

LOST IN TRANSIT: Cross border surrogacy arrangements and the right of children not to be discriminated against on the basis of their birth or status

By

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Cross border surrogacy agreements

Discrimination

International legal framework

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Rights of a child

Status of a child

Surrogacy

Statelessness



DECLARATION

I declare that '*LOST IN TRANSIT: Cross border surrogacy arrangements and the right of children not to be discriminated against on the basis of their birth or status*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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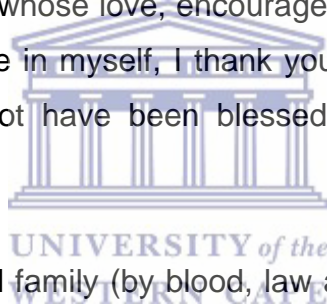


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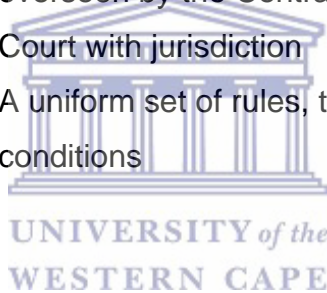
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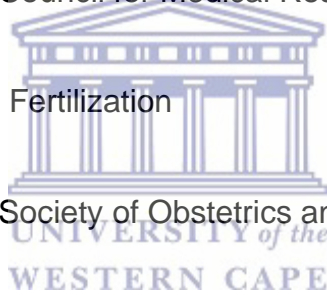
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LIST OF ABBREVIATIONS

ART	Assisted Reproductive Technology
GWA	Guardian and Ward Act 8 of 1890
HAMA	Hindu Adoption and Maintenance Act 78 of 1956
HCCH	Hague Conference of International Private Law
HFEA	Human Fertilization and Embryology Act, 2008
ICMR	Indian Council for Medical Research
IVF	In-vitro Fertilization
JSOG	Japan Society of Obstetrics and Gynaecology
UNCRC	United Nations Convention on the Rights of a Child



CHAPTER ONE: INTRODUCTION

The purpose of this chapter is to set out the problem question, provide a brief overview of the research and explain concepts relevant to the study. This is followed by a description of the aims and significance of the research, the problem question, the methodology and literature review. An outline of the chapters of the study is provided at the end of the chapter.

1.1 Problem statement

Cross border surrogacy arrangements form part of an ever-increasing and lucrative medical tourism trade. It is estimated to be worth approximately US \$450 million per annum in India¹ and contributes between US \$ 5 - 6 billion per annum to the global economy.²

Despite the significant increase in the number of cross border surrogacy arrangements being concluded, the reception and regulation of surrogacy is remarkably diverse between countries.³ This disparity has been the cause for much legal debate and litigation over recent years as the number of surrogate children born stateless and without certain parentage became more prevalent.⁴ In terms of

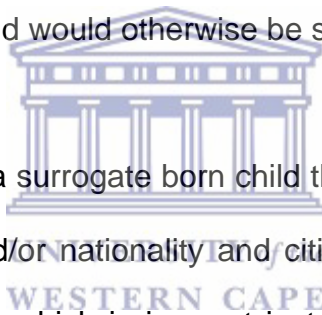
¹ Mohapatra S 'Achieving reproductive justice' (2012) 21 *Annals of Health Law-ASLME Special Edition* 191 193; Bishop L 'India's surrogacy laws are only part of the equation' (14 March 2013) available at <http://monash.edu/news/show/indias-new-surrogacy-laws-are-only-part-of-the-equation> (accessed on 23 July 2013).

² Smerdon UR 'Crossing Borders, Crossing Bodies: International surrogacy between the US and India' (2008-2009) 39 *Cumberland Law Review* 15 at 17; Malhotra A and Malhotra R 'All aboard for the fertility express: Surrogacy and human rights in India' (2012/2013) 14 *Yearbook of Private International Law* 455 456.

³ Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 20-2 *Hastings Women's Law Journal* 275 277.

⁴ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 30 *Berkeley Journal of International Law* 412 414; A stateless person is someone who not considered a national by any state under the operation of its law. Article 1 of 'The Convention relating to the status of stateless persons' (28 September 1954) 360 *United Nations Treaty Series* 117; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 21 *Cardozo Journal of International and Comparative Law* 545 546.

article 2 of the United Nations Convention of the Rights of a Child (UNCRC),⁵ state parties to the UNCRC are obliged to respect and guarantee to all children within their jurisdiction the rights as set out in the UNCRC, without discrimination on the listed or any other grounds. One such listed ground is the right of a child not to be discriminated against on the basis of a child's or his or her parent's 'birth or other status'.⁶ Article 7 of the UNCRC provides that all children shall have the right to acquire a nationality from birth, particularly where he or she would otherwise be stateless.⁷ It is submitted that article 7 read with article 2 of the UNCRC could be interpreted to place an obligation on all member states to implement domestic laws which will guarantee a child born in or permanently resident within its jurisdiction a nationality, especially if the child would otherwise be stateless.



The failure or refusal to grant a surrogate born child the nationality and citizenship of his or her country of birth and/or nationality and citizenship of his or her intended parents' country of nationality, which is in most instances also the child's intended country of residence, could result in the surrogate born child being stateless.⁸ It is submitted that such refusal or failure, could be construed as discrimination against

⁵ The UNCRC came into force on 2 September 1990. A copy of UNCRC is accessible on <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed on 17 July 2013).

⁶ Article 2 provides: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

⁷ Article 7 provides: "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. 2. State parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

⁸ Lin T 'Born lost: Stateless children in international surrogacy arrangements' (2013) 559.

the surrogate born child on the basis of his or her birth and/or status. Countries including Germany, France and Norway regard surrogacy agreements as illegal and unlawful.⁹ These countries will not award citizenship to surrogate born children, even if the intended parents are genetically related to the child(ren) and are citizens of the country, without an adoption order which awards legal parentage to the adoptive parents.¹⁰

1.2 Surrogacy as an assisted human reproduction option

Surrogate motherhood is a form of assisted human reproduction.¹¹ A 'surrogate motherhood agreement' is defined in the South African Children's Act as:¹²

'an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent'.¹³

⁹ Carnelley M and Soni S 'A tale of two mummies. Providing a womb in South Africa: Surrogacy and the legal rights of parents within the Children's Act 38 of 2005. A brief comparative study with the United Kingdom' (2008) 2 *Speculum Juris* 37; Lin T 'Born lost: Stateless children in international surrogacy arrangements' (2013) 552.

¹⁰ *Balaz v Anand Municipality* (2009) LPA 2151/2009 (Germany/India); Smerdon UR 'Birth registration and citizenship rights of surrogate babies born in India' (2012) 20:3 *Contemporary South Asia* 341 342 and 345-351.

¹¹ Lewis S *The constitutional and contractual implications of the application of chapter 19 of the Children's Act 38 of 2005* (unpublished LLM thesis, University of the Western Cape, 2011) 3.

¹² 38 of 2005.

¹³ Section 1(1) of the Children's Act 38 of 2005, the definition of a surrogate motherhood agreement envisages conception of the child by means other than natural sexual intercourse: Louw A *Acquisition of Parental Responsibilities and Rights* (unpublished LLD thesis, University of Pretoria, 2009) 334; Lewis S *The constitutional and contractual implications of the application of chapter 19 of the Children's Act 38 of 2005* (2011) 3.

A cross border surrogacy arrangement is concluded between a surrogate mother and the commissioning parent(s) from different countries.¹⁴ 'Partial' or 'traditional' surrogacy is where the ovum of a surrogate mother is fertilized with the sperm cells of a donor or the intended father of the child.¹⁵ 'Full' or 'gestational' surrogacy involves implanting an embryo made up of either the intended parents' gametes or the gametes of a donor.¹⁶ In both forms of surrogacy, the surrogate mother intends to carry the baby to term and upon the birth of the child or within a reasonable time thereafter, hand the child over to the commissioning parents with the intention that the child will become the legitimate child of the commissioning parents.¹⁷ Surrogacy, whether traditional or gestational, can be broken up into two further categories: being either commercial or altruistic.¹⁸ Commercial surrogacy arrangements are concluded for financial gain, whereby the commissioning parent(s) undertake to pay the surrogate mother a fee exceeding the costs incurred by the pregnancy or lost



¹⁴ European Parliament: Directorate General for Internal Policies (Policy Department C: Citizen's rights and constitutional affairs) 'A comparative study on the regime of surrogacy in EU member states' (May 2013) available at <http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=93673> (accessed on 23 July 2013).

¹⁵ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 335; Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 413.

¹⁶ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 335; Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 413.

¹⁷ Louw A 'Surrogate Motherhood' in Davel CJ and Skelton (eds) *A Commentary on the Children's Act 38 of 2005* (2007) Juta and Company 19-2. In South Africa, full and partial surrogacy falls under the category of what is termed 'formal' surrogacy. A second category of surrogacy is practised in South Africa known as 'informal' or 'customary' surrogacy. Informal surrogacy was found to be practised in many South African communities and is a reference to the process whereby a surrogate mother is inseminated with the gametes of the commissioning father. It is privately performed by the parties according to customary practices and without the intervention of medical practitioners or clinics. Cultural surrogacy is not covered by the Children's Act due to the practice not covering the interests of all concerned parties: Lewis S *The constitutional and contractual implications of the application of chapter 19 of the Children's Act 38 of 2005* (2011) 20; Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 335; Carnelley M and Soni S 'A tale of two mummies. Providing a womb in South Africa: Surrogacy and the legal right of the parents within the Children's Act 38 of 2005. A brief comparative study with the United Kingdom' (2008); Bekker JC *WG Seymour's Customary Law in Southern Africa* 5 ed (1989) 279.

¹⁸ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 551.

income.¹⁹ Commercial surrogacy is prohibited in South Africa under section 301 of the Children's Act. The giving of or promise to give or receipt of consideration in cash or in kind is criminalized under section 305(1) (b) of the Children's Act.²⁰ Section 305(6) of the Children's Act prescribes a punishment of a fine or imprisonment of up to 20 years or both, for contravention of section 301.²¹

Altruistic surrogacy arrangements are motivated by the benevolent desire to assist another person or couple to have a child genetically linked to the couple or one of them or an individual.²² In most instances where an altruistic surrogacy agreement is concluded, the surrogate mother is a friend or family member of the commissioning parent(s).²³



Altruistic surrogacy agreements are permissible in South African law, and are strictly regulated.²⁴ In order for a surrogate motherhood agreement to be enforceable in South Africa, it must have the essential elements prescribed in section 292(1) (a) to (d) of the Children's Act, it must be assessed and confirmed by the High Court of

¹⁹ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 350; Louw A 'Surrogate Motherhood' in Davel CJ and Skelton *A Commentary on the Children's Act 38 of 2005* (2007) 19-17.

²⁰ The payments allowed are set out in sections 301(2)(a), (b) and (c) and 301(3), which includes expenses related to confirmation of the surrogacy agreement, expenses related to the artificial fertilization, pregnancy and birth, loss of earnings, cost of insurance against her death or disability as a result of the pregnancy and reasonable compensation to persons for bona fide professional legal or medical service related to the conclusion of the surrogate motherhood agreement: Schafer L *Child Law in South Africa- Domestic and International Perspectives* (2011) Lexis Nexis 271.

²¹ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 367 - 368; Louw A 'Surrogate Motherhood' in Davel CJ and Skelton *A Commentary on the Children's Act 38 of 2005* (2007) 19-30; Schafer L *Child Law in South Africa- Domestic and International Perspectives* (2011) 271.

²² Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 350; Louw A 'Surrogate Motherhood' in Davel CJ and Skelton *A Commentary on the Children's Act 38 of 2005* (2007) 19-17.

²³ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 350; Louw A 'Surrogate Motherhood' in Davel CJ and Skelton *A Commentary on the Children's Act 38 of 2005* (2007) 19-17.

²⁴ For a general discussion of the conditions under which a surrogate motherhood agreement may be concluded, see Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 335- 353; Louw A 'Surrogate Motherhood' 19-7 – 19-20; Schafer L *Child Law in South Africa- Domestic and International Perspectives* (2011) 265 – 275.

South Africa²⁵ and once confirmed by the High Court of South Africa, the surrogate mother must be artificially fertilized within 18 months of the confirmation by the High Court.²⁶ Due to the limited scope of this research paper, a full discussion pertaining to the prescribed conditions as found in Chapter 19, sections 292 to 296, of the Children's Act will not be done. It is however, important for purposes of this research paper to note the requirements prescribed by section 292(1)(b),(c) and (d) of the Children's Act namely that, (i) the surrogate motherhood agreement must be concluded in South Africa; (ii) at least one of the commissioning parents or if single, the commissioning parent must be domiciled in South Africa when the agreement is concluded and (iii) the surrogate mother and her husband or partner, if applicable, must be domiciled in South Africa at the time of the agreement being concluded.²⁷ Should the jurisdiction requirements not be fulfilled, the surrogacy agreement will not be enforceable in South Africa and may not be confirmed by the High Court of South Africa.²⁸



Surrogacy is not a new means of alternative reproduction.²⁹ The increased interest in surrogacy as an alternative means of reproduction could be attributed to a wide

²⁵ Sections 292(1)(e) and 295.

²⁶ Section 296(1).

²⁷ Section 292(1)(b),(c) and (d) of the Children's Act; Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 336 - 337; Louw A 'Surrogate Motherhood' 19-8; Schafer L *Child Law in South Africa- Domestic and International Perspectives* (2011) 268-9.

²⁸ Louw A 'Surrogate Motherhood' in Davel CJ and Skelton *A Commentary on the Children's Act 38 of 2005* (2007) 19-8; The aim of this section is said to prevent couples from concluding surrogacy agreements in countries where the requirements are less cumbersome: Pretorius R 'Surrogate Motherhood: A detailed commentary on the draft bill' (1996) *De Rebus* 114 at 117; Section 292 (2) grants a court discretion to waive the domicile requirement in respect of the surrogate mother and her husband or partner on good cause shown. It is argued that the court should exercise great caution when considering the good cause so as not to allow the commissioning parent(s) access to surrogate mothers in countries where the regulation of surrogacy is more relaxed: Schafer L *Child Law in South Africa- Domestic and International Perspectives* (2011) 269.

²⁹ Surrogacy dates back to biblical times: Tager L 'Surrogate Motherhood- legal dilemma' (1986) 103 *SALJ* 381 383-4; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 550; Stehr E 'International surrogacy contract regulation: National governments' and international

range of reasons. These reasons include improved medical technology, a wider public acceptance of surrogacy, a decrease in new born babies available for adoption, increased access to information, increased access to global travel and financially motivated reasons.³⁰ India, with its advanced medical facilities, high poverty rates and willing surrogate mother participants has seen a surge in cross border surrogacy arrangements being concluded.³¹ The notable increase of surrogacy arrangements is not unique to India. It has become a global phenomenon.³² The USA, India and Eastern Europe are the main surrogacy destinations which attract individuals from a wide range of countries.³³

As the topic under discussion in this research paper relates to cross border surrogacy arrangements, the South African legal perspective has not been considered under the comparative analysis due to such agreements not being



bodies' misguided quests to prevent exploitation' (2012) 35 *Hastings International and Comparative Law Review* 253; *Ex Parte WH* 2011 6 South Africa 574 (GNP) para 2; 43.

³⁰ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 413; Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 284; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 553; Stehr E 'International surrogacy contract regulation: National governments' and international bodies' misguided quests to prevent exploitation' (2012); Storey GP 'Ethical problems surrounding surrogate motherhood' (2000) available at

www.yale.edu/ynhti/curriculum/units/2000/7/00.07.05.x.html#top (accessed on 23 July 2013); Welstead M 'This child is my child; this child is your child; this child was made for you and me- Surrogacy in England and Wales' in Atkin B (ed) *The International Survey of Family Law* (2011) 165.

³¹ Perry-Thomas R 'Commercial surrogacy- A priceless commodity?' (2012) available at www.aglobalvillage.org/journal/issue7/globalhealth/surrogacy/ (accessed on 23 July 2013); PRWeb 'Incredible India credits surrogacy' (17 November 2012) available at

www.prweb.com/releases/2012/11/prweb10146438.htm (accessed on 24 July 2013) - the popularity of surrogacy globally has increased by 89% between 2004 and 2008; In India the demand for surrogacy increased by 198% in 2010, in 2011 it had increased by 528% and in 2012 it had doubled.

