

INTERNATIONAL SURROGACY FORUM 2019
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University of Cambridge, England, United Kingdom

INTRODUCTION

The International Surrogacy Forum 2019, organized by Cambridge Family Law, University of Cambridge, together with the International Academy of Family Lawyers (IAFL) and the American Bar Association (ABA) Section of Family Law, explored a range of issues and challenges surrounding the law and practice of national and international surrogacy from a practical perspective.

Practitioners, lawmakers, academics, and individual participants in the surrogacy process came together to discuss the legal consequences of the rise in international surrogacy arrangements (ISAs) and, in particular, reproductive tourism. The Forum was structured to provide academic analysis, practical expertise, and lived experiences from individuals involved with ISAs in various legal systems around the world. Invited to the Forum were academics, practitioners, government actors, NGO representatives, participants in surrogacy (intended parents and surrogates alike), and children born through surrogacy. Invitations were extended to prospective delegates across a broad spectrum: those with known positions on surrogacy generally, both supportive and in opposition, and those who did not have a clear position on surrogacy. The unifying factor among all the invitees was a significant interest in surrogacy, whether that interest was professional, academic, regulatory, or personal. The final delegate list included approximately 150 participants from over 25 countries from five continents.

The intent of this report is not to provide a complete transcription, but rather to provide a summary of the presentations and discussions that occurred during the Forum sessions.¹ Detailed information about the presentations, including audio and video recordings, may be found on the Forum's resources website.²

¹ This report was prepared by organisers of the Forum, including : Bruce Hale, Esq.; Anne-Marie Hutchinson, OBE, QC; Dean Hutchison, Esq.; Stephen Page, Solicitor; Steven Snyder, Esq.; Colin Rogerson, Solicitor Advocate; and Richard Vaughn, Esq.

² <https://www.family.law.cam.ac.uk/international-surrogacy-forum/resources>.

Discussions have been summarised and organised for clarity. While the authors of this report are confident in its overall accuracy, it must be recognised that this report was compiled from individual notes as well as from recordings of the sessions. Therefore, a certain degree of interpretation and subjectivity may be inevitable. Direct quotations are used sparingly, in circumstances where confirmation was possible. Otherwise, statements by individuals may be reworded. Thus, this report does not in any way claim to reflect the specific views and positions of the organisers or the persons mentioned, but rather an account of the discussion at the Forum. Terminology is kept as consistent as possible in this report, although presenters and delegates may have used alternate terms. External information is cited where helpful.

OPENING OF THE FORUM

The Forum opened with introductory remarks by representatives of the sponsoring organisations, including a statement by Prof Jens Scherpe, the Director of Cambridge Family Law, that “surrogacy itself is not the problem” but rather that the way surrogacy is handled by various countries needs closer examination. To that end, the Forum was structured to examine four principal approaches to surrogacy taken by countries around the world: Prohibitive, Tolerant, Free Market, and Regulatory.³

For IAFL, Anne-Marie Hutchinson, OBE, QC (Hon) emphasized the importance of exchange among the delegates. She stated that the aim of the Forum was to foster dialog on these important issues, and invited the delegates to engage with the presenters during the sessions and with each other while here in Cambridge.

Two questions for the delegates to consider during the Forum were offered by Richard Vaughn of the ABA :

1. How do we as an international community ensure protections for participants in international surrogacy arrangements without imposing unreasonable burdens?

and

2. How can we have recognition of parentage across borders?

³ For further detail on these approaches and categorisation see: JM Scherpe, C. Fenton-Glynn and T. Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, Intersentia, 2019.

After these opening remarks, the Forum began.

BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW

The Law Commission of England and Wales and the Scottish Law Commission published their joint consultation paper on surrogacy entitled "Building families through surrogacy: a new law" on 6 June 2019.⁴ Professor Nick Hopkins of the Law Commission of England and Wales presented a brief overview of the major conclusions and open questions of the consultation paper.

The joint consultation paper starts with the premise that surrogacy is a legitimate and unavoidable form of procreation, and that it must work best for those who directly participate in or result from surrogacy – the children, the surrogates, and the intended parents. The consultation paper seeks to foster a legal environment wherein citizens of the United Kingdom would prefer to remain in the United Kingdom as they participate in surrogacy, thereby minimising the need for ISAs. Specifically, the paper proposes a “New Pathway” for parentage adjudication in the contexts of domestic (within the UK) surrogacy arrangements.

