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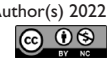

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Paperwork: Following the trail of (identity) papers in transnational commercial surrogacy

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Abstract

Transnational surrogacy—the carrying of a child by a woman in one country on behalf of persons in another—is strongly shaped by documents. Of these, identity documents are particularly crucial as they establish the belonging of a child born through such an arrangement both to its parents (birth certificate) and to a country (passport). However, the acquisition of these documents is subject to national laws that may contradict one another in transnational settings where citizens of more than one country are involved. As a result, in the last few years, there have been several cases of children stuck in legal limbo without clear parenthood and citizenship. Based on ethnographic research in India and Germany, we analyze how in such a transnational setting, documents and documentation become part of the making and unmaking of persons and belonging.

Keywords

Assisted reproductive technologies, birth certificate, custody, Germany, identity documents, India, parenthood, passport, surrogacy, transnational reproduction

Introduction

Surrogacy, the carrying of a child by a woman (a "gestational surrogate" or "surrogate mother") for others ("intended parents"), in many cases, takes place transnationally. Intended parents seek surrogacy services abroad for various reasons, most importantly restrictive laws and regulations in the home country (König, 2018) and greatly differing costs (Rudrappa, 2015), with clinics and agencies in some countries (e.g. India (Majumdar, 2017), Ukraine (Siegl, 2018), and Mexico (Hovav, 2019)) offering surrogacy services at a small fraction of the cost in other places (e.g. California, König, 2020). However, the phenomenon of children being born through surrogacy in one country

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to intended parents who are citizens of another country has led to litigation and challenges to the idea of parenthood and citizenship that many nations (and intended parents) had not foreseen.

In this article, we discuss the frictions that may emerge in such transnational encounters, as well as the consequences of these frictions, by examining two cases of international surrogacy arrangements involving citizens of Germany and India who were subject to long-term legal disputes. While the transnational aspect of surrogacy has been investigated by a number of scholars from an anthropological and sociological perspective (e.g. Deomampo, 2016; Majumdar, 2017; Pande, 2014; Rudrappa, 2015; Whittaker, 2018), the legal issues involved have so far been mainly examined by legal scholars (e.g. Ergas, 2013; Smerdon, 2012; Trimmings and Beaumont, 2011) and have not received much attention within the social sciences. Yet, our research shows that in the context of transnational surrogacy arrangements, legal documents play an essential role in the establishment of familial and national belonging, without which a person bureaucratically does not "exist." With this article, we thus aim to close the gap within social research on transnational surrogacy and present an anthropological analysis of the social significance of documents involved in transnational surrogacy arrangements. We are especially concerned with the ways in which the legal existence and identity of the surrogacy-born child are established and, therefore, explore the meaning and importance of documents that certify a child's belonging: to people (its parents) on one hand and to a nation-state (its citizenship) on the other hand. We use the example of "German-Indian" surrogacy arrangements, specifically two surrogacy cases drawn from our long-term research on transnational surrogacy, in order to take a closer look at both how these documents are acquired, modified, and finalized, and their trajectories within and across national legal systems. Through their establishment of belonging, these documents hinder or enable movement and mobility—an essential aspect in transnational settings.[1] We identify this process of engaging with documents as they are made and used to ascertain citizenship and belonging through myriad laws and bureaucracies as "paperwork." We employ this concept to think through the physical and metaphorical journeys involved in the granting of citizenship to the newborn. In many ways, we prioritize the "journey" as paperwork, involving physical documents, bureaucratic red tape, intercountry legislation, and the navigation of parenthood (that of surrogates and intended parents alike) through negotiated ideas of genes and family.

Methods

This article is grounded in many years of empirical research on surrogacy in India (Anindita Majumdar) and Germany, Switzerland, the United States, and Ukraine (Anika König). Both authors have carried out participant observation and interviews with surrogates, intended parents, clinicians, attorneys, and registrars. We have also reviewed government documents, legal texts, court decisions, and media reports in India, Germany, Switzerland, and the United States. This article is mainly based on the analysis of these juridical documents, reports on prominent surrogacy cases, and interviews with persons involved in surrogacy cases that were subject to litigation.

Our approach is inspired by the works of the great theorist of globalization, Arjun Appadurai (1986), who, in the introduction to *The Social Life of Things*, writes,

> [W]e have to follow the things themselves, for their meanings are inscribed in their forms, their uses, their trajectories. It is only through the analysis of these trajectories that we can interpret the human transactions and calculations that enliven things. Thus, even though from a *theoretical* point of view human actors encode things with significance, from a *methodological* point of view it is the things-in-motion that illuminate their human and social context. (p. 5)

Methodologically, this approach corresponds to George Marcus' (1995) concept of multi-sited ethnography, and especially his suggestion to "follow the thing" (pp. 106–108). While in our empirical research, we were unable to physically follow identity documents across the globe, we did collect data on people's experiences with such documents. We focus particularly on how they applied for, handled, and issued or refused to issue these documents, as well as how legal decisions about these documents were made. We thus also focus on the role of actors such as attorneys, registrars, and judges in establishing kinship—in this case through parenthood—and, linked to this, citizenship as national belonging. The kinds of belonging and relatedness that these documents certify have a significant impact on the lives of the people who partake in surrogacy arrangements, especially the surrogates, the intended parents, and the children born through this reproductive arrangement. We particularly focus on surrogacy arrangements commissioned in India by German intended parents, tracking the trajectories of documents within and between several sites in these two countries.

The data that this analysis is based on triangulate empirical material drawn from research conducted by Anika König in Germany and Anindita Majumdar in India, mass media reportage, and legal documents concerning German-Indian surrogacy cases that were subject to litigation.