³² Louw A *Acquisition of Parental Responsibilities and Rights* (2009) Ch 6 371; Louw A 'Surrogate Motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007) 19-2; Stehr E 'International surrogacy contract regulation: National governments' and international bodies' misguided quests to prevent exploitation' (2012).

³³ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 414; Gamble N 'Surrogacy: creating a sensible national and international framework' (2012) available at

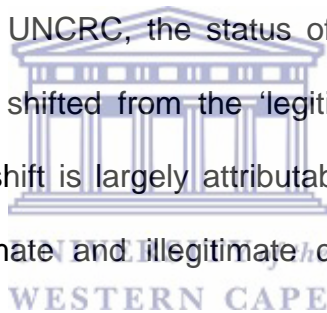
<http://www.nataliegambleassociates.com/assets/assets/Sep%202012%20-%20IFL%20%20Surrogacy%20creating%20a%20sensible%20national%20and%20international%20legal%20framework.pdf> (accessed on 17 July 2013).

enforceable in South Africa because of the jurisdictional requirements described above.

1.3 Brief overview of the research and important concepts

1.3.1 The development of the legal definition of the status of a child

The status of a child has in the past been a reference to the distinction between whether a child is legitimate or illegitimate.³⁴ In recent years, with the evolution in the traditional make-up of a family, and in keeping with the protection of the rights of a child as encompassed in the UNCRC, the status of a child in the domestic legal systems of many states has shifted from the 'legitimacy' of a child to the 'legal parentage' of a child.³⁵ This shift is largely attributable to the abolition of the legal differentiation between legitimate and illegitimate children in the domestic legal systems of states.³⁶



³⁴ Kleijkamp G *Family Life and Family Interests: A Comparative Study of the Influence of European Convention of Human Rights on Dutch Family Law and the Influence of the United States Constitution on American Family Law* (1999) Kluwer Law International and Martinus Nijhoff Publishers 300; Hutchinson AM 'The Hague Convention on surrogacy: Should we agree to disagree' (2012) American Bar Association Section of Family Law 2012 Fall CLE Conference (unpublished) available at http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf (accessed on 23 July 2013).

³⁵ Bainham A *Children: The Modern Law* 3 ed (2005) 185 - 188; The Hague Conference on Private International Law Permanent Bureau *Private International Law Issues Surrounding the Status of Children, including Issues Arising from International Surrogacy Arrangements* Preliminary Document 11 (March 2011) (hereafter HCCH Preliminary Document 11 (March 2011)) <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (accessed on 17 July 2013).

³⁶ The international trend to abolish the distinction between legitimate and illegitimate children is in line with state obligations set out in Article 2 of the UNCRC which seeks to protect children from being discriminated against on the basis of their or their parent's "birth or other status". Regional instruments such as The African Charter on the Rights and Welfare of the Child (article 2); the American Convention on Human Rights (article 1); the European Convention on Human Rights (articles 8 and 14) and the European Convention on the Legal Status of Children born out of Wedlock place similar obligations on states to protect children from being discriminated against on the basis of their or their parent's birth or other status. International legal jurisprudence has followed a similar course towards affording children this protection. See for example the European Court of Human Rights cases, *Marckx v Belgium* (13 June 1979) 2 ECHR 330 and *Johnston and others v Ireland* (18 December 1984) 8 ECHR 2003.

The issue of who is recognised as a child's legal parent(s) has become a relatively settled issue in most domestic legal systems.³⁷ The change in family patterns and advanced medical technology in the fields of DNA testing and assisted reproduction technology has challenged the conventional establishment of legal parentage and therefore the status of a child.³⁸ This challenge has caused states to reform and/or adopt laws to provide a contemporary definition and establishment of legal parentage.³⁹ Approaches to paternity establishment, medically assisted human reproductive technology and same sex families have varied between countries due to cultural, economic and social environments. As a result, states have developed laws on parentage at varying rates which has resulted in there being no uniformity and international consensus on how to establish and contest legal parentage. This has caused many difficulties on an international level.⁴⁰



1.3.2 Increase in cross country surrogacy agreements

The increase in the number of cross border surrogacy arrangements being concluded may be attributable to the sharp contrasts in the reception of surrogacy between various states.⁴¹ By way of illustration, Israel, Greece, Ukraine, California, United Kingdom and South Africa regulate surrogacy; Turkey, France and Germany

³⁷ Kleijkamp G *Family Life and Family Interests: A Comparative Study of the Influence of European Convention of Human Rights on Dutch Family Law and the Influence of the United States Constitution on American Family Law* (1999) 301; Hutchinson AM 'The Hague Convention on surrogacy: Should we agree to disagree'; HCCH Preliminary Document 11 (March 2011).

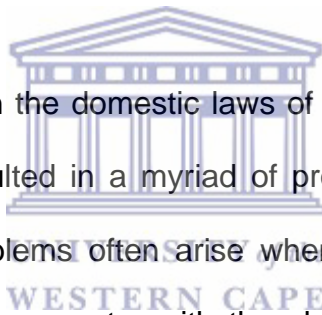
³⁸ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 556.

³⁹ For example the following States have amended their legislation or rules on parentage or assisted reproduction: Australia, reform on surrogacy and assisted reproductive technologies in 2009; Canada reform on assisted human reproduction in 2004 and in 2010 adopted the Uniform Child Status Act; United Arab Emirates (2005), Qatar (2006) and Bahrain (2009), codification of Family Law; France (2005), Puerto Rico (2009) and Belgium (2006), reform on parentage; New Zealand (2004 and 2007) and United Kingdom (2008) reform on human assisted reproduction; Germany (2008) reform on paternity acknowledgement; Sweden (2006) reform on access to medically assisted reproduction treatment.

⁴⁰ HCCH Preliminary Document 11 (March 2011) paragraphs 9 and 10.

⁴¹ Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 277.

prohibit surrogacy; while countries such as Japan have not dealt with surrogacy in its domestic laws to date.⁴² Couples or individuals who live in a country where surrogacy is prohibited, strictly regulated or financially inaccessible, may seek to conclude a surrogacy agreement in a country like India, where the laws or practice is more flexible and/or cheaper.⁴³ This factor together with the increased access to international travel, access to information and communication on an international scale has resulted in a surge in the number of cross border surrogacy arrangements being concluded.⁴⁴ Surrogacy is a viable option available to a couple or individual who wish to have a child of their own genetic make-up but who are medically or biologically unable to bear children.⁴⁵



Misinformation, the diversity in the domestic laws of states and a lack of precedent and legal framework has resulted in a myriad of problems arising in cross border surrogacy agreements.⁴⁶ Problems often arise when the commissioning parent(s) attempt to return to their home country with the child.⁴⁷ Problems may also arise when the commissioning parent(s) wish to register the child's foreign birth certificate

⁴² International Reference Centre for the Rights of Children Deprived of their Family 'International Surrogacy and Children's Rights' Monthly Review Number 174 (July – August 2013) 2; HCCP Preliminary Document 11 (March 2011) paragraph 9; Israel laws on surrogacy can be found in The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn Law) 5756 of 1996 and the South African law on surrogacy agreements can be found in chapter 19 the Children's Act 38 of 2005; Schafer L *Child Law in South Africa- Domestic and International Perspectives* (2011) 264; Schuz R 'Surrogacy in Israel: An analysis of the law in practice' in Cook R and Day Sclater S with Kaganas F (eds) *Surrogate Motherhood: International Perspectives* (2003) 35-53.

⁴³ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 553.

⁴⁴ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 413; Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 284; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 553; HCCP Preliminary Document 11 (March 2011) paragraph 12.

⁴⁵ Louw A 'Surrogate Motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007) 19-1; *Baby Manji Yamada v Union of India and Anr.* (2008) INSC 1656 (29 September 2008).

⁴⁶ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 553;

⁴⁷ *Baby Manji Yamada v Union of India and Anr* (Japan/India); *G (Surrogacy: Foreign Domicile)* (2008) 1 FLR 1047 (Turkey/UK); *Balaz v Anand Municipality* (2009) Letters Patent Appeal 2151/2009 (Germany/India).

in their home country or when they attempt to register a judicial or administrative order relating to the child's parentage in their home country.⁴⁸ Difficulties could arise later when the child's parentage is brought into question in matters relating to parental rights and responsibilities such as care and maintenance.⁴⁹ The most common problems which have been identified in reported cases are the risk of commissioning parent(s) and/or the child being left stranded and of the child being left stateless and with uncertain parentage.⁵⁰

The problems presented will be best illustrated by way of international case examples. The applicable countries' reception and regulation of surrogacy in the countries relevant to the case studies need to be expanded on. The jurisdictions of Japan, India and the United Kingdom are discussed in more detail because: (i) these countries feature in the case examples discussed under chapter 2; and (ii) the diverse manner in which these countries deal with surrogacy reinforces the disparity in the manner that different countries regulate and receive surrogacy.

1.3.3 Statelessness

Nationality denotes a person's status as a subject of a state in an international arena, while citizenship denotes an individual's membership of a country on a

⁴⁸ HCCH Preliminary Document 11 (March 2011) para 13; *Baby Manji Yamada v Union of India and Anr* (Japan/India); *G (Surrogacy: Foreign Domicile)* (2008) 1 FLR 1047 (Turkey/UK); *Balaz v Anand Municipality* (2009) LPA 2151/2009 (Germany/India); *X and Y (Foreign Surrogacy)* (2009) 1 FLR 733; *K (Minors) (Foreign Surrogacy)* (2010) EWHC 1180; *Office of the Mayor of Shinagawa v Takada and Mukai Supreme Court 23 March 2007 Minshu 61*.

⁴⁹ HCCH Preliminary Document 11 (March 2011) paragraph 14, *Miller-Jenkins v Miller-Jenkins* 912 A.2d 951 (2006).

⁵⁰ European Parliament: Directorate General for Internal Policies (Policy Department C: Citizen's rights and constitutional affairs) 'A comparative study on the regime of surrogacy in EU member states' (May 2013); HCCH Preliminary Document 11 (March 2011) paragraph 13; *Baby Manji Yamada v Union of India and Anr* (Japan/India); *G (Surrogacy: Foreign Domicile)*; *Balaz v Anand Municipality*; *X and Y (Foreign Surrogacy)*; *K (Minors) (Foreign Surrogacy)*.

domestic level.⁵¹ The concept of nationality is in most instances related to the issue of state sovereignty.⁵² A state has no obligation to confer citizenship on an individual and has full discretion to dictate the terms for eligibility of its citizenship.⁵³ An individual with an unknown nationality or a non-citizen is generally considered stateless.⁵⁴ Statelessness is where an individual or group of persons is/are denied membership or the nationality of any state in the world.⁵⁵ One factor which contributes to the risk of surrogate born children being stateless is partly attributed to the varying principles in countries on the acquisition of nationality.⁵⁶ The acquisition of nationality operates under two principles, namely *jus soli* (the right of soil) and *jus sanguinis* (the right of blood).⁵⁷ If a child is born in a country that subscribes to the *jus soli* principles, the child will obtain citizenship of the country by virtue of his or her birth there. Surrogacy presents problems if the country of birth or intended country of residence applies principles of *jus sanguinis*. In *jus sanguinis* countries, legal parentage must be established. The legal rules of countries on the establishment of parentage in a cross border surrogacy arrangement may conflict which, in turn, may result in the surrogate born child being stateless.

⁵¹ Weis P *Nationality and Statelessness in International Law* 2 ed (1979) The Netherlands: Sijthoff & Noordhoff Alphen aan den Rijn 3-7; Keightley R 'The child's right to a nationality and the acquisition of citizenship in South African Law' (1998) 14 *SAJHR* 411 412.

⁵² Blackman JL 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 *Michigan Journal of International Law* 1141 1151.

⁵³ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 555.

⁵⁴ There continues to be debate on an international level of a clear legal definition of 'statelessness': Van Waas L *Nationality Matters: Statelessness under International Law* (LLD thesis University of Tilburg, Netherlands 2008) 29 *School of Human Rights Research Series* Antwerp: Intersentia 9 – 10; Keightley R 'The child's right to a nationality and the acquisition of citizenship in South African Law' (1998) 415.

⁵⁵ Van Waas L *Nationality Matters: Statelessness under International Law* (LLD thesis University of Tilburg, Netherlands 2008) 29 *School of Human Rights Research Series* Antwerp: Intersentia v,11; Keightley R 'The child's right to a nationality and the acquisition of citizenship in South African Law' (1998) 415.

⁵⁶ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 555.

⁵⁷ Two further means to obtain citizenship is by way of marriage or residency in a country other than the country of origin; Weil P 'Access to Citizenship : A Comparison of Twenty-Five Nationality Laws in Aleinikoff TA and Klusmeyer D (eds) *Citizenship Today: Global Perspectives and Practices* (2001) Carnegie Endowment for International Peace Washington DC 17.

Stateless persons are excluded from the legal protection and membership of a country and are more vulnerable to being marginalised, discriminated against and abused in a public and private sphere.⁵⁸ Statelessness may result in an individual or group of persons being unable to effectuate a range of rights such as obtaining an education, medical care, register the birth of their children, participate in political arenas, obtain employment and enjoy an identity. It poses a major obstacle in simple administrative procedures.⁵⁹ Stateless persons will often not be issued with any form of identity which may expose them to an increased risk of becoming a victim of human trafficking or other forms of exploitation.⁶⁰ Without positive identity they are often prevented from travelling and as a result may be unable to return to their country of origin if they are in a foreign country.⁶¹ Statelessness has dire social, civil and political consequences for individuals. More than being unable to travel across borders, a stateless person's protection of rights on an international level and at a domestic level may be denied.⁶² It is thus important to avoid a situation where a child is placed at risk of being stateless in order to ensure protection of all of the child's rights encompassed in the UNCRC.

1.4 Aim of the research

The research aims to show that:

⁵⁸ Van Waas L *Nationality Matters: Statelessness under International Law* 12 – 13; Smerdon UR 'Birth registration and citizenship rights of surrogate babies born in India (2012) 20:3 *Contemporary South Asia* 341 353.

⁵⁹ Van Waas L *Nationality Matters: Statelessness under International Law* 12 – 13.

⁶⁰ Van Waas L *Nationality Matters: Statelessness under International Law* 12 – 13.

⁶¹ Van Waas L *Nationality Matters: Statelessness under International Law* 12 – 13; Smerdon UR 'Birth registration and citizenship rights of surrogate babies born in India (2012).

⁶² Milbrandt J 'Stateless' (2011) 20 *Cardoza Journal of International and Comparative Law* 75 92.

- i) The continued practice of concluding cross country surrogacy arrangements without uniform international regulation potentially undermines the right of a child to a nationality and parentage. It will be argued that the denial of these rights results in the discrimination against the surrogate born child on the grounds of his/her birth or status;
- ii) There is a need to establish and implement an international legal framework on cross country surrogacy agreements;
- iii) The research paper will propose suggestions on the form of the legal framework. It suggests some vital elements that the legal framework ought to contain to provide a unified point of reference in cross border surrogacy arrangements.



1.5 Significance of the research

Cross border surrogacy agreements form part of a growing medical tourism industry. A significant number of international cases which have received wide media coverage have highlighted the need to address and regulate these arrangements on an international level. These cases have exposed the real risk of children born of a cross border surrogacy arrangement being denied their basic rights. Laws relating to legal parentage, the rights of children and surrogacy continue to evolve at varying rates in states. The study will add to existing literature on the rights of children and the protection of all children from discrimination against them on listed or any other ground as defined in international and regional instruments and domestic laws. It will provide an up to date account of the potential risks that a surrogate born child may

be exposed to. The study will address the need to implement an international legal framework for cross country arrangements.

1.6 Research question

The research paper will address the question of whether an international legal framework on cross border surrogate agreements is required in order to provide a unified international point of reference and to protect children against discrimination on the grounds of birth or parental status. This question will be addressed having regard to the contrasting reception and implementation of surrogacy.

In addressing whether there is a need for an international framework, a comparative analysis of the Indian, Japanese and United Kingdom laws relating to surrogacy will be done. These countries have specifically been chosen for their contrasting regulation of surrogacy and parentage. Cases from various jurisdictions which illustrate problems encountered will be used to demonstrate the legal difficulties and the potential rights infringed on or denied to the child born of a cross country surrogacy arrangement.

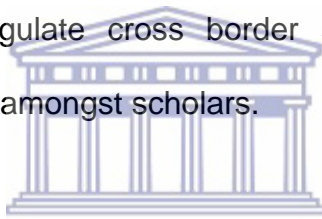
1.7 Methodology

The methodology employed in this research paper will be predominantly by way of desktop literature reviews of articles on the topic, research papers and reports by professionals, organisations or bodies in the field, cases and judgements delivered in various countries.