ISAs would continue to require intended parents to follow the existing parental order process to secure their parental status with regards to children born through surrogacy outside the United Kingdom. The consultation paper proposes that surrogacy agencies remain non-profit entities in the United Kingdom, and surrogacy contracts remain non-enforceable. Another element of current policy that would remain unchanged is that legal parentage granted to a child born through surrogacy by a jurisdiction outside the United Kingdom would not be recognised. However, the paper asserts a desire to find a way to permit the recognition of another jurisdiction’s parentage determination if the United Kingdom could be satisfied that the parentage was adjudicated in that other jurisdiction with a level of safeguards that would be consistent with parentage adjudicated in the United Kingdom.

⁴ *Building families through surrogacy: a new law*, Law Commission Consultation Paper 244, Scottish Law Commission Discussion Paper 167, available at <https://www.lawcom.gov.uk/project/surrogacy/> and at <https://www.scotlawcom.gov.uk/law-reform/consultations>.

Included in the consultation paper are new proposals to provide protections to participants in surrogacy. One such example is to make information available to children born through surrogacy about the other participants in their conception and birth – first with non-identifying information at age 16, and then with identifying information when the child reaches the age of 18.

The consultation paper includes many open questions. Two such areas of questions described by Prof. Hopkins were with regards to payment of the surrogate and with the information made available to the child. For payments to the surrogate, there are questions about categories of payments that may be available to the surrogate, and what latitude may be given for the negotiation of payments. For the information that may be made available to children born through surrogacy, questions include whether or not there should be a national registry of information about surrogates, gamete donors, and intended parents, and how children born through surrogacy can identify genetic and gestational siblings.

A delegate asked Prof. Hopkins what would happen under the proposed law if a surrogate objected to parentage vesting in the intended parents – specifically, would the surrogate be the legal mother at that point, or would the court launch a fact-finding process? Professor Hopkins responded that the intended parents would need to launch a legal action regarding parentage in order to achieve their parentage in this situation.

Another delegate asked whether the proposed law draws a distinction between genetic and gestational surrogacy⁵ for the provisions allowing the surrogate to change her mind about allowing parentage to vest in the intended parents. Prof. Hopkins responded that the proposed law makes no distinction between these two types of surrogacy in this situation. Another delegate spoke up to urge the Law Commission to rethink this point, referencing cases of intended parents who were denied parentage of their own genetic children.

⁵ A *genetic* surrogate is a person who conceives a child that is genetically her own (usually by intrauterine insemination) using the sperm of a man other than her husband or partner and who agrees to carry the child to term for intended parents, whether for compensation or not. A *genetic* surrogate is also known as *traditional surrogate*. A *gestational* surrogate is a person who carries a child in her womb that is not genetically related to her and who intends to give birth to a child for other persons who are the intended parents.

Another delegate shared the solution in Russia in the event that a surrogate revokes her consent to have the parentage attach to the intended parents. In this event, the court would engage in fact-finding, and would analyse the best interests of the child to determine parentage. According to this delegate, the best-interests analysis would apparently nearly always be in favor of the intended parents. Therefore, the idea that the surrogate has a complete right to revoke consent to parentage attaching to the intended parents is essentially a pretext that would not work in practice. The bottom line for this delegate is that the child should be recognised as the child of the intended parents.

Finally, another delegate raised the point that international pressure helps the evolution of laws in countries that may be seen as behind the times. This delegate expressed hope that the increased legal recognition in many countries of children born through surrogacy and of families headed by same-sex parents would lead to broader international recognition of these families.

THE PROHIBITIVE APPROACH

A. Legal framework of the approach

Professor Anatol Dutta (LMU, Munich) described the legal landscape of surrogacy in Germany as an example of a country that applies a prohibitive approach to surrogacy arrangements.⁶ According to Prof. Dutta, the system in Germany is reflective of the social and ethical perspectives of the 1980s.

There are no specific legal rules for surrogacy in Germany apart from the criminal code, and no authority other than prosecutors that oversees surrogacy arrangements. The medical procedures that would be involved with a surrogacy are subject to criminal penalties, and doctors could lose their license to practice if they help with surrogacy. Likewise, agencies and legal practitioners are subject to criminal penalties if they are found to be involved in surrogacy.

Surrogacy is seen to be incompatible with family law in Germany. Under German family law, the woman who gives birth to a child is the legal mother of that child. If she is married, her husband is the legal father of the child. If she is unmarried, there is a mechanism for consent to be given to

⁶ For a more detailed explanation of the legal landscape in Germany, see: Dutta, 'Surrogacy in Germany', *Eastern and Western Perspectives on Surrogacy*, supra note 3, pp 35-47.

recognise paternity in another party. German family law contains no special rules for the transfer of parentage in surrogacy. One way would be to challenge paternity where the gametes of a man were used.⁷ Unlike a challenge to paternity, there is no specific provision in German law to challenge maternity. Thus, another way to transfer parentage would be to pursue an adoption route.⁸

The prohibitive approach to surrogacy taken by Germany has led to several results. First, because there is no legal structure for surrogacy, there are no statistics about surrogacy. It is unknown how many surrogacies have occurred in Germany, or how many children born through international surrogacy live in Germany. It is also unknown how many prosecutions based on the criminal code provisions regarding surrogacy have occurred. Second, the prohibitive approach has stifled any discussion of reform of law relating to surrogacy in Germany. Intended parents from Germany who wish to pursue surrogacy for procreation see no choice but to engage in ISAs and then try to navigate the German family law process once the child is born.