In 2016, India banned the commissioning of surrogacy by foreign-intended parents. Most of our data, therefore, is from the years before the ban, especially the mass media presentation of some cases that led to major legal wrangling between India and the intended parents' home countries. But even if transnational surrogacy arrangements are not currently taking place in India—at least not officially (Chauhan, 2020)—an analysis of two separate countries with contradictory laws and a sender-recipient relationship concerning surrogacy (with babies being born in India to German intended parents) helps us to better understand the social life of documents (in their physical as well as abstract form) and the meanings they acquire in transnational settings beyond these two countries. We look at the circumstances in which documents in our two case studies were or were not issued, as well as how they acquired a certain meaning as objects, were negotiated in courts in both countries, and traveled in the form of certificates and passports. We also examine how their nonexistence had very severe consequences for the children, their parents, and also the surrogates and their families.

Scholarship on transnational surrogacy

Transnational commercial surrogacy has been the subject of academic and ethnographic scrutiny for more than a decade (Deomampo, 2016; Majumdar, 2017; Markens, 2012). While the surrogate and her labor continue to influence academic studies (Majumdar, 2018; Pande, 2015; Rudrappa, 2014), intended parents and their act of making and unmaking kinship impact a smaller proportion of the literature (Deomampo, 2015; König, 2018; Pralat, 2020). Within such literature, the predominant focus is on the making of "mothers" (Berend, 2010; Gerrits, 2015; Pande, 2009; Teman, 2010), the attribution of genetic parenthood to intended parents (Deomampo, 2015; Majumdar, 2017; Smietana, 2017), and the discussion of gay parenthood (Layne, 2018; Riggs et al., 2015; Smietana, 2018). The child, however, has long been neglected by social analysis,[2] largely because of the concentration on conception, pregnancy, and parenthood, and is only now emerging as a focus for research, especially vis-à-vis citizenship (Cheney, 2018; Smerdon, 2012). The same can be said about the relative absence of long-term research into how intended parents negotiate surrogacy and tales of birth with their children (Goodfellow, 2015). In contrast, emerging conversations at The Hague Convention on Intercountry Adoption (Cheney, 2014) place the child born through surrogacy at the center of their investigations. Finally, faced with emerging issues of the citizenship of babies born transnationally, involving countries with differing views on surrogacy,

belonging has become an important focus for academic scrutiny into transnational commercial surrogacy (Davies, 2017; Deomampo, 2015; König, 2018; Majumdar, 2015). But when it comes to the creation of belonging, little has been said about the role played by, on one hand, clinicians and agency personnel and, on the other hand, attorneys, registrars, and judges.

As we argue in this article, these sets of actors are important in understanding the ways in which transnationalism is crucial when thinking about belonging, kinship, citizenship, and nationality. This particularly concerns documents and the actors (such as intended parents, surrogates, clinicians, agents, lawyers, and registrars) who apply for and issue them. Transnational surrogacy is highly dependent on documents, without which it could not exist in its current form; these range from intended parents' contracts with agencies, surrogates, clinics, and laboratories to medical results, bank statements, and parental identity documents and, finally, the birth certificate and passport of the child or children in question. These last two documents in particular are usually only valid in their physical form "as thing" (Buckland, 1991), making them tangible objects with not just abstract, digital trajectories but also physical ones that connect different places and people.

Paperwork: documents in motion

Documents, especially identity papers in their physical forms, can be understood as what Buckland (1991) calls "information-as-thing": they are tangible (printed on paper), and they represent an event (the birth of a child) as well as knowledge (of that child's connection to particular persons and a country). Accordingly, identity papers are a means by which information is transferred (Buckland, 1991: 352) and are thus intrinsically linked to granting citizenship and identity. While this is true for every newborn, it is even more crucial in arrangements as fragile and complex as gestational surrogacy, which often involves not just the intended parent/s and the surrogate, but also additional persons (gamete or embryo donors), and in which reproduction may take place across several countries or even continents. Consequently, paperwork—which we understand as the process of handling documents, for instance, applying for or issuing them—is an integral element of transnational commercial surrogacy arrangements, as it establishes the rights of the intended parents and, in turn, provides the child with parents. At the same time, in India, the establishment of the relations between intended parents and their surrogacy-born child or children is enabled by the relinquishment of parenthood by the surrogate and anonymous donors. Accordingly, a dissolution of relations (between donors or surrogates and the child or children born with the help of their reproductive labor) is necessary to facilitate new ones—those between the intended parents and their child or children. The two sets of relations cannot exist simultaneously; one replaces the other.

Belonging is thus strongly intertwined with the processing of paperwork.[3] This also becomes evident in what Carswell and De Neve (2020) call the "materiality of bureaucracy," represented through repeated and circuitous paperwork seeking to gain legitimacy from the state. In the case of transnational commercial surrogacy, citizenship is "'emergent', rather than [. . .] 'static' and 'just there', and [. . .] a process that requires continual negotiation and engagement" (Carswell and De Neve, 2020: 496).

This continual negotiation between the pursuit of a legal identity and the granting of it is represented by documents in motion. This mechanism has been elaborately discussed in the context of ethnographic research on refugees and undocumented immigrants, which chronicles the ways in which paperwork extends legitimacy and "deservingness" (Willen, 2012) to disenfranchised individuals. Miriam Ticktin's (2011) work is especially provocative, as she looks at how African refugees and undocumented immigrants, often classified as *sans papiers* ("without papers"), must negotiate French bureaucracy and position themselves as deserving of the host nation's attention.

For those at the margins, this may involve enacting particular tropes of vulnerability that fit with images of Western philanthropy and global human rights principles and discourse. Moreover, papers become important means for obtaining legitimacy and escape, as evidenced in Omar Dewachi's (2015) searing narrative of Iraqi men and women seeking to escape devastation during the US-led occupation of Iraq between 2003 and 2011. Here, people must constantly reenact painful experiences of death and devastation in order to be able to claim compensation and the opportunity to escape to the United States. As these examples show, the relationship between the Global South and the Global North is deeply conflicted and yet also one of dependency. The flow of capital and people further entrenches relations and dependencies, bringing with it great potential for exploitation. Bureaucratic processes of creating and handling documents exacerbate these hierarchical and interdependent relationships.