Textbooks, South African and international journals, international and regional conventions, theses, South African and foreign legislation and case law will form a large part of this research. South Africa as a jurisdiction is, however, excluded from this study due to the requirement of local domicile for the conclusion of a valid surrogate motherhood agreement in terms of the South African Children's Act 38 of 2005.

1.8 Literature review

The general consensus amongst scholars appears to be that an international legal framework is required to regulate cross border surrogacy arrangements. The motivation for this need differs amongst scholars.



Lee calls for the enactment and implementation of regulatory policies to guard against the potential exploitation of women.⁶³ She argues that European Union countries and states within the United States of America must understand that refraining from regulating surrogacy due to moral debates will exacerbate the problems of the growing surrogacy trade and over-burden developing states like India, which has less resources and legal tools to tackle the legal problems related to surrogacy.⁶⁴ She asserts that governments should recognize that they have a duty to protect children.⁶⁵ Mohapatra similarly advocates for the implementation of an international framework but for different reasons.⁶⁶ She demonstrates the need for

⁶³ Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009).

⁶⁴ Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 277 and 299.

⁶⁵ Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 299.

⁶⁶ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012).

an international framework on cross country surrogacy agreements by identifying the problems from a bioethical viewpoint. She argues that an international surrogacy framework will assist in the prevention of cross border surrogate born children being born stateless.⁶⁷

Similar to the arguments in this research, Lin argues that an international legal framework is required to assist in the prevention of surrogate born children's rights being undermined.⁶⁸ She recognises that an international legal framework will not eliminate incidents of children being born or rendered stateless when they are taken to their parents' country of origin, but argues that it will limit and reduce the number of children born or rendered stateless. She demonstrates a potential model for a convention based on the studies of Trimmings and Beaumont.⁶⁹ There are advocates for the regulation of surrogacy to limit potential exploitation.⁷⁰ Some scholars are opposed to the regulation of surrogacy, so as to not exclude historically disadvantaged groups such as same-sex couples or single infertile persons.⁷¹

There is a large majority of proponents for an international legal framework on cross border surrogacy, but for varying reasons. It is submitted that the common factor in the reasons advanced for establishing an international framework, is the protection of the children from statelessness and other negative legal or social consequences. In this study, it will be argued that the need for an international legal framework on

⁶⁷ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 413 and 448-450.

⁶⁸ Lin T 'Born Lost: Stateless children in international surrogacy arrangements'.

⁶⁹ Trimmings K and Beaumont P 'International surrogacy arrangements: An urgent need for legal regulation at the international level' (2011) 7 *Journal of Private International Law* 627.

⁷⁰ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 437.

⁷¹ Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 437.

cross border surrogacy arrangements will afford surrogate born children protection against discrimination on the grounds of birth and status, and thereby diminish the risk of statelessness of surrogate born children.

1.9 Chapter outline

1.9.1 Chapter one: Introduction

The introduction sets out the background to the research, the development of the concept of the status of a child and its evolution from the legitimacy of a child to legal parentage. It sets out important concepts, the aims and significance of the research. It further identifies the research question and provides an outline of the chapters which follow.



1.9.2 Chapter two: A comparative analysis of the domestic laws of Japan, India and United Kingdom on parentage and surrogacy

The purpose of this chapter is to highlight the disparity in the regulation and acceptance of surrogacy and the consequences for legal parentage in the relevant jurisdictions. Legal parentage is used as the basis to define the status of a child. The laws on parentage and surrogacy in Japan, India and the United Kingdom will be reviewed and discussed with reference to cases from the jurisdiction of these countries.

The specific rights of a child to a nationality, parentage and identity, with reference to the UNCRC, which seeks to protect the rights of children, will also be discussed.

The author will analyse whether the solutions offered by the countries, such as adoption in India and Japan, or the ex post facto parental orders of the United Kingdom, are viable models which could be employed on an international level to eliminate the risk of surrogate born children being stateless and with unclear parentage.

1.9.3 Chapter three: Addressing surrogacy in the international legal arena

This chapter sets out the discussions drawn from the research and based on the investigation; suggestions on the form of an appropriate international legal framework on cross border surrogacy agreements and the issues that such legal framework ought to cover will be proposed.



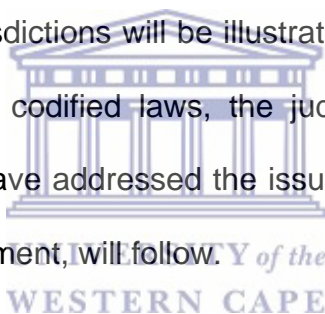
1.9.4 Chapter four: Conclusion

The research questions will be answered and a suggestion made that an international legal framework for cross border surrogacy be adopted and implemented as a priority.

CHAPTER TWO: A COMPARATIVE ANALYSIS OF THE DOMESTIC LAWS OF JAPAN, INDIA AND UNITED KINGDOM ON PARENTAGE AND SURROGACY

2.1 Introduction

This chapter focuses mainly on the reception and regulation of surrogacy in the three very distinct legal systems of Japan, India and the United Kingdom. The regulation of surrogacy and parentage in these three countries are remarkably diverse. The laws applicable to citizenship and legal parentage in each jurisdiction will be briefly discussed. Thereafter, the manner in which surrogacy has been received and addressed in the selected jurisdictions will be illustrated. A discussion of how, in the absence of any or adequate codified laws, the judiciary, administrative or other bodies in these jurisdictions have addressed the issue of the status of children born abroad of a surrogate arrangement, will follow.



2.2 Japan

2.2.1 Citizenship in Japan

The entry into the publicly maintained family register, the 'koseki', establishes legal status and awards Japanese nationality to individuals in Japan.⁷² Japan's nationality laws are based on the principles of *ius sanguinis*. The Japanese nationality law prescribes that a child shall be a Japanese national when at the time of his or her

⁷² Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 32 *Journal of Japanese Law* 65 69.

birth, the father or mother is a Japanese national.⁷³ The establishment of a child's legal parentage is therefore essential in order to establish citizenship and/or nationality of a child.⁷⁴

2.2.2 The parent-child relationship

Japanese law bases the parent-child relationship on a nuclear, biological family model.⁷⁵ The dominant family norm in Japan is the nuclear family of a married couple and their biological children.⁷⁶ It is submitted that the nuclear family model ignores the changing patterns of society and the evolutionary modern concepts of family which have been brought about by an increased number of divorces, single parents and same-sex parents. Advances in reproductive technology have also changed the face of biological procreation significantly, thereby further challenging the concept of the nuclear family.⁷⁷ It has been argued that surrogacy in particular challenges the nuclear family model because it may contain elements of contracts, payments and questions the legal and social concept of a 'mother'.⁷⁸ Dolgin argues that surrogacy

⁷³ Articles 2(1) of the Nationality Act Law 147 of 1950 as amended by Law number 88 of 2008. The English translation is available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&co=01&x=65&y=19&ky=nationality+act&page=7> (accessed on 21 September 2013); Article 2(3) of the Nationality Act provides that a child born in Japan may acquire Japanese citizenship if his or her parents are unknown or the child has no nationality.

⁷⁴ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 48 No 3 *Family Court Review* 417 – 430 421.

⁷⁵ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) at 78.

⁷⁶ Lock M 'Perfecting Society: Reproductive Technologies, Genetic Testing and the Planned Family in Japan' in Lock M and Kaufert P (eds.) *Pragmatic Women and Body Politics* (1998) 206, 220 and 230; The use of the nuclear, biological family model as a basis to establishing a legal parent-child relationship in western countries has been criticised by some authors; Dolgin JL *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (1997) University Press; Morgan D 'Surrogacy: An Introductory Essay' in Lee R and Morgan D (eds) *Birthrights: Law and Ethics at the Beginning of Life* (1989) 55;

⁷⁷ Schulz MM 'Reproductive Technology and Intention-Based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297 299 – 300.

⁷⁸ Dolgin JL *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (1997) 67.

undermines the biological aspect of gestation on the one hand, but preserves the biological basis of family relations by creating genetically related nuclear families, which would in certain instances not be possible.⁷⁹ This is especially relevant in the context of Japan where it is not uncommon for a couple who have no children, or no male children, to adopt an adult or their son in law(s) in order to ensure that an heir to the family estate or business is established.⁸⁰

The Japanese Civil Code establishes two types of parent-child relationships, namely, 'natural' and 'adopted'.⁸¹ The Japanese Civil Code makes provision for the establishment of a natural parent-child relationship by legitimacy or affiliation.⁸²

The Japanese Civil Code contains two presumptions relating to paternity, namely: (i) a child conceived during marriage or born within 200 days after marriage is presumed to be the child of the husband;⁸³ and (ii) a child born within 300 days after a couple's divorce is presumed to be the child of the ex-husband, unless rebutted by the ex-husband.⁸⁴ The former husband may approach a court for an order confirming that he is not the child's father.⁸⁵

⁷⁹ Dolgin JL *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (1997) 67 - 68.

⁸⁰ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 75; Bryant TL 'Sons and Lovers: Adoption in Japan' 38 (1990) *American Comparative Law Journal* 303. 333.

⁸¹ Civil Code Act 89 of 1896 as amended by Law 28 of 2006 available at <http://www.japaneselawtranslation.go.jp/law/detail/?yo=%E6%B0%91%E6%B3%95&ft=2&re=02&ky=&page=2> (accessed on 22 September 2013; Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 72.

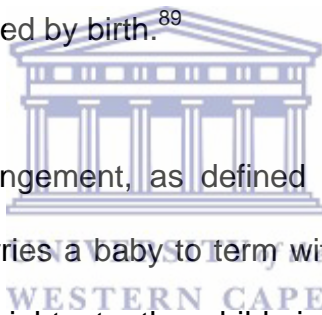
⁸² Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 72.

⁸³ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 72.

⁸⁴ Article 772 (1) of the Civil Code.

⁸⁵ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 73.

The Civil Code of Japan does not explicitly state that the birth mother of a child is the legal mother but it has been held that it is implied.⁸⁶ Although a mother may affiliate⁸⁷ her child, in a 1962 case, the Supreme Court of Japan held that Japanese law determines the mother of a child by birth, not affiliation.⁸⁸ Children born out of wedlock may be affiliated by the parents. Affiliation ensures that the parentage of certain children born out of wedlock is accurately recorded in the family register. Affiliation is not possible if the mother of a child is married due to the presumptions of paternity as contained in the Japanese Civil Code. Until 1962, the birth mother of a child born out of wedlock was also required to affiliate her child. This requirement became obsolete when the court held that the Japanese Civil Code implied that the maternity of a child is established by birth.⁸⁹



In terms of a surrogacy arrangement, as defined in chapter 1, section 1.2, the gestational or birth mother carries a baby to term with the intention to relinquish all parental responsibilities and rights to the child, in favour of the commissioning parents. In terms of Japanese law, the commissioning mother cannot be regarded as the legal mother of the surrogate born child due to the requirement that only the birth mother may be considered the legal mother of the child. In addition, and as is set out above, there is a legal presumption that the husband or former husband, as the case may be, of the birth mother is the father of the child and the child must be registered on his family register. If the birth mother is unmarried, the commissioning father may potentially be registered as the child's father by affiliation, but this will still exclude

⁸⁶ *Office of the Mayor of Shinagawa v Takada and Mukai* Supreme Court (23 March 2007) Minshu 61 619 *The Japanese Journal Annual of International Law* 51 (2008) 554.

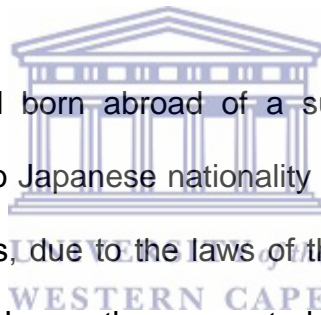
⁸⁷ Affiliate means to acknowledge the familial or parental relationship of the child.

⁸⁸ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 420 and fn 43; Supreme Court Minshu 16 27 April 1962 1247.

⁸⁹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 73.

the commissioning mother from automatically being entitled to a legally recognised and protected parent-child relationship with the child without having to follow a process of adoption.

Establishing a parent-child relationship under the Japanese Civil Code entitles a child to be registered on the parents' family register. Registration on the family register establishes a mutual duty of support to and by their parents, inheritance rights and entitlement to Japanese nationality.⁹⁰ The disadvantages of not being registered as the natural child of his or her parents include a child not being entitled to a Japanese nationality and not being entitled to inherit intestate.⁹¹



Problems arise when a child born abroad of a surrogate arrangement may be excluded from being entitled to Japanese nationality because the birth mother is not Japanese. In certain instances, due to the laws of the birth mother's country being incompatible with the laws of Japan, the surrogate born child may be deprived of a citizenship and/or a nationality. The case examples discussed below will further expand on this aspect.

2.2.3 Adoption as a means to establish legal parentage of a child

The second manner in which a parent-child relationship may be established under Japanese law is by way of adoption. There are two types of adoption under the Japanese Civil Code, namely ordinary adoption and special adoption.

⁹⁰ Articles 877(1) and 887(1) of the Civil Code Act 89 of 1896; Article 2 of the Nationality Act Law number 147 of 1950 as amended by Law number 88 of 2008.

⁹¹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 73-74.

2.2.3.1 Ordinary adoption

An ordinary adoption is a contractual arrangement between the parties.⁹² The law requires the parties to register the adoption on the family register in order for the adoption to be legally recognised.⁹³ If the adoptee is a minor, the court must approve the adoption.⁹⁴ An ordinary adoption results in a legal parent-child relationship being established between the child and the adoptive parents.⁹⁵ The legal consequences of a natural parent-child relationship such as the mutual rights of inheritance and support will flow from the legally recognised parent-child relationship.⁹⁶

Ordinary adoption does not, however, sever the legal ties between the adoptee and his or her natural parents. The child's family register records the natural and adoptive parents' names and the adoptee may succeed to both their natural parents and adopted parents' estates.⁹⁷ Adoption was traditionally used in Japan to adopt adults: as a result, there is very limited court intervention in ordinary adoptions.⁹⁸ It is not uncommon in Japan for parents to adopt their son in laws, or to adopt an heir to reduce inheritance taxes.⁹⁹ Ordinary adoptions are also used by same sex partners

⁹² Bryant TL 'Sons and Lovers: Adoption in Japan' (1990) 303.

⁹³ Article 739 and 799 of the Civil Code; Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 74.

⁹⁴ Article 798 of the Civil Code; Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 74 - 75.

⁹⁵ Articles 809 and 820 of the Civil Code.

⁹⁶ Articles 877 and 887(1) of the Civil Code.

⁹⁷ Article 13 Family Registration Act 224 of 1947, as amended by Law 53 of 2011.

⁹⁸ Bryant TL 'Sons and Lovers: Adoption in Japan' (1990) 303.

⁹⁹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 75; Bryant TL 'Sons and Lovers: Adoption in Japan' (1990) 333.

to adopt their partners as an alternative to marriage or for the adoption of extra-marital partners.¹⁰⁰

The Japanese Civil Code provides for the rescission or dissolution of an ordinary adoption on similar grounds as the rescission or dissolution of a marriage because it was designed for adult adoptees capable of protecting themselves.¹⁰¹ Having regard to the fact that an ordinary adoption does not sever the ties between child and birth mother, that there is limited court intervention in adoptions, and the ease with which it may be rescinded or dissolved, it is submitted that ordinary adoption is not a viable option to establish a parent-child relationship between the commissioning parents and child.

2.2.3.2 Special adoption



The second type of adoption is a special adoption which was introduced in the Japanese Civil Code in 1988.¹⁰² A special adoption applies to the adoption of minors under the age of six and extinguishes the legal parent-child relationship between the adopted child and his or her natural parents.¹⁰³ Only married couples, one of whom must be 25 years old or older and the other 20 years old or older may be eligible to adopt a child by way of a special adoption.¹⁰⁴

¹⁰⁰ Mackie V 'Embodiment, Citizenship and Social Policy in Contemporary Japan' in Goodman R (ed) *Family and Social Policy in Japan: Anthropological Approaches* (2002) 210-11; Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 75.

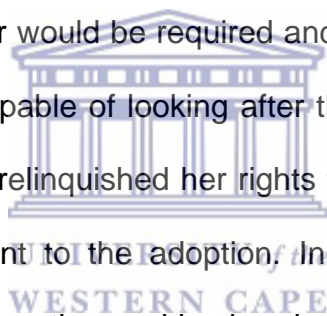
¹⁰¹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 75; Bryant TL 'Sons and Lovers: Adoption in Japan' (1990) 333.

