1. Surrogacy and the law: an introduction

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One of the most fundamental familial and even human concepts is parenthood. The parent–child relationship is often perceived as the pinnacle of committed relationships and a lens through which to define and understand other human interactions. Surrogacy challenges this fundamental concept in a significant way. While the legal definition of parenthood changes between circumstances, jurisdictions and times, the basic understanding of parenthood seemed to be rather stable until the age of assisted reproductive technology (ART) and particularly surrogacy. Surrogacy is an intervention in nature and parenthood that is perceivable to the naked eye. It is medically as taxing, if not more so than almost any other ART procedure. It is probably more prolonged and public than any other ART procedure. Yet it seems like the deep longing and pressing need of many facing fertility (and social) hardships have made it so that surrogacy is becoming increasingly available and prevalent, while the legal recognition and formalization of the matter is lagging behind. This has complex implications for all those involved in surrogacy, not least the children themselves who are born through surrogacy arrangements, and into an ever more complex world.

While the medical and ethical challenges of surrogacy are mapped out to a large extent, the complexity of surrogacy has so far received less than a satisfactory amount of attention. And while the public is mostly concerned with the local availability of surrogacy within different jurisdictions and the cross-border regulation of surrogacy as a way to circumvent local limitations, other aspects of surrogacy have so far been, for the most part, disregarded. Many legal works, including some by the editors and contributors of this volume, have addressed various aspects of the legal regulation of surrogacy. Those works have laid the ground for a more complex evaluation of surrogacy. This Handbook aims to engage with surrogacy on this next level.

The understanding of the law as composed of distinct legal fields is not inevitable. In fact, this is a rather recent notion. Surrogacy is a good reflection of this fact. While it might seem most closely connected with family law (as it centres on the creation of parent–child relationships) or human rights law (as it touches upon the rights of the child, surrogate and intended parents), the reality of surrogacy is in fact much more complex than that. It involves contract law, as surrogacy arrangements are usually contractual. It involves labour law, as the surrogate might be seen as an employee (or not). It involves various aspects of public law, including criminal law, citizenship law. And it is obviously, as other works demonstrate, a particularly apt subject for comparative investigation, including due to the diversity of legal approaches taken by nation states around the world. This Handbook aims to offer the reader a full introduction to surrogacy law, by engaging with surrogacy through a plethora not only of jurisdictional perspectives, but of intra-legal perspectives as well. It contains contributions from legal scholars (both senior and junior) from across the globe, and seeks to provide a scholarly, state of the art overview of research and the scope of current thinking in the field. The Handbook is written to be useful for different groups of readers, including academics, practitioners and pol-
icymakers, but also accessible and relevant to students (both undergraduate and postgraduate) with an interest in the legal aspects of surrogacy.

OVERVIEW: CORE THEMES

There is a growing discourse on surrogacy from the legal perspective, reflected in a growing volume of literature on the topic. However, as often happens with discourses on discrete legal topics, certain critical themes continue to be overlooked or relegated to the margins. This *Handbook* seeks to bring greater attention to these themes. To achieve that, it tackles significant issues related to surrogacy in the legal context, in their theoretical, cultural and political complexity, and touches on key controversies including those pertaining to globalization, power, gender, sexual orientation, genetics, human rights and family relations. By incorporating these themes and perspectives along with traditional analytical perspectives, the *Handbook* aims to deepen the readers’ understanding of surrogacy and the challenges that surrogacy presents from a multi-faceted legal perspective.

The *Handbook* is divided into four parts. It begins with perspectives on surrogacy and rights (Part I), before moving on to exploring the interface between surrogacy and different areas of law (Part II). The focus of Part III is on the cross-border dimension of surrogacy arrangements, and the *Handbook* ends with regional perspectives on surrogacy from across the world (Part IV).

