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Nationality And Statelessness in Cross-Border Surrogacy: A Child-Centred Framework Analyzing India's Legal and Judicial Responses

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Abstract

Cross-border surrogacy raises complex legal challenges, particularly in determining the nationality and citizenship of children born through such arrangements. In India, the Citizenship Act, 1955 provides no explicit guidance on assisted reproductive technologies, leaving children vulnerable to statelessness due to fragmented laws, discretionary administrative practices and ad hoc judicial interventions. Although the Surrogacy (Regulation) Act, 2021 excludes foreign nationals from accessing surrogacy in India, children born through pre-existing, clandestine or transnational arrangements remain at risk, making the analysis relevant. This paper examines statelessness as a structural conflict-of-laws problem and proposes a child-centred choice-of-law framework as a practical solution. By prioritising the nationality of intended parents and embedding procedural safeguards across birth registration, passport issuance and consular coordination, the framework reduces discretionary uncertainty while aligning Indian practice with international norms, including the Convention on the Rights of the Child and UNHCR guidance on statelessness. Comparative examples from Belgium, Mexico and the United States illustrate the effectiveness of provisional nationality schemes and fast-track registration, while highlighting the limits of harmonisation. The study emphasises that moral or ethical objections to surrogacy cannot justify denying children legal recognition, offering a foundation for future legislative, policy and judicial action.

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1. INTRODUCTION

Cross-border surrogacy has become a significant transnational legal phenomenon, yet reliable data on its scale remain limited. Estimates suggest that 20,000-30,000 surrogacy births occur globally each year, many involving cross-border arrangements prompted by legal restrictions in the intended parent's home countries.[1] These arrangements often involve the movement of intended parents, surrogates, gametes, embryos and children across borders, creating complex intersections between family law, nationality law and private international law. While international discussions, including those at the Hague Conference, have highlighted these challenges, no harmonized legal framework has yet emerged.[2]

The main legal challenge does not lie in the act of surrogacy itself, but in the failure of national legal systems to assign clear status to the child at birth. Differences in parentage and nationality laws across countries often prevent consistent recognition. Intended parents may not be recognised as legal parents, citizenship may not automatically follow, and children may face statelessness or legal limbo.[3] In India, the Surrogacy (Regulation) Act, 2021 recognises the child as the biological offspring of the intending couple but does not address nationality, which remains governed by the Citizenship Act, 1955. As a result, children born to foreign intending parents in India may experience delays or uncertainty in obtaining passports, citizenship or travel documents, often requiring judicial intervention.[4]

Although the Surrogacy (Regulation) Act, 2021 restricts surrogacy for foreign nationals, the risk of statelessness persists through a range of channels. The list includes legacy cases predating the Act, children born under clandestine or ongoing arrangements, and transnational mismatches where foreign states decline to recognise parentage. This underscores the importance of a child-centered approach where legal frameworks protect children regardless of the circumstances of their birth, in line with UNHCR principles.[5] Consequently, a child-centered choice-of-law framework is necessary to provide predictable and protective nationality outcomes for children who are already or likely to become affected notwithstanding statutory prohibitions.

Rationale for Study

Children born through cross-border surrogacy face legal difficulties arising from fragmented parentage and nationality regimes. Parentage recognised in one country may not be acknowledged in another, and citizenship laws linked to parentage can deny or delay nationality. Birth states may refuse to confer citizenship, while intended parent's states may question the legality of the surrogacy or the parentage claim. Cases such as *MR and DR v. An t-Ard-Chláraitheoir*, (2014)[6] and *Jan Balaz v. Anand Municipality*, (2010)[7] illustrate how children can become trapped between conflicting legal systems. The underlying problem is not surrogacy itself, but fragmented nationality laws and inadequate conflict-of-law rules. This study examines the risk of statelessness for children born through cross-border surrogacy and explores legal mechanisms to protect their nationality. It analyses how India's citizenship law, administrative practices and judicial interventions interact with international norms, including Article 7 of the Convention on the Rights of the Child (hereinafter referred to as CRC). The study aims to propose a child-centered choice-of-law framework that prioritizes the intended parent's nationality, reduces discretionary outcomes and ensures legal recognition, without requiring full harmonization of substantive nationality laws.

2. METHODOLOGY

This paper addresses statelessness arising from cross-border surrogacy by situating the problem within India's nationality and administrative framework while engaging with international legal norms. It adopts a doctrinal and comparative approach, analysing statutes, case law, administrative guidance and international instruments. Selective foreign practices are considered to assess their relevance for India. The study examines gaps in the Citizenship Act, 1955, and discretionary consular practices that create uncertainty. It evaluates Indian judicial and administrative responses, which often operate as ad hoc solutions. It also undertakes comparative analysis of mechanisms used abroad to prevent childhood statelessness. Building on this, the paper proposes a child-centred choice-of-law framework that prioritises legal certainty and parental responsibility without requiring substantive harmonisation of nationality laws. Procedural and doctrinal safeguards are suggested to align Indian practice with international child-rights obligations while respecting sovereign regulatory choices.

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[1] Raywat Deonandan, 'Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy' (2015) 8 Risk Management and Healthcare Policy 111.

[2] Patrick Präg and Melinda C Mills, 'Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care' in Michaela Kreyenfeld and Dirk Konietzka (eds), *Childlessness in Europe: Contexts, Causes, and Consequences* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-44667-7_14> accessed 12 January 2026; Pedro Brandão and Nicolás Garrido, 'Commercial Surrogacy: An Overview' (2022) 44 RBGO Gynecology & Obstetrics 1141.

[3] 'Anonymous Donation of Sperm and Oocytes: Balancing the Rights of Parents, Donors and Children - Recommendation 2156' (Council of Europe 2019) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27680>.

[4] RS Sharma, 'Social, Ethical, Medical & Legal Aspects of Surrogacy: An Indian Scenario' (2014) 140 The Indian Journal of Medical Research S13.

[5] 'The Best Interests of the Child – A Dialogue Between Theory and Practice' (Council of Europe 2016) <https://rm.coe.int/1680657e56>.

[6] *MR and DR v An t-Ard-Chláraitheoir,* [2014] IESC 60.

[7] *Jan Balaz v Anand Municipality,* [2010] AIR 21 (Guj).

