] As these incidents indicate, children were frequently left in legal limbo for lack of clear-cut rules and coordination between states.

III. Commercialism and the Global South

A. *Comparative Study*

In a comparative perspective, these legal problems surrounding cross-border surrogacy derive from fundamental differences in substantive law rules and policy throughout various jurisdictions. The relevant legal systems can be divided into the following three groups.

The first group (i) concerns a number of countries that prohibit surrogacy in domestic law. They include Germany, France, Austria, Switzerland, Spain, Italy, Nordic countries, Mainland China, Taiwan, Singapore, and the State of Michigan, in the United States,[31] as well as Islamic countries in general.[32] Japan is generally understood to belong to this category, although sur-

30. Raveena Aulakh, *After 6 years and fertility mixup, surrogate twin can come home*, Toronto Star (May 5, 2011), https://perma.cc/H4LF-K7KY. For a discussion of a comparable German case, see Konrad Duden, Leihmutterschaft im Internationalen Privat- und Verfahrensrecht 84 n. 295 (2015).

31. For an overview, see Yuko Nishitani, *Identité culturelle en droit international privé de la famille,* 401 Recueil des cours 386–88 (2019); for France, Code civil [Civil Code] art. 16-7, 16-9; Code pénal [Penal Code] art. 227-12(3); for Germany, Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern [Act on Brokerage of Adoption and the Prohibition of Brokerage of Surrogate Mothers] art. 13c (July 2, 1976), BGBl. 1976 I, 1762 [as amended]; Gesetz zum Schutz von Embryonen [Act on the Protection of Embryos] art. 1(1) no. 7 (Dec. 13, 1990), BGBl. 1990 I, 2746 [as amended]; for the State of Michigan in the U.S., Mich. Compiled L. Serv. ch. 722 § 851–63 (notably, House Bill No. 5207 authorizing gestational surrogacy has passed the House and been submitted to the Senate on Nov. 9, 2023) (https://perma.cc/EM2J-4APQ); for further comparative studies on France, Germany, Spain, Nordic countries, China, Taiwan, Singapore and the United States, *see* Eastern and Western Perspectives on Surrogacy, *supra* note 9, at 17–34, 35–48, 59–82, 264–267, 311, 359–376, 377–396, 397–416; for China, *see also* Zhengxin Huo, *The Peoples' Republic of China, in* International Surrogacy Arrangements. Legal Regulation at the International Level 93–103 (Katarina Trimmings and Paul Beaumont eds., 2013).

32. Islamic legal systems generally prohibit ART and surrogacy for religious reasons, except Iran and Lebanon where Shi'a authorities have given permission. *See* Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni versus Shi'a Islam,* 30(4) Culture, Medicine and Psychiatry 427–50 (2006).

rogacy is neither allowed nor forbidden explicitly, as in Belgium and South Korea.[33] In Japan, in the absence of statutory rules, surrogacy is *de facto* deterred through self-regulation of medical associations issuing guidelines.[34] These countries generally hold surrogacy contracts as null and void[35] for violating human dignity and inalienability of the human body. Surrogacy is condemned for unduly outsourcing pregnancy and commoditizing women's bodies.[36] It may also cause serious physical and mental damage to surrogates without ensuring an independent, informed consent, and place the best interests of the child at risk.[37] As a result of a surrogacy ban, these countries do not have rules specific to legal parentage resulting from surrogacy. Thus, the legal mother will be the surrogate giving birth to the child under their domestic law.[38]

The second group (ii) concerns jurisdictions that allow surrogacy under strict conditions provided for in domestic law or administrative rules. They include England and Wales, the Netherlands, Portugal, Israel, South Africa, Australia, New Zealand, Hong Kong, Brazil, Mexico (only the States of Sinaloa and Tabasco), Uruguay, some U.S. states (Louisiana,

33. For Belgium, see Gert Verschelden and Jinske Verhellen, *Belgium, in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 31, at 49–83; for South Korea, see Ock-Joo Kim and Byung-Hwa Lee, *Surrogacy in South Korea, in* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 9, at 449–66.

34. Japan Soc'y Obstetrics & Gynecology, *Dairi Kaitai ni kansuru Kenkai* [Position on Surrogacy] 821–822 (Aug. 2023), https://perma.cc/BN5E-KU8Y; Nishitani, *supra* note 25 (on file with author).

35. For France, CODE CIVIL [CIVIL CODE] arts. 16-7, 16-9; for Germany, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 138.

36. *See* David M. Peña-Guzmán & G.K.D. Crozier, *Surrogacy as Medical Tourism. Philosophical Issues*, *in* HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 46–47 (E. Scott Sills ed., 2016).

37. See Science Council of Japan: Committee on Study of the Modality of ART, *Dairi kaitai wo chûshin tosuru Seishoku Hojo Iryô no Kadai: Shakaiteki Gôi ni mukete* [Issues of ART with a Focus on Surrogacy: Seeking Societal Consensus] (Apr. 8, 2008), https://perma.cc/2UMW-ARWB.

38. For an overview of prohibitive jurisdictions, see Claire Fenton-Glynn & Jens M. Scherpe, *Surrogacy in a Globalized World. Comparative Analysis and Thoughts on Regulation*, *in* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 9, at 517–562; Claire Fenton-Glynn, Jens M. Scherpe & Nicolás Espejo-Yaksic, *Surrogacy in Latin America. An Introduction, in* SURROGACY IN LATIN AMERICA, *supra* note 9, at 18–28.

