

IV. Perspectives

The recognition of the right to democracy offers significant potential for the expansion of the protection of human rights. It is an expression of the progressive development of human rights, which ultimately leverages democracy toward stages of greater substantive density. It is appropriate to distinguish the main ways in which this right may have legal effectiveness within the Inter-American system. In some situations, it will reinforce the guarantee of political rights already enshrined in the ACHR; in others, it will extend the implications of the corresponding specific right with the perspective of the impact on the democratic system of the alleged violation.

REFERENCES:

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2. Inter-American Court of Human Rights. Case of López Lone et al. v. Honduras : Judgment of October 5, 2015 (Merits, Reparations and Costs), para. 164.
3. Inter-American Court of Human Rights. Case of Yatama v. Nicaragua: Judgment of June 23, 2005 (Preliminary Objections, Merits, Reparations and Costs). concurring opinión of judge Diego García-Sayán, para. 7.
4. Inter-American Court of Human Rights, Case of Capriles v. Venezuela, Judgment of October 10, 2024 (Preliminary Objections, Merits, Reparations and Costs). Concurring opinion of Judge Eduardo Ferrer Mac-Gregor, para. 110.
5. Inter-American Court of Human Rights. Case of Manuel Cepeda Vargas v. Colombia (Preliminary Objections, Merits, Reparations and Costs), Judgement May 26, 2010, para. 177.
6. Inter-American Court of Human Rights, Case of Castañeda Gutman v. México. 2024 (Preliminary Objections, Merits, Reparations and Costs), Judgement of August 6, 2008, para. 140.
7. Morales Antoniazzi, Mariela (ed.), *El test democrático interamericano frente al COVID-19 (Inter-American Democratic Test in the Face of COVID-19)*, Querétaro: Instituto de Estudios Constitucionales del Estado de Querétaro – MPIL – DFG, 2021.

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INTERNATIONAL REGULATION OF LEGAL PARENTAGE : FROM NORMATIVE DIVERSITY TO UNIVERSAL HARMONISATION

Origin constitutes one of the foundational elements of a child's legal status, carrying profound significance across their life and serving as the determinative basis for a broad range of consequential legal relationships — including citizenship, family ties, inheritance, and beyond. These questions implicate children's

fundamental human rights (see, e.g., the UN Convention on the Rights of the Child, Arts 7 and 8). The case-law of the European Court of Human Rights offers particularly instructive examples in this regard [1]. The frequency of situations in which the choice of applicable law for the determination of a child's origin becomes a matter of central legal importance, where a family seeks assisted reproductive services in a foreign jurisdiction, where a child is born during the mother's temporary residence abroad, or where one or both parents hold foreign nationality or permanent residency status.

The conflict-of-laws approaches adopted by states in respect of the establishment of maternity and paternity are notably diverse. As a primary connecting factor for determining the law applicable to a child's origin, national legal systems have variously embraced: *the law of the child's nationality at birth* (Art. 83 of the Bulgarian Private International Law Code, Art. 33 of the Law on the Reform of the Italian Private International Law System, Art. 87 of the Law on Private International Law of Montenegro), *the law of the country of the child's habitual residence* (Art. 50(1) of the Georgian Private International Law Act), *the mother's personal law on the date of the child's birth* (Art. 311-14 of the French Civil Code), *the law of the parents' last common nationality* (Art. 18 of the Greek Civil Code), etc. The range of alternative and subsidiary connecting factors is no less varied, extending from *the law of the child's habitual residence* (Art. 19 of the Introductory Act to the German Civil Code), *the law of the mother's habitual residence* (Section 54(1) of the Czech Private International Law Act) *to the law of the country in which the circumstances giving rise to the dispute over the child's parentage arose* (Article 51 of the Georgian Private International Law Act). Comparable diversity is equally apparent in the rules governing international jurisdiction over proceedings for the establishment and contestation of parenthood.

This fragmentation of regulatory approaches gives rise to what are classically termed *limping legal relationships* — relationships that are legally valid and recognised in one jurisdiction, yet denied recognition in another. In cases of *limping parenthood*, it is invariably the children who bear the greatest burden: their uncertain status under family law may preclude them from acquiring citizenship, deprive them of any right to maintenance, and leave them without a legal representative when urgent decisions — such as those concerning medical treatment — must be made.

At the international level, the Hague Conference on Private International Law (HCCH) has been engaged in elaborating a draft convention on legal parentage — encompassing, among other matters, parentage arising from international surrogacy arrangements — though its final text has yet to be published [2]. The applicable law dimensions of this subject were addressed in the HCCH's November 2022 Final Report on the feasibility of one or more private international law instruments on legal parentage [3].

The experts identified a universal international legal instrument as the most effective regulatory solution, since broad state participation would maximise predictability, certainty, and continuity of legal filiation in cross-border situations, while ensuring the protection of human rights — including children's rights as enshrined in the UN Convention on the Rights of the Child. To this end, they proposed two related but distinct instruments: a Convention on the Establishment and Recognition of the Legal Parentage of Children, and a Protocol on cross-border

surrogacy arrangements as an annex thereto.