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3. LITERATURE REVIEW

Existing Discourse and Scholarly Perspectives:

Existing scholarship on cross-border surrogacy has mainly focused on conflicts of parentage and nationality arising from divergent domestic laws. The Hague Conference on Private International Law's Parentage/Surrogacy Project identifies private international law challenges related to recognition of legal parentage in international surrogacy arrangements and explores harmonised recognition mechanisms. While valuable, the project is non-binding and does not resolve substantive questions concerning nationality or citizenship outcomes for surrogate-born children.[8] A child-rights perspective is advanced in the Council of Europe's report on Children's Rights Related to Surrogacy (2016), which highlights risks such as statelessness, uncertainty of legal identity, and violations of the right to know one's origins. The report foregrounds the best interests of the child but remains limited in legal impact due to the absence of binding standards.[9]

Foundational doctrinal guidance is provided by general family law and conflict-of-laws scholarship. *Jonathan Herring*'s Family Law explains how legal systems construct parenthood, responsibility and children's rights,[10] while *Dicey, Morris & Collins* on the Conflict of Laws offers authoritative analysis on jurisdiction, recognition of foreign judgments, and cross-border family disputes.[11] Although these works address parentage and recognition doctrines, they engage only incidentally with surrogacy or nationality risks in international surrogacy contexts. Several scholars focus directly on the statelessness of surrogate-born children. *Iliadou* analyses international surrogacy through Article 7 of the CRC, showing how conflicting nationality and parentage laws expose children to legal and social harm.[12] *Ní Ghráinne and McMahon* argue that existing public international law obligations can safeguard nationality rights without requiring new treaties.[13] While these contributions strengthen the normative case for protection, they offer limited guidance on domestic implementation. Ethical and empirical dimensions of international surrogacy are examined by *Igareda González*,[14] and by *Brandão and Garrido*, highlighting regulatory gaps, exploitation risks, and global drivers of commercial surrogacy, but without translating findings into concrete nationality solutions.[15]

Judicial responses mirror these limitations. In *Baby Manji Yamada v. Union of India*, (2008), the Supreme Court acknowledged the legal vacuum surrounding international surrogacy and child status but refrained from articulating principles on citizenship or parentage.[16] In contrast, the European Court of Human Rights in *Mennesson v. France*, (2014)[17] and *C. v. Italy*, (2023)[18] recognised that denial of legal parent-child recognition in surrogacy cases violates the child's right to private life under Article 8 of the ECHR. While these decisions affirm the centrality of legal identity, they do not mandate uniform nationality rules or harmonised surrogacy laws. In India, statutory regulation remains fragmented. The Surrogacy (Regulation) Act, 2021 establishes a restrictive domestic regime by banning commercial surrogacy and excluding cross-border arrangements, while the Citizenship Act, 1955 relies on traditional notions of birth and descent without accounting for surrogacy or assisted reproduction. The lack of coordination between these statutes leaves surrogate-born children, particularly in international contexts, vulnerable to legal uncertainty and potential statelessness.

Taken together, the literature reveals a persistent gap between international recognition of children's rights and their domestic realisation. Although scholarship, judicial decisions and policy initiatives acknowledge the risks faced by surrogate-born children, Indian law lacks an integrated framework aligning surrogacy regulation with nationality determination. This gap justifies a focused examination of how surrogacy and citizenship law can be reconciled to prevent statelessness and ensure legal certainty for children born through cross-border surrogacy.

CONCEPTUALISING CROSS-BORDER SURROGACY AS A CONFLICT-OF-LAWS ISSUE:

Cross-border surrogacy involves multiple legal systems, creating a classic conflict-of-laws scenario. The state of birth governs birth registration, initial parentage and sometimes nationality, often privileging the gestational mother.[19] The intended parent's state determines citizenship transmission, immigration status and long-term recognition of parent-child relationships, usually requiring proof of legally recognised parentage. The state governing the surrogacy arrangement regulates the legality of the contract but disclaims responsibility for nationality outcomes. These divergent rules can produce uncertainty across jurisdictions, leaving children's legal identity unclear. No single state assumes full responsibility since the birth state prioritises the gestational mother, the parent's state

[8] 'Parentage / Surrogacy Project Reports 2016-2025' (Hague Conference on Private International Law 2025) <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

[9] 'Children's Rights Related to Surrogacy - Doc. 14140' (Committee on Social Affairs, Health and Sustainable Development, Council of Europe 2016) <https://pace.coe.int/en/files/23015/html>.

[10] Jonathan Herring, *Family Law* (9th edition, Pearson 2019).

[11] Albert Venn Dicey, Lawrence Collins and Jonathan M Harris, *Dicey, Morris and Collins on the Conflict of Laws* (16th ed, Sweet & Maxwell Thomson Reuters 2022).

[12] Marianna Iliadou, 'International Surrogacy and Stateless Children: Article 7 UNCRC and the Harmful Effects of Statelessness' (2024) 5 Amicus Curiae 474.

[13] Bríd Ní Ghráinne and Aisling McMahon, 'A Public International Law Approach to Safeguard Nationality for Surrogate-Born Children' (2017) 37 Legal Studies 324.

[14] Noelia Igareda González, 'Legal and Ethical Issues in Cross-Border Gestational Surrogacy' (2020) 113 Fertility and Sterility 916.

[15] Brandão and Garrido (n 2).

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

[17] *Mennesson v France,* ECtHR 65192/11.

[18] *C v Italy,* ECtHR 47196/21.

[19] *MR and DR v. An t-Ard-Chláraitheoir,* [2014] IESC 60 (n 6).

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conditions nationality on recognised parentage, leading to delays or denials, while the surrogacy state regulates contracts without ensuring identity outcomes.[20] Scholars, including *Crockin* and *Choudhury*, and the Hague Conference on Private International Law identify this diffusion of authority as a structural cause of legal limbo and statelessness.[21]

Traditional conflict-of-law connectors i.e. territoriality, nationality, domicile and habitual residence, fail to resolve these issues in cross-border surrogacies. Territoriality favours the gestational mother, nationality presupposes recognised parentage, domicile is unstable at birth, and habitual residence is indeterminate for newborns. These connectors assume a settled legal status that does not exist at the moment of birth in cross-border surrogacy. As noted by the HCCH Expert's Group and scholars such as *Dicey, Morris & Collins* and *Valc*, this creates circularity where parentage must first be resolved before any connecting factor can operate.[22] The result is doctrinal incoherence and heightened risk of statelessness. Citizenship laws are domestic and provide little guidance for cross-border surrogacy. States apply *jus soli* or *jus sanguinis* rules without addressing foreign birth or parentage recognition.