¹⁰² Hayes P and Habu T *Adoptions in Japan: Comparing policies for children in need* (2006) 3-4.

¹⁰³ Articles 817-2 (1), 817-7 and 817- 9 of the Civil Code.

¹⁰⁴ Articles 817-3 (1) and 817- 4 of the Civil Code.

The adoption is done through the Family Court and may only be ordered with the consent of the biological parents. It must be shown that the biological parents are incapable or unfit to care for the child or for other reasons that would render the adoption necessary and in the child's best interest.¹⁰⁵ Similar to a natural parent-child relationship, a special adoption results in the child being registered on the parents' family register but the registration itself differs from the registration of a child on his or her natural parents' family register.¹⁰⁶ It also differs from a natural parent-child legal relationship in that a court may dissolve the special adoption and a special adoption does not confer automatic Japanese citizenship on the child.¹⁰⁷ It is submitted that this form of adoption is also not ideal in a surrogacy arrangement as the consent of the birth mother would be required and she and/or her husband must be shown to be unfit and incapable of looking after the child. In most instances the surrogate mother would have relinquished her rights to the child and it is submitted, with it her capacity to consent to the adoption. In very few instances will it be possible to show that the birth mother and husband are incapable or unfit to care for the child.¹⁰⁸



¹⁰⁵ *Takada and Mukai v The Office of the Mayor Shinagawa* The Family Court (30 November 2005) Minshu 61 658 (hereinafter *Takada and Mukai v The Office of the Mayor Shinagawa* The Family Court (30 November 2005)); *Office of the Mayor of Shinagawa v Takada and Mukai* High Court (29 September 2006) Minshu 61 2- case number 2006 (Kyo) Number 47 5 available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html> (accessed on 22 September 2013 (hereinafter *Office of the Mayor of Shinagawa v Takada and Mukai* High Court (29 September 2006)); *Office of the Mayor of Shinagawa v Takada and Mukai* Supreme Court (23 March 2007) Minshu 61 619 in *The Japanese Journal Annual of International Law* 51 (2008) (hereafter *Office of the Mayor of Shinagawa v Takada and Mukai* Supreme Court (23 March 2007)).

¹⁰⁶ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 82.

¹⁰⁷ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 82.

¹⁰⁸ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 82.

2.2.4 Surrogacy in Japan

Japan has no legislation which regulates surrogate births and the legal relationship between the genetic donors, birth mothers, commissioning parents and children.¹⁰⁹ The Liberal Democratic Party set up a panel in 2012 to draft a preliminary outline for a bill which aims to address the legalization of surrogacy in certain limited circumstances in Japan.¹¹⁰ As at date of this research, no remarkable progress has been made towards implementing legislation on the issue of surrogacy.

Since 2000, the Ministry of Health, Labour and Welfare have published several reports on how to regulate surrogacy in Japan, all of which steadfastly recommended a prohibition of surrogacy.¹¹¹ The first publicised surrogate birth in Japan took place in 2001.¹¹² Thereafter very few surrogate births were publicised.¹¹³ In 2003, The Japan Society of Obstetrics and Gynaecology (JSOG) prohibited all its members from performing surrogacy treatments in Japan.¹¹⁴ Although the JSOG rule was non-binding, it was followed by the majority of members.¹¹⁵

In 2006, the Minister of Justice and the Minister of Health, Labour and Welfare mandated the Science Council of Japan to investigate surrogate births in Japan. In

¹⁰⁹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 66.

¹¹⁰ Seth R 'Bill on conditional approval for surrogacy being drafted by Japan's LDP' *Japan Daily Press* (12 June 2012) available at <http://japandailynews.com/bill-on-conditional-approval-for-surrogacy-being-drafted-by-japans-ldp-124009/> (accessed on 21 September 2013).

¹¹¹ Ahlefeldt M 'Less than family: Surrogate birth and legal parent-child relationships in Japan' (2011) 68; De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 424-5.

¹¹² De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 424.

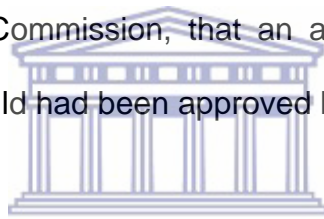
¹¹³ Ahlefeldt M 'Less than family: Surrogate birth and legal parent-child relationships in Japan' (2011) 68; De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 425.

¹¹⁴ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 424.

¹¹⁵ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 424.

April 2008, the Science Council recommended the legal prohibition of surrogate births in Japan.¹¹⁶ The Science Council acknowledged that even if the law prohibited surrogacy in Japan, prospective commissioning parents could conclude a surrogacy arrangement in other countries.¹¹⁷ It is for this reason that they recommended the Japanese government clarify the status of surrogate born children.¹¹⁸

The Science Council recommended that Japanese law give recognition to the birth mother as the legal mother and that parent-child relationship between the commissioning parents and the surrogate born child be established only through formal adoption.¹¹⁹ In 2009, it was announced during a meeting with the Liberal Democratic Party Research Commission, that an adoption by the commissioning parents of a surrogate born child had been approved by a Japanese Family Court.¹²⁰



As at 2013, Japan has not implemented laws to regulate surrogacy. In light of the general opinion to prohibit surrogacy in Japan, it has been expressed that the signs tend to indicate that surrogacy will be legally prohibited in Japan in the near future.¹²¹

The non-regulation and general consensus to prohibit surrogacy in Japan has presented problems in Japan. As at 2008 when the Science Council conducted its research, it was estimated that more than 100 Japanese couples had concluded

¹¹⁶ Science Council of Japan: Assisted Reproductive Technologies Review Committee 'Issues Related to the Assisted Reproductive Technologies Centred on Surrogate Pregnancy: Towards a Social Consensus' (2008) 39 available at <http://www.sci.go.jp/ja/info/kohyo/pdf/kohyo-20-t56-1e.pdf#page=1> (accessed on 19 September 2013); In 2007, the Japan Federation of Bar Association also released a report reaffirming its position of a prohibition of surrogacy: De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 425.

¹¹⁷ Science Council of Japan: Assisted Reproductive Technologies Review Committee 'Issues Related to the Assisted Reproductive Technologies Centred on Surrogate Pregnancy: Towards a Social Consensus' (2008) 30.

¹¹⁸ Science Council of Japan: Assisted Reproductive Technologies Review Committee 'Issues Related to the Assisted Reproductive Technologies Centred on Surrogate Pregnancy: Towards a Social Consensus' (2008) 30.

¹¹⁹ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 426.

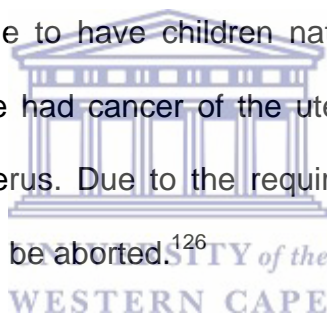
¹²⁰ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 427.

¹²¹ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 427.

surrogate agreements in other countries. In addition, some doctors were assisting with falsifying birth notifications in order to allow the commissioning or adoptive parents to register the surrogate born or adopted child as their natural children on the family register.¹²² This occurrence remained prevalent, despite the JSOG having published guidelines in terms of which surrogacy is expressly prohibited.¹²³

2.2.5 Approach of the Japanese Judiciary

In the much publicised case of Takada and Mukai, the parentage of surrogate born twins came under the spotlight.¹²⁴ Aki Mukai, a Japanese actress and her husband, Nobuhiko Takada were unable to have children naturally.¹²⁵ Mukai was pregnant when she discovered that she had cancer of the uterus. A part of her uterus was removed and later the full uterus. Due to the required removal of her uterus, the foetus she was carrying had to be aborted.¹²⁶



The couple sourced a willing surrogate mother based in the United States of America who would be prepared to carry their child to term. Using the gametes of Mukai and Takada, the couple went through a few failed attempts before a second surrogate mother, from Nevada, gave birth to twins in November 2003.¹²⁷ Surrogate

¹²² Hayes P and Habu T *Adoption in Japan: Comparing Policies for Children in Need* (2006) 3-4.

¹²³ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 68.

¹²⁴ *Takada and Mukai v The Office of the Mayor Shinagawa The Family Court* (30 November 2005); *Office of the Mayor of Shinagawa v Takada and Mukai High Court* (29 September 2006); *Office of the Mayor of Shinagawa v Takada and Mukai Supreme Court* (23 March 2007).

¹²⁵ *Office of the Mayor of Shinagawa v Takada and Mukai High Court* (29 September 2006); De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 418.

¹²⁶ For a summary of the facts of the case see, De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 418-19.

¹²⁷ Brasor P 'Entertaining the Idea of Surrogate Mums' available at

agreements are allowed in Nevada provided that the rights of each party are clearly specified. In terms of Nevada law, the commissioning parents are considered the legal parents of the surrogate born child and the birth mother has no parental rights and responsibilities in respect of the child provided that the surrogate agreement met all the conditions to render it a valid and legally binding contract under the laws of Nevada.¹²⁸

After the birth of the twins, Mukai and Takada applied to the Nevada courts for a declaration that they were the genetic and legal parents of the twins. The courts granted an order authorizing the applicable authorities to issue the birth certificates for the children which recorded Mukai and Takada as their legal and genetic parents. The couple returned to Japan with the twins and submitted the birth certificates to the Office of the Mayor, Shinagawa, in Tokyo to register the twins as their natural children on the Japanese family register. As stated in section 2.2.1, the recordal in the Japanese family register grants legal status and awards Japanese nationality to individuals. The authorities of Shinagawa refused to register the children as Mukai and Takada's natural children because Mukai was not their birth mother.

The couple applied to the Tokyo Family Court for an order that the authorities record the twins as the couple's natural children. Their application was unsuccessful as the Family Court agreed that the children could not be registered as the couple's natural children because Mukai was not their birth mother.¹²⁹ The couple appealed to the

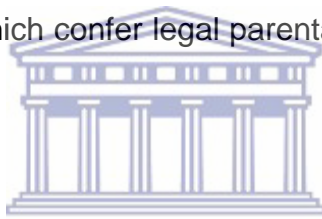
<http://www.japantimes.co.jp/news/2004/02/01/national/entertaining-the-idea-of-surrogate-mums/> (accessed on 21 September 2013); Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 69.

¹²⁸ De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 421.

¹²⁹ *Takada and Mukai v The Office of the Mayor Shinagawa The Family Court* (30 November 2005) 658.

Tokyo High Court and successfully obtained an order in terms of which the order granted by the Family court was overturned. The High Court ordered the authorities to register the children as the couple's natural children on the family registers. The office of the Mayor, Shinagawa appealed the decision to the Supreme Court.

The High Court and Supreme courts of Japan held that Japanese law does not confer legal parentage to the commissioning parents.¹³⁰ The best interest of the children was not the explicit standard for the courts' decisions, but underlies both decisions.¹³¹ Both courts based their decisions on private international law. Their decisions were based on whether the Japanese courts were under an obligation to enforce foreign judgements which confer legal parentage of a surrogate born child to commissioning parents.¹³²



Article 118 of the Japanese Code of Civil Procedure provides that a final and binding decision of a foreign court shall be effective if (i) the jurisdiction of the foreign courts is recognised under laws, regulations, treaties or conventions; (ii) the defendant has received notice or is aware of the proceedings and the content of the judgement; and (iii) the court proceedings are not contrary public policy in Japan.¹³³ The courts in the Takada and Mukai case considered whether the Nevada decision to grant Takada and Mukai legal parentage of the twins contravened Japanese public policy.¹³⁴

¹³⁰ *Office of the Mayor of Shinagawa v Takada and Mukai High Court (29 September 2006); Office of the Mayor of Shinagawa v Takada and Mukai Supreme Court (23 March 2007) 554.*

¹³¹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 69 - 70.

¹³² Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 69.

¹³³ Code of Civil Procedure Act 109 of 1996 as amended by Law 95 of 2007, available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&co=01&ky=civil+procedure&page=75> (accessed on 22 September 2013).

¹³⁴ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 70.

The Tokyo High Court found that the surrogate arrangement between Mukai and the surrogate mother, did not violate the six basic principles submitted by the Ministry of Health, Labour and Welfare's for the prohibition of surrogacy, namely (i) to prioritise the children's best interests; (ii) not to treat people merely as a means of reproduction; (iii) to carefully consider safety; (iv) to eliminate eugenics; (v) to eliminate commercialism; and (vi) to protect human dignity.¹³⁵ In coming to its decision, the High Court also considered factors such as the fact that the twins were genetically related to Mukai and Takada; surrogacy was the only means by which the couple were able to have a genetically related child; and it was in the children's best interests to be for Mukai and Takada to be recognised as their legal parents because they had cared for the children since their birth and wished to raise them while the birth mother and her husband did not wish to do so.¹³⁶ Having regard to these various factors and considerations, the High Court held that the Nevada order granting legal parentage of the children to Mukai and Takada did not contravene Japanese public policy.

The Supreme Court held that a foreign judgement contravened Japanese public policy if it involves a foreign legal system that is incompatible with the core values and fundamental principles of Japan's legal structures.¹³⁷ In the Takada and Mukai case, the Supreme Court held that the natural parent-child relationship relates to the core values and fundamental principles of Japanese laws on personal status because it forms the basis for social relationships and influences the best interests of

¹³⁵ Ministry of Health, Labour and Welfare: Health Services Council- Committee on Assisted Reproductive Technology Treatment 'Report on the Maintenance of the System of Assisted Reproductive Treatment Using Donor Sperms, Eggs and Embryos' (2003) in Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 70.

¹³⁶ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 70.

¹³⁷ *Office of the Mayor of Shinagawa v Takada and Mukai* Supreme Court (23 March 2007) 553.

children. It held that the standards to establish parent-child relationships should be unambiguous and uniform. For this reason, the court held that foreign judgements that recognise a parent-child relationship where such a relationship is not recognised by the Japanese Civil Code, is against Japanese public policy.¹³⁸ The Japanese Civil Code adopts a blood relationship as the basis for establishing a parent-child relationship. At the time of its enactment, a woman who gave birth to a child was always genetically related to the child. As such it is submitted that birth is the implied basis to establish a parent-child relationship as required by the Civil Code. The Supreme Court thus held that the Nevada judgement was incompatible with the Japanese public policy because the Civil Code requires the parent-child relationship to be established through birth. Legal parentage is conferred on a birth mother of a child, and on her husband.¹³⁹ The twins in the Takada and Mukai matter were not able to be registered as the natural children of the Mukai and Takada and no legal parent-child relationship was established. The children were thus not able to obtain Japanese nationality and citizenship as they were not able to be registered on the family register of their genetic parents. The children obtained American citizenship and passports and are cared for by the couple, their genetic parents, as foreign residents in the care of Japanese nationals.¹⁴⁰

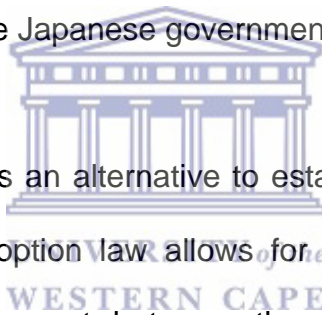
The court seemed to suggest that Takada and Mukai could use special adoption to establish legal parentage of the children. The requirements for special adoptions may, as in the Takada and Mukai case, pose a problem. The surrogacy contract

¹³⁸ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) at 71.

¹³⁹ *Office of the Mayor of Shinagawa v Takada and Mukai* Supreme Court (23 March 2007) 619.

¹⁴⁰ It has been reported but unconfirmed that the twins were later adopted by the couple through the Family Court and subsequently obtained dual citizenship of the United States of America and Japan: De Alcantara M 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 421.

stipulated that the birth mother of the children relinquished all rights and responsibilities in respect of the children. In order for the adoption to be granted, the birth mother who, in terms of the contract, had no responsibilities and rights in respect of the children would have been required to consent to the adoption. In addition, and because the courts interpret and enforce the requirements for a special adoption strictly, the fact that the birth mother and her husband did not wish to raise the children would not necessarily have sufficed as grounds for them to be found incapable or unfit to care for the children or to meet the requirement that the special adoption is in the children's best interests. Japanese courts are in any event reluctant to grant special adoptions of surrogate born children as it does not want to encourage surrogacy which the Japanese government opposes.¹⁴¹



It is submitted that adoption as an alternative to establishing legal parentage is not ideal in Japan. Japanese adoption law allows for the dissolution of an ordinary adoption of a child by agreement between the adult parties to the adoption agreement with limited court intervention or consideration for the best interests of the child.¹⁴² Foreign adopted children cannot obtain Japanese nationality, even if specially adopted because one of the child's parents must be a Japanese national at the time of their birth.¹⁴³

In the Takada and Mukai matter, had Takada and Mukai not been married, it is possible that the children could have been affiliated and registered on Takada's

¹⁴¹ Ahlefeldt M 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 76.