Unlike the politics of paperwork in refugee and immigration contexts, in the case of transnational adoption and surrogacy, the relationship between those who grant papers and those who receive them is more complex. While a sense of traditional North-South dependency and hierarchy—at least in the German-Indian examples we discuss in this article (other, North-North arrangements, are organized differently)—the process of acquiring identity papers is at once similar and contrary to the above examples. In many cases of transnational adoption and surrogacy (including the examples we discuss in this article), intended/adoptive parents from the Global North seek children from the Global South, though they also depend on the bureaucracy in the latter countries to facilitate their parenthood. Needless to say, the arbitrators who decide whether the necessary papers will be granted are important agents (Maunaguru, 2013) whose power is primarily derived from the processing (or not) of the papers themselves—not unlike in the case of the *sans papiers*.

Thus, within transnational commercial surrogacy, an identity document is a "site in which power and knowledge are transformed or reconfigured . . . [I]t is less important what documents stand for than how they arrange people around themselves" (Biruk, 2019: 204). Within the transnational space, "jurisdiction" is thus used to maneuver the ways in which paperwork as a process is imbued with particular power. Consequently, issuing and denying documents becomes an important means of exercising jurisdiction as well as exclusion (Coutin et al., 2002). In such transnational settings, it is especially at the intersection of different national jurisdictions that problems arise and friction occurs: when, for example, two jurisdictions interpret the awarding of parental rights—and, based on this, the citizenship of a child—in different ways; when, as we show below, children may end up in legal limbo between these two jurisdictions. These frictions between different national jurisdictions—between those who apply for documents and those who grant them, as well as between different understandings of belonging—can best be understood by taking a closer look at the most essential documents in transnational settings: identity documents.

Essential documents in transnational surrogacy

In transnational surrogacy arrangements involving intended parents from Germany and surrogates from India, three documents are central to the establishment of belonging: the birth certificate, the passport, and the so-called "relinquishment document."[4]

Perhaps the most important of these is the birth certificate, which "retroactively [defines] a particular birth as legally cognizable" (Yngvesson and Coutin, 2006: 178), thereby making the birth legally "real." In this article, we show what may happen if this certification of birth does not take place or is contested. Even though the child has "really" been born and is physically present, without a birth certificate, it is situated in legal limbo; not *non*-existent but also not fully existent. This "in-between" status (Carsten, 1991) also means that it does not (yet) have any legal kin, as the birth certificate not only serves as proof of birth, but also establishes the legal link between the

child and its parents. Accordingly, a birth certificate "makes" not only a child, but also parents. This becomes visible in the names of the parents (or parent)[5] which, together with the child's name and its place and date of birth, are listed on birth certificates in both India and Germany.

Regardless of specific national regulations regarding the awarding of citizenship—whether through descent from one's parents or birth in a particular territory—a person's acquisition of citizenship usually coincides with the acknowledgment of a person's birth (for instance, in the form of a birth certificate that identifies their parents' names and their place of birth). The two kinds of belonging—kinship and citizenship—are thus tightly intertwined,[6] taking shape in the form of the birth certificate and, subsequently, the passport. Within the above-discussed literature on humanitarianism and refugees, the passport is always the mode through which legitimacy is sought; it thus signifies membership in a nation-state as certified by the state itself (Dewachi, 2015).

In the case of surrogacy in India, one other type of documentation is an important prerequisite for the acquisition of both the birth certificate and the passport, namely, the "relinquishment document," whereby the surrogate officially relinquishes rights to the child. In cases where the surrogate is married, there is an additional hidden element to this document: her husband's disavowal of the child, as the tie of marriage legally places him in the role of father. Moreover, a surrogate also needs signed approval from her husband and/or his kin when entering into a surrogacy arrangement, making the husband an essential (albeit hidden) element of the eligibility criteria for working as a surrogate. However, in practice, this is a fluid rule, with widows and divorced women participating in surrogacy arrangements as well.

Entangled forms of belonging: kinship and citizenship in transnational surrogacy

In most analysis of identity and belonging in gestational surrogacy, the issues of parenthood and kinship predominate (Deomampo, 2016; Kroløkke, 2012; Majumdar, 2015). However, the already complex issue of parenthood in surrogacy is further complicated in transnational agreements by issues and incongruities related to the awarding of citizenship to children born through this arrangement, in different national jurisdictions. Intended parents are regarded as a child's legal parents in jurisdictions such as Ukraine (Guseva, 2020), while in others—India among them (Smerdon, 2012: 342)—parenthood is not necessarily clear, and surrogacies are handled differently from case to case. Places like Germany and Switzerland, by contrast, establish maternity through the act of giving birth and therefore recognize the surrogate as the child's "mother" and her husband as the father. In the first instance, it is "intent" that makes a parent,[7] while the last is based on the Roman legal principle of *mater semper certa est* ("the mother is always certain")—a biologistic approach that determines motherhood through gestation and birthing (but not through genetics, that is, the egg cell). The father is "social" in this setting, as it is usually the birth mother's husband who is regarded as the father, irrespective of his any factual genetic link to the child. If the birth mother is unmarried, legal systems such as the one in Germany regard any man who acknowledges paternity as the child's father—again, regardless of a genetic link.

The second major difference between legal systems that plays an important role in transnational surrogacy arrangements is the way in which citizenship is conferred. The two main concepts are *jus soli*, the granting of citizenship based on the territory of birth (as is done, for example, in the United States, Canada, and most Central and South American states), and *jus sanguinis*, the granting of citizenship based on "blood" (e.g. in Germany, Israel, and Thailand). A person born on US soil thus becomes a US citizen at birth, while (with a few exceptions) only the child of at least one German parent acquires German citizenship at birth.[8]

Both kinship/parenthood and citizenship can thus be determined and are linked in different ways, which may lead to serious problems when a child is born in a setting that involves different and conflicting legal systems. Especially in terms of the disaggregation of motherhood—which transnational commercial surrogacy, with its involvement of genetic (oocyte donor), gestational (carrying), and social (intended and commissioning) mothers, represents—parenthood (and thus, belonging) has become a fuzzy concept. In this context, identity papers and other processes of conferring parenthood (and, linked to this, citizenship) become essential (Deomampo, 2016; Majumdar, 2015). But the processes of claiming and granting parenthood and citizenship are not simple ones; they entail navigating various roadblocks, each representing the ways in which cultural, racial, ethnic, and national boundaries are traversed or asserted.