B. Practice within the Prohibitive approach

Maître Caroline Mécarry described the application of the law in France, which also takes a prohibitive approach to surrogacy since it was forbidden by the highest court of France in 1989 and the prohibition codified into law in 1994.⁹ The prohibition centers around two principal crimes: incitement for the abandonment of a child, and mediating a contract for surrogacy. As with Germany, the prohibition of surrogacy in France results in the reliance on ISAs for those who choose to procreate through surrogacy.

With regards to surrogacy, Maître Mécarry outlined four key points. First, in France, a birth certificate establishes a person's family identity, including parentage, without regard to genetics. Second, when a child is born abroad, the normal procedure is for the French administration to recognise the

⁷ A challenge to paternity must hinge on the assertion of "*beigewohnt*" by the person claiming paternity. This German term implies that the paternity claimant has engaged in sexual intercourse with the woman who gave birth, although courts have interpreted it broadly, particularly in cases of anonymous sperm donation.

⁸ For the adoption, the "best interests" standard would apply.

⁹ For a detailed discussion of surrogacy in France, see: Caroline Mécarry, *PMA et GPA, des clés pour comprendre*, Paris, PUF, coll « Que sais-je ? », 2019.

parentage as adjudicated by the foreign jurisdiction. Third, notwithstanding the second point, the French administration has chosen to treat birth certificates of children born through a “suspected” surrogacy differently – *even though this distinction has no basis in French law*. Which leads to the fourth point: for children born through surrogacy, practitioners in France must mount legal proceedings that are not necessary for other foreign-born children in order to regularise the legal status of the child. In reality, where the intended parents are able to be legally recognised as the parents of the child (and placed on the birth certificate of the child) in the jurisdiction of the child’s birth, the French law principle is that this parentage should be recognised in France.¹⁰

In 2017, the highest court of France issued a ruling that allowed for only a partial transcription¹¹ of a foreign birth certificate in favor of the intended father, but not in favor of the intended mother. The court’s reasoning for this decision seemed to be based on an idea of protecting the child and the surrogate, but eventually the true reason was revealed: to discourage the practice of ISAs. Since this decision, lower courts have begun granting full transcriptions of foreign birth certificates even in surrogacy cases. This situation demonstrates that when judges follow the actual law, children born in other countries through surrogacy can have their legal parents recognised in France. It is when judges decide matters on a moral basis that things go awry and the participants – including the children - suffer.

C. Personal experience within the Prohibitive approach

M. Dominique and Mme Sylvie Mennesson, French citizens, pursued surrogacy to build their family. In 2000, their twin daughters Valentina and Fiorella were born to a surrogate in California. Since the birth of their children, M. and Mme Mennesson have fought to secure the recognition of their family in France, ultimately winning a partial legal victory before the European Court of Human Rights.¹² Despite this partial legal victory, the family continues to encounter difficulties with the French

¹⁰ Foreign birth certificates must be apostilled (or otherwise legalised) and translated into French in order to be given validation in France.

¹¹ A transcription is a formality that creates a French birth certificate based on the foreign birth certificate. The process of transcription has no legal significance, but makes administrative tasks that use a birth certificate easier in France.

¹² *Mennesson v. France*, no. 65192/11, 26 June 2014.

administration in obtaining full recognition of their family. In 2006, the Mennessons created Association Clara, which defends all children born through surrogacy and promotes legalization of surrogacy in France.

Mme Mennesson, M. Mennesson, and their daughter Fiorella presented their experience as a family built through surrogacy in a country that follows a prohibitive approach to surrogacy. Mme Mennesson briefly introduced the family, and stated that surrogacy is a question of trust, love, and family – and nothing else. Fiorella Mennesson shared her perspective as a child born through surrogacy. She stated that she has no confusion about who her parents are, and that the circumstances of her birth are part of her life. She noted that in France, the most common questions she receives are whether she has any doubts about who her parents are. She reiterated her mother’s point that it is about love and family. “I’m doing great, I think” she said. While stating that “I’m a really normal girl”, Fiorella explained that “the institutions make you feel different.” In stating this, she explained that the only disruption that surrogacy has caused to her life is the legal situation they have had to deal with in France. As an example, she explained that it was only two years ago that she received French citizenship even though she has lived in France her whole life. She has had to see her parents struggle with the legal process. Fiorella explained that it is the institutions in France that make her feel like merchandise, like a number, like a concept. “We cannot be born and exist in a world that does not recognise us.” She does not want other kids to be humiliated and not recognised by the institutions. Rather, “everyone deserved to be born in a family that wants you and loves you.” It is love and family that are normal, and ignorance and hate that are not.¹³