Virginia, etc.), and Canadian provinces.[39] These jurisdictions in general only authorize altruistic surrogacy, limiting the payment to reasonable expenses.[40] Surrogacy agreements need to be in writing and the surrogate is supposed to consent before and after childbirth.[41] Many of these jurisdictions only allow gestational surrogacy without using the surrogate's eggs, and require genetic link between the child and intended parent(s).[42] The availability of this facility to same-sex couples is increasing for male couples who cannot have a child with their genes otherwise.[43] Legal parentage of the intended parents is established either by birth registration,[44] or by parental order[45] or adoption[46] after childbirth. Notably, most of these jurisdictions only accept domestic surrogacy and deter "procreation

39. For comparative studies on England and Wales, Australia, New Zealand, Hong Kong, Israel, Portugal, and the United States, *see* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 9, at 85–104, 115–34, 165–84, 203–28, 229–57, 307–28, 419–38; for South Africa, *see* Sloth-Nielsen, *supra* note 9, at 185–201; for the Netherlands, *see* Ian Curry-Sumner and Machteld Vonk, *The Netherlands, in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 31, at 273–93; for Brazil and Mexico, *see* SURROGACY IN LATIN AMERICA, *supra* note 9, at 82–101, 195–213; for Uruguay, Ley nº 19.167, Regulación de las técnicas de reproducción humana asistida [Regulation on the Assisted Human Reproduction Techniques], art. 25 (Nov. 22, 2013), REGISTRO NACIONAL DE LEYES Y DECRETOS, t. 2(2) at 2088; for the State of Louisiana in the U.S., La. R.S. § 9: 2718–2720.15; for the State of Virginia in the U.S., Code Va., §§ 20-156–65; for Canada, see Ellen K. Embury, *Establishing Parentage for Surrogacy Babies Across Canada*, CANADA FERTILITY LAW (Jan. 19, 2022), https://perma.cc/69ML-77BM.

40. Fenton-Glynn & Scherpe, *supra* note 38, at 530–34; Fenton-Glynn, Scherpe, & Espejo-Yaksic, *supra* note 38, at 41; INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 31, at 238–39 and 276.

41. Fenton-Glynn & Scherpe, *supra* note 38, at 523–30.

42. Fenton-Glynn & Scherpe, *supra* note 38, at 544–52.

43. Yuko Nishitani, *Protection of Same-Sex Couples in Cross-Border Legal Relationships*, *in* DROITS HUMAINS DES MINORITÉS SEXUÉES, SEXUELLES ET GENRES – REGARDS FRANCO-JAPONAIS (Yoshie Ito et al. eds., *forthcoming* 2024) (on file with author).

44. This is the case in Canada in British Columbia (Family Law Act, SBC 2011, c. 25) and Ontario (Children's Law Reform Act, RSO 1990, c. C.12, § 10); Portugal (Lei nº 32/2006, July 26, 2006, art. 8(7)); Uruguay (Torres, Shapiro & Mackey, *supra* note 9, at 8).

45. England and Wales (Human Fertilisation and Embryology Act 2008, c. 22, § 54); Canada in Alberta (Family Law Act, SA 2003, c F-4.5, § 8.2), Saskatchewan (Children's Law Act, SS 2020, c 2), Manitoba (Family Maintenance Act, CCSM 2021, c F20), and Nova Scotia (Birth Registration Regulations, NS Reg. 390/2007); also Australia and Israel (see EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 9, at 91–92 and 172).

46. This is the case in New Zealand (*Id.*, at 217).

tourism" from abroad by requiring at least one intended parent to be a national or have habitual residence in that jurisdiction,[47] or be related to the surrogate.[48] This is also the case with the State of New York that allows surrogacy since February 2021, ordering that one of the intended parents be a U.S. citizen or lawful U.S. permanent resident and have resided in New York for at least six months.[49]

Intended parents residing in a jurisdiction belonging to group (i) or (ii) often sought to circumvent a domestic surrogacy ban or restrictions and went abroad to enter a surrogacy arrangement. Their destinations have been the third group of jurisdictions (iii) that accept commercial surrogacy commissioned by foreign intended parents. They include a number of U.S. states (California, Nevada, Minnesota, etc.), Russia, Ukraine, Georgia, Greece, and some Asian countries in the past, as will be discussed below.[50] In the third group of jurisdictions (iii), legal parentage of the intended parents is established, prior or subsequent to childbirth, by court order,[51] birth registration,[52] or parental registration.[53] The degree of control and requirements for surrogacy widely differ among

47. Fenton-Glynn & Scherpe, *supra* note 38, at 550; Nishitani, *supra* note 31, at 386–87.

48. This is the case in Brazil; see Torres, Shapiro & Mackey, *supra* note 9, at 6.

49. N.Y. Fam. Ct. Act § 581-402(b). Notably, the State of New York allows to compensate the surrogate (*Id.* § 581-502) and to render a parentage judgment prior to childbirth (*Id.* § 581-203).

50. For further comparative studies on Russia, see Olga A. Khazova, *Surrogacy in Russia, in* Eastern and Western Perspectives on Surrogacy, *supra* note 9, at 281–306; for the United States, see Naomi Cahn & June Carbone, *Surrogacy in the United States of America, Id.* at 309–28; for Ukraine, see Gennadiy Druzenko, *Ukraine, in* International Surrogacy Arrangements, *supra* note 31, at 357–65; for Greece, see Nomos 4272/2014, Prosarmogi sto ethniko dikaio tis Ektelestikis Odigias 2012/25/EE tis Epitropis tis 9is Oktobriou 2012 [Transposition into national law of the Commission Directive 2012/25/EU, Oct. 9, 2012], Ephemeris tes Kyverneseos tes Hellenikes Demokratias [E.K.E.D.] 2014, A 145; Achilles G. Koutsouradis, *Aktuelle Entwicklungen im griechischen Familienrecht*, 61 FamRZ 1550–51 (2015).