¹⁴² Article 811 of the Civil Code; Article 817-10 of the Civil Code allows for the dissolution of a special adoption by application to the Family Court where a child has been abused by his or her adoptive parents; Bryant TL 'Sons and Lovers: Adoption in Japan' (1990) 334.

¹⁴³ Article 2(1) of the Nationality Act.

family register thereby allowing them to obtain Japanese nationality. However, because affiliation is not available to married women, affiliation was not an available option. It is ironic that the married status of the twins' birth and genetic mother was cause for them to be treated differently to a child born out of wedlock with a negative outcome for the twins. The child born out of wedlock could have been registered on the father's family register by affiliation and would have been entitled to obtain Japanese nationality on the basis of his or her father's Japanese nationality.

A lack of Japanese nationality and citizenship excludes persons from certain categories of self-employment, being eligible for public sector employment and obtaining political rights. It is submitted that the exclusion of a surrogate born child in Japan obtaining the nationality of his or her country of residence or the nationality of his or her parent(s) amounts to discrimination on the basis of the child's birth by surrogacy and status due to Japan's failure to legally recognise his or her parentage. Japan has failed in its international obligation to ensure the protection of all children in its jurisdiction as is demonstrated in the Takada and Mukai matter.¹⁴⁴ Had the twins not been granted American citizenship, they would have been stateless, without a nationality.

¹⁴⁴ *Office of the Mayor of Shinagawa v Takada and Mukai* Supreme Court 23 March 2007 Minshu 61 619 in (2008) 51 *The Japanese Journal Annual of International Law* 554.

2.3 India

2.3.1 Citizenship in India

Prior to 1987, India subscribed to a doctrine of *jus soli* in regard to the granting of citizenship to persons. In terms of the Indian Citizenship Act of 1955, a person born in India between 26 January 1950 and 1 July 1987 may be ascribed citizenship at birth irrespective of the nationality of his or her parents.¹⁴⁵ The Citizenship Act of 1955 was amended by the Citizenship (Amendment) Act of 1986 which introduced principles of *jus sanguinis* to India's citizenship laws.¹⁴⁶ Persons born in India between 1 July 1987 and 3 December 2004, are considered citizens of India if either of their parents were citizens of India at the time of their birth.¹⁴⁷ Persons born in India after 3 December 2004 are considered citizens of India, if both or either of their parents are/is citizens of India at the time of birth, provided that the other parent is not an illegal migrant.¹⁴⁸ With the introduction of the doctrine of *jus sanguinis* to the Indian citizenship laws, the establishment of the child's legal parentage, especially in a cross border surrogacy arrangement, is of vital importance in order to establish the citizenship and nationality of a child.

Similar to the other jurisdictions under discussion, the birth mother of a child is considered the legal mother of the child to whom she gives birth.¹⁴⁹ The legal

¹⁴⁵ Section 3 of the Citizenship Act of 1955; Sadiq K *Paper Citizens: How illegal immigrants acquire citizenship in developing countries* (2009) Oxford: University Press 9-10.

¹⁴⁶ Sadiq K *Paper Citizens: How illegal immigrants acquire citizenship in developing countries* (2009) 10-11.

¹⁴⁷ Section 3 of the Citizenship Act of 1955; India's Ministry of Home Affairs (Government of India) website available at <http://indiacitizenshiponline.nic.in/acquisition1htm>.

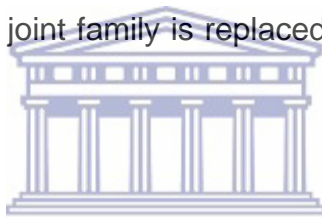
¹⁴⁸ Smerdon UR 'Birth registration and citizenship rights of surrogate babies born in India' (2012) 20:3 *Contemporary South Asia* 343.

¹⁴⁹ Smerdon UR 'Birth registration and citizenship rights of surrogate babies born in India' (2012) 347.

parentage status of a child born in India, to an Indian surrogate mother, must be considered when assessing whether he or she may acquire citizenship of India.

2.3.2 Status of the child in India

Indian families are predominantly patriarchal, collectivistic, joint families with three or more generations of members forming part of the joint family living in one household.¹⁵⁰ The joint Indian family is considered to be a strong, stable, close, resilient and enduring unit, with the focus on family integrity, loyalty and unity as opposed to individuality, freedom of choice, privacy and personal space.¹⁵¹ Over the last decade, the family unit has undergone tremendous change as the predominant family structure of a traditional joint family is replaced with a nuclear family structure (mainly in urban areas).¹⁵²



The general consensus and principle applied by Indian courts is that the welfare and interests of a child is paramount in decisions relating to him or her.¹⁵³ It is submitted that the best interest of a child is of paramount importance in all decisions pertaining

¹⁵⁰ Mullatti L 'Families in India: Beliefs and realities' (1995) 26 *Journal of Comparative Family Studies* 11 – 25.

¹⁵¹ Mullatti L 'Families in India: Beliefs and realities' (1995) 11 – 25.

¹⁵² Bhat PN, Arnold F, Gupta K, Kishor S, Parasuraman S, Singh SK and Lhungdim H 'Household Population and Housing Characteristics' 2005-2007 *Ministry of Health and Family Welfare, Government of India- International Institute for Population Sciences and Macro International* 21 – 52.

¹⁵³ Although the best interests principle has been applied in the context of the care of a child and juvenile justice matters, it is submitted that the same principle will be applied to any matter where the interests of a child is in question, including determination of the legal parent-child relationship in a surrogacy arrangement. See generally for a discussion of the application of principle of the best interest of a child being paramount as applied by courts in disputed custody and parent child abduction cases, Malhotra A and Malhotra R 'India, Inter-country Parental Child Removal and the Law' *Reunite* available at <http://www.reunite.org/edit/files/Library%20%20Conference%20Papers/2008%20IFSL%20Contribution.pdf> (accessed on 24 September 2013).

to children, including in a determination of the parentage of a child born in India through a surrogate arrangement.¹⁵⁴

2.3.3 Surrogacy in India

Assisted reproductive technology (ART), which includes in-vitro fertilization (IVF), artificial insemination and surrogacy, became popular in India as far back as 1978.¹⁵⁵ Today India has more than 200 000 clinics which offer artificial insemination, IVF or surrogacy arrangements.¹⁵⁶ January 2004 marked the start of an unprecedented increased interest in India as a medically assisted reproductive destination.¹⁵⁷ Since this date, surrogacy has become a lucrative business in India with the Supreme Court of India remarking in 2009 that commercial surrogacy was reaching “industry proportions” in India.¹⁵⁸ India has become the global centre for the reproductive tourism industry.¹⁵⁹ Despite the thriving reproductive tourism industry being pioneered in India, the Indian government has to date not implemented laws to govern surrogacy agreements.¹⁶⁰ The absence of legal regulation together with the low costs of quality medical treatment, readily available surrogate mothers and the

¹⁵⁴ This position was affirmed by the Gujarat High Court in the *Union of India and ANR v Jan Balaz and others* Civil Appeal No. 8714 of 2010 Supreme Court of India: Smerdon UR ‘Birth registration and citizenship rights of surrogate babies born in India’ (2012) 346.

¹⁵⁵ Malhotra A and Malhotra R ‘All Aboard for the Fertility Express: Surrogacy and Human Rights in India’ (2012/2013) 14 *Yearbook of Private International Law* 455 456.

¹⁵⁶ Malhotra A and Malhotra R ‘All Aboard for the Fertility Express: Surrogacy and Human Rights in India’ (2012/2013) 456.

¹⁵⁷ In January 2004, the story of the Indian grandmother who carried her daughter’s twin children received widespread media coverage thereby sparking a new found international interest in surrogacy arrangements in India: Malhotra A and Malhotra R ‘All Aboard for the Fertility Express: Surrogacy and Human Rights in India’ (2012/2013) 456.

¹⁵⁸ *Baby Manji Yamada v Union of India and Anr.* (2008) INSC 1656 (29 September 2008).

¹⁵⁹ Malhotra A and Malhotra R ‘All Aboard for the Fertility Express: Surrogacy and Human Rights in India’ (2012/2013) 456.

¹⁶⁰ Bishop L ‘India’s surrogacy laws are only part of the equation’ (14 March 2013) available at <http://monash.edu/news/show/indias-new-surrogacy-laws-are-only-part-of-the-equation> (accessed on 23 July 2013); Malhotra A and Malhotra R *Surrogacy in India- a Law in the Making* (2013) Universal Law Publishing Company.

availability of gamete donors has made India the most popular destination in the reproductive tourism industry.¹⁶¹

2.3.4 Attempts to regulate surrogacy

In 2005, the Indian Council for Medical Research (ICMR) published guidelines in an attempt to regulate the ever increasing number of medically assisted reproduction conducted in India.¹⁶² Because these guidelines are non-statutory, they are not binding, have no legal sanctity and can (as is often the case) be ignored.¹⁶³

As surrogacy arrangements continue to be concluded unabated in India, and due to legal problems that have already presented due to surrogacy and other ART arrangements being conducted in an unregulated manner, the Indian government has been prompted to enact laws which make surrogacy (and other ART) agreements legally enforceable in order to afford protection to the commissioning parents, the surrogate mother and the child.¹⁶⁴

¹⁶¹ Malhotra A 'New medical visa laws to regulate surrogacy' *The Tribune* (5 February 2013) available at <http://www.tribuneindia.com/2013/20130205/edit.htm#6> (accessed on 5 October 2013); Malhotra A and Malhotra R 'Surrogacy: Imported from India- The need for a regulatory law' in International Reference Centre for the Rights of Children Deprived of their Family 'International Surrogacy and Children's Rights' ISS Monthly Review Number 174 (July – August 2013) 9. Malhotra A and Malhotra R 'All Aboard for the Fertility Express: Surrogacy and Human Rights in India' (2012/2013) 456.

¹⁶² Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 30 *Berkeley Journal of International Law* 412 412; Malhotra A and Malhotra R 'All Aboard for the Fertility Express: Surrogacy and Human Rights in India' (2012/2013) 458.

¹⁶³ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India in Atkins B and Banda F (eds) *The International Survey of Family Law* (2013) 152; Malhotra A and Malhotra R 'All Aboard for the Fertility Express: Surrogacy and Human Rights in India' (2012/2013) 458.

¹⁶⁴ Malhotra A and Malhotra R 'All Aboard for the Fertility Express: Surrogacy and human rights in India' (2012/2013) 456.

In 2008, the Assisted Reproduction Technologies Regulation Bill 2008 was tabled. This Bill was succeeded by the 2010 version of the Assisted Reproduction Technologies Regulation Bill. It has however been argued that both versions of the Bill seek to regularise an enforceable contract between the commissioning parents and the surrogate mother, rather than define the rights of either the surrogate mother or the child to be born.¹⁶⁵ As at date of this research, three years after the tabling of the 2010 Bill and 5 years since the tabling of the 2008 Bill, debates on the content of the Bill and how to address practical problems continue to take place.

The Bill makes provision for the legalisation of commercial surrogacy by making provision for the surrogate mother to receive compensation for carrying the baby in addition to having her medical and lay-in expenses covered.¹⁶⁶ It provides that a surrogate agreement which complies with certain conditions will be legally valid and that the surrogate mother will relinquish all parental responsibilities and rights over the child once the compensation is paid.¹⁶⁷ It prescribes certain conditions for women to act as surrogate mothers, such as an age restriction of between the ages of 21 – 35 years old and a restriction that the surrogate mother should not have borne more than 5 children, including her own.¹⁶⁸ It also covers issues such as who may conclude a surrogate agreement with a surrogate mother, and that a person will not be precluded from concluding a surrogacy agreement on the basis of their sex, marital status or sexual orientation.¹⁶⁹ It provides that the child born of the surrogate

¹⁶⁵ Bishop L 'India's surrogacy laws are only part of the equation' (14 March 2013).

¹⁶⁶ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' in Atkins B and Banda F (eds) *The International Survey of Family Law* (2013) 154.

¹⁶⁷ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 154.

¹⁶⁸ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

¹⁶⁹ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

arrangement will be the legitimate child of the individual, or in the case of a married couple, both spouses or in the case of an unmarried couple, both partners, provided that both have given consent to the surrogate arrangement. If the commissioning parents separate or get divorced, the child will be the legitimate child of both commissioning parents.¹⁷⁰

In an attempt to address issues of statelessness or children being left in a legal limbo and with uncertain parentage, the Bill requires foreigners who seek to conclude a surrogacy agreement in India, to first register with the embassy of the country of nationality.¹⁷¹ Foreign commissioning parents must appoint a local guardian for the child and a guardian who will be legally responsible for the care of the surrogate mother during pregnancy and after birth of the child until the child is handed over to the intended parents. The Bill requires the commissioning parent(s) to show that he/she will be responsible for the child outside of India.¹⁷²



The Bill also specifies that if the commissioning parents are foreigners, the child born of a surrogacy agreement, even if born in India, will not obtain Indian citizenship.¹⁷³

Should the commissioning parents not take delivery of the child, the local guardian appointed to the child, will be legally obliged to take the child and will be entitled to

¹⁷⁰ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

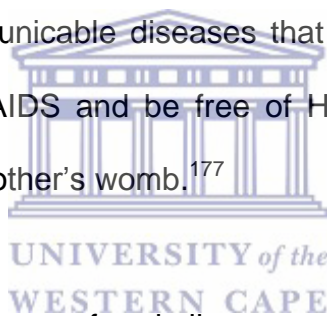
¹⁷¹ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 561-2.

¹⁷² Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

¹⁷³ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

give the child up for adoption. In event of the legal guardian taking the child, or the child being placed up for adoption, the child will obtain Indian citizenship.¹⁷⁴

The Bill further provides that the commissioning parent(s) must produce documentary proof that their country of origin permits surrogacy and that the child will be allowed entry into the country of their origin as a biological child of the commissioning parents.¹⁷⁵ Surrogacy may be recommended to women who are medically incapable or if it is inadvisable for medical reasons for the woman to carry a child. ART clinics may not, however, advertise surrogacy arrangements.¹⁷⁶ The Bill places a duty on ART clinics to ensure that the surrogate mothers are free of sexually transmitted or communicable diseases that may endanger the pregnancy and must be tested for HIV/AIDS and be free of HIV/AIDS before the embryo is transferred to the surrogate mother's womb.¹⁷⁷



It is submitted that in the absence of a similar commitment to address surrogacy in other countries, or if it is not addressed at a uniform pace throughout the world, the proposed law on surrogacy in India will at best serve to arrest the burgeoning reproductive trade in India. This submission is based on the assertions made in Chapter 1 that the domestic law on parentage in general has not evolved at an equal rate between countries. Many countries are still grappling with the legal and ethical considerations of surrogacy. Some countries criminalize surrogacy or certain types

¹⁷⁴ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 561-2.

¹⁷⁵ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

¹⁷⁶ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

¹⁷⁷ Malhotra A and Malhotra R 'All aboard for the fertility express- Surrogacy and human rights in India' (2012/2013) 460.

of surrogacy, like commercial surrogacy, while allowing altruistic surrogacy; other countries sanction surrogacy in practice, but have no codified laws. Very few countries have codified laws on surrogacy and if they do, many of these countries prohibit commercial surrogacy. On this basis, very few foreigners will qualify to conclude a surrogacy agreement in India on the basis that surrogacy is not recognised in their country of origin.

Lee argues that India is ill-equipped to enact appropriate legislation to regulate the social effects of the changing face of child birth introduced by ART.¹⁷⁸ However, it is submitted that India is better equipped than any other country to do so due to the comparatively high volumes of ART births which have taken place in India. India is one of the few countries that can confidently claim to have experienced the real problems that may arise in a cross border surrogacy arrangement. In an attempt not to let history repeat itself, India is engaged in a process of drafting a comprehensive set of laws to eliminate the problems experienced in ART births and surrogacy arrangements. It must be noted that although India is considered a third world country, it is not prevented from taking the lead on an international legal issue.