Contested citizenship: the Balaz twins

In India, newspaper reports between 2008 and 2010 included regular coverage of the case of the Balaz twins, which involved international commercial surrogacy and resulted in litigation (Hindustan Times, 2010; Mahapatra, 2009).[9] This case illustrates the ways in which different national laws may clash and become a source of conflict and negotiation. In addition, the case of the Balaz twins is an important example of how differently nations—in this case, Germany (a country that prohibits surrogacy) and India (which at the time facilitated surrogacy)—understand familial and genetic belonging and membership to the nation-state and, accordingly, how they engage with paperwork.

In this particular case, a German couple had commissioned surrogacy that involved egg donation (from an anonymous Indian donor) and an Indian surrogate. Jan Balaz, the intended father, had provided the sperm and was, thus, the genetic father.[10] After the twins' birth in January 2008, due to the prohibition of surrogacy in Germany, the German embassy did not acknowledge Jan Balaz and his wife, Susanne Lohle, as their legal parents. The embassy, therefore, refused to issue passports to the twins for travel to Germany. Balaz and Lohle then tried to acquire Indian passports for the children, which—provided that the German embassy then issued travel visas—would have enabled them to bring the twins to Germany. However, the Indian government also refused to give the babies passports, as it considered the children Balaz and Lohle's, not the surrogate's, and thus German and not Indian nationals. As a result, the children became stateless "legal orphans" (Smerdon, 2012) stuck in a legal no-man's-land (Pathak, 2015). Balaz petitioned the Gujarat High Court to grant Indian citizenship to the babies, and in its ruling in November 2009, the court did so on the grounds that the "natural" mother—the surrogate who had carried the babies—was Indian. The High Court took the definition of "mother" to be "one who gives birth," thereby making the surrogate the children's legal mother. Moreover, the twins could already be regarded as half-Indian by virtue of having an anonymous Indian woman as the egg donor (Nikhil Goel, former counsel for Jan Balaz, personal communication with Anindita Majumdar, 27 April 2010). The Union of India, however, was unwilling to accept the idea of the mother as the "one who gives birth," as this would have set a precedent that would have fundamentally disrupted the arrangements in other surrogacy cases involving foreign couples. This led to a situation whereby the government was unwilling to hand out passports and citizenship to what it considered to be non-Indian nationals. It was only through extended negotiations between the Indian and German governments that a solution was found, in this case in favor of the Balaz twins, who the Indian government issued with "temporary travel documents" allowing them to go to Germany, where their parents could pursue their citizenship case.

Contested parenthood: an agreement *contra bonos mores*

Shortly after the Balaz case was resolved (at least in India), another German couple struggled with conflicting German and Indian laws. Andreas and Sven Schuster[11] (interviewed by Anika König, 13 June 2013), a gay couple, had chosen to become parents through surrogacy as all attempts at adoption had been unsuccessful.[12] They chose India because the country and the agency they chose to work with seemed gay-friendly, with the agency explicitly advertising to gay intended parents. Embryos were created using Andreas' sperm and an Indian donor's eggs, and after one unsuccessful attempt, an Indian surrogate gave birth to Andreas and Sven's daughter Julia in March 2010. However, the new fathers had completely underestimated the legal hurdles they would encounter; Julia's birth was the beginning of a several-year-long battle for documents that would establish Andreas' paternity and, based on this, provide Julia with German citizenship.

After Julia's birth, Andreas tried to obtain the documents that would enable his daughter to leave India. He and Sven had deliberately chosen an unmarried surrogate because, according to German law, any man who claims paternity of a child born to an unmarried woman is regarded as the child's father. As Julia's father, Andreas would have been able to pass down German citizenship to her, and she would thus have been eligible for a German passport. Although Andreas did not disclose that Julia had been born through surrogacy, the fact that he was in a civil partnership with Sven made this fact obvious to the consular officer at the German embassy in New Delhi, who refused to register his paternity. While Andreas maintains that the consular officer did so based on the argument that, according to German law, surrogacy is *contra bonos mores* ("against good morals"), according to legal documents which reconstructed the case (OLG Düsseldorf, I-3 Wx 211/12), the embassy later claimed that there had been reasonable doubt regarding the identity and marital status of the surrogate. It argued that in India, only married women who have already given birth to children of their own are chosen as surrogates, making it very likely that the surrogate who had carried and given birth to Julia was married and, consequentially, that her husband—not Andreas—was Julia's legal father. The embassy also voiced an entirely contradictory suspicion: that the unmarried woman who was officially identified as Julia's birth mother had been hired only to disguise the fact that the surrogate had actually been another woman, one who was married. This, according to Andreas, was "complete nonsense" (Unfug). He suspected that the real reason for the embassy's refusal to register his paternity was concern with setting a precedent. The case was particularly delicate as, at the time of Julia's birth, the case of the Balaz twins had kept Indian and German officials, attorneys, and courts busy for more than 2 years. Only in May 2010, almost 3 months after Julia's birth, were Jan Balaz and Susanne Lohle finally able to bring their twin boys to Germany (Smerdon, 2012: 351).

According to Andreas, the German embassy hired a detective to verify the documents and information that he and Sven had provided as proof that the surrogate was unmarried. Andreas strongly criticized the detective's approach and methods:

> This verification was done James Bond-style—the guy just walked around and spied on the surrogate. I fervently complained to the attaché three times. I rang the attaché, and from the start, I told him, "Listen, this doesn't work, see? He can't walk around and ask people here if I'm the father of the child, can he? In the woman's neighborhood and all that?" He says, "We didn't do that, we didn't do that, but I assure you, it will stop." (Andreas Schuster, interviewed by Anika König, 13 June 2013)

According to Andreas, however, it did not stop. The detective kept calling people, including Andreas, and went to see the surrogate's mother and brother as well as her neighbors. The surrogate was very upset about this and complained to Andreas, who in turn complained to the attaché.