PART I: SURROGACY AND RIGHTS

The authors in this part explore surrogacy from the perspectives of various legal rights. In the first of these chapters, Nola Cammu and Machteld Vonk (Chapter 2) examine the relevance of genetics in surrogacy, focusing on two separate facets that complexify this debate. First, they expound the potential limitations of the current categorization of surrogacy, which distinguishes between gestational (‘high-technological’) and genetic-gestational (‘low-technological’). Second, they examine the role genetics has played in the legal debate on surrogacy both globally and in the jurisprudence of the European Court of Human Rights (ECtHR). Kimberly Mutcherson (Chapter 3) then explores the intersection between surrogacy and global justice. She introduces the idea of reproductive justice as a framework for understanding and protecting choices made about reproduction and family life and argues that surrogacy should be considered by policymakers as a form of labour for the purposes of regulation.

The authors of the next three chapters explore the topic of surrogacy from the perspective of the rights and interests of the child, albeit approaching it from different angles. Claire Fenton-Glynn (Chapter 4) discusses the theoretical and philosophical considerations pertaining to the principle of the ‘best interests of the child’ as well as its practical implications. In doing so, she highlights the way this principle has been used by legislators and judges in different jurisdictions throughout the world, and argues that in deciding whether or how to recognize the results of a surrogacy arrangement after the child is born, the child’s best interests must always be considered, and given primary importance. Then, in the chapter on surrogacy, intermediaries and the sale of children (Chapter 5), David Smolin and Maud de Boer-Buquicchio focus on the links between the sale of children and other potential human rights violations.
They explain that intermediaries facilitate and structure commercial surrogacy markets which practice or risk sale of children, and which lack adequate safeguards to protect the rights of the child. To tackle the problem, the authors propose an enforcement and regulatory focus primarily on intermediaries. This trio of chapters ends with Mia Dambach and Nigel Cantwell’s contribution on the child’s right to identity in surrogacy (Chapter 6). The authors focus on five key phases when the child’s right to identity needs to be guaranteed: creation, modification, falsification, preservation and restoration, whilst demonstrating the heightened risks of rights violations in surrogacy arrangements, given that the great majority of decisions affecting the child’s identity rights occur pre-birth or shortly after. The authors propose that states respond to this problem by establishing effective safeguards as well as mechanisms to speedily re-establish the child’s identity.

In the next chapter (Chapter 7), Nensi Sinanaj examines a range of potentially discriminatory aspects of the practice of surrogacy related to the child, the surrogate mother and the intended parents. She concludes that various aspects of the legal landscape currently governing surrogacy are discriminatory, due to the application of domestic surrogacy laws and the practical realities involved. Then, in Chapter 8, Alina Tryfonidou explores the approach taken towards surrogacy by the ECtHR and the European institutions, in particular the Court of Justice of the European Union (CJEU). She focuses on the cross-border recognition of the effects of surrogacy arrangements, including vis-à-vis the European Union free movement provisions in situations where there is an exercise of EU free movement rights.

In the next chapter (Chapter 9), Vanessa Gruben, Stefanie Carsley and Alicia Czarnowski examine surrogacy through the lens of the intended parent(s)’ sexual orientation and gender identity. The authors use Canada as a case study to illustrate how law and policymaking impacts family building through surrogacy for LGBTQ2S+ families.

In the last chapter in this part (Chapter 10), Yasmine Ergas addresses the rights of surrogate mothers under international human rights law. This chapter can be seen as complementary to Chapter 4 and Chapter 5 (see above) in that it discusses the compatibility of commercial surrogacy with fundamental norms regarding human dignity, in particular the prohibition of discrimination against women, but also the prohibition of the sale of children, which is at the centre of Chapter 5. The author argues that in order to safeguard the human rights of surrogate mothers and children, surrogacy must be regulated under the auspices of family law, not contract law.