India's Citizenship Act, 1955, like statutes in Europe and North America, sets substantive criteria but is silent on which law applies to parentage abroad. No binding international instrument resolves this gap. The CRC guarantees the right to nationality but does not specify the governing law. UNHCR reports show that children born through international surrogacy may face delays or denials in nationality.[23] Cases such as *Tuan Anh Nguyen v. INS,* (2001)[24] and analyses by *Fenton-Glynn* confirm that unilateral domestic interpretations produce inconsistent outcomes and prolonged uncertainty.[25] Without a clear choice-of-law rule, no state is clearly responsible for conferring nationality at birth. Birth states may deny nationality under restricted *jus soli*, while intended parent's states may require legally recognised parentage. European Court of Human Rights cases illustrate how non-recognition can leave children without legal identity, while administrative delays in registration and passports exacerbate statelessness.[26]

Conflicting jurisdictional claims leave children without legal identity. If the birth state does not grant automatic nationality and the intended parent's state refuses to recognise surrogacy parentage, children can become stateless.[27] Scholars and Council of Europe Reports emphasise that, absent binding international frameworks, no jurisdiction fully assumes responsibility. This produces legal gaps that heighten administrative hurdles and increase the risk of statelessness. When restrictive nationality rules coincide with non-recognition of foreign parentage, surrogate-born children face prolonged uncertainty, depriving them of legal identity and fundamental rights under international law, including the right to nationality at birth. These outcomes arise directly from the lack of coherent conflict-of-law rules determining which law governs nationality attribution.[28]

CITIZENSHIP TRANSMISSION RULES AND THEIR STRUCTURAL LIMITS:

Territorial, birth-based citizenship (*jus soli*) confers nationality on children born within a state's territory, irrespective of parental nationality. Approximately thirty-five countries, including the United States and Canada, continue to grant unconditional *jus soli*, while many others impose conditions such as parental residence or legal status. Historically, *jus soli* functioned as an important safeguard against statelessness. In the context of cross-border surrogacy, however, it frequently fails to offer effective protection. Birth states may deny or condition citizenship, while the intended parent's states often require legally recognised parentage before permitting nationality transmission. As a result, children may face legal uncertainty or statelessness from birth. These risks are compounded where surrogacy unsettles domestic assumptions about family and parentage.[29] In *S.–H. v. Poland*, (2020)[30] Polish authorities refused to recognise the citizenship of children born in the United States through surrogacy, relying on restrictive domestic family law definitions. Similarly, in jurisdictions that prohibit or restrict surrogacy, such as Italy, foreign surrogacy birth certificates may not be recognised.[31] Conflicting rules between birth states and the intended parent's states therefore intensify the risk of statelessness. Proposed Indian regulatory approaches reflect a comparable logic,

[20] Igareda González (n 14).

[21] 'Parentage / Surrogacy Project Reports 2016-2025' (n 8); Cyra Akila Choudhury, 'Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation' in Oxford Handbooks Editorial Board (ed), *Oxford Handbook Topics in Law* (Oxford University Press) <https://doi.org/10.1093/oxfordhb/9780199935352.013.38> accessed 12 January 2026; Susan L Crockin, 'Legal Perspectives on Cross-Border Reproductive Care' (2011) 23 Reproductive Biomedicine Online 811.

[22] 'Report of the Experts' Group on the Parentage / Surrogacy Project (Meeting of 6-9 February, 2018)' (Hague Conference on Private International Law 2018) <https://assets.hcch.net/docs/0510f196-073a-4a29-a2a1-2742c95312a2.pdf>; Dicey, Collins and Harris (n 11).

[23] Ghráinne and McMahon (n 13).

[24] *Tuan Anh Nguyen v INS,* 533 US 53 (2001).

[25] Claire Fenton-Glynn, *Children and the European Court of Human Rights* (First edition, Oxford University Press 2021).

[26] *C. v. Italy, ECtHR 47196/21* (n 18); 'Surrogacy and the Sale of Children - Special Rapporteur on the Sale and Sexual Exploitation of Children' (OHCHR 2018) <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy-and-sale-children>.

[27] *Baby Manji Yamada v. Union of India,* (n 16); *C. v. Italy, ECtHR 47196/21* (n 18).

[28] Sanoj Rajan, 'International Surrogacy Arrangements and Statelessness' (Institute on Statelessness and Inclusion 2017) <https://www.children.worldsstateless.org/3/safeguarding-against-childhood-statelessness/international-surrogacy-arrangements-and-statelessness.html>; Igareda González (n 14).

[29] 'What is Jus Soli?' (*iLand - Investment Migration Council*, 17 September 2025) <https://www.iland.co.com/news/what-jus-soli> accessed 12 January 2026; Daniel ATZ, 'Countries With Birthright Citizenship (Jus Soli)' (*Citizenship.EU*, 29 August 2025) <https://citizenship.eu/dual-citizenship/countries-with-birthright-citizenship-jus-soli/> accessed 12 January 2026.

[30] *S–H v Poland,* ECtHR 56846/15.

[31] *C. v. Italy,* ECtHR 47196/21 (n 18).

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conditioning nationality outcomes for foreign surrogacy births on diplomatic assurances rather than automatic protection.[32]

Descent-based citizenship (*jus sanguinis*) confers nationality on the basis of a child's legal or biological relationship with a parent rather than place of birth. This model is followed by more than 150 states. Nationality under *jus sanguinis* depends on the prior legal recognition of parentage and where such recognition is absent, intended parents are unable to transmit citizenship.[33] In *Re: X & Y (UK)*, (2009) children born through a Ukrainian surrogate were initially denied British citizenship because the surrogate was recognised as the legal mother under domestic law.[34] A similar refusal of recognition occurred in *C. v. Italy*, (2023), where Italian authorities declined to acknowledge parentage established through foreign surrogacy arrangements.[35] Scholars such as *Beaumont* and *McEleavy*, along with reports of the Hague Conference on Private International Law, note that the non-recognition of parentage is a recurrent barrier to nationality transmission. UNHCR studies confirm that this disconnect is a leading structural cause of statelessness among children born through cross-border surrogacy.[36]

Nationality regimes thus rely heavily on legally recognised parentage while remaining largely silent on how parentage should be determined in transnational reproductive contexts. In cross-border surrogacy, intended parents may be connected to the child biologically or contractually, yet remain legally invisible. This legal gap obstructs the acquisition of nationality at birth. Decisions such as those discussed in this section illustrate how the absence of coordinated parentage recognition produces prolonged legal uncertainty. Reports by the HCCH and UNHCR consistently emphasise that this structural disjunction between parentage and nationality law results in extended periods of legal limbo. Scholars including *Kanics* and *Iliadou* observe that courts and administrative authorities often respond through ad hoc and exceptional measures, rather than through predictable legal rules.[37]

These dynamics frequently result in legal deadlocks in which neither the birth state nor the intended parent's state accepts responsibility for conferring nationality. Birth states may disclaim responsibility where surrogacy conflicts with domestic norms, as seen in *S.–H. v. Poland* case, while intended parent's states may refuse nationality in the absence of recognised foreign parentage, as in *Mennesson v. France* case and *D and Others v. Belgium*, (2014).[38] Such conflicting positions render children legally invisible, depriving them of citizenship, civil registration and travel documentation. Indian cases such as *Baby Manji Yamada*'s and *Jan Bala*'s case demonstrate the need for extraordinary administrative and judicial intervention to avert this outcome. Scholarly commentary links these deadlocks to the structural separation between nationality and parentage regimes, which produces inconsistent judicial responses and prolonged statelessness, contrary to Articles 7 and 8 of the CRC.[39] Children may thus exist socially and biologically within families, yet remain legally unrecognised, exposing a critical gap in both domestic and international legal frameworks.