51. As is the case in California (Cal. Fam. Code § 7962(f)), New York (N.Y. Fam. Ct. Act § 581-201–06), and Nevada (Nev. Rev. Stat. § 126.720).

52. As in Ukraine, where intended parents are registered from the outset. Druzenko, *supra* note 50, at 359.

53. As in Russia, where legal maternity is transferred from the surrogate to the intended mother. Khazova, *supra* note 50, at 292–95.

these jurisdictions.[54] Many U.S. states provide excellent services based on a rigorous screening of surrogates with necessary medical and legal safeguards,[55] as a result of the developments since the 1986 "Baby M" case.[56] Thus, well-off commissioning parents from Europe, Israel, or Japan come to the United States to take advantage of its surrogacy services. On the other hand, the prohibitive costs in the United States often induce aspiring U.S. parents to pursue less expensive options abroad.

B. *"Race to the Bottom" in Asia*

In South and Southeast Asia, commercial surrogacy with lower prices flourished since the early 2000s, attracting intended parents from the Global North.[57] Initially, India and Thailand were the favored destinations, belonging to the (iii) third group of jurisdictions.

In 2014, the Thai "Gammy" case drew attention worldwide.[58] The Australian couple had twins via surrogate in Thailand. When they quickly left Thailand due to a political uproar, they allegedly only took healthy daughter Pipah home, willfully leaving behind their son Gammy, who had Down syndrome, with the surrogate. This incident was highly mediatized and the couple encountered harsh criticism. Only later did it come out that it was in fact the Thai surrogate who deliberately retained Gammy due to her strong attachment to the twins since her pregnancy.[59] Another case from 2014 concerned a 24-year-old Japanese multimillionaire businessman, who had 16 babies

54. For an overview, see Fenton-Glynn & Scherpe, *supra* note 38, at 517–562; Fenton-Glynn, Scherpe & Espejo-Yaksic, *supra* note 38, at 27–31.

55. *See* Cahn & Carbone, *supra* note 50, at 309–20; for the general legal framework, see Unif. Parentage Act § 802 (Unif. L. Comm'n 2017) (proposed regulation governing eligibility to enter gestational or genetic surrogacy agreements; introduced in five states and enacted in seven states as of Nov. 26, 2023; prior version of 2002 enacted in nine other states; see https://perma.cc/H6HZ-S75E); *see also* Am. Soc'y For Reprod. Med., Fact Sheets on Gestational Carrier (Surrogate), https://perma.cc/7DLH-4XBL.

56. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

57. Nishitani, *supra* note 31, at 388–89.

58. Bridie Jabour, *Gammy case: child protection officers make contact with Australian couple*, The Guardian (Aug. 7, 2014), https://perma.cc/TGN7-BYYP.

59. This grew into a custody dispute in the Family Court of Western Australia over Pipah, which the Australian couple won on Apr. 14, 2016. *Farnell & Anor v Chanbua* [2016] FCWA 17.

via surrogates in Thailand. He simply wished to have a large family with his own gene and to add 10 to 15 children every year. Due to suspected human trafficking and child abuse, the police raided the man's Bangkok condominium and found one pregnant surrogate and nine babies being taken care of by nine nannies there. The infants were immediately handed over to the Thai social services. The Japanese man fled to his home country without being arrested or prosecuted in Thailand or Japan.[60]

These cases raised certain ethical issues relating to surrogacy and Thailand's legislature eventually enacted a statute on February 19, 2015 to introduce strict regulations and shut the door to overseas surrogacy.[61] The Thai law now only allows altruistic surrogacy carried out by a surrogate who is over 25 years old and a family member of the intended parents. The commissioning parents need to be an opposite-sex couple married for over three years, and one of them needs to be a Thai national.[62] Vietnam adopted similar rules on June 26, 2014, precluding "procreation tourism."[63]

In India, the above-mentioned 2008 "Manji" case generated calls for law reform. Moreover, in the context of the Indian caste system and the economic disparity in the country, surrogates allegedly often stemmed from the lower class, sometimes living under the poverty line.[64] Poor women without education but married with children strained their bodies to pay for their children's education, maintain their family, or buy a house.[65] The

60. In 2018, the Thai courts granted the Japanese man custody over 13 children. Kaweewit Kaewjinda, *Japanese man given custody of 13 surrogate kids*, WASH. POST (Feb. 20, 2018), https://perma.cc/H9DD-CB8E.

61. Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBRARY OF CONGRESS (Apr. 6, 2015), https://perma.cc/AJ6X-MPYZ.

62. *Id.*

63. *Luật Hôn Nhân Và Gia Đình* [Law on Marriage and Family], No. 52/2014/QH13, art. 95 (June 26, 2014) (Vietnam) (requiring that the commissioning parents are an opposite-sex married couple, the surrogate is their family member, and only altruistic surrogacy is admitted).

64. MATSUO, *supra* note 14, at 19–22.

65. *See* BAHL & BHARTIYA, *supra* note 12, at 11–12 (noting that surrogacy arrangements have "attracted the poverty-stricken population of India because of economic necessity," and that surrogates may neglect or be unaware of related health risks); ROTABI & BROMFIELD, *supra* note 8, at 143–47 (explaining the plight of poor surrogate mothers in India); cf. RUDRAPPA, *supra* note 16, at 41–43 (pointing out the screening process for surrogates to avoid poverty-stricken women).