2.3.5 Current regulation of surrogacy in India

Currently the legality of a surrogacy agreement is determined by Indian contract law.¹⁷⁹ The Indian Contract Act 9 of 1872 applies to in the determination of the validity of the surrogacy agreement. If the surrogacy agreement is concluded with

¹⁷⁸ Lee R 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 20-2 *Hastings Women's Law Journal* 275 276.

¹⁷⁹ Malhotra A and Malhotra R 'All Aboard for the Fertility Express: Surrogacy and Human Rights in India' (2012/2013) 461.

the free consent of the parties who are competent to contract; the agreement is for lawful consideration; the object of the agreement is lawful; and the agreement is not expressly declared to be void, the agreement is considered a contract in terms of the Indian Contract Act.¹⁸⁰ By this definition, provided that it complies with the requirements set out in section 10 of the Contract Act of 1872, a commercial surrogacy agreement may be a valid contract under Indian law. The enforceability of the agreement would be determined in terms of the Indian Code of Civil Procedure¹⁸¹ and may be subject to a civil suit to establish any issues related to the surrogacy agreement.

The commissioning parents may apply to obtain guardianship of the child under the Guardian and Ward Act (GWA).¹⁸² Adoption in India of the child is ruled out as an option if the commissioning parent(s) is/are foreigners and not Hindu. The Hindu Adoption and Maintenance Act (HAMA)¹⁸³ only affords resident and non-resident Hindus the right to adopt Hindu children in India.¹⁸⁴ Foreigners and non-Hindus will have to consider adoption procedures in their country of origin or the option afforded under the GWA to be granted guardianship of the child.¹⁸⁵ Other than applying for guardianship of a surrogate child under the GWA, the only manner to determine the validity and enforceability of a surrogacy arrangement, including legal parentage of the child, would be by way of a civil suit under the Indian Code of Civil Procedure.¹⁸⁶

¹⁸⁰ Section 10; Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 155.

¹⁸¹ Act 6 of 1908.

¹⁸² Act 8 of 1890; Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 159.

¹⁸³ Act 78 of 1956.

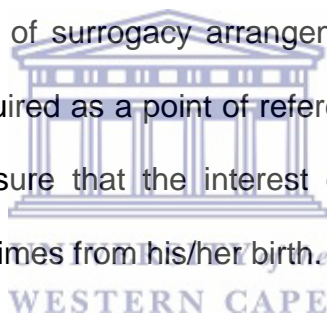
¹⁸⁴ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 159.

¹⁸⁵ Malhotra A and Malhotra R 'All Aboard for the Fertility Express: Surrogacy and Human Rights in India' (2012/2013) 461.

¹⁸⁶ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 155.

In an attempt to address the lacuna in its laws on cross border surrogacy agreements, the Indian government has passed new medical visa laws to regulate cross border surrogacy agreements. These laws came into effect on 15 November 2012.¹⁸⁷ According to these regulations, foreigners who intend to visit India for the purpose of commissioning a surrogacy arrangement, must apply for medical visas and can no longer use a tourist visa.

Although India appears to be ahead of the rest of the world in the enactment of laws legalising and regulating commercialised surrogacy, it is submitted that in order to enjoy the full benefit of the intended purpose of the domestic laws and thereby afford protection to all children born of surrogacy arrangement in India or elsewhere, an international framework is required as a point of reference in cross border surrogacy arrangements in order to ensure that the interest of the surrogate born child is observed and protected at all times from his/her birth.



2.4 Problems that may arise in a cross border surrogacy arrangement as illustrated in the case of Baby Manji

In the case of *Baby Manji*,¹⁸⁸ a married couple from Japan elected to enter a gestational surrogacy agreement with a surrogate mother based in India.¹⁸⁹ In 2007, they signed an agreement of surrogacy with the Akansha IVF Centre in Ahmedabad

¹⁸⁷ Malhotra A 'New medical visa laws to regulate surrogacy' (5 February 2013) *The Tribune* available at <http://www.tribuneindia.com/2013/20130205/edit.htm#6> (accessed on 5 October 2013); Malhotra A and Malhotra R *Surrogacy in India- a Law in the Making* (2013).

¹⁸⁸ *Baby Manji Yamada v Union of India and Anr* (2008) INSC 1656 (29 September 2008).

¹⁸⁹ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 156-7.

in India.¹⁹⁰ As already noted, Japan and India subscribe largely to the *jus sanguinis* principles, thus necessitating the establishment of parentage to obtain citizenship.¹⁹¹

A donor egg was fertilized with the sperm of commissioning father and implanted in the womb of the surrogate mother.¹⁹² One of the terms of the surrogacy agreement was that the commissioning father would obtain sole custody of the baby if the commissioning parents separated.¹⁹³ The commissioning parents of Baby Manji divorced one month prior to her birth.¹⁹⁴ The commissioning father intended to raise the child, while the commissioning mother refused to accept parental responsibilities and rights for the child.¹⁹⁵

Baby Manji had three potential mothers, the anonymous egg donor, the commissioning mother and the surrogate mother.¹⁹⁶ With the identity of the egg donor being unknown, and because neither the commissioning mother nor the surrogate mother wished to have parental rights over Baby Manji, her birth certificate only reflected the details of the commissioning father.¹⁹⁷ The details of the mother were left blank.

Shortly after the birth, the commissioning father applied to the Japanese embassy in India for a passport in order for the child to travel with him to Japan, his home

¹⁹⁰ Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 157.

¹⁹¹ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557; The Citizenship Act 57 of 1955 section 4 (India) and Kokusekiho [Nationality Law] 147 of 1950 article 2(1) (Japan).

¹⁹² Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557.

¹⁹³ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557.

¹⁹⁴ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557; Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 157.

¹⁹⁵ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557; Malhotra A and Malhotra R 'Law and Surrogacy Arrangements in India' (2013) 157.

¹⁹⁶ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557.

¹⁹⁷ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 557-8.

country. The application was rejected on the basis that Japan had no laws regulating surrogacy and the Japanese law only recognised the birth mother as the legal mother of the child and her husband, if married, as the father of the child.¹⁹⁸ He then applied to the Indian government for a passport. This too was refused on the basis that the Citizenship Act of India required at least one of the parents to be a citizen of India in order to acquire Indian citizenship. As he was a Japanese national and the only parent registered on the child's birth certificate, she was not entitled to Indian citizenship.¹⁹⁹

Under the 2005 Indian Council for Medical Research (ICMR) Guidelines, the surrogate born child was deemed to be the legitimate child of the commissioning parents if they were married and agreed to the surrogacy. The gamete donors would have no parental responsibilities and rights over the child.²⁰⁰ The Guidelines also specify that the birth certificate of a child would reflect the names of the genetic parents.²⁰¹ If the parties have concluded a surrogacy agreement with the use of donor gametes, and they separate, India's domestic law on parentage would apply.²⁰²

The nationality law of Japan at the time of Baby Manji's birth did not recognise children born out of wedlock to a Japanese father and foreign mother as a Japanese citizen. This law has subsequently in 2008 been amended to afford persons born out of wedlock to a Japanese father and foreign mother Japanese citizenship if they are

¹⁹⁸ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 558.

¹⁹⁹ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 558.

²⁰⁰ ICMR guidelines 74.

²⁰¹ ICMR guidelines 63.

²⁰² ICMR guidelines 3.12.4.

recognised by the father after birth.²⁰³ In addition, Indian laws prohibit single men from adopting female children. As a non-Hindu, the father could have at best applied for guardianship under the Wards and Guardian Act 8 of 1890. Baby Manji was stateless and unable to leave India. A certificate of identity was eventually issued to the child, which enabled her to obtain a Japanese visa and travel to Japan.²⁰⁴

In chapter 1, the author submitted that article 7 read with article 2 of the UNCRC could be interpreted to place an obligation on all member states to implement domestic laws which would grant a child born or resident within its jurisdiction, a nationality, if that child would otherwise be rendered stateless.²⁰⁵ It is submitted that Baby Manji should have been afforded the right to a nationality by India as the country of her birth, or by Japan, as the country of her intended residence and the country of origin of her genetic father. India and Japan are signatories to, and have ratified the UNCRC. As such, they are obliged to implement domestic laws to guarantee a child within its jurisdiction a nationality. It is submitted that the denial of a child's right to a nationality on the basis of his or her birth by surrogacy and unclear legal parentage status amounts to discrimination on a listed ground.

²⁰³ Law number 88 of 2008.

²⁰⁴ A certificate of identity is legal document given to people who are stateless; Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 417 – 419.

²⁰⁵ Keightley R 'The child's right to a nationality and the acquisition of citizenship in *SAJHR* (1998) 411 416, expresses a different view, whereby she asserts that Article 7(2) of the UNCRC provides a limitation on states' obligations to award nationality in that it only obliges a state to implement domestic laws on the award of nationality to a person. She is of the view that if the domestic law of a state excludes a child born in its territory to foreign parents from being entitled to the nationality of the state such laws would not offend its obligation under article 7 of the UNCRC.

2.5 United Kingdom

2.5.1 The parent-child relationship in the United Kingdom

In the United Kingdom, the birth mother of a child is the legal mother of a child, unless a parental order, adoption or other order granted by a competent court vests parentage of a child with another person(s).²⁰⁶ Under the Human Fertilization and Embryology Act of 2008 (HFEA 2008), the birth mother of a child born of a surrogate arrangement and her husband, if she is married, is/are considered to be the legal parents of a surrogate born child.²⁰⁷



2.5.2 Development of the law on surrogacy in the United Kingdom

2.5.2.1 Legislation

The “Baby Cotton” case²⁰⁸ initiated much public interest in the United Kingdom on the issue of commercial surrogate agreements.²⁰⁹ This led to an investigation being conducted by the Warnock Committee in 1984, which resulted in the enactment of

²⁰⁶ The Human Fertilization and Embryology Act 2008 section 33 (1); Gruenbaum D ‘Foreign Surrogate Motherhood: mater semper certa erat’ (2012) 60 *The American Journal of Comparative Law* 475 476; Hodson D and Ghevaert L ‘Surrogacy’ in Hodson D *The International Family Law Practice* (2012) 2 ed Jordan Publishing Ltd 508 – 9.

²⁰⁷ Sections 33 to 35 of the HFEA 2008; Hodson D and Ghevaert L ‘Surrogacy’ in Hodson D *The International Family Law Practice* (2012) 509; Henaghan M ‘International Surrogacy Trends: How Family Law is Coping’ unpublished conference paper (2013) *Sixth World Congress on Family Law and Children’s Rights* available at <http://www.lawrights.asn.au/6th-world-congress/papers.html> (accessed on 3 October 2013) 6.

²⁰⁸ *Re: C (A Minor) (Wardship: Surrogacy)* (1985) FLR 846.

²⁰⁹ This was one of the first publicised surrogacy cases whereby a mother based in India, carried the twins of her daughter, a United Kingdom resident: Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 371.

the Surrogacy Arrangements Act of 1985 (the Surrogacy Arrangements Act).²¹⁰ The Surrogacy Arrangements Act made it a criminal offence in the United Kingdom to be involved in the negotiation of or conclusion of a commercial surrogacy agreement.²¹¹ It served to provide a framework for the prevention of commercial surrogacy in the United Kingdom and limit its practice to altruistic arrangements.²¹² The Surrogacy Arrangements Act left the question of enforceability of surrogacy agreements open and uncertain.²¹³ The position was clarified with the enactment of the Human Fertilization and Embryology Act of 1990 (HFEA 1990). Section 36(1) of the HFEA 1990 introduced section 1A of the Surrogacy Arrangement Act which states that a surrogacy arrangement will not be “enforceable by or against any of the persons making it”.²¹⁴ Although the Surrogacy Arrangement Act imposes criminal sanctions upon third parties who arrange a commercial surrogacy agreement, there have been no criminal prosecutions under this Act to date.²¹⁵ Even if the parties to the commercial surrogacy agreement do not suffer criminal penalties, the agreement will, in terms of the Surrogacy Arrangement Act, remain unenforceable.²¹⁶ As a result of the unenforceability of the contract, the surrogate mother cannot sue the commissioning parents for payment, nor can the commissioning parents claim delivery of the child if the surrogate mother refuses to hand over the child in terms of their agreement.²¹⁷

²¹⁰ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 371.

²¹¹ Section 2 (1) of the Surrogacy Arrangement Act of 1985; Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 371.

²¹² Hodson D and Ghevaert L ‘Surrogacy’ in Hodson D *The International Family Law Practice* (2012) 506.

²¹³ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 371.


²¹⁴ Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 371.

²¹⁵ Busby K and Vun D ‘Revisiting the Handmaids Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers’ 13 (2010) *Canadian Journal of Family Law* 36.

²¹⁶ Lin T ‘Born Lost: Stateless children in international surrogacy arrangements’ (2013) 575.

²¹⁷ Anderson P ‘An evaluation of Surrogacy Law and its Potential Development in the UK: Is there a Clear Way Forward’ 2(2) (2010) *Kings Student Law Review* 37 at 38-39.

The HFEA 1990 introduced codified laws which govern legal parenthood in assisted reproduction cases.²¹⁸ It was updated in 2008 with the enactment of the HFEA 2008, which was introduced to bring the HFEA in line with equality legislation.²¹⁹ The HFEA 2008, however, failed to provide an overhaul of the English laws on surrogacy.²²⁰ Section 36 of the HFEA 2008, provides that if the birth mother is unmarried, the commissioning father may be considered the legal father of the child if he is the genetic father. The HFEA 2008 also provides a mechanism (the parental order) by which the commissioning parent(s) may be considered the legal parent(s) of the child. In terms of the HFEA 2008, the commissioning parent(s) may be legally recognised as the legal parent(s) of a surrogate born child, through a parental order being issued by a court, if:

- 
- (i) the child is genetically related to one of the commissioning parents;
 - (ii) the commissioning parents are married, in civil partnership or in a committed relationship and are both over 18 years old;
 - (iii) the application for a parental order is made within six months of the child(ren)'s birth;
 - (iv) the surrogate born child(ren)'s home is with the commissioning parent(s);
 - (v) at least one of the parents are domiciled or permanently resident in the United Kingdom;
 - (vi) the birth mother or any other relevant person consented to the parental order being granted, at least 6 weeks after the child(ren)'s birth; and

²¹⁸ Hodson D and Ghevaert L 'Surrogacy' in Hodson D *The International Family Law Practice* (2012) 506.

²¹⁹ Hodson D and Ghevaert L 'Surrogacy' in Hodson D *The International Family Law Practice* (2012) 506.

²²⁰ Hodson D and Ghevaert L 'Surrogacy' in Hodson D *The International Family Law Practice* (2012) 506.

- (vii) the court is satisfied that no monies or other benefits have passed between the parties for the making of the order, conclusion of the agreement to have the parental order granted by a court, handing over of the child or making arrangement with a view to obtaining a court order, other than reasonable expenses, unless the court authorises the payment or benefit.²²¹

2.5.2.2 Case law and the parental order

It has been argued that because reasonably incurred expenses are not clearly defined in the Act, the courts have a wide discretion to grant parental orders even if the expenses exceed “reasonable” expenses.²²² The courts will grant an order even if the payments are unreasonable, if it is the best interest of the child to grant the order.²²³ To date a parental order has not been refused on the grounds of the payments being unreasonable.²²⁴ The court has held that, when determining the reasonableness of the payment, it is necessary for the court to assess the payments made overall and not only to the surrogate mother.²²⁵ When assessing the payments made, the court in the recent judgement of *Re: P-M* had regard to the payments made to the surrogacy organisation/agent which had assisted with the surrogacy arrangement for commercial and financial benefit, in addition to the payments made

²²¹ Section 54(1) – (8); Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 371; Gruenbaum D ‘Foreign Surrogate Motherhood: mater semper certa erat’ (2012) 60 *The American Journal of Comparative Law* 475 484-5; Welstead M ‘This child is my child; this child is your child; this child was made for you and me- Surrogacy in England and Wales’ in Atkin B (ed) *The International Survey of Family Law* (2011) 165 171-2.

²²² Lin T ‘Born Lost: Stateless children in international surrogacy arrangements’ (2013) 576.

²²³ Lin T ‘Born Lost: Stateless children in international surrogacy arrangements’ (2013) 576.

²²⁴ Anderson P ‘An evaluation of Surrogacy Law and its Potential Development in the UK: Is there a Clear Way Forward’ (2010) 40.