The separation of the surrogacy Protocol is a deliberate and pragmatic choice, reflecting the divergent domestic approaches to surrogacy and to the establishment or recognition of legal parentage across states.

The Final Report's analysis of conflict-of-laws rules on legal parentage is structured according to the method by which filiation is established: by operation of law or administrative act (extra-judicial act, the predominant approach in practice) and through judicial decision.

The proposed mechanism for determining the applicable law for the extrajudicial establishment of legal parentage comprises three rules.

The general rule designates the *law of the child's State of birth* as the applicable law. The rationale is that the parents typically have a legally relevant connection to the State of birth, that connection is readily ascertainable, and it is in that State that the child's birth is registered — and, in the great majority of cases, nationality is determined. Applying the law of the State of birth accordingly enables the registering authority to apply its own law.

This general rule is not, however, of universal application. Where a sufficient connection between the (presumed) parents and the State of birth is absent — for instance, where the child was born abroad while the parents were temporarily present, such as during a holiday — a fallback rule applies: the *law of the State of habitual residence of the person who gave birth*, at the time of the child's birth. This rule is triggered where, at the time of birth, neither (presumed) parent was habitually resident in the State of birth.

The third rule is of an exceptional character, applicable where the question of parentage arises only after the child has established habitual residence in a State other than the State of birth. In such circumstances, the *law of the child's State of habitual residence* may govern, provided this serves the child's best interests.

As an alternative to uniform applicable law rules, the Final Report also contemplates recognition-based rules whereby legal parentage established abroad without a judicial decision could be recognised subject to certain conditions — such as a proximity requirement or correct application of the otherwise applicable domestic law. Though the Group noted that this approach raises its own feasibility challenges, particularly for states whose current practice lacks a non-judicial act capable of serving as the basis for recognition.

With respect to the judicial establishment of parentage, a comprehensive approach is proposed, encompassing not only conflict-of-laws rules on applicable law but also rules on international jurisdiction, conditions for the recognition of foreign judgments, and grounds for refusal of recognition. The Experts' Group did not reach consensus on whether the applicable law rules for extrajudicial and judicial establishment (or contestation) of parentage should be differentiated, while acknowledging that states which rely exclusively on unilateral PIL rules — to the exclusion of foreign law — may face particular difficulties in applying bilateral conflict-of-laws rules.

The elaboration of a regulatory mechanism for the Protocol on surrogacy has proven one of the most demanding challenges confronting the expert community. The complexity of international regulation in this area stems from two converging sources: the profoundly divergent approaches of states to surrogacy itself, and the multiplicity of private interests requiring protection. Children born through cross-

border surrogacy arrangements are not the only vulnerable party — surrogate mothers, particularly those from economically disadvantaged backgrounds, and prospective parents, who are often in desperate pursuit of parenthood, are equally at risk of exploitation, and any viable framework must address the protection of all parties concerned.

Harmonisation is further complicated by the variety of methods through which states that permit surrogacy provide for the establishment of legal parentage: from the issuance of a birth certificate under a general administrative procedure, to the judicial transfer of parental status by court order.

Against this backdrop, the focus of the expert community's discussions has centred less on the determination of applicable law and more on forms of international cooperation and regulatory standards capable of ensuring the protection of children born through surrogacy, irrespective of the circumstances of their birth.

Conclusion. The legal determination of parentage in cross-border situations remains one of the most fragmented and contested areas of private international law. The diversity of connecting factors employed by national legal systems, combined with the absence of a binding international instrument, continues to generate limping legal relationships whose consequences fall most heavily upon children - undermining their rights to identity, nationality, maintenance, and legal representation.

The work undertaken by the Hague Conference on Private International Law represents a significant step toward remedying this situation. The proposed two-instrument framework — a Convention on legal parentage and an annexed Protocol on cross-border surrogacy — reflects a pragmatic acknowledgment of the profound divergences among states, while preserving the overarching goal of continuity of legal filiation across borders. The finalisation and adoption of the HCCH instruments will therefore constitute a defining moment for the international community's capacity to respond to the realities of modern family life in an increasingly mobile world.

REFERENCES:

1. See Judgment of the Court (First Section) of 31 August 2023, application no. 47196/21: C v Italy; Judgment of the Court (Second Section) of 6 December 2022, application no. 25212/21: K.K. and Others v Denmark; Judgment of the Court (Third Section) of 22 November 2022, application nos. 58817/15 and 58252/15: D.B. and Others v Switzerland.

2. An overview on the HCCH Parentage/Surrogacy project is available at: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

3. Parentage / Surrogacy Experts' Group: the feasibility of one or more private international law instruments on legal parentage: final rep., Nov. 2022, № 1. Hague Conference on Private International Law. <https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf>.