"womb for rent," however, was a risky business. During the pregnancy, the clinic placed surrogates in a dormitory ("surrogate house"), provided them with nutrition, environment, and medical control.[66] Yet, the pregnancy could end in miscarriage or cause physical or mental distress and even fatal complications.[67] Surrogates were misused by their husbands, parents-in-law, parents, or clinics, without realizing and being duly informed of the risks inherent in surrogacy and egg donation.[68]

Thus, the Indian government started to contemplate regulations on surrogacy before the legislature took action. After preparing the 2010 bill,[69] the Ministry of Home Affairs restricted in 2012 the eligibility for surrogacy to opposite-sex couples married for at least two years, to the exclusion of single parent and same-sex couples.[70] In November 2015, the Indian government further declared a ban on commercial surrogacy and only permitted altruistic surrogacy to needy married Indian couples. The government also prohibited the import of embryos and excluded foreign commissioning parents, along the lines of the 2014 bill.[71] Ultimately, India's parliament took necessary legislative measures in this sense in 2021.[72]

At the dawn of the overseas surrogacy ban in Thailand and India, infertility clinics operating in these countries quickly transferred to Nepal to continue their business,[73] where surrogacy was allowed insofar as non-Nepalese surrogates carried it out. In April 2015, it all came to a head when a massive earthquake hit Kathmandu and numerous Indian surrogates were stranded in precarious conditions, while Israeli same-sex intended parents

66. Matsuo, *supra* note 14, at 34.

67. *Surrogate mother dies of complications*, Times of India (May 17, 2012), https://perma.cc/3CSR-2ME2.

68. *See* Matsuo, *supra* note 14, at 32–46; Rotabi & Bromfield, *supra* note 8, at 147–49.

69. The 2010 bill still allowed commercial surrogacy, but required foreign couples to have a local guardian and reside in a country that accepts surrogacy and permits entry of children. The Assisted Reproductive Technologies (Regulation) Bill - 2010 (India), https://perma.cc/445F-NDBC.

70. Bahl & Bhartiya, *supra* note 12, at 156–157.

71. The Assisted Reproductive Technology (Regulation) Bill, 2014, §§ 56–57 (India); *No commercial surrogacy, only for needy Indian couples, Govt tells SC*, Indian Express (Mar. 6, 2017), https://perma.cc/5MQB-QEEL.

72. The Surrogacy (Regulation) Act, 2021, §§ 4, 38; The Assisted Reproductive Technology (Regulation) Act, 2021, § 33 (India).

73. HCCH, *The Parentage/Surrogacy Project: An Updating Note* (CGAP 2015, Prel.Doc. No 3A) para. 19, https://perma.cc/ZSA3-5XFL.

were evacuated by their government forthwith.[74] The Nepalese government decided to shut out the foreign surrogacy industry by no longer issuing exit permits to children born to surrogates after August 25, 2015.[75] The closure of Thailand, India, and Nepal to surrogacy caused a sudden influx of infertility clinics and foreign couples into Cambodia due to its ambiguous regulations and a visa-on-arrival facility.[76] Surrogates arrived there from Vietnam, Laos, Thailand, and India. They were, however, mistreated in surrogate houses with insufficient nutrition and poor hygiene, and suffered from mental distress.[77] On October 31, 2016, the Cambodian Ministry of Health announced it would apply the Act prohibiting the commercial donation of human organs also to gestational surrogacy. This rendered surrogacy illegal in Cambodia.[78]

Following these developments, Laos and China have become popular destinations for reproductive tourism. In China, surrogacy commissioned by domestic and foreign—including the U.S.—couples has flourished in recent years with an estimate of between 5,000 and 10,000 resulting children born every year.[79] In 2015, when the one-child policy was lifted after 38 years, surrogacy was praised as a means to increase population in China.[80] Surrogacy has, however, remained controversial, so the legislature refrained from regulating it so far. Today, surrogacy is generally understood as illegal in China for violating ethical norms and

74. Ruth Eglash, *Among Nepal's earthquake survivors: Israeli gays and their surrogate babies*, THE WASH. POST (Apr. 30, 2015), https://perma.cc/J32E-Z66V.

75. HCCH, *Background Note for the Meeting of the Experts' Group on the Parentage/Surrogacy Project*, para. 22 (Jan. 2016), https://perma.cc/ 5XC8-BUVD.

76. Nilanjana Bhowmick, *After Nepal, Indian surrogacy clinics move to Cambodia*, AL JAZEERA (Jun. 28, 2016), https://perma.cc/M4MX-YHM8.

77. *Id.*

78. Prakas No. 679 on the Management of Human Blood, Reproductive Cells, Bone Marrow and Cells, 2016, art. 12 (Cambodia) ("surrogacy, one of a set of services to have a baby by Assisted Reproductive Technology, is banned completely"); Law on the Regulation of Donation and Adaptation of Human Cells, Tissues, and Organs, 2016 (Cambodia); *see* Kang Sothear, *Government Passes Law to Regulate Organ Donation*, CAMBODIA DAILY (Jul. 1, 2016), https://perma.cc/GUM4-3KHJ.

79. *See* Yongping Xiao et al., *Surrogacy in China: A Dilemma Between Public Policy and the Best Interests of Children,* 34 INT'L J. L. POL'Y FAM. 1–2 (2020) (accounting for between 5,000 to 10,000 children born due to surrogacy practices in China); Lei Shi, *Surrogacy in China*, *in* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 9, at 362.