He claims that this, together with the fact that he and the vice-consul did not get along well personally, further complicated his situation: "We were not compatible. He says to me, 'Mr. Schuster, you are right, and you will get away with this, I know that. But I am not giving [the registration] to you'" (Andreas Schuster, interviewed by Anika König, 13 June 2013).

In the meantime, Sven had returned to Germany to earn money and financially support Andreas and Julia, who were stuck in India. Finally, the couple decided to file a lawsuit against the German Foreign Office, as they felt the embassy had unlawfully denied the acknowledgment of Andreas' paternity. The administrative court in Berlin scheduled a settlement conference in June 2011, which Andreas found surprising:

> And I am saying, what shall I do with a settlement conference? What can I offer them [to amicably settle the lawsuit]? Shall I bring a pair of old socks, which I can then put on the table and tell them, "Well, you get the socks and I get the passports?" I don't have anything that I can offer. But that was far from true. We actually did have something very valuable to offer—namely, withdrawing the action. The Foreign Office wants to continue doing what they are doing to us because they weren't only doing it to us. But they can only do it as long as there is no verdict. (Andreas Schuster, interviewed by Anika König, 13 June 2013)

Sven then flew to India to look after Julia, so that Andreas could fly to Berlin to participate in the settlement conference. At the meeting, Andreas felt that the judge took his side, and in the end, the parties reached a settlement. The embassy would certify the acknowledgment of Andreas' paternity and declaration of parental responsibility and, based on this, issue a German passport for Julia—on the condition that Andreas and the surrogate appeared, in person, at the German embassy in New Delhi. There, they were to provide original copies of the surrogate's identity papers (i.e. her Permanent Account Number card and voter ID) along with a declaration by her brother, certified by a notary, that she was unmarried and had not been married in 2009 or afterward. Andreas and the surrogate fulfilled these requirements less than 1 month after the settlement conference. Another month later, in late August 2011, the surrogate declared in lieu of oath that she herself had given birth to Julia as a surrogate that she wished for Julia to be adopted by Andreas' partner Sven, and that she did not want to be bothered about the case any further.

However, the odyssey did not end there. As Andreas described it,

> the registrar [in the German embassy in New Delhi] applied a notation to the document saying that actually, she does not believe the facts that she is certifying. And that she was only issuing the certificate at the instruction of the administrative court in Berlin. Of course, this is nonsense. It's totally unbelievable. [. . .] Effectively, the Foreign Office, her superior authority, made a deal. And then she says, "Well, I'll adhere to that, but I don't believe all of this," right? But that doesn't work. A civil servant can't write, "I do not believe what I am writing here." She cannot do that! (Andreas Schuster, interviewed by Anika König, 13 June 2013)

Legal documents (OLG Düsseldorf, I-3 Wx 211/12, 26 April 2013) confirm this incident and, irrefutably, it was the inclusion of the registrar's doubts on the documents that caused further problems. At first, things seemed to go smoothly: Julia received a German passport, which enabled her to travel with Andreas to Germany. After their arrival in Germany, Andreas applied to the local family court for sole custody of Julia, which was granted on 22 November 2011 (Order 45 F 309/11), more than a year and a half after her birth. However, difficulties arose again when Andreas requested Julia's entry into the German birth registry and a German birth certificate from the local registrar's office in his hometown. The registrar contacted the German embassy in New Delhi to clarify the doubts the embassy registrar had noted on the documents, and the embassy, again, voiced concerns regarding the identity and family status of the surrogate. As a result, the local

registrar in Germany refused both Julia's entry into the birth registry and the issuance of her German birth certificate. The case was then taken to the district court. On 28 February 2012, the court decided that there were no doubts regarding Andreas' paternity—which, in addition to his legal acknowledgment, had also been proven with a DNA test—and that Julia, therefore, was entitled to a German birth certificate. However, the town disputed the decision, and the case went to the regional appellate court, which also confirmed that there were no doubts about Andreas' paternity (Decision I-3 Wx 211/12). This decision finally led to Julia's entry into the German birth registry, and she received a German birth certificate.

Documents as signatures of the state and sites of friction

Like adoption documents, the official documents that are issued in transnational surrogacy arrangements can be understood as "signatures of the state": "that is, they are connected to documentary practices of the state and its law" (Posocco, 2011: 437, referencing Veena Das, 2007). This becomes particularly interesting when a practice such as transnational surrogacy involves different states, leaving people—in this case, children born through surrogacy—stuck at the intersection of these states and their conflicting laws. The documentary practices we have described earlier, and therefore, the state signatures, not only differ but may even contradict one another, leading to friction. Particularly evident here is what Veena Das (2007), referencing Walter Benjamin, calls the detachment of the legal form (the birth certificate) "from what it is supposed to represent" (the birth, p. 162), as the same event can be certified by very different, sometimes contradictory, documents.

In the Balaz case, at Jan Balaz and Susanne Lohle's request, the first Indian birth certificate named them as the children's parents—a practice apparently not uncommon in surrogacy arrangements in India at the time (Smerdon, 2012: 342). After the intervention of the Gujarat High Court, the second birth certificate replaced Susanne Lohle's name with that of the surrogate (Smerdon, 2012: 342). In court, the application for Indian citizenship was then also linked to the egg donor as an Indian national. The fragmentation of motherhood (and its converse, three women sharing motherhood of one child), which many regard to be the most salient (and problematic) feature of gestational surrogacy, thus became manifest in the inclusion of all three women in the negotiations in court. Although the identity documents of the Balaz twins were contested, negotiated, and changed within the Indian legal system, they were nevertheless strongly shaped by the signature of the Indian state and by the ways in which India's law and documentary practices work.