PART II: INTERFACE BETWEEN SURROGACY AND DIFFERENT AREAS OF LAW

Part II of this Handbook discusses the interface between surrogacy and different areas of law. Brian Bix (Chapter 11) begins with an analysis of the intersections of surrogacy and contract law. The author provides an overview of the legal regulation of surrogacy contracts, focusing on the varying legal approaches of different states in the United States, a jurisdiction where contractual approaches dominate surrogacy regulation. Annick Masselot and Martha Ceballos (Chapter 12) then explore to what extent employment law can provide employment protection for parties to a surrogacy agreement. They argue that employment law, although relevant to surrogacy, remains ill adapted to the complexity of this modern form of procreation. In exploring the interrelationship between surrogacy and criminal law, Ilona Cairns and...
Molly O’Donoghue (Chapter 13) conclude that surrogacy should be regulated, however, not by means of criminal law. The authors believe that criminal law is not the correct regulatory mechanism for surrogacy as criminalization of surrogacy is both unjustified and ineffective, not least because it fails to meet its aim of deterring surrogacy. Patricia Fronk, Jayne Hewitt and Malcolm Smith (Chapter 14) then discuss the intersection of surrogacy and bioethics, focusing in particular on the issue of informed consent. They conclude that commercial cross-border surrogacy as practised today fails to address ethical concerns and breaches modern understandings of informed consent in several ways. This includes the provision of information, the need for understanding and choice, the principle of autonomy, and fails to accord with the commonly accepted standards and legal obligations related to these concerns. One substantive area of law not covered in Part II, but which we note remains ripe for further attention in the context of surrogacy and law, is the interface between constitutional law and surrogacy.

PART III: CROSS-BORDER DIMENSIONS

Part III turns the spotlight onto the cross-border dimensions of surrogacy. Given the evolution of cross-border surrogacy over the past 10–15 years, and the myriad of legal issues this practice triggers – including due to the varying national legal approaches to surrogacy – readers will notice that the threads of cross-border surrogacy from differing legal perspectives run throughout this entire Handbook. However, Part III hones in on some of the legal issues at play in cross-border surrogacy, by bringing forward three specific legal perspectives. First of all, Sharon Shakargy (Chapter 15) discusses the private international law dimensions of surrogacy, focusing on the determination of parenthood in surrogacy. She provides analysis of the ways in which private international law provides avenues by which to deal with this particularly complex aspect of cross-border surrogacy, arguing that applying the personal law of the intended parents in surrogacy provides a way to uphold the human and legal rights of children born through cross-border surrogacy. Turning attention to the foremost intergovernmental effort to-date relating to cross-border surrogacy, Laura Martinez-Mora (Chapter 16) provides an overview of efforts to-date under the auspices of the Hague Conference on Private International Law, specifically relating to legal parentage issues under private international law. She provides the most up-to-date exploration of this work, including analysis of the way forward in this complex area of law where international agreement remains elusive. Rounding out Part III is Michael Wells-Greco’s discussion of the many nationality and immigration issues that abound in cross-border surrogacy arrangements (Chapter 17). Drawing on theory and practice with reference to case examples, the chapter highlights the challenges in establishing nationality for children born through cross-border surrogacy, and the steps that it is imperative for states to take to uphold children’s nationality rights in the surrogacy context.

PART IV: REGIONAL PERSPECTIVES

This Handbook concludes by presenting an examination of surrogacy from a range of regional legal perspectives, and in doing so, brings forward regional legal perspectives that have not to-date previously been presented together. Readers can begin their global exploration of
surrogacy in Chapter 18, where Cristina González Beilfuss provides analysis of Western European approaches to surrogacy, highlighting the mainly prohibitive approach to surrogacy reflected in the majority of the national laws of countries in this region. Given these largely restrictive approaches, the approaches of Western European nations to the globalized realities of surrogacy practices are discussed. Olga Khazova (Chapter 19) brings forward an up-to-date examination of recent changes in Russian law on surrogacy in the Eastern European context, and in doing so provides regional insights into the range of approaches to surrogacy in Eastern Europe, including inconsistencies relating to national approaches to upholding the identity rights of children born through surrogacy.