²²⁵ *Re: P-M* (2013) EWHC 2328 (Fam).

to the surrogate mother.²²⁶ The court observed that when considering whether to grant a parental order, the court had an obligation not only to consider the provisions of section 54(8) of the HFEA 2008 in relation to excessive payments, but had to also consider the welfare of the children. The court noted that each case had to be considered on its own merits and the court had to caution against sanctioning commercial surrogacy arrangements which offend public policy.²²⁷

The courts may, in the interests of the surrogate born child's welfare, confer parental responsibilities and rights on the commissioning parents even if the agreement is unenforceable or the parties to the agreement have acted contrary to the law.²²⁸ In the 2010 case of *Re: L (A Minor)*, the court addressed whether commercial surrogacy is accepted in English law.²²⁹ In this case, a British couple entered into a surrogacy agreement with a surrogate mother from Illinois in the United States of America. The surrogate mother was paid a fee for the gestation of the child. Baby L was issued with a United States of America passport. The commissioning parents travelled with Baby L to the United Kingdom after being granted temporary leave to do so. The English court was tasked with determining whether it would recognise the commissioning parents as the legal parents of Baby L, considering that the payment made was outside the definition of reasonable expenses and was therefore illegal in terms of section 54(8) of the HFEA 2008. In consideration of this issue, the court

²²⁶ *Re: P-M* (2013) para 15.

²²⁷ *Re: P-M* (2013) para 18; the factors to be taken into account by a court when assessing whether the payments were reasonable are (i) whether the sum paid was disproportionate to reasonable expenses; (ii) were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother; and (iii) were the applicants' party to any attempt to defraud the authorities: see paragraphs 20 to 24 of the judgement; also see Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 577 and *Re: X and Y (Foreign Surrogacy)* 2008 EWHC 3030 (Fam.) para 21 - 24.

²²⁸ Case examples include *Re: L (A Minor)* (2010) EWHC 3146 (Fam); *Re: S (Parental Order)* (2009) EWHC 2977 (Fam) and (2010) 1 FLR 1156; *Re: IJ (A Child)* (2011) EWHC 291 (Fam).

²²⁹ (2010) EWHC 3146 (Fam).

held that the welfare of the child was the paramount consideration and in the case of Baby L, the child's welfare outweighed public policy considerations on surrogacy agreements.²³⁰ The presiding officer stated that it would only be in extreme cases of abuse of public policy that the court would not grant a parental order if all indications appear to suggest that it is in the child's interest to grant the order.²³¹

In the cases of *Re: IJ (A Child)*²³² and *Re: X and Y (Foreign Surrogacy)*,²³³ the court held that the requirement in terms of the Human Reproductive and Embryology (Parental Orders) Regulations, which required the Home Office to be given notice of any parental order that would confer British citizenship on a child, may be dispensed with in cases of international surrogacy.²³⁴ In both these cases the sperm of the English commissioning fathers and a donor egg were used. Both fathers were thus genetically related to the children born of the respective surrogacy arrangements. The surrogate mothers were based in Ukraine. In terms of Ukrainian law, the commissioning parents are considered to be the legal parents of the surrogate born children. The children were thus ineligible to obtain Ukrainian citizenship.²³⁵ In terms of United Kingdom laws, on the other hand, the birth mother of the child is considered the legal mother (and if married, her husband is considered the legal father) of the child born of the surrogate agreement. In both cases, the children were at risk of being legally orphaned and stateless due to the incompatible laws of the two countries on the legal parentage of surrogate born children. The children were

²³⁰ *Re: L (A Minor) (2010)* EWHC 3146 (Fam) para 9; Henaghan M 'International Surrogacy Trends: How Family Law is Coping' (2013) 6; in an earlier case of *Re X and Y (Foreign Surrogacy)* (2008) para 20, the court considered the best interest of the child an important factor but not paramount.

²³¹ *Re: L (A Minor) (2010)* para 10; also see *Re: S* (2009) EWHC 2977 (Fam).

²³² (2011) EWHC 291 (Fam).

²³³ (2008) EWHC 3030 (Fam).

²³⁴ Henaghan M 'International Surrogacy Trends: How Family Law is Coping' (2013) 6. The court relied on the paramountcy of the child's best interests in coming to its decision.

²³⁵ Hodson D and Ghevaert L 'Surrogacy' in Hodson D *The International Family Law Practice* (2012) 510.

not eligible for English citizenship under English law, as they were neither born in the United Kingdom nor did they have a link to the country through their legal parentage.²³⁶

Faced with the dilemma of the children being stateless, the British authorities granted the children entry into the United Kingdom after DNA tests confirmed that the commissioning fathers were the genetic fathers of the children. Although this decision was against public policy on surrogacy (due to the payments made exceeding reasonable expenses), it was considered to be in the children's interests.²³⁷



Justice Hedley, the judge in both these cases, commented in *Re: X and Y (Foreign Surrogacy)*:

'the difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes before a court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.'²³⁸

Case law emanating from the English courts indicates that the commercial nature of the agreement will not necessarily exclude the commissioning parents from obtaining a parental order, even though commercial surrogacy agreements are illegal in the

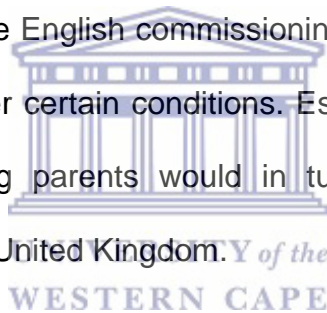
²³⁶ Hodson D and Ghevaert L 'Surrogacy' in Hodson D *The International Family Law Practice* (2012) 510.

²³⁷ *Re: X and Y (Foreign Surrogacy)* (2008) 10; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 577-8.

²³⁸ *Re: X and Y (Foreign Surrogacy)* (2008) 24; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 577.

United Kingdom, provided that the parental order is in the best interests of the child concerned.²³⁹

It is clear that the United Kingdom has adopted legislation to regulate surrogacy. The United Kingdom Surrogacy Arrangements Act of 1985 (the Surrogacy Arrangements Act) clarified the legal position of surrogacy arrangements in the United Kingdom by prohibiting commercial surrogacy arrangements and condoning altruistic surrogacy arrangements. It failed, however, to address the issue of enforceability of surrogacy, which led to the enactment of the HFEA 1990 and later the updated version of the Act, the HFEA 2008. The HFEA codified the laws under which a parental order may be granted, which would entitle English commissioning parents to legal parentage of the surrogate born child, under certain conditions. Establishment of legal parentage to the English commissioning parents would in turn entitle the surrogate born child(ren) to citizenship of the United Kingdom.



In addition to the legislation which regulates surrogacy arrangements and the conditions under which a parental order may be granted, the judiciary has clarified ambiguities and uncertainties in the implementation of the legislation. The courts have provided guidelines for the granting of parental orders and have reinstated the principle of the child's welfare being paramount when considering whether to grant a parental order.²⁴⁰

²³⁹ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 577-9.

²⁴⁰ Lin T "Born Lost: Stateless Children in International Surrogacy Arrangements" (2013) 574; Gruenbaum D 'Foreign Surrogate Motherhood: mater semper certa erat' (2012) 484.

2.6 Conclusion

One thing all three countries discussed have in common is that they recognise the birth mother as the legal mother of the child and, if she is married, her husband is presumed to be the father of the child. This forms the default basis for the establishment of parentage. On reflection, it makes sense to have the birth mother and her husband recognised as the legal parents of a child and it is argued here, this default position should be retained.

However, technological advances and the evolution of family structures require the law to advance at an equal pace so as to afford all people (including children) equal protection of their rights. ART births and surrogacy have changed the face of child bearing. The law must be extended to make it legally possible for parentage to be conferred on commissioning parents. Adoption is not always an option, as is seen from the instance of Japan and India. It is in any event very different to surrogacy. In many cases, one or both of the commissioning parents may be a genetic parent of the child. But for the child's gestation and birth by a surrogate mother, the genetic parent would have been considered a legal parent. There is no compelling reason why a genetic parent should not be granted legal parentage of a surrogate born child solely because the child was not born through the traditional means of conception, gestation and birth.

It is suggested that the United Kingdom's judicial process of granting parental orders in surrogate matters, upon satisfaction of certain criteria and conditions, is a useful model that should be considered by the judicial systems of other countries. It retains

the default position of the birth mother being the legal mother, but makes it possible for commissioning parents to be granted parental responsibilities and rights in relation to the child. At the same time, and through the process of a judicial enquiry, the court may regulate observance of public policies which prohibit the commercialisation of surrogacy and the birth of children by considering each case on its merits and may only override such public policy if it is the child's best interests to do so. This model offers surrogate born children the right to obtain the nationality of their intended parents and place of residence, while respecting state sovereignty and its choice of laws on citizenship.



CHAPTER THREE: ADDRESSING SURROGACY IN THE INTERNATIONAL ARENA

3.1 Introduction

As may be surmised from the preceding chapters, the lack of consensus regarding the reception and legality of surrogacy in various countries and the divergent laws on conferring nationality and legal parentage, have all contributed to the risk of surrogate born children being stateless and without legal parentage.

India has made substantial progress in its attempts to address the issue of surrogacy.²⁴¹ It is submitted that if India were to pass the most progressive and comprehensive set of laws on surrogacy, as stated by Malhotra, such laws will serve little purpose other than to arrest the growing surrogacy trade in India, if receiving countries do not similarly regulate surrogacy.²⁴²

The most efficient manner to reduce the risk of surrogate born children being stateless or without their factual parents (the commissioning parents) being recognised as their legal parents, is to formulate an international legal framework for surrogacy which could be a point of reference in cross border surrogacy arrangements.²⁴³ It is conceded that this will not eliminate the risk of surrogate born children being stateless, but it will reduce the likelihood significantly.²⁴⁴

²⁴¹ Chapter 2: section 2.3.4 p 40 – 44.

²⁴² Malhotra A 'New medical visa laws to regulate surrogacy' *The Tribune* (5 February 2013) available at <http://www.tribuneindia.com/2013/20130205/edit.htm#6> (accessed on 5 October 2013).

²⁴³ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 21 *Cardoza Journal of International Comparative Law* 545 549.

²⁴⁴ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 549.

It is estimated that 20 000 children are born by way of cross border surrogacy arrangements each year.²⁴⁵ In most instances the commissioning parents have sought to conclude a surrogacy agreement in a foreign country because surrogacy is not a legal option in their own country.²⁴⁶ In many of the reported cases, when the commissioning parents attempt to return to their home country with the child born of the surrogacy agreement, they establish that either the child cannot obtain the nationality of their home country or the child's country of birth or they cannot be recognised as the legal parents, without an adoption process.²⁴⁷ As is demonstrated in Chapter 2, adoption is not always a viable option.²⁴⁸

3.2 Steps Taken by the Hague Conference on Private International Law

The parent-child relationship was suggested, albeit on an informal basis, as a possible future topic of the Hague Conference of International Private Law (HCCH) in 2001.²⁴⁹ In 2010, the Council on General Affairs and Policy of the Hague Conference invited the Permanent Bureau to provide a preliminary brief on the private international law on the status of children and the recognition of the parent-

²⁴⁵ International Reference Centre for the Rights of Children Deprived of their Family 'International Surrogacy and Children's Rights' *ISS Monthly Review* Number 174 (July – August 2013) 3.

²⁴⁶ Chapter 1: section 1.3.2 p 10.

²⁴⁷ See the case discussions of baby Samuel Ghilain in Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 546 – 8; the case of the Le Roche baby in Mohapatra S 'Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy' (2012) 30 *Berkeley Journal of International Law* 412 420-1; Jan Balaz v Anand Municipality LPA 2151/2009 (17 November 2009).

²⁴⁸ Chapter 2: section 2.2.3 p 26 and 27; section 2.2.5 p34 - 35; section 2.3.5 p 45.

²⁴⁹ The Hague Conference on Private International Law Permanent Bureau *Private International Law Issues Surrounding the Status of Children, including Issues Arising from International Surrogacy Arrangements* Preliminary Document 11 (March 2011) (hereafter HCCH Preliminary Document 11 (March 2011)).

<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (accessed on 17 July 2013) para 1.

child relationship.²⁵⁰ On 10 March 2011, the Permanent Bureau produced a comprehensive preliminary report.²⁵¹ The Permanent Bureau aims to produce a full report by 2013 and a final report by 2014. The process of establishing a framework is currently in its consultative stage, with comments from legal practitioners having been invited for submission by 1 August 2013.²⁵²

Having regard to studies conducted by the author, certain elements have been identified as essential for an international legal framework on cross border surrogacy arrangements.

3.3 Proposed international framework on cross border surrogacy

Some scholars have suggested that the 1993 Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (the Hague Adoption Convention) should be used as a model for regulating cross border surrogacy arrangements.²⁵³ In terms of the preliminary report on the issues arising from international surrogacy arrangements, it was suggested that the Hague Adoption Convention was not the appropriate model for the following reasons:

²⁵⁰ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) at 565; Hutchinson AM 'The Hague Convention on Surrogacy: Should we agree to disagree' (2012) American Bar Association Section of Family Law 2012 Fall CLE Conference (unpublished) available at http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf (accessed on 23 July 2013); HCCH Preliminary Document 11 (March 2011) para 1.

²⁵¹ HCCH Preliminary Document 11 (March 2011).

²⁵² The Hague Conference on Private International Law Permanent Bureau *Private International Law Issues Surrounding the Status of Children, including Issues Arising from International Surrogacy Arrangements* Preliminary Document 3 (April 2013) available at http://www.hcch.net/upload/wop/gap2013pd03_en.doc (accessed on 17 July 2013).

²⁵³ Trimmings K and Beaumont P 'International Surrogacy Arrangements: An urgent need for legal regulation at the international level' (2011) 7 *Private International Law* 627.

- (i) Commercial adoptions are prohibited under the Convention;²⁵⁴ whereas it is likely that at the very least payment of reasonable expenses will be allowed in cases of surrogacy to cover costs related to the pregnancy.
- (ii) The mother's consent to relinquish her rights and responsibilities must be given after the child's birth in adoption matters;²⁵⁵ whereas in surrogacy arrangements the consent is given before the child's birth;
- (iii) The Hague Adoption Convention promotes the subsidiarity principle, where the possibility for placement in the child's state of origin must first be considered.²⁵⁶ In international surrogacy arrangements this is not applicable;
- (iv) The Hague Adoption Convention prescribes that there should be no contact between the adopters and the child's biological parents prior to the assessments as set out in articles 4 and 5 of the Hague Adoption Convention being completed.²⁵⁷ This is not possible in surrogacy arrangements as the parties may have to meet when the arrangement is entered into or when the reproduction process takes place.²⁵⁸

As suggested by Trimmings and Beaumont, an international framework for surrogacy should not aim to unify the conflicting domestic laws of countries, but should rather establish a framework for international co-operation with the need for safeguards and procedures for courts, administrative authorities or private intermediaries.²⁵⁹ It is submitted that the international framework should serve as a guideline for domestic

²⁵⁴ Article 4(c)(3).

²⁵⁵ Article 4(c)(4).

²⁵⁶ Article 4(b).

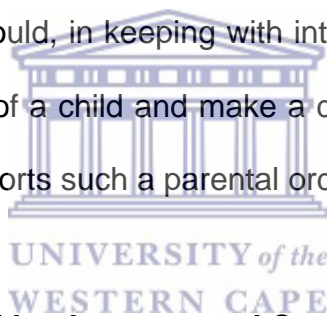
²⁵⁷ Article 29.

²⁵⁸ The Hague Conference on Private International Law Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* 10 (March 2012) paragraphs 58 – 62 available at <http://www.hcch.net/upload/wop/gap2012pd10en.pdf> (accessed on 5 October 2013).

²⁵⁹ Trimmings K and Beaumont P 'International Surrogacy Arrangements: An urgent need for legal regulation at the international level' (2011) 635.

laws of a country and, in the event of a conflict of laws or in the absence of regulations on any specific issue in respect of surrogacy that may become contentious, provide a set of default provisions which will become operable.

The United Kingdom model of judicially endorsed parental orders appears to be an appropriate model for awarding legal parentage to the commissioning parents in cross border surrogacy arrangements. The intervention of the court for consideration of the granting of a parental order will enable the independent judiciary to assess each case on its merits. The court, as is the case in the United Kingdom, ought to be mindful of the public policy considerations to discourage the risk of abuse in commercial surrogacy, but should, in keeping with international standards, apply the principle of the best interests of a child and make a decision to grant an order if the best interests of the child supports such a parental order being granted.²⁶⁰



3.3.1 Aspects to be covered by the proposed Convention

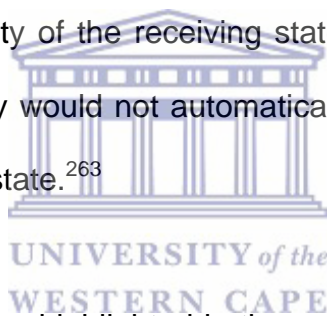
It is suggested that the legal framework should take the form of a Convention and should contain the following elements:

- 3.3.1.1 The establishment of a Central Authority.
- 3.3.1.2 A specialised court or the High Court of the land must have sole jurisdiction.
- 3.3.1.3 A uniform set of rules, terms and conditions should apply to surrogacy arrangements.