80. Xiao et al., *supra* note 79, at 1–2.

moral standards.[81] It is, however, widely taking place in a black market, like in other countries lacking an explicit surrogacy ban in domestic law.[82] The surrogacy market in China has allegedly expanded during COVID-19, as Chinese prospective parents could no longer travel to the United States, Russia, or Ukraine to contract surrogacy arrangements.[83] At present, about one thousand agencies are said to be engaged in surrogacy brokerage in China.[84] Chinese case law has so far declared surrogacy agreements unenforceable, and allocated legal motherhood to the surrogate by birth and legal fatherhood to the intended father by registration of children born out of wedlock.[85]

When some countries in Asia closed the door to "procreation tourism," the surrogacy hub moved to another venue with no or insufficient regulations in a "race to the bottom." By promoting the surrogacy industry out of economic interests, Asian countries placed vulnerable women and children at risk. The most viable way to protect the rights of surrogates and children is to duly regulate surrogacy through domestic law. This is, however, a long way off and entails a risk of yielding a black market or underground industry and affording much less protection in the end. The phenomena relating to cross-border surrogacy demonstrate a clear divide between the Global North and the Global South and the difficulties of tackling these issues by only one country. To overcome these issues and find a global response, adopting an international instrument could be an alternative avenue.

IV. Cross-border Surrogacy and Legal Parentage

A. *Determining Legal Parentage*

Admittedly, the acceptance, modality, and control of surrogacy largely differ among the three groups of jurisdictions

81. Huo, *supra* note 31, at 93–96; Shi, *supra* note 79, at 359–61.

82. This is the case with several Latin American and African countries. See *supra* note 9.

83. *See Stranded babies, sobbing parents: Covid-19 pandemic splits surrogates from families in China*, Straits Times (Sept. 22, 2020), https://perma.cc/J2JP-P58G. David Dodge, *How Coronavirus Is Affecting Surrogacy, Foster Care and Adoption*, N.Y. Times (Apr. 1, 2020), https://perma.cc/3BCS-L4UZ.

84. Shi, *supra* note 79, at 362.

85. Xiao et al., *supra* note 79, at 14–18.

(i)-(iii), as described above. There is no consensus on how to regulate surrogacy and whether and how to establish legal parentage of the intended parents. While it is desirable to introduce adequate regulations on surrogacy, it is to date not yet conceivable to take a uniform position worldwide either to prohibit or allow surrogacy and, if allowing, under which conditions.

Arguably, a better way to set global standards will be to focus on the legal parentage of the child in question, which is usually established for intended parents in the state of origin that authorizes or carries out surrogacy. Conflict of laws can set forth under which conditions the legal parentage ought to be recognized in the receiving state. A limping legal parentage resulting from the absence of recognition hinders children from obtaining nationality, entering the receiving state, or being cared for by the intended parents. Setting up a legal framework and appropriate safeguards substantiating public policy for the recognition of legal parentage could help realize the best interests of the child and, at the same time, protect surrogates and intended parents. In exceptional cases, where legal parentage of the intended parents is not established in the state of origin as in the 2008 Manji case or under Chinese case law, a fall-back rule for facilitating adoption in the receiving state will be desirable.

B. *Recognition versus Adoption*

Among the various jurisdictions mentioned above, recognition of the legal parentage of intended parents established in the state of birth was initially refused in the first group of jurisdictions (i) that prohibits surrogacy, and in the second group of jurisdictions (ii) that solely allows domestic surrogacy under strict conditions.[86] Both categories of countries do not tolerate their nationals bypassing domestic surrogacy ban or strict regulations by contracting surrogacy arrangements abroad and bringing back children born through surrogates.[87] Also in Japan belonging to the group (i), on March 23, 2007, the Supreme Court declined to recognize the pre-birth decree of a court in Nevada, in the United States, that had established legal parentage of the Japanese intended parents and excluded

86. *See* Fenton-Glynn & Scherpe, *supra* note 38, at 562–66.
87. Nishitani, *supra* note 31, at 389–90.

any rights or obligations of the surrogate and her husband.[88] From the viewpoint of Japan, the U.S. surrogate, who only gave birth to the child and had no intention nor rights or obligations to care for the children under Nevada law, was considered the legal mother. The twins had a stable, good life with the intended parents in Japan, but were denied any legal bonds of parentage with them.

In some countries of group (i) and (ii), however, the firm attitude of denying the recognition of legal parentage has gradually been lifted in view of protecting children's human rights and best interests. These countries now recognize legal parentage or at least paternity of the intended parent(s) established abroad, subject to certain conditions. In the seminal 2014 *Mennesson* and *Labassee* decisions,[89] the European Court of Human Rights (ECtHR) declared that France infringed upon children's right to respect for private life (ECHR art. 8)[90] by completely refuting legal parentage of the French intended parents that had been established through court decrees in California and Minnesota, in the United States, respectively. The French courts had neither allowed the registration of the birth details nor acknowledgement, possession d'état, or adoption of the children, excluding all avenues for establishing legal parentage of the intended parents.[91] According to the ECtHR, while there was no violation of the commissioning parents' right to family life, France infringed upon the children's right to private life by denying their legal paternity and causing uncertainty as to their identity and acquisition of French nationality and inheritance rights. Notably, the ECtHR did not mention the treatment of legal maternity.

88. Saikō Saibansho [Sup. Ct.] Mar. 23, 2007, 61(2) Saikō Saibansho Minji Hanreishū [Minshū] 619. The Tokyo High Court had granted recognition in view of the status quo in the U.S., genetic link, non-commercial character, and the willingness of both intended parents to care for the children (Tōkyō Kōtō Saibansho [Tokyo High Ct.] Sept. 29, 2006, 1957 Hanrei Jihô 20).

89. ECtHR Jun. 26, 2014, *Mennesson v. France*, App. No. 65192/11; Jun. 26, 2014, *Labassee v. France,* App. No. 65941/11, https://perma.cc/JXR6-8C5C.

90. Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art. 8(1), Nov. 4, 1950 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

91. Cass. (1e civ.) [Sup. Ct. for judicial matters (1st Civ.)] Dec. 17, 2008, No. 07-20.468; Apr. 6, 2011, No. 09-17130; Sept. 13, 2013, No. 12-18315, 12-30138; Mar. 19, 2014, No. 13-50005.