The second example we presented, the case of Andreas, Sven, and Julia Schuster, evidently carried the signature of the German state and its laws, which clearly and irrefutably identify the woman who has carried and birthed a child as the child's mother. In contrast to the Indian approach in the Balaz case, the egg donor and her genetic connection with the child were irrelevant here. Germany considered the surrogate the child's mother—an approach that Andreas and Sven, as a gay couple, did not question. To enable Andreas to register his paternity with the German embassy, however, they did make sure that the surrogate was unmarried. Problems arose when the German embassy questioned the surrogate's identity and family status, suspecting her to be married and, based on this, denying Andreas the status of Julia's father. Andreas suspected that the embassy chose this tactic to prevent the legalization of a surrogacy arrangement after the fact, as acknowledging and certifying his paternity would oblige the embassy to issue Julia's identity documents and thereby indirectly legalize this particular surrogacy arrangement.

The ways in which the two states, India and Germany, approached and handled these two cases were not only different but contradictory. In both cases, India tended to regard the children as German, while Germany did the opposite, regarding the very same children to be Indian. The signatures of these two states thus resulted in refusals to issue (or physically sign) the documents

necessary for the children to receive legal identities valid in both countries—and, linked to this, citizenship.

Furthermore, as we have shown, these documentary practices do not take place within a static legal system; they may be subject to negotiation, especially in problematic cases. These negotiations can go far beyond the documents in question and touch upon central questions of being and belonging. For example, the Indian Supreme Court, in its hearing concerning the Balaz twins, expressed concern by asking if

> an Indian baby is a commodity [. . .] Do we treat children born out of surrogacy as a commodity? In the end we have to ask if this is a country where people are going to enter a contract to buy or sell children. (Rajagopalan, 2009)

In the opinion expressed by the court, the debate on statelessness seemed to blend together with ethical questions about "creating" children through an exchange of money. The focus was on the surrogate, who was "paid to relinquish" her rights to the children, and the different notions of surrogacy in the two countries and cultural contexts involved. This became evident in the legal back and forth over the definition of "mother" in the Balaz case. After all, Indian citizenship could be granted on the basis of one of the parents being Indian by birth, and the Indian "parent" invoked here was both the surrogate and the egg donor. "Motherhood" came to occupy a particular legal meaning in the Balaz case, as discussed by Jan Balaz's former counsel, who attended the case's hearing at the Indian Supreme Court in 2010:

> In the case of Balaz, the egg was from an undisclosed lady, which made the children half Indian.[13] Accordingly, the [Gujarat] High Court saw the "mother" as Indian—therefore, the children were entitled to Indian passports. Now, the definition of "mother" was not clearly laid out, but [was] broadly understood as being the woman who gives birth. In that sense, the "mother" in the Balaz case was Indian too. The Gujarat High Court ruling was challenged by the Indian government, as in most surrogacy arrangements here, the mother is usually Indian. There was an objection on the grounds of [the] definition of "mother." The implication was that there would be a misuse of the process, in the sense that giving citizenship to children born of surrogacy arrangements involving foreign nationals would lead to these children, in case they are not adopted, becoming nationals of India and adding to the already burgeoning population. (Nikhil Goel, former counsel for Jan Balaz, interviewed by Anindita, 27 April 2010)

> According to Jan Balaz's former counsel, the Indian state's cause for concern was twofold: first, adding to the number of unclaimed children in a country that already had a very bad track record on children's rights; and second, the status of Indian citizenship. In the Balaz case, the recurring fear of children born through surrogacy becoming stateless through no fault of their own could only be remedied with the granting of Indian citizenship. That, however, meant the Indian state compromising its sovereign status by issuing an Indian passport as a travel document rather than as an identity document. After their arrival in Germany, Jan Balaz was expected to relinquish his children's Indian citizenship in favor of German citizenship. For the Indian Supreme Court, this constituted disrespect of Indians and Indian citizenship: Opposing the couple's [Jan Balaz and Susanne Lohle's] plea, [the] Solicitor General of India Gopal Subramanium said Indian citizenship should not be used as a "step of temporary nature for a child, or for that matter for any person, to get acceptance in another country. How can law create a citizenship for the purpose of transit?" (Rajagopalan, 2009)

The fear of diminishing the status of the passport—from citizenship document to transit document, in the form of temporary identity papers to be used for travel to Germany—impacted the way in which the Balaz case was handled throughout its hearing. The prospect of granting the stateless children Indian identity only to have it abandoned after the documents had enabled them

to travel to Germany was a great disincentive for the courts to quickly expedite the case in favor of the twins.

This reluctance could also be attributed to squeamishness around monetary transactions involving children and technology. Both the clinic and the in vitro fertilization (IVF) specialist who helped Jan Balaz and Susanne Lohle to have the twins were accused of illegally trafficking children, or "baby selling" (Smerdon, 2012). The "market" rhetoric and the legal gray area surrounding the underground marketplace of transnational surrogacy meant that the entire arrangement and the children born of it were "tainted." The transnational reach of the technology created a situation where the work of "legitimation" was made difficult (Coutin et al., 2002).

The rejection by another sovereign state (Germany) further tainted the Balaz twins. Their being "unwanted" exacerbated the situation for the Indian government, which suddenly had to grapple with the emergence of an industry that was clearly operating in a sphere of ambiguity. To this day, the large number of unwanted and abandoned children in India is a source of anxiety for the Indian state. Many of these children used to be adopted through the transnational circuit until a Supreme Court judgment in 1984 (*Lakshmi Kant Pandey vs. Union of India*) deprioritized international adoption in favor of Indian couples adopting domestically (Yngvesson, 2010). The 2016 ban on transnational surrogacy followed a similar logic, being strongly influenced by, on one hand, anxiety regarding abandoned babies in transnational surrogacy and, on the other hand, reports of surrogates being exploited (Nair, 2016). In the case of the Balaz twins, the "abuse" of Indian identity documents was ultimately circumvented through elaborate negotiations, finally leading to an interim "travel document" that enabled the twins to travel to Germany as well as subsequently facilitating the their acquisition of citizenship there.