STATELESSNESS AS A STRUCTURAL OUTCOME OF LEGAL DESIGN:

International law defines a stateless person as "*a person who is not considered as a national by any State under the operation of its law*".[40] Scholarly writing distinguishes between *de jure* statelessness, where no state recognises an individual as a national under its laws, and *de facto* statelessness, where nationality exists in formal terms but cannot be exercised due to the absence of recognition, documentation or effective protection.[41] Children born through cross-border surrogacy are vulnerable to both forms. *De jure* statelessness arises when the state of birth refuses to confer nationality under *jus soli*, while the intended parent's state denies citizenship because legal parentage is not recognised. *De facto* statelessness occurs where nationality may exist in principle, but access to registration, travel documents or legal recognition is obstructed. Scholars such as *Ní Ghráinne, McMahon and Iliadou* emphasise that both forms expose structural gaps in domestic and international legal frameworks.[42] These gaps undermine Article 7 of the CRC, leaving children legally invisible at birth and restricting access to healthcare, education and civil rights.

In the context of surrogacy, statelessness is closely linked to failures in choice-of-law design. Conflicting nationality and

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[32] Kounteya Sinha, 'Surrogacy Bill: Citizenship Issue to Be Addressed' *The Times of India* (28 January 2011) <https://timesofindia.indiatimes.com/india/surrogacy-bill-citizenship-issue-to-be-addressed/articleshow/7373901.cms> accessed 12 January 2026.

[33] 'Field Listing Citizenship' (*Citizenship - The World Factbook*, 2025) <https://www.cia.gov/the-world-factbook/field/citizenship/> accessed 12 January 2026.

[34] *Re X & Y (Foreign Surrogacy),* [2009] 1 FLR 733.

[35] *C. v. Italy,* ECtHR 47196/21 (n 18).

[36] Ghráinne and McMahon (n 13); Sanoj Rajan (n 28).

[37] Choudhury (n 21).

[38] *D and Others v Belgium,* ECtHR Application No 29176/13.

[39] Aryaveer Hooda and Himadri Badoni, 'Surrogacy and Trafficked Prostitution: The Lesser Known Facets of Statelessness' (*LSE Human Rights*, 24 August 2023) <https://blogs.lse.ac.uk/humanrights/2023/08/24/surrogacy-and-trafficked-prostitution-the-lesser-known-facets-of-statelessness/> accessed 12 January 2026; Ghráinne and McMahon (n 13).

[40] Maaike Wienk, '1954 Convention Relating to the Status of Stateless Persons' (*Melbourne Law School*, 16 December 2025) <https://law.unimelb.edu.au/centres/statelessness/education/factsheet/1954-convention-relating-to-the-status-of-stateless-persons> accessed 12 January 2026.

[41] Eric Fripp and Katia Bianchini, 'Statelessness' (Asylex Global 2024) <https://rightsinexile.org/special-issues/statelessness/>.

[42] Iliadou (n 12).

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parentage rules between the state of birth and the intended parent's state often leave children without effective protection. Empirical studies show that statelessness frequently arises when the birth state denies *jus soli*, the intended parent's state conditions nationality on recognised parentage, and foreign birth certificates are refused recognition.[43] Although international instruments provide some safeguards, their protective effect remains limited. Article 1(1) of the Convention on the Reduction of Statelessness, 1961, obliges states to grant nationality to children who would otherwise be stateless, yet this obligation often fails in practice when surrogacy is prohibited or parentage is legally contested.[44] Reports such as *The World's Stateless Children* and studies by the European Network on Statelessness demonstrate that children may formally possess a nationality but remain unable to obtain documentation, rendering them effectively stateless.[45] The persistent disjunction between parentage recognition and nationality law thus produces legal invisibility from birth.

International human rights law clearly recognises a child's right to nationality. Article 15 of the Universal Declaration of Human Rights affirms that "*everyone has the right to a nationality*" and that no one shall be arbitrarily deprived of it. Article 7 of the CRC guarantees birth registration and the right to acquire a nationality, particularly where a child would otherwise be stateless.[46] The 1961 Convention similarly imposes obligations on states to prevent childhood statelessness. However, the enforceability of these protections remains weak. Nationality continues to fall within the domain of state sovereignty, not all states are parties to these instruments, and effective protection depends on domestic incorporation. In cross-border surrogacy cases, unresolved conflicts between parentage and nationality regimes frequently prevent the effective acquisition of nationality at birth.[47]

These international safeguards often fail because treaty commitments do not align with domestic nationality laws. Many states delay or resist incorporating international obligations into national legislation. Empirical data indicates that approximately 29% of states lack any safeguards for otherwise stateless children, while a further 28% maintain provisions that are inadequate in scope or application.[48] Even where safeguards exist, access to nationality commonly depends on legally recognised parentage, leaving children born through surrogacy outside their protective reach. Procedural requirements, such as formal applications, residence conditions or proof of non-acquisition of another nationality, further delay protection. The cumulative result is a system in which international norms articulate protection but do not ensure its delivery.[49]

Cross-border surrogacy therefore demonstrates that statelessness is not an incidental administrative failure but a predictable structural outcome of legal design. Statelessness arises from unresolved conflicts between domestic parentage rules and nationality laws, compounded by the absence of effective choice-of-law solutions. While international human rights norms affirm the child's right to nationality, they do not provide operational mechanisms to resolve conflicts across legal systems. Prevention is largely left to domestic courts and administrative authorities, which often respond on an ad hoc, case-by-case basis. India, as a former hub for cross-border surrogacy, illustrates this dynamic. Judicial and administrative interventions have relied on the best interests of the child to grant relief, revealing both the protective potential and the inherent limits of adjudicatory solutions in the absence of a coherent, child-centred choice-of-law framework.

JUDICIAL AND ADMINISTRATIVE RESPONSES - LIMITS OF CASE-BY-CASE SOLUTIONS:

Indian courts have primarily encountered cross-border surrogacy disputes in the context of citizenship, travel documentation and parentage recognition. Judicial engagement has largely been reactive, responding to the immediate legal invisibility of children rather than operating within a comprehensive statutory framework. Prior to the enactment of the Surrogacy (Regulation) Act, 2021, Indian law provided no clear guidance on parentage determination or the legal consequences of cross-border surrogacy. In this vacuum, courts relied on constitutional principles, international child-rights norms, and equitable discretion to prevent statelessness and ensure the child's welfare.[50]

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[43] Ghráinne and McMahon (n 13).