²⁶⁰ Discussed in Chapter 2: section 2.5.2.2 p53 – 57.

3.3.1.1 The establishment of a Central Authority and aspects to be overseen by the Central Authority

It seems sensible to import the establishment of a Central Authority in contracting countries from the Hague Adoption Convention.²⁶¹ The Central Authority should be responsible for: co-operating with its foreign counterpart; regulating fertility clinics and agencies in its jurisdiction by setting up accreditation systems in order to monitor and assess compliance with the conditions set out in the framework and international human right treaties; making recommendations to a court on whether a parental order should be granted.²⁶² It should also be tasked with assisting commissioning parents to obtain the nationality of the receiving state for the child(ren) born of the surrogacy arrangement, if they would not automatically be entitled to the nationality or citizenship of the receiving state.²⁶³



In addition to the responsibilities highlighted in the preceding paragraph, the Central Authority should be tasked with obtaining confirmation that both parties are fully aware of the consequences of the agreement and have been granted an opportunity to obtain independent legal advice. The Central Authority should receive confirmation that the surrogate mother is medically (physically and mentally) healthy in order to reduce a risk of harm to her or the baby during pregnancy or immediately after birth.²⁶⁴ As part of this condition, the surrogate mother must be proven to be

²⁶¹ Trimmings K and Beaumont P 'International Surrogacy Arrangements: An urgent need for legal regulation at the international level' (2011) 641; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 566.

²⁶² Trimmings K and Beaumont P 'International Surrogacy Arrangements: An urgent need for legal regulation at the international level' (2011) 641 and 642; Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 566.

²⁶³ Lin T 'Born Lost: Stateless children in international surrogacy arrangements' (2013) 566-7.

²⁶⁴ *Ex Parte WH* (2011) 6 SA 514 (GNP) paragraph 67; also see the Indian Assisted Reproduction Technologies Bill 2010 discussed in Chapter 2 section 2.3.4 p 43.

free of sexually transmitted or communicable diseases and HIV/AIDS.²⁶⁵ The Central Authority should obtain confirmation that the commissioning parent(s) has/have not been found guilty of violent crimes or crimes of a sexual nature or been found to be an unfit parent to other children in their care, if applicable.²⁶⁶ The Central Authority must scrutinise and may call for proof of all payments made in relation to compensation and medical or other expenses related to the surrogacy.²⁶⁷ It is suggested that it may be a helpful consideration to grant the Central Authority the power to recommend or provide therapeutic assistance to the surrogate mother or parents, the commissioning parent(s) and the child to deal with any emotional issues that may arise from the surrogacy arrangement, at state expense if the parties cannot afford private therapy. It is further suggested that the Central Authorities of the two contracting countries must submit a joint or individual comprehensive report(s) on the above issues and other relevant factors as may be set out in the legal framework, together with documentary proof of compliance with the conditions.²⁶⁸ This report should be used in support of an application for a parental order and a final parental order should not be granted without one.

3.3.1.2 Court with jurisdiction

It is submitted that a specialised court, or a specialised seat of the High Court of the country should be granted exclusive jurisdiction to grant parental orders in domestic

²⁶⁵ *Ex Parte WH* (2011) 6 SA 514 (GNP) paragraph 67; also see the Indian Assisted Reproduction Technologies Bill 2010 discussed in Chapter 2 section 2.3.4 p 43.

²⁶⁶ *Ex Parte WH* (2011) para 68.

²⁶⁷ *Ex Parte WH* (2011) para 29, 30, 40 and 64; Carnelley M 'Ex Parte WH 2011 6 SA 514 (GNP)' 2012 *De Jure* 179 182.

²⁶⁸ For example: a letter from the parties' legal advisors, a medical report and written confirmation that the child will receive the necessary citizenship and nationality of the intended country of residence and failing that country, of the country of birth.

and international surrogacy matters. The presiding officers must have the appropriate training and experience in relation to child care matters to qualify for an appointment as an adjudicator in these courts. It may be beneficial to consider a model which allows for the appointment of a liaison judge in contracting countries, on a similar basis as followed in international abduction cases. The liaison judge is to act as an intermediary between the central authority and other judges of the country, as well as the central authority and judges of the contracting country.²⁶⁹ It is recommended that the granting of parental orders should not be made at an administrative level.

3.3.1.3 A uniform set of rules, terms and conditions

The best interest of the child must be the primary consideration in determining whether the parental order should be granted.²⁷⁰ The proposed convention should provide a modern definition for a legal mother and father taking into account the medical technology advances of ART births, the changing family formations and advances in legal acceptance of gay marriages, partnerships and unions and recognise that the commissioning parents may be granted parentage of their surrogate born child.²⁷¹

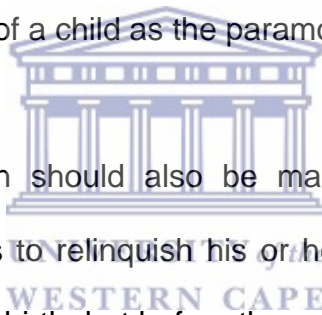
It should provide for the establishment of legal parentage by agreement between all role players and provide that the surrogate born child will for all purposes, once the parental order is granted, be considered the legal child of the commissioning parents

²⁶⁹ Andrews PD *Links between child abduction and relocation: Moving towards like-mindedness in relocation disputes internationally- Is it time for a protocol regulating international relocation disputes?* (unpublished mini-thesis, University of the Western Cape, 2012) 78-9.

²⁷⁰ As discussed in Chapter 2: section 2.5.2.2 p 53 – 57.

²⁷¹ Discussed in Chapter 1: section 1.3.1 p 9; Chapter 2: section 2.6 p 58.

with all rights and responsibilities as applicable to biological or legally adopted children flowing therefrom.²⁷² The proposed Convention must expressly not exclude any person from obtaining legal parentage through surrogacy solely on the basis of the listed grounds of discrimination including race, sex, marital status or sexual orientation, provided that they fulfil all the criteria set out in the convention to be considered a fit and proper parent.²⁷³ Member countries should commit to enacting domestic laws in terms of which altruistic surrogacy at the very least, is recognised and regulated in a manner which makes it possible for the parentage of a child to be awarded to the commissioning parents. In the absence of domestic laws, or in the case of a conflict of laws, the rules set out in the convention should apply against the backdrop of the best interests of a child as the paramount consideration.



It is suggested that provision should also be made for the following: If either commissioning parent decides to relinquish his or her parental responsibilities and rights either before or after the birth, but before the granting of the parental order, the other parent may obtain sole rights. If either parent were to relinquish parental responsibilities and rights after the parental order is granted, this may only be done in terms of the child custody laws of the child's country of residence.²⁷⁴ If either commissioning parent were to die before the birth of the child, the surviving parent will obtain sole custody. In the instance of both commissioning parents' death or should both wish to opt out of the parental arrangement, the birth mother ought to be given first option to accept legal parentage of the child. In the event of her not

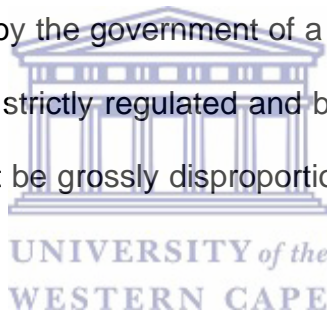
²⁷² Similar provisions may be found in the Indian Assisted Reproduction Technologies Bill 2010 as discussed in Chapter 2: section 2.3.4 p 41 - 42.

²⁷³ Indian Assisted Reproduction Technologies Bill 2010 discussed in Chapter 2: section 2.3.4 p 41-42.

²⁷⁴ Indian Assisted Reproduction Technologies Bill 2010 as discussed in Chapter 2: section 2.3.4 p 42 - 43.

wishing to accept the parental responsibilities and rights of the child, it is suggested that provision should be made for the child to be made available for adoption, with the written consent of all relevant parties, that is, the commissioning parent(s), the birth mother, and if she is married or in a life partnership, her spouse or life partner. It is suggested that the child may be made available for adoption in his or her birth country or intended country of residence, at the election of his or her caregiver, and will assume the nationality of the applicable country.

If the surrogacy arrangement is a commercial one, it is suggested that a maximum compensation payable to the surrogate mother for bearing the child, over and above expenses, must be stipulated by the government of a country. The rates that may be charged by agencies must be strictly regulated and be open for public scrutiny. The fee paid to an agency may not be grossly disproportionate to the compensation paid to the surrogate mother.²⁷⁵



The minimum requirements to qualify to be a surrogate mother, such as the age bracket of prospective surrogate mothers; the maximum number of children (own and surrogate children) that a surrogate mother may gestate; and the physical and mental health condition of a woman, should be defined in the proposed Convention. The criteria to qualify as commissioning parent(s) should also be stipulated. These should include age parameters and proof of financial, physical and mental ability to care for the child(ren). Persons with a criminal record for offences of a sexual nature or offences against women and children, as discussed in paragraph 3.3.1 above,

²⁷⁵ *Re P-M* (2013) EWHC 2328 (Fam.).

should be disqualified from being entitled to become commissioning parents, unless they are shown to be fully rehabilitated and pose no risk to the child.

In addition to the salient terms of an agreement and the aspects highlighted above, it is suggested that the agreement should make provision for any compensation due to the surrogate mother, including medical expenses, to be paid to the surrogate mother, if she should have a still born baby or miscarry through natural causes without self-inflicted harm or risk to the foetus. It is suggested that provision be made for the surrogate mother to be paid a pro rata fee for each month of gestation. In the event of the child's death, the commissioning parents should be responsible for the reasonable burial costs.



It is suggested that while the process of establishing an international framework for surrogacy is on-going, a set of guidelines should be formulated, as a source of reference, which will assist a court when faced with determining the issue of parentage of a surrogate born child, and consequently, his or her nationality. These guidelines may, in the absence of legal precedent, be referred to by the courts and offer the court guidance, without infringing on the independence of the judiciary.²⁷⁶

The guidelines will not be binding, and may take a similar form to the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, albeit at present without a “parent” convention.²⁷⁷ The

²⁷⁶ Similar to the provisions of the non-binding *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which is aimed at assisting with the implementation of the Hague Adoption Convention: Conclusion and Recommendation of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22 – 28 March 2001) para 1.16.

²⁷⁷ The Hague Conference on Private International Law *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part I- Central Authority Practice* (Guide 1); *Part II – Implementing measures* (Guide 2) and *Part III- Preventative Measures* Family Law Jordan Publishing; Guide 1 and 2 available at

aim of the guidelines would be to provide an interim framework as a point of reference, which courts may have the option to refer to, in an attempt to reduce the risk of children born of cross border surrogacy arrangements being stateless and without legal parents.



CHAPTER FOUR: CONCLUSION

The aim of the research was to determine whether the continued practice of concluding cross border surrogacy agreements, without uniform international regulation, places the rights of a surrogate born child at risk; and if so, whether an international legal framework would assist in reducing this risk and provide a platform by which surrogate born children could be protected against discrimination on the grounds of birth or parental status.²⁷⁸

Based on the discussion of the three jurisdictions of Japan, India and United Kingdom, it is clear that the reception and regulation of surrogacy is vastly disparate between countries.²⁷⁹ This diversity has placed children born of surrogate arrangements in a position where they risk statelessness and clear legal parentage.



In many instances, the determination of children's parentage will determine their legal status and entitlement to a nationality and/or citizenship.²⁸⁰ Without clarity on a child's legal parents, that child's fundamental rights, as set out in UNCRC, including the article 7 right to a nationality, identity and parentage, is violated.²⁸¹ Article 2 of the UNCRC provides that no child should be discriminated against on the basis of his or her birth or other status.²⁸² It is submitted that the denial of a surrogate child's right to a nationality, identity or parentage, on the basis of birth by surrogacy, amounts to the discrimination against the child based on 'birth'.²⁸³

²⁷⁸ Chapter 1: sections 1.4 and 1.6 p 13 – 15.

²⁷⁹ Chapter 2: p 20 – 59.

²⁸⁰ Chapter 1: section 1.3.3 p 12 – 13; Chapter 2: section 2.2.1 p 20 - 21; section 2.3.1 p 37.

²⁸¹ Chapter 1: section 1.3.3 p 12 – 13; Chapter 2: section 2.2.5 p 36 and 2.4 p 49.

²⁸² Chapter 1: section 1.1 p 2; Chapter 2: section 2.4 p 49.

²⁸³ Chapter 1: section 1.1 p 2-3; Chapter 2: section 2.4 p 49.

The domestic laws of adoption in various jurisdictions may prove problematic, inappropriate or inadequate as a means to award legal parentage on the commissioning parent(s) and to address the potential risk of statelessness, as is the case in India and Japan.²⁸⁴ Inter-country adoption in terms of the Hague Adoption Convention is not always a viable solution. Some of the reasons for this assertion is alluded to in section 3.2, where the reasons why the Hague Adoption Convention is not a suitable model for a cross border surrogacy legal framework is discussed.²⁸⁵

There seems no appropriate manner to address the risks to surrogate born children, other than to regulate surrogacy by implementing an international framework as a unified source of reference in the otherwise fragmented regulation between countries.



The international family law fraternity is called upon to consider the enactment of a convention and an interim set of guidelines as a matter of urgency so as to ensure that the obligation of states, to guarantee to all children in their jurisdiction the right to a nationality, identity and parentage, as encompassed in article 7 of the UNCRC, without discrimination on the basis of their birth or status,²⁸⁶ is met. The elements of such a convention are proposed in chapter 3, section 3.3.²⁸⁷

The UNCRC was openly embraced by all countries of the world, save for Somalia, South Sudan and the United States of America. This indicates a desire to afford all

²⁸⁴ Chapter 2: sections 2.2.3 p 26 and 27; section 2.2.5 p 34 - 35 and section 2.3.5 p 45 and 49.

²⁸⁵ Chapter 3: section 3.2 p 62 – 63.

²⁸⁶ Article 2 of the UNCRC.

²⁸⁷ Chapter 3: section 3.3 p 64 - 70.

children equal protection. The number of children born by surrogacy each year is rapidly increasing.²⁸⁸ These children's rights cannot continue to be violated while countries debate issues of ethics, morality and traditions around surrogacy. For these children the effects of the non-regulation of surrogacy are a reality. Being denied their fundamental rights should be avoided. It is submitted that a binding international framework on cross border surrogacy would be the most appropriate means to address this.

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²⁸⁸ International Reference Centre for the Rights of Children Deprived of their Family 'International Surrogacy and Children's Rights' Monthly Review Number 174 (July – August 2013) 3.

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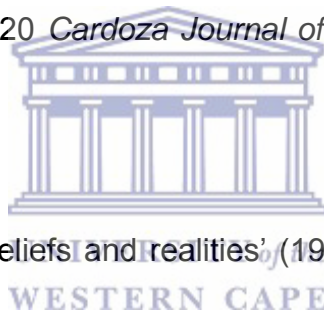
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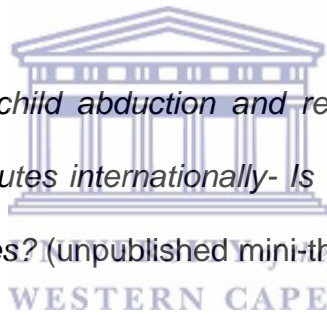
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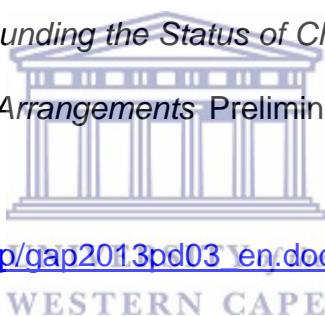
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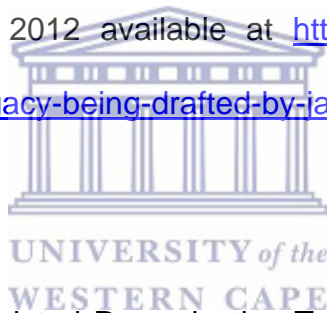
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