Extending the reasoning of these 2014 decisions of the ECtHR, Germany belonging to the first group (i)—like Austria—has decided to honor legal parentage of both the intended parents established in the foreign state of birth, including the motherhood of the intended mother and double fatherhood in cases of same-sex couples, insofar as the surrogacy takes place in a legal, reasonable, and ethical way in the state of origin.[92] In a comparable way, the courts of Israel belonging to the second group (ii) have often given effect to the legal parentage of commissioning parents including motherhood, when the respective parent's genetic link with the child was proven.[93]

On the other hand, while French case law has lifted the complete recognition ban for legal parentage of an intended father having genetic link with the child, motherhood of his wife is declined recognition as running counter to the maxim "*mater semper certa est,*" so is the second fatherhood of his male spouse.[94] This position accords with the 2019 Advisory Opinion and recent case law of the ECtHR, granting a "margin of appreciation" for receiving states to refuse the recognition of maternity in general and paternity in the absence of genetic link.[95] Similarly, Italy, Spain, and Switzerland only recognize the

92. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 2014, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 203, 350; Sept. 5, 2018, FAMRZ 2018, 1846. *Cf.* BGH Mar. 20, 2019, FAMRZ 2019, 892 (holding that German law applies due to the child's habitual residence in Germany and, therefore, the surrogate is considered as legal mother). Austria had started to recognize both the paternity and maternity of opposite-sex couples in 2011. Verfassungsgerichtshof [VfGH] [Const. Ct.] Dec. 14, 2011, AUSGEWÄHLTE ENTSCHEIDUNGEN DES VERFASSUNGSGERICHTSHOFES [VFSLG] No. B13/11; Oct. 11, 2012, No. B99/12 ua.

93. Rhona Schuz, *Surrogacy in Israel*, *in* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 9, at 180–83.

94. In France, foreign birth certificates are only transcribed when they correspond to the legal parentage under French law (CODE CIVIL [CIVIL CODE] art. 47 (introduced by Loi n° 2021-1017 relative à la bioéthique [Law No. 2021-1017 on Bioethics], Aug. 2, 2021)), whereas the avenue of adoption is also accessible. Cass. (1e civ.) [Sup. Ct. for judicial matters (1st Civ.)] Jul. 7, 2021, No. 20-10.721, 10722; for further details, Danielle Moutoux, *V° État civil: Fasc. 30: Établissement de la filiation: Principes généraux,* part. II. A. 1 & 2, *in* JURISCLASSEUR NOTARIEL FORMULAIRE (last updated Jul. 23, 2023).

95. ECtHR (GC) Advisory Opinion, Apr. 10, 2019, Request No. P16-2018-001; also ECtHR Nov. 19, 2019, *C/E v. France*, App. No. 1462/18 and 17348/18; Jul. 16, 2020, *D. v. France*, App. No. 11288/18; May 18, 2021, *Valdis Fjölnisdóttir v. Iceland*, App. No. 71552/17; Mar. 24, 2022, *A.M. v. Norway*, App. No. 30254/18; Nov. 22, 2022, *D.B. et al. v. Switzerland*, App. No. 58817/15

intended genetic father as the legal parent and not his opposite-sex or same-sex spouse or partner,[96] although changes in case law might soon be expected.[97] In the absence of recognition, the only way to establish legal parentage is to go through full adoption or stepchild adoption in the receiving state, which is often time-consuming and subject to strict conditions, including eligibility of the adoptive parents, matching process, and consent of the biological parents. In the above-mentioned *Mukai* case, the Japanese couple could fortunately get out of the impasse by carrying out a full adoption in Japan.[98]

Furthermore, many jurisdictions belonging to the second group (ii)—*inter alia,* England and Wales, Hong Kong, Canada, Australia, and New Zealand—are still opposed to recognizing legal parentage of the intended parents established in the state of origin due to their obvious circumvention of the domestic regulations. Instead of recognition, intended parents can go to court in the receiving state and seek a parental order or adoption decree pursuant to its domestic law to establish their legal parentage, following a thorough examination of the necessary safeguards, including restrictions on payments, strict eligibility criteria, and the best interests of the child.[99]

The avenue of domestic adoption or parental order in the receiving state, however, is not reliable or the best conceivable

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and 58252/15; Dec. 6, 2022, *K.K. et al. v. Denmark*, App. No. 25212/21; Aug. 31, 2023, *C. v. Italy*, App. No. 47196/21, https://perma.cc/JXR6-8C5C.

96. For Italy, Cass. (sez. un.) [Sup. Ct. (GC)] May 8, 2019, No. 12193; Dec. 30, 2022, No. 38162; for Spain, Trib. Sup. (civ. pl.) [Sup. Ct. (GC)], Feb. 6, 2014, STS 247/2014; Mar. 31, 2022, STS 1153/2022; for Switzerland, Bundesgericht [BG] [Fed. Sup. Ct.] May 21, 2015, No. 5A_748/2014; Sept. 14, 2015, No. 5A_443/2014; *cf.* BG Feb. 7, 2022, No. 5A_545/2020; Jul. 1, 2022, No. 5A_32/2021 (refused transcription of Georgian birth certificates as Swiss law applied on grounds of the child's habitual residence).

97. See, e.g., in Italy, Corte cost. [Const. Ct.], Mar. 9, 2021, No. 33 (declared the constitutionality claim inadmissible, but indicated the need of honoring the second fatherhood established in Canada of an Italian male same-sex spouse without biological link with the child and invited legislature to introduce a specific form of adoption); Cass. (prima civ.) [Sup. Ct. (1st Civ.)] Jan. 21, 2022, No. 1842 (interlocutory order to refer the decision of the same underlying case to the Grand Chamber).