[44] 'The Convention on the Reduction of Statelessness, 1961' Article 1(1).

[45] Sanoj Rajan (n 28).

[46] UN General Assembly, 'Article 7: Name and Nationality - Convention on the Rights of the Child' (*UNICEF*, 20 November 1989) <https://archive.crin.org/en/home/rights/convention/articles/article-7-name-and-nationality.html?> accessed 20 February 2024.

[47] 'Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness' <https://www.unhcr.org/in/sites/en-in/files/legacy-pdf/3dc69f1d4.pdf>; 'The Convention on the Reduction of Statelessness, 1961' (n 44).

[48] 'Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, of the Country in Which They Are Born, If They Otherwise Would Be Stateless' (UNGA 2015) <https://documents.un.org/doc/undoc/gen/g15/286/02/pdf/g1528602.pdf>.

[49] Jyothi Kanics, 'Preventing and Addressing Statelessness: In the Context of International Surrogacy Arrangements' (2014) 19 Tilburg Law Review 117.

[50] 'Compendium of Instructions/ Guidelines Relating to Issue of Passports in India/Abroad' <https://passportindia.gov.in/AppOnlineProject/pdf/Latest_Passport_Manual_for_disclosure_under_RTI_Act.pdf>; 'The 228th Law Commission of India Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy"' (Ministry of Law, GOI 2009)

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In *Baby Manji Yamada*'s case, the Supreme Court addressed the case of a child born in India through a surrogate to Japanese intending parents whose marriage had dissolved before the child's birth. Owing to uncertainty surrounding nationality and parentage, the child was unable to leave India. The Court facilitated the issuance of travel documents and recognised interim guardianship, prioritising the child's welfare over unresolved questions of citizenship or legal parentage.[51] Similarly, in *Jan Balaz*'s case, twins born through surrogacy to German intending parents faced prolonged delays in nationality recognition. The Gujarat High Court adopted a purposive interpretation of section 3 of the Citizenship Act, 1955, granting Indian citizenship to prevent statelessness.[52] These cases reveal a consistent judicial pattern wherein courts invoke the best interests of the child, drawing upon Article 3 of the CRC and Article 21 of the Constitution, to grant exceptional, case-specific relief. While measures such as temporary travel documents, guardianship orders and ad hoc recognition mitigate immediate harm, they do not address the underlying structural deficiencies in the legal framework.[53]

Judicial remedies, however, are inherently limited by inconsistency and unpredictability. Indian courts have consistently demonstrated a normative commitment to shielding children from the harsh consequences of legal gaps, particularly the risk of statelessness. However, their interventions remain circumscribed by institutional limits and the absence of clear legislative guidance. By relying on best-interests reasoning and granting exceptional, case-specific relief, courts respond to the immediate effects of cross-border surrogacy disputes without addressing their underlying structural causes. While such judicial practices are protective in individual cases, they underscore the inadequacy of reactive adjudication and reinforce the need for a coherent, child-centred choice-of-law framework capable of operating *ex ante*, rather than through episodic judicial rescue.[54]

In practice, administrative authorities, including municipal registrars, passport offices, Foreigners Regional Registration Offices (FRROs) and consular officials, serve as the primary gatekeepers of citizenship recognition, travel and legal documentation. Following the enactment of the Surrogacy (Regulation) Act, 2021, which restricts surrogacy to heterosexual Indian couples married for a minimum of five years and prohibits commercial surrogacy, administrative scrutiny has intensified. Passport authorities frequently require notarised affidavits, DNA reports and judicial orders, often resulting in delays extending over several months.[55] Officials of the Ministry of External Affairs and Indian consulates exercise wide discretion in issuing exit permits, sometimes conditioning approval on confirmation of foreign nationality, thereby producing procedural deadlocks. Sequential processing across multiple authorities' further fragments outcomes, while genetic reductionism persists despite judicial clarification in *Jan Balaz* that DNA alone does not determine nationality. These administrative practices closely mirror the ad hoc nature of judicial relief.[56]

Administrative authorities thus play a decisive role in shaping a child's legal identity. Birth registrars, operating under the Registration of Births and Deaths Act, 1969, determine parentage entries and nationality indicators, yet their practices vary significantly. Some registrars accept the names of intending parents pursuant to court orders, while others insist on affidavits, DNA evidence, or proof of compliance with the 2021 Act. Passport authorities assess eligibility under both citizenship law and surrogacy regulations, often demanding extensive documentation. Consular officials regulate exit and travel permits, subject to overlapping domestic and foreign requirements.[57] Across these institutions, common patterns emerge. Wide discretionary variation, reliance on individual judgment rather than uniform procedures, reactive intervention only after documentation is submitted and risk-averse decision-making, are some of the most common patterns. As a result, administrative authorities frequently determine a child's legal fate, underscoring the structural inadequacy of fragmented, discretionary processes.[58]

The limitations of these judicial and administrative interventions are therefore structural rather than incidental. Courts provide exceptional relief grounded in child welfare, while administrative authorities apply surrogacy and citizenship laws unevenly. Sequential processing, multiple layers of oversight, and broad discretionary powers generate uncertainty and delay. Consequently, a child's nationality and legal identity often depend on the interpretive choices of individual officials rather than predictable legal rules. These patterns highlight the urgent need for a coherent, anticipatory and child-centred

<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf>; *Shalu Nigam v Regional Passport Officer,* (2019) 14 SCC 134.

[51] *Baby Manji Yamada v. Union of India,* (n 16).

[52] *Jan Balaz v. Anand Municipality,* (n 7).

[53] Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 Signs: Journal of Women in Culture and Society 969.

[54] *Gaurav Nagpal v Sumedha Nagpal,* (2009) 1 SCC 42; *Nil Ratan Kundu v Abhijit Kundu,* (2009) 9 SCC 413.

[55] 'Lok Sabha Unstarred Question No. 3541 to Be Answered on 22.03.2023 - Methodology for Measurement of Poverty' <https://sansad.in/getFile/loksabhaquestions/annex/1711/AU3541.pdf?source=pqals#:~:text=METHODOLOGY%20FOR%20MEASUREMENT%20OF%20POVERTY,Aayog.>; The Passports Act, 1967 s 6; The Surrogacy (Regulation) Act, 2021 s 3.

[56] 'Simplification of Passport Rules' <https://www.mea.gov.in/Images/amb1/lu2641_anne1.pdf>; 'Special Cases of Minors Requiring Passports' <http://services1.passportindia.gov.in/psp/SplCaseOfMinorsReqPassport>.