In Germany, legal interactions with children born through surrogacy abroad are further complicated by the fact that surrogacy is prohibited—both the necessary medical procedures (by the Embryo Protection Act, which was introduced in 1991) and the brokering of surrogacy arrangements (by the Adoption Placement Act, which was amended in 1989 to include the arrangement of surrogacy). This issue became evident in the consular officer's statement to Andreas that surrogacy is *contra bonos mores* ("against good morals") and thus against German law. However, the Embryo Protection Act and the Adoption Placement Act rule that neither the commissioning parents nor the surrogate should be punished.[14] This has led to friction, not only in intercountry arrangements such as those described in this article, but also in different settlements and court decisions within Germany. Several German court decisions in the last decade have acknowledged the parenthood of persons whose child or children was/were born through surrogacy, while other German courts have clearly positioned themselves against this. Whereas some of these decisions were primarily informed by the well-being of the child, who often had already been living with its intended parents for months or even years, others were mainly concerned with the illegality of surrogacy arrangements in Germany, which the issuing courts felt justified a refusal to acknowledge parenthood. In these latter cases, however, children were not removed from their families, though some courts, such as the Frankfurt District Court, denied commissioning mothers permission to adopt their children as stepchildren (Frankfurt District Court, 9 April 2018, 470 F 16020/17 AD). As grounds, they cited the German Civil Code (§ 1741 (1)), which allows courts to block adoption if the procurement of the child was unlawful or contrary to public policy and if adoption is not "necessary" for the best interests of the child. Nevertheless, such decisions have often been rejected and overturned by higher level courts. The 2018 Frankfurt District Court decision cited earlier, for example, was overturned by the Frankfurt Higher Regional Court on 28 February 2019 (1 UF 71/18).

In Germany, hesitation to enable the adoption of children born through surrogacy is motivated by ethical and moral considerations. Here, one of several major arguments against surrogacy is that

it violates human dignity: the dignity of the gestational surrogate, who is widely assumed to carry a child for others only out of financial need and desperation, and the dignity of the child, who, from this perspective, is commodified and traded. The repudiation of surrogacy was even codified in the coalition agreement between the Social Democrats and the Christian Democrats/Christian Social Union for the 2013–2017 legislative period: "We reject surrogacy because it is incompatible with human dignity" (CDU et al., 2013: 99).

While some concerns were thus similar in India and Germany, particularly those regarding the commercialization and commodification of women and children, in both of the cases mentioned earlier, German authorities were in a much more comfortable position as Germany was not the sending country but the receiving one. The birth of children on Indian territory to Indian women forced India to find solutions regarding the status of those children. In contrast, Germany's gatekeepers, in the form of embassy registrars and consular officers, were able to keep those same children out of their country by not issuing the appropriate identity documents. The friction between the two legal systems and their documentary practices and signatures is thus not necessarily between equals. Rather, it can be understood in terms of global inequality and stratification.[15]

Conclusion: fragile endorsement or documents that "misfire"

In our discussion of the Balaz and Schuster cases, we have shown that documents are not necessarily directly linked to the actual birth of a real child; rather, the birth certificate only "lead[s] back to birth as a legally cognizable event" (Yngvesson and Coutin, 2006: 178). If documents do not follow predetermined trajectories, as was the case in both of the above examples, the recoupling of the certificate to the birth is interrupted. As we illustrated, the birth is thus not a legally cognizable event, and the child whose birth should have been certified is stuck in limbo. In both cases, the interruption resulted from two main issues: first, the involvement of more than one man and one woman in the creation of the child or children, and second, a clash between legal systems that assigned parental belonging differently. In both cases, the documents that should have certified and thereby legalized the children's births "misfired." This event, an "act of failing to achieve the act [. . .] not because something is missing, but because something else is done" (Felman, 2003, quoted in Posocco, 2011: 449), caused the two families to remain in India for a year and a half and 2 years, respectively.

In the Balaz case, the misfiring began with the issuance of the birth certificate that named Jan Balaz and Susanne Lohle as the children's birth parents, although a third person, the surrogate, had gestated and birthed the twins. While this initial version of the document could have followed the trajectory of other birth certificates that have certified and legalized the birth of a child to German parents abroad, in this case, doubts about the document exacerbated the disruptions in the process, which only ended in the family's travel to Germany after 2 years of negotiation and the involvement of a number of attorneys, courts, and diplomats. We have no information about the continuation of the case in Germany, but in all probability, after their return home, Balaz and Lohle adopted their children—itself a several-year-long process that is not only draining, but also marked by uncertainty. The abovementioned court case from Frankfurt, where an intended mother was denied the opportunity to adopt her surrogacy-born child, is an example of such a disrupted surrogacy-cum-adoption trajectory. While the question of "who the parents are" is difficult to clearly answer in surrogacy arrangements, in transnational arrangements, the clashing legal signatures of different states further complicate the issue and may even prevent adoption of the child or children, at least in the short term.

For the Schuster family, the misfiring of documents took a different shape: here, it was especially the consular officer's disclaimer on the documents that she did not believe what she was certifying that severely changed the documents' trajectory and prevented Julia's inclusion in the German birth registry for several years. An even more dramatic case occurred in Italy, where a 6-month-old child who had been born through surrogacy in Russia was removed from his family after doubts arose regarding the accuracy of his documents. These doubts were expressed by the very same Italian embassy in Moscow that had issued the documents in the first place. A subsequent DNA test revealed that neither of the intended parents was genetically related to the child, who was then placed in a children's home and, later, a foster family. The case even made it to the European Court of Human Rights (2015, *Paradiso and Campanelli vs. Italy*, Application no. 25358/12), which criticized the removal of the child from its social family but claimed that at the time of the judgment in 2015, he had "undoubtedly developed emotional ties with the foster family with whom he had been living since 2013" and that, therefore, it could not oblige "the Italian State to return the child to the applicants."