98. Nishitani, *supra* note 31, at 389–90 n. 1347.

99. Fenton-Glynn and Scherpe, *supra* note 38, at 564–65.

solution. First, children initially face split legal parentage between the state of birth and the receiving state. Children may not be granted nationality or a passport to enter the receiving state. It is questionable to punish the intended parents' acts of circumventing a domestic surrogacy ban or regulations at the cost of the children's best interests. Second, adoption or parental order has the imminent risk of the intended parents not undertaking it or delaying it *ex post* due to, *e.g.*, a breakdown of their marriage, the child's disabilities, or economic hardship.[100] Third, adoption may not be admissible for contravening the 1993 Intercountry Adoption Convention, once the Convention applies as the child is held habitually resident in the state of birth and the commissioning parents in the receiving state.[101]

Thus, for the child's best interests, it is arguably more expedient to recognize legal parentage of the intended parents established in the state of origin and entrust them with the care and custody of the children. It is a valid principle in conflict of laws that legal situations constituted abroad should be respected as far as possible to realize international harmony and coordination, restricting recourse to public policy. This fundamental precept in favor of recognition is particularly true with status issues, which necessitate stability and continuity across borders.[102]

V. HCCH Parentage/Surrogacy Project

In view of the paramount importance of protecting children's rights and best interests, the Hague Conference on Private International Law (HCCH) has been contemplating

100. For these arguments, see BGH Dec. 10, 2014, *supra* note 92; Nishitani, *supra* note 31, at 390–91.

101. The following points arguably would run counter to the 1993 Convention: the surrogate's consent to give up parental rights is given before the childbirth (Art. 4(c)), the principle of subsidiarity does not apply (Art. 4(b)), no prior control takes place before the child is sent out of their state of habitual residence (Art. 17), and the adoptive parents and the child are in touch in advance (Art. 29). See HCCH, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* (CGAP 2011, Prel. Doc. No. 11), para. 43, https://perma.cc/TE62-GGV8.

102. Nishitani, *supra* note 31, at 330–33.

adopting one or two instruments for the recognition of legal parentage established abroad, including in surrogacy cases.[103] Notwithstanding the hesitation of many states, the avenue of parental recognition has greater advantages than domestic adoption or parental order and will ensure predictability, certainty, and continuity of the status of children. From 2016 till 2022, the Experts Group (EG) of the HCCH worked in this sense on a feasibility study on the Draft Convention on legal parentage in general and the Draft Protocol on legal parentage resulting from cross-border surrogacy arrangements.[104] In March 2023, the CGAP of the HCCH approved the feasibility study by the EG and decided to convene a Working Group (WG), mandating it to undertake further studies, elaborate provisions, and consider integrating the provisions into one instrument.[105] The first WG meeting was held Mid-November 2023 and the second one is scheduled for April 2024.[106]

With a view to respecting children's rights and best interests, the Draft Instrument aims to create a mechanism of recognizing legal parentage of the commissioning parents established in the state of origin as a result of a cross-border surrogacy arrangement. The Draft Instrument will include traditional rules for the recognition of foreign judgments,[107] while it is left to further discussions whether to extend its scope to the recognition of legal parentage established by operation of law

103. The initial preparatory work dates back to 2010. For further details on the HCCH Parentage/Surrogacy Project, see https://perma.cc/95BT-RUWD.

104. The Draft Convention and the Draft Protocol may cover both the recognition of judgments and that of legal parentage established by operation of law or legal acts. They could also address domestic surrogacy, and domestic adoption other than the cases governed by the 1993 HCCH Intercountry Adoption Convention. For further details, *see* HCCH Parentage/Surrogacy Experts' Group, *Final Report: The Feasibility of One or More Private International Law Instruments on Legal Parentage,* at 16–24, 27–28, 44–48, Prel. Doc. No. 1 (Nov. 2022), https://perma.cc/24NE-QNWL.

105. *Conclusions & Decisions, supra* note 10, at 4.

106. HCCH Parentage/Surrogacy Working Group, *Report of the first meeting of the Working Group (from 13 to 17 November 2023)* (CGAP 2024, Prel. Doc. No. 1), paras. 1-5, https://perma.cc/2EWU-5E59.

107. These rules will presumably address the exclusive indirect jurisdiction at the surrogate's habitual residence as a condition for recognition, in addition to the traditional grounds for refusal (i.e., lack of a proper service to the defendants, fraud, violation of public policy, and inconsistency with previous judgments, among others). Parentage/Surrogacy Experts' Group, *supra* note 104, at 30–31.

or legal acts (*e.g.,* by birth or registration).[108] At the same time, it is desirable that the Draft Instrument provides for necessary safeguards to duly protect surrogates and children by excluding the recognition of legal parentage resulting from an illicit practice of surrogacy.

For this purpose, the Draft Instrument could ideally set forth minimum standards for the recognition of legal parentage, such as the surrogate's consent *ex ante* and *ex post,* eligibility of the surrogate and intended parents (age, previous childbirth, marital and family status etc.), exclusion of commercial surrogacy, or genetic link.[109] This would require that surrogacy takes place legally pursuant to domestic regulations on medical procedure in the state of origin to the exclusion of black market and underground industry. Uniform safeguards in the Draft Instrument are expected to deter illicit practices by declining the recognition of legal parentage *ex post* in the other contracting states. It is anticipated that surrogacy in exploitation of surrogates or for potential child trafficking would not occur when the intended parents and clinics were aware that their legal parentage would not be recognized in the receiving countries under the Draft Instrument.