[57] 'Simplification of Passport Rules' (n 56).

[58] Mahmoud Salama and others, 'Cross Border Reproductive Care (CBRC): A Growing Global Phenomenon with Multidimensional Implications (a Systematic and Critical Review)' (2018) 35 Journal of Assisted Reproduction and Genetics 1277.

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choice-of-law framework. Such a framework would reduce discretionary variance, enhance legal predictability for intending parents and children, and secure children's rights systematically, rather than through episodic judicial or administrative intervention.

COMPARATIVE INSIGHTS - LIMITED INNOVATIONS AND PERSISTENT GAPS:

Emerging State Practices to Prevent Statelessness:

Cross-border surrogacy frequently results in children with uncertain nationality due to conflicting domestic citizenship rules and the non-recognition of foreign parentage. In response, a limited number of states have developed provisional nationality schemes, fast-track registration procedures, or special citizenship mechanisms aimed at reducing the risk of statelessness. Although these measures are exceptional and unevenly applied, they offer instructive models for India.

In Belgium, children born abroad through surrogacy may acquire provisional nationality through administrative or judicial recognition of intended parentage, even in the absence of a genetic link, provided domestic surrogacy norms are respected. This temporary status enables access to legal identity and documentation while formal determinations are pending.[59]

In Mexico, certain states permit expedited civil registration for children born abroad to Mexican nationals via surrogacy, issuing provisional birth certificates that allow passports and consular services before full verification is completed.[60] In the United States, nationality is attributed either by birthright or through parentage, irrespective of gestational carrier involvement. Pre-birth parentage orders enable intended parents to be recorded on birth certificates, while Consular Reports of Birth Abroad provide immediate proof of nationality.[61] Judicial recognition, as in *Buzzanca v. Buzzanca*, (2002)[62] further consolidates intended parentage.

In India, post-2021 administrative practice reflects tentative movement toward similar protective mechanisms. FRROs and FROs process exit permits for children born through altruistic surrogacy on the basis of documentary compliance with the Surrogacy (Regulation) Act, 2021. In some instances, municipal registrars, acting pursuant to court orders, have issued birth certificates listing intended parents, thereby enabling passport issuance and averting immediate statelessness. Across jurisdictions, these practices share common features including recognition of intended parentage despite surrogate or donor involvement, the use of temporary or provisional legal status to facilitate documentation and travel, and administrative or statutory grounding that reduces reliance on exceptional judicial intervention. Collectively, they demonstrate that statelessness can be mitigated through anticipatory mechanisms rather than post hoc judicial rescue.[63]

Inconsistency and Lack of Harmonisation:

Despite these initiatives, state responses remain fragmented and inconsistent. No harmonised international framework governs surrogacy, parentage recognition or nationality attribution. Domestic laws vary considerably, resulting in divergent outcomes for children in materially identical circumstances. Nationality regimes commonly require prior recognition of parentage, yet standards for such recognition differ across legal systems. Consequently, a child recognised as a national in one jurisdiction may remain legally invisible in another. Even where procedural mechanisms exist, such as in the United States or Mexico, they are often conditional, administratively driven, and dependent on stringent evidentiary requirements. Judicial remedies, including Mexico's *amparo* procedure, offer protection only to those with access to courts. Administrative safeguards based on executive guidelines or consular practice remain vulnerable to policy shifts, producing temporal and jurisdictional inconsistency.[64]

Absence of Binding International Coordination

These structural challenges are exacerbated by the absence of binding international rules on parentage recognition or nationality attribution in cross-border surrogacy. While child-rights instruments such as Article 7 of the CRC affirm the right to nationality, they do not supply operational mechanisms to resolve transnational conflicts. India, although a party to the CRC, relies primarily on the Citizenship Act, 1955, and is not a State Party to the 1961 Convention on the Reduction of Statelessness. At the private international law level, the Hague Conference on Private International Law has examined the risks posed by surrogacy and parentage disputes but has yet to produce binding norms. In this vacuum, Indian authorities navigate cross-border conflicts through discretionary administrative processes or ad hoc judicial intervention. Consular officials frequently condition travel documentation on foreign verification, while Ministry of External Affairs guidance ties exit permissions to compliance with domestic surrogacy regulations and foreign recognition. These practices vary across missions and over time. Indian courts, as seen in

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[59] The Belgian Civil Code Arts. 310–314; 'Acknowledgement of Parentage' (*FPS Foreign Affairs - Foreign Trade and Development Cooperation*, 22 March 2022) <http://diplomatie.belgium.be/en/belgians-abroad/registry/acknowledgement-parentage> accessed 12 January 2026.

[60] The Mexican Civil Code Arts. 305–308; 'What Is the Amparo Law for Surrogacy in Mexico?' (*CAREM Legal Experts*, 14 October 2025) <https://carem.mx/en/what-is-the-amparo-law-for-surrogacy-in-mexico/> accessed 12 January 2026.

[61] The Immigration and Nationality Act, 1952 s 1401(c); 'Assisted Reproductive Technology (ART) and Surrogacy Abroad' (*U.S. Department of State*, 2024) <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html> accessed 12 January 2026.

[62] *Buzzanca v Buzzanca,* 2002, 72 CalApp4th 500.

[63] 'Simplification of Passport Rules' (n 56).

[64] Martín Hevia, 'Surrogacy, Privacy, and the American Convention on Human Rights' (2018) 5 Journal of Law and the Biosciences 375; Sanoj Rajan (n 28).

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Baby Manji Yamada and *Jan Balaz*, occasionally invoke international norms, but primarily to justify humanitarian relief rather than to systematise nationality attribution.[65]

Structural Implications

Neither domestic discretion nor ad hoc international cooperation adequately addresses the structural causes of statelessness in cross-border surrogacy. In India, legislative silence, administrative fragmentation, and the absence of treaty-level coordination compel courts and officials to resolve conflicts through improvised, case-specific reasoning. While such interventions mitigate immediate harm, they fall short of delivering predictable, rights-based outcomes. This persistent gap underscores the necessity of a child-centred, *ex ante* choice-of-law framework capable of reconciling competing claims to parentage and nationality, ensuring uniform protection, and preventing statelessness as a matter of legal design rather than remedial discretion.