Transnational surrogacy arrangements are thus subject to frictions and discrepancies between legal approaches, laying bare some of the weaknesses of such arrangements and creating new vulnerabilities, especially for surrogates, children, and their intended parents. In addition, as the comparison between India and Germany shows, stratification does not only exist on the micro level involving surrogates and intended parents. It can also be observed on the national level, with countries such as India forced to deal with children who are stuck in legal limbo but at the same time physically present on Indian territory and unable to leave due to their legal inexistence. Countries such as Germany, meanwhile, can easily avoid dealing with these children as long as their gatekeepers (in the form of consular officers and ambassadors) refuse to issue documents that would enable them to travel to Germany and become a citizen.

Although India has now closed its doors to foreigners seeking surrogacy, new and often legally uncertain "reprohubs" (Inhorn, 2015) and "repronubs" (see the article by Whittaker, Gerrits, and Weis in this special issue) have emerged on the global surrogacy map. Moreover, in order to circumvent or embrace legal discordance, surrogacy has become hybridized (Whittaker, 2018) and fragmented, taking on the fluid form of "reprowebs" (König and Jacobson, 2021), with gametes donated in one country, IVF performed in another, surrogates traveling back and forth between countries with different legal regulations, and children being born in yet another country. In this global setting—which has recently been severely disrupted by the COVID-19 pandemic (König et al., 2020)—the trajectories of documents have become increasingly sinuous, involving several countries with differing legislation. It remains to be seen how these developments will affect surrogates, children, and intended parents in transnational surrogacy arrangements in the long term and in post-pandemic times.

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Notes

1. This issue has also become particularly salient during the 2022 Russian war of aggression against Ukraine, which began after this article was written. The existence or nonexistence of identity papers has become a matter of life and death as newborns without identity papers officially do not belong to their intended parents and, therefore, cannot be brought out of Ukraine if the surrogate refuses to leave the country. This war is thus a prime example of the vulnerabilities that result from missing papers.

2. There have, however, been several psychological studies, including a longitudinal study on children conceived through reproductive donation, by the Centre for Family Research at the University of Cambridge (Golombok et al., 2013; Golombok et al., 2017; Jadva et al., 2012; Zadeh et al., 2018).
3. In fact, article 24 of the International Covenant on Civil and Political Rights states that "Every child shall be registered immediately after birth and shall have a name" and that "Every child has the right to acquire a nationality." (Office of the High Commissioner for Human Rights, 1966). We thank reviewer 1 for their allusion to this reference.
4. The relinquishment document, which is central to surrogacy arrangements in India, does not exist in the same form in other countries. Just as national laws differ greatly between countries, so too do surrogacy regulations. For an overview of different national surrogacy regulations (albeit a slightly outdated one), see Trimmings and Beaumont (2013).
5. In some cases, only one parent is listed on the certificate. In India, this is usually the (unmarried) mother, who may, for example, choose not to disclose the father's identity. More recently, however, there have also been birth certificates issued that only mention the father (Majumdar, 2017).
6. Kinship and citizenship are not necessarily fixed, however, and can be changed in, for example, the case of adoption and/or application for multiple citizenships.
7. As has also been established in some legal decisions regarding surrogacy in the United States, such as *Johnson vs. Calvert* in 1993 (Dorfman, 2016).
8. Many countries, however, practice a combination of the two, although they usually privilege certain aspects of one of the two approaches (cf. Honohan and Rougier, 2018).
9. There was, in fact, another prominent surrogacy case in India that made frequent headlines from 2008–2009: the case of baby Manji, who was unable to travel back to Japan with her Japanese father. There were multiple complexities in the case, including Manji's intended parents divorcing just before her birth and the resultant relinquishment of all claims on Manji by her intended father's ex-wife (primarily because she had not donated her own gametes to the surrogacy). As per Indian law, single men cannot adopt baby girls, and the only way that Manji could be taken to Japan was if a female guardian stepped in to facilitate her "adoption." This is when Manji's paternal grandmother became her "mother." Japan and India had to engage in bilateral negotiations to facilitate Manji's travel, but it was far less acrimonious than the case of the Balaz twins, as Japanese-Indian ties remained cordial.
10. The story presented here is an abbreviated version of an extremely complex case and thus does not include all of the details.
11. In order to protect their identities, names, and other identifying information have been changed.
12. Until the introduction of same-sex marriage (*Ehe für alle*) in Germany in 2017, it was virtually impossible for same-sex partners to adopt children not related to either of the partners.
13. Jan Balaz, who is likely to have selected the donor from a pre-approved list, provided this information to his counsel.
14. This is likely due to the wish to protect the best interests of the child, as incarceration of its parents would leave it without parents.
15. This also becomes obvious when we compare the example of transnational surrogacy in India with the same procedure in North-North arrangements, such as German-US surrogacy. In the latter case, due to *jus soli*, children born on US territory automatically receive US citizenship. Moreover, many surrogacy-friendly US states determine parenthood in surrogacy cases through court decision, either during the pregnancy (with a "pre-birth order") or after the child's birth (with a "post-birth order"). These orders "make" the parents, who then are listed on the birth certificate. In a seminal decision in 2014, the German Federal High Court of Justice ruled that a US court order regarding parenthood through surrogacy had to be acknowledged by German courts. The underlying problem, however, is the prohibition of surrogacy in Germany more generally, which, as one reviewer of this article noted, "kicks the can of reproduction down the road to other countries." While it is true that the prohibition does not inherently discriminate against (or establish preference for) particular countries (or, therefore, establish more or less complicated procedures for acquiring citizenship and familial belonging), in practice, it does. The cost of surrogacy in the United States is not affordable for most intended parents, in contrast to the cost in countries like India, Ukraine, or Georgia—all of which have a steady supply of women willing to become surrogates for much less compensation.

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