Yet, negotiations among states would not easily yield uniform safeguards in the Draft Instrument. Countries allowing surrogacy in the group (ii) and (iii)—*e.g.,* England and Wales, Greece, Israel, Australia, Canada, and Brazil, as well as most U.S. states and Russia—have different conditions and regulations for surrogacy in their substantive law. These countries may demur applying divergent criteria only for the parentage recognition in conflict of laws. Thus, the EG considered as an alternative that, absent consensus for uniform safeguards, the Draft Instrument could opt for country-to-country safeguards based on substantive law of the respective state. In this approach, it is up to each contracting state to list up which countries fulfill the minimum standards and whose judgments establishing legal parentage are eligible to be recognized.[110]

Even if the HCCH should approve the Draft Instrument, the challenge would remain for countries of the group (i) and

108. *Id.*, at 28.

109. *Id.*, at 32–38.

110. The selection of specific countries can be asymmetric since the eligible states do not need to reciprocate to recognize legal parentage. *Id.*, at 37–38.

(ii) to sign and ratify it. They would face contradictions with their domestic policy to prohibit or restrict surrogacy and may fear unduly enhancing "procreation tourism" by ensuring the recognition of the resulting legal parentage of the commissioning parents.

As discussed above, however, the recognition approach is the most effective way to respect children's rights and best interests and indirectly control the practice of surrogacy abroad by declining parentage recognition afterwards where necessary. The route of domestic adoption or parental order would not suffice due to its uncertainty, drawbacks of limping legal parentage, and risk of the intended parents not conducting necessary court proceedings *ex post*. Hopefully, countries at the negotiation table remain flexible to adjust their current policy and cooperate with each other to set up a legal framework for the recognition of legal parentage in cross-border surrogacy cases. It is promising that the CGAP consisting of the HCCH member states has approved the continuation of the work in this fast-moving, important area. It is hoped that the WG can swiftly complete preparatory work and eliminate residual obstacles for treaty negotiations to be launched.

As a caveat, there are several points to be considered. First, the HCCH project is limited to conflict of laws and can only control the recognition of legal parentage in view of the minimum standards.[111] After all, it is left to the individual states of origin to duly regulate surrogacy, monitor its practice, and ensure safety and health of surrogates and children. Second, as a fallback rule, domestic adoption or parental order should remain admissible when the state of origin did not authorize surrogacy or refused to establish legal parentage of the intended parents at birth. This secondary avenue would be needed to safeguard the best interests of the child without creating a legal loophole.[112] Third, 90 current HCCH member states scarcely encompass Asia and Africa.[113] They should be mindful of hearing the voices of the Global South where overseas surrogacy often takes place. It is hoped that these points will be further contemplated in the WG in developing the new instrument.

111. *Id.*, at 9.
112. *Id.*, at 45–47.
113. *See* HCCH, https://perma.cc/FXR3-5QE8 (listing members to the HCCH).

VI. Conclusion

Debates on globalization arguably did not properly consider the situation and needs of the Global South. As this paper discussed, the issues of cross-border surrogacy as a "procreation tourism" demonstrate a clear divide between the Global North and the Global South. When Asian countries tackled overseas surrogacy by implementing domestic regulations, the hub was simply transferred to a neighboring country or black market and the operation of surrogacy continued in the Global South for intended parents coming from the Global North. A vicious circle continued, which jeopardized rights and bodily integrity of surrogates and the best interests of children. The most efficient way of tackling these issues is to introduce strict domestic regulations in developing countries where surrogacy takes place. We are, however, a long way off from realizing it. As an alternative, cross-border surrogacy could be better addressed through global measures, as is envisaged by the HCCH. An HCCH Draft Instrument for the recognition of legal parentage could be a helpful tool to indirectly deter illicit practices of surrogacy, even though it is subject to the challenge of reaching an agreement between HCCH member states.

On the part of developed countries of the group (i) that prohibit surrogacy to date, better regulations could be envisioned by introducing and conducting surrogacy under strict control domestically. This might discourage commissioning parents residing there from taking advantage of illicit or inexpensive practices of surrogacy abroad. In Japan as well, there is a proposal to authorize limited surrogacy for intended parents when the wife has no or only abnormal an uterus,[114] but Japan's legislature has not taken any action so far. Rather, with further developments of reproductive technology, the transplantation of a womb[115] or the creation of artificial wombs might soon become the reality.

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114. This was recommended by the ART Project Team of the leading Liberal Democratic Party in Aug. 2022. Kai Ichino, *Dairi Shussan no Jōken-tsuki Yōninan, Jimin PT Matomeru. Kaisei Hōan he Han-ei Mezasu* [The Liberal Democratic Party approved a Legislative Proposal with a Conditional Acceptance of Surrogacy, seeking to influence Statutory Amendments], Asahi Shimbun (Aug. 29, 2022), https://per ma.cc/HA9R-9RJG.

115. *See* Aravamudan, *supra* note 16, at 234–36. The womb transplantation has been practiced since 2013 in Turkey and Sweden and extended to more than 25 countries today.

In this fast-moving area of surrogacy, however, it is crucial to seek an immediate global response rather than waiting for an evolution of technology. To achieve global justice, it no longer suffices to solely fulfill duties and responsibilities within the confines of nation states, as social relations and connections cut through geopolitical borders. In tackling issues of cross-border surrogacy, transnational cooperation is necessary to take collective actions in a spirit of shared responsibility between the Global North and the Global South.[116] The HCCH Parentage/Surrogacy Project will hopefully yield fruitful results and serve for instituting a mechanism for cooperation and coordination between states. Further developments are anxiously awaited.

116. *See* Peña-Guzmán and Crozier, *supra* note 36, at 52–54.