A CHILD-CENTRED CHOICE-OF-LAW FRAMEWORK FOR CITIZENSHIP DETERMINATION:

Rationale for a Choice-of-Law Approach:

Statelessness in cross-border surrogacy arises not merely from gaps in domestic law but, more fundamentally, from conflicts between multiple nationality and parentage regimes operating across jurisdictions. Substantive harmonisation of nationality laws remains politically unrealistic, given that citizenship continues to be a core expression of state sovereignty. A choice-of-law approach therefore offers a more viable and normatively defensible alternative. Rather than altering domestic citizenship rules, it determines which state's law should govern nationality attribution in a transnational case.[66]

Private international law has long relied on connecting factors, such as nationality, domicile, habitual residence or the location of legally relevant acts, to allocate applicable law in cross-border disputes. In family and personal status matters, these techniques promote legal certainty, reduce forum shopping, and enable predictable outcomes without encroaching upon sovereign regulatory space. Applied to cross-border surrogacy, choice-of-law rules can resolve nationality questions *ex ante*, thereby reducing dependence on judicial discretion or ad hoc administrative accommodations. Crucially, this approach respects state sovereignty where states retain full authority to define citizenship under domestic law, while the framework merely identifies which legal system governs the child's nationality. By decoupling nationality attribution from the legality of surrogacy arrangements, it prevents children from becoming collateral victims of regulatory divergence. In the Indian context, where neither the Citizenship Act, 1955 nor the Surrogacy (Regulation) Act, 2021 addresses nationality in transnational surrogacy, choice-of-law principles provide a necessary bridge between existing legal regimes and cross-border realities, securing children's legal identity without undermining domestic surrogacy policy.[67]

Priority of the Intended Parent's Nationality:

A coherent choice-of-law framework requires a clear and stable connecting factor to ensure predictable nationality attribution. Among the available options i.e. place of birth, surrogate's nationality or habitual residence, priority should be accorded to the nationality of the intended parents. Intended parents assume full parental responsibility and possess the strongest normative and functional claim to legal parenthood. This approach is also consistent with prevailing nationality regimes as many domestic legal systems, including section 4 of India's Citizenship Act, 1955, confer citizenship primarily by descent rather than by place of birth.[68]

Anchoring nationality in the intended parent's legal system enables advance planning for birth registration, travel and documentation, thereby reducing the uncertainty that currently leaves children dependent on case-specific judicial or administrative relief. It further aligns with Article 7 of the CRC, which obliges states to ensure that every child acquires a nationality and legal identity. Unlike connecting factors based on birthplace or surrogate residence, which often reflect administrative convenience rather than social reality, intended parentage corresponds directly to the lived parent-child relationship. In the absence of explicit statutory guidance in Indian law, courts and administrative authorities have relied on analogies and discretionary reasoning, producing inconsistent outcomes. Prioritising the nationality of the intended parents offers a principled and predictable alternative, consistent with domestic practice, comparative experience and international child-rights norms, while effectively mitigating the risk of statelessness.[69]

Doctrinal Justification

The proposed framework rests on three interrelated doctrinal foundations i.e. the best interests of the child, the prevention of statelessness, and private international law norms facilitating functional cooperation in matters of personal status. The principle of the best interests of the child, recognised under Article 21 of the Indian Constitution and Article 3 of the CRC, encompasses not only physical welfare but also legal identity

[65] 'Background Note for the Meeting of the Experts' Group on the Parentage / Surrogacy Project' (Hague Conference on Private International Law 2016) <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf>; 'Parentage / Surrogacy Project Reports 2016-2025' (n 8); 'Assisted Reproductive Technology (ART) and Surrogacy Abroad' (n 61).

[66] Sitharamam Kakarala, *India and the Challenge of Statelessness: A Review of the Legal Framework Relating to Nationality* (National Law Univ 2014).

[67] Adrian Briggs, *The Conflict of Laws* (Fifth edition, Oxford University Press 2024).

[68] Mohammad Shahadat Hossain and S M Shahidul Islam, 'Habitual Residence as a Personal Connecting Factor in Private International Law: Significance and Future Direction' (2023) III EBAUB Journal of Law 90; *Rachita Francis Xavier v Union of India,* [2024] SCC OnLine 3612 (Del).

[69] Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694.

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and security. Judicial decisions such as those in *Gaurav Nagpal* and *Baby Manji Yamada*'s case demonstrate that Indian courts have treated nationality and legal status as integral to child welfare. A choice-of-law rule institutionalises this protective logic *ex ante*, rather than relying on exceptional judicial intervention.[70]

The prevention of statelessness constitutes a second, closely connected pillar. Statelessness severely restricts access to fundamental rights, including education, healthcare and freedom of movement. International standards, including CRC Article 7 and UNHCR Guidelines No. 4, emphasise the urgency of early and effective nationality attribution. By anchoring nationality determination in the most appropriate and stable legal system, the framework gives practical effect to these obligations.[71] Finally, private international law provides the technical tools necessary to allocate jurisdiction and applicable law predictably. Prioritising intended parent's nationality enables India to align with emerging international practice without importing foreign substantive surrogacy norms.[72] Supreme Court jurisprudence, notably *Olga Tellis v. Bombay Municipal Corporation*, (1985)[73] further reinforces the centrality of legal identity to human dignity, supporting the normative foundations of the framework.

Addressing Public Policy Objections:

Public policy concerns surrounding surrogacy, whether ethical, socio-economic or cultural, must be analytically distinguished from the legal question of a child's nationality. The Surrogacy (Regulation) Act, 2021 reflects India's restrictive regulatory stance by permitting only altruistic surrogacy and criminalising commercial arrangements. While such policy choices legitimately regulate adult conduct, they cannot justify the denial of nationality to children, who bear no responsibility for the circumstances of their birth. Withholding nationality risks infringing Article 21 of the Constitution and impeding access to essential rights and services.[74]

Private international law recognises public policy exceptions to the application of foreign law, but these exceptions are traditionally construed narrowly and invoked only to protect fundamental domestic interests. Denying nationality on the basis of surrogacy arrangements is a disproportionate response since any public policy objection should target the reproductive conduct itself rather than the child's legal status. International child-rights principles reinforce this position. Articles 2 and 7 of the CRC prohibit discrimination based on birth circumstances and affirm every child's right to nationality.[75] UNHCR guidance similarly emphasises that statelessness prevention must operate irrespective of the legality or morality of parental conduct. By permitting narrowly tailored exceptions while safeguarding children's legal identity, the proposed framework reconciles India's regulatory autonomy with its constitutional and international obligations, ensuring that public policy serves justice rather than producing collateral exclusion.[76]

OPERATIONALISING THE FRAMEWORK - PREVENTING STATELESSNESS IN PRACTICE:

Provisional Nationality at Birth:

Provisional nationality offers immediate and temporary legal recognition to children born through cross-border surrogacy, ensuring that they are not rendered stateless while questions of final nationality remain unresolved. This interim status secures access to essential rights, including healthcare, education, civil registration and travel documentation, without prejudicing the state's ultimate determination of citizenship. International law consistently underscores the urgency of early nationality attribution. Article 7 of the Convention on the Rights of the Child and UNHCR Guidelines No. 4 emphasise that children must acquire nationality promptly and must not be discriminated against on the basis of parental status, conduct or the circumstances of birth.[77]

Conceptually, provisional nationality mirrors interim protective mechanisms recognised in private international law, which provide legal continuity pending resolution of substantive claims. Importantly, such mechanisms do not encroach upon state sovereignty. They preserve the state's authority to determine nationality in accordance with domestic law, while preventing the immediate harms associated with legal invisibility. Indian judicial and administrative practice demonstrates the feasibility of this approach. In *Baby Manji Yamada*'s case, the Supreme Court facilitated emergency travel documentation for a child born through surrogacy, prioritising

[70] *Gaurav Nagpal v. Sumedha Nagpal,* (n 54); *Baby Manji Yamada v. Union of India,* (n 16); *Anil Kumar Jain v Maya Jain,* (2008) 8 SCC 641.

[71] 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/105120>; 'Stateless People - What Is Statelessness?' (*UNHCR*, 2026) <https://www.unhcr.org/about-unhcr/who-we-protect/stateless-people> accessed 12 January 2026; 'OHCHR and the Right to a Nationality - About Nationality and Human Rights' (*OHCHR*, 2020) <https://www.ohchr.org/en/nationality-and-statelessness> accessed 12 January 2026.

[72] Briggs (n 67).

[73] *Olga Tellis v Bombay Municipal Corporation,* (1985) 3 SCC 545.

[74] *National Thermal Power Co v Singer Co,* (1992) 3 SCC 551.

[75] 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (n 71).

[76] *Ramesh Chand Ardawatiya v Anil Panjwani,* (2003) 7 SCC 350; *Renusagar Power Co v General Electric Co,* (1994) Supp (1) SCC 644; 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (*UNHCR*, 2006) <https://www.refworld.org/legal/general/crc/2006/en/40994> accessed 12 January 2026.

[77] Briggs (n 67).

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welfare over procedural uncertainty. Similarly, the issuance of temporary passports and exit permits by the Ministry of External Affairs and FRROs reflects an existing administrative capacity to provide interim protection. Provisional nationality thus functions as a child-protective measure that is fully compatible with India's prohibition of commercial surrogacy under the Surrogacy (Regulation) Act, 2021, by clearly separating the child's legal status from parental conduct.[78]

Procedural Safeguards and Timelines:

The effectiveness of provisional nationality depends on the existence of clear, child-centred procedural safeguards governing birth registration, passport issuance and exit documentation. Under section 4(1) of the Citizenship Act, 1955, children born abroad to Indian parents may acquire citizenship by descent, provided registration occurs within the prescribed timeframe. Prompt and uniform birth registration is therefore essential to securing legal recognition and access to rights. Indian consular offices should standardise registration procedures, documentation requirements and timelines to minimise delay and discretion.[79]

Passport issuance under the Passports Act, 1967 is similarly contingent upon birth registration and parental declarations. Procedural safeguards must ensure transparency in decision-making, including written reasons for additional document requests and clearly defined processing timelines. Exit documentation, issued by the Ministry of External Affairs and FRROs, has historically included temporary travel permits for children with uncertain nationality. To prevent prolonged legal limbo, formal mechanisms for inter-agency coordination are necessary. Standardised checklists for birth registration, passports and exit permits, designated communication channels between registrars, consulates and FRROs, and escalation protocols for persistent delays would transform existing ad hoc practices into a predictable administrative framework. Together, these measures operationalise the child-centred choice-of-law approach, securing children's legal identity while maintaining India's regulatory autonomy.[80]

Limits and Safeguards Against Abuse:

Preventive mechanisms must be carefully designed to avoid facilitating prohibited surrogacy arrangements or undermining public policy. Indian private international law permits refusal to apply foreign law that is contrary to fundamental domestic principles, but such public policy discretion must be exercised narrowly. By analogy, nationality cannot be denied to children through a blanket opposition to surrogacy. The Supreme Court's reasoning in *Renusagar Power Co. v. General Electric Co.*, (1994)[81] clarifies that public policy operates to protect only fundamental legal interests and cannot be invoked to justify arbitrary deprivation of rights.

International child-rights standards reinforce this limitation. The CRC and UNHCR guidance affirm that nationality must not be withheld on the basis of the circumstances of birth. Accordingly, safeguards must be structured to protect children without incentivising prohibited surrogacy practices. Public policy exceptions should be invoked only where strictly necessary to protect core domestic values and should never operate to penalise the child. Read together, Indian constitutional doctrine and international norms establish a dual safeguard i.e. limited public policy discretion, firmly anchored by the child's right to nationality. This balance ensures that provisional nationality functions as a protective, not punitive, mechanism within the broader choice-of-law framework.[82]

4. CONCLUSION

Children born through cross-border surrogacy face a heightened risk of statelessness arising from fragmented Indian citizenship law, discretionary administrative practices, and the absence of explicit legal guidance on assisted reproductive technologies. Judicial and administrative interventions have, at times, provided essential protection, but such responses remain reactive and case-specific, offering humanitarian relief without delivering systemic certainty. Comparative experience demonstrates that provisional nationality regimes and fast-track registration procedures in other jurisdictions can mitigate similar risks, yet these mechanisms remain uneven, contingent, and insufficient to address the structural causes of legal invisibility.

This paper advances a child-centred choice-of-law framework as a pragmatic and normatively grounded response. By designating the intended parent's nationality as the governing law, the framework reduces administrative discretion, prevents legal invisibility at birth, and aligns Indian practice with international obligations, particularly under the Convention on the Rights of the Child and UNHCR guidance on statelessness. Crucially, it recognises that ethical or moral contestation

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[78] 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (n 71); 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 76).

[79] The Citizenship Act, 1955 s 4(1).

[80] 'Compendium of Instructions/ Guidelines Relating to Issue of Passports in India/Abroad' (n 50); 'Surrogacy Matters - FAQs' (*Ministry of External Affairs, Government of India*, 2026) <https://mea.gov.in/surrogacy-matters.htm> accessed 12 January 2026.

[81] *Renusagar Power Co. v. General Electric Co.,* (n 76).

[82] Dicey, Collins and Harris (n 11).

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surrounding surrogacy cannot justify the denial of legal identity to children. Operationally, the framework calls for clearly articulated procedural safeguards, institutional coordination across administrative authorities, and narrowly tailored public policy exceptions. While not exhaustive, this approach provides a coherent blueprint for doctrinal reform and offers principled guidance for future legislative, administrative and judicial engagement with the complex realities of transnational reproductive arrangements.

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