Mary Keyes (Chapter 20) provides a regional perspective into surrogacy in the Anglo world, taking in the common law jurisdictions of United Kingdom, Australia, Canada and New Zealand. In doing so she highlights the commonalities in the regulation of surrogacy across the four countries surveyed, and provides insights into the dynamic nature of the regulation of surrogacy in all four countries. Elizabeth Aguiling-Pangalangan (Chapter 21) comprehensively explores surrogacy in Asia, a region of the world where surrogacy has both boomed in its practice in some nations, while remaining a highly vexed area of legal practice in others (and in some states both statements are true concurrently). This chapter traverses 17 Asian countries (including all ASEAN member states), examining the surrogacy laws of states that have a total ban on surrogacy (Macao, Indonesia, China, Japan, Cambodia); those that allow altruistic surrogacy but ban commercial surrogacy (South Korea, Hong Kong, Thailand, India, Vietnam); those that provide partial recognition of surrogacy (Malaysia, Myanmar, Singapore) and those with no existing legal regulation of surrogacy (the Philippines, Taiwan, Laos, Brunei Darussalam). Sital Kalantry (Chapter 22) then explores surrogacy in the United States of America. The significant evolution in surrogacy law in the United States over several decades is discussed, as are the associated changing perspectives in United States’ courts when it comes to surrogacy, and the realities of the state-by-state regulation of surrogacy in the United States, rather than the national level (federal) regulation of surrogacy favoured in many other regions of the world.

Nieve Rubaja (Chapter 23) provides a regional perspective on surrogacy and the law in South America. In doing so, the relevance in surrogacy situations of the progressive strengthening of human rights in Latin American legal systems is highlighted, including in the jurisprudence of the Inter-American Court of Human Rights in matters concerning assisted reproductive technology, diversity in families, and children’s rights. The chapter provides analysis of the laws and jurisprudence of countries in the region expressly permitting surrogacy (Brazil, Uruguay); those not regulating surrogacy (Argentina, Bolivia, Chile, Colombia, Ecuador, Paraguay, Peru, Venezuela), as well as an overview of the rest of Latin America. Readers are then provided with insights into gestational surrogacy in Muslim-majority states through Andrea Büchler and Arezoo Sang Bastian’s analysis (Chapter 24). The chapter examines the Islamic legal system and surrogacy from both a Sunni Islam and Shia Islam perspective, before turning to explore surrogacy in the laws of Sunni states (Egypt, Morocco, Saudi Arabia, Tunisia, Jordan, Oman Tukey) and Shia states (Iran, Lebanon).

Unaisi Narawa (Chapter 25) invites readers into an exploration of surrogacy in the Pacific. The chapter presents the legal framework governing surrogacy in Pacific Island states. In explaining that these states do not have laws regulating surrogacy, consideration of other laws applicable to surrogacy is presented, including legislation governing the family and status of children. The future of surrogacy in the Pacific is also explored, in light of the reality that the
Pacific currently remains one of the regions of the world where there remains less interest in surrogacy. Julia Sloth-Nielsen (Chapter 26) brings Part IV of the Handbook to a close, focusing on surrogacy in Africa. The chapter explores surrogacy in Africa first from a thematic perspective (such as cultural and social values), before turning to country-specific analysis of surrogacy from a legal perspective covering legislation, practice and case law (including discussion of South Africa, Ghana, Nigeria, Uganda, Kenya, Botswana, Mauritius, Namibia, Rwanda) and then draws some conclusions in relation to surrogacy in Africa.

As the broad range of chapters in this book shows, surrogacy remains a dynamic and evolving social practice, and by its nature, practice in this area is changing from day-to-day. Despite this reality, this Handbook provides a multi-faceted examination of surrogacy from a legal perspective, and in many instances brings forward what have remained, until now, under-explored perspectives on surrogacy. It is our hope that this Handbook provides you and a wide range of readers with new insights on surrogacy and the law. We hope that the chapters contained in this Handbook are useful to shape your thinking and work in relation to this method of family formation and its implications for all those involved, including the children at its very centre, the range of parental figures with relationships to the children born, as well as the wide range of third-parties that play a role in this practice.