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Book review: International Surrogacy Arrangements

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INTERNATIONAL SURROGACY AGREEMENTS. LEGAL REGULATION AT THE INTERNATIONAL LEVEL. Eds K Trimmings and P Beaumont

Oxford: Hart (www.hartpub.co.uk), 2013. xxvii + 559 pp. ISBN 9781849462808. £65.

Should – and if so, how should – the international surrogacy market be regulated? Is access to cross-border surrogacy a right attaching to the free movement of persons, or a risk for women in developing countries? Is this an issue of personal ethics or of global economics? Arguments pit personal autonomy against public policy; democracy against sovereignty; the right to a child against the protection of women; anthropology against discrimination. The heated moral, religious and political debates which in recent years have followed spectacular revolutions in reproductive technology are naturally reflected in widely divergent national standpoints, of which international surrogacy agreements – that is, between intended parents issuing (usually) from a surrogacy-hostile jurisdiction and a surrogate in a surrogacy-friendly environment – have become the focal point. The ensuing conflicts of laws are all the more complex in that they also take place in the wake of the liberalisation of same-sex marriage in a growing number of jurisdictions, so that the issue of surrogacy arises as one of the right to a child; restricting its benefit to sterile heterosexual couples then appears as inherently discriminatory. But the backdrop of such conflicts is also one of increasing global economic and social inequality. Whereas the cross-border demand for children tends to come from developed Western (often surrogacy-hostile) countries (such as France), some developing states (such as India), when not strictly prohibitive on religious grounds, have encouraged or abetted a growing surrogacy industry which cannot but take its toll on a generation of young women.

This highly informative book contains, first of all, a remarkable wealth of comparative legal materials on surrogacy, in the forms of national reports, covering a large number of jurisdictions from both sides of the international surrogacy market. These reports reveal that the legal issues – and potential conflict of laws – are as intractable as the moral debates. They range from the cross-border consequences of the criminalisation of surrogacy, or indeed its constitutional prohibition, to the intricate challenge of the effects of surrogacy, when permitted, on family relationships from the perspective of all the persons involved in the conception and birth of the child. Here, we find the (contract law) issue of the rights of the surrogate to withhold the child, and the obligations of the intended parents if the child proves to be “abnormal” in some way. But beyond the contractual relationship between the private parties to the agreement, public policy may interfere with the civil status of the child in the home state. Thus, the European Court of Human Rights is currently seized of a case involving twins born of an American surrogate, which has occupied the French legal system for several years: the intended parents, a French non-biological mother and their biological father, have been prevented from establishing their parenthood in France, their own *fraude à la loi* overriding any further consideration of the rights of the child.

In this challenging context, the editors of the volume then provide their own analysis of the way in which an international regulation might be designed. The result is a template for a future Hague Convention, largely inspired from the model provided by the highly successful 1980 Convention on inter-country adoption. Indeed, there are clear analogies between the various socio-economic and personal issues which arise in the context of inter-country adoption, and the difficulties raised by international surrogacy agreements. To a large extent, the dwindling supply of adoptable children in developing countries is both the cause and effect of the rise

of surrogacy. The idea, then, is to use a similarly cooperative system both to tackle surrogacy trafficking and the exploitation of vulnerable women, and to ensure that a child born of a transnational surrogacy agreement is not left in limbo without a civil status and a personal identity, a victim of a conflict of laws. Under such a system, central authorities designated in the country of residence of each of the parties to the surrogacy agreement channel, filter and mediate the offer and the demand. The advantages lie in the avoidance of any direct contact—with its risk of moral or financial pressure on the surrogate—between the individuals concerned, and adequation between the applicant(s)' legal status as potential parent(s) and the vocation of the child under the law of the surrogate's residence to be considered as theirs.

While highly convincing, such allocation of jurisdiction—or, more precisely, of responsibilities as between the authorities of the country of the surrogate and the country of the intended parents—is likely not to suffice. In order to gain the adhesion of more reluctant states, there may be a need to establish a set of core substantive principles relating to such matters as whether or not the surrogate can also be the biological mother; whether children born through surrogacy may have access to birth records; whether and to what extent there may be compensation for the surrogate; whether private intermediaries may receive fees; and much more. On all these issues, with reference to the national reports, the authors are careful to point out the difficulties which lie in wait before any such consensus can form. They are also aware that, as in the case of inter-country adoption, any such regulation brings with it the risk that a black market for international surrogacy may spring up and thrive alongside it. Indeed, if the surrogate is not the biological mother, the potential demand for surrogacy is likely to be even higher, since racial difference does not weigh into the equation: an Indian surrogate may provide Western parents with a white child. Furthermore, the argument is often made, from the standpoint of the more reluctant jurisdictions, in the name of the personal dignity of the surrogate or the battle against the exploitation of women, that to regulate surrogacy (whether domestic or international) is to be complicit in the legalisation of the very wrongs it seeks to remedy. However, the editors of this book make out a highly plausible case that an attempt should nevertheless be made to coordinate, as far as possible, potentially diverging national legal responses, in the best interests of the child, the surrogate and the intended parents.

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