M. Mennesson described the decisions they have received from the courts, up to and including the 2014 decision by the European Court of Human Rights. While this last decision ordered France to

¹³ Fiorella’s presentation received the largest applause over the course of the Forum. Her words had a strong impact on many of the delegates, and were referred to frequently throughout the remainder of the Forum by subsequent presenters and other delegates.

recognise both of the Mennessons as the legal parents of their children, France still tries to deny the legal parentage of Mme Mennesson. They continue their fight.¹⁴

M. Mennesson then shared three key messages. First, that surrogacy is not the same as adoption, and the legal issues between the two are distinct. Second, that it is inappropriate to require his wife to pursue a step-parent adoption, because this is not an adoption situation. Third, that they are very proud of their surrogacy journey. They have met and worked with a wonderful woman in California who acted as their surrogate. For M. Mennesson, real altruism is based on relationship, and the relationship with the surrogate was very important to their experience.

D. Discussion

The Mennessons were asked by a delegate whether they would have chosen to pursue surrogacy if, as the UK Law Commission consultation paper proposed, the surrogate would be able to object to the intended parents' fitness and thereby block the transfer of parentage. M. Mennesson replied that part of their decision to work with a surrogate in California was that the legal system in California was supportive of their rights as intended parents.

THE TOLERANT APPROACH

A. Legal framework of the approach

Dr Claire Fenton-Glynn (University of Cambridge) presented an overview of the current legal system that regulates surrogacy in the United Kingdom, which was one of the first jurisdictions to address surrogacy through legislation. The system is considered “tolerant” because it does not regulate surrogacy per se, but rather regulates the consequences of surrogacy for the law of parenthood. The history of this system can be traced back to the publication of the Warnock report on Assisted Reproduction in 1984, and the media attention given to a surrogate birth in 1985. Later that same year, the Surrogacy Arrangements Act of 1985 became law. Under this law, surrogacy arrangements

¹⁴ The Mennesson family did indeed achieve a resolution to their situation not long after the Forum was held. In a judgment issued on 4 October 2019, the French Cour de Cassation ruled that Mme Mennesson is in fact the legal mother of their children. See: Cass. 4 October 2019, no. 10-19.053.

were deemed unenforceable, either by or against any party. Later, the Human Fertilisation and Embryology Act (HFEA) was passed in 1990 and subsequently updated in 2008. Under the HFEA, parentage can be adjudicated in favor of the intended parents, via a Parental Order, provided they meet certain requirements. One critical criterion is that the surrogate's consent must be given no sooner than six weeks after the birth. Further, only payment of "reasonable expenses" to the surrogate are allowed. This framework of laws is the basis for the parental order process in existence today. Since these laws were enacted, however, the judiciary has ripped apart the legislative framework. Notably, the decision in *Re X and Y*¹⁵ established a three-prong test for evaluating a surrogacy arrangement which, on its face, did not conform with the requirements in the HEFA, particularly as regards the compensation to the surrogate. In this case, the court was faced with balancing competing and perhaps irreconcilably conflicting concepts: the policy against commercial surrogacy, and the welfare of the child that has been born through commercial surrogacy. As stated in this decision, "...it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order."¹⁶

Under this system, ex post facto regulation is futile, and the court's ability to fully balance the interests before it has been undermined. In 2010, a change in the legislation elevated the best interests of the child to "paramount" consideration. This change made the ability of the court to refuse a parental order even less likely. Rather, the courts need to find humane ways to resolve the status of the child, particularly where the parties are clearly not in compliance with the requirements of the process. The one requirement that persists is the requirement for the surrogate to give consent to the parental order, although certain cases have started to push on this requirement as well.

While the courts have played "fast and loose" with the statutory requirements, this has been out of necessity. When presented with a child that is living with people who for all intents and purposes are the child's parents, there is little room for denying a parental order. The legal system in the UK is in

¹⁵ *Re X and Y* (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

¹⁶ *Id.* ¶ 24.

an untenable position. In this system, principles have given way to practicality: the desire to form a family is stronger than the legislative barriers in place.

B. Practice within the Tolerant approach

Colin Rogerson, Solicitor advocate, described the challenges for legal practitioners within the current legal regime for surrogacy in the United Kingdom. As a bottom line, Mr. Rogerson stated that change is needed in the UK with regards to the regulation of surrogacy, as it does not adequately protect the best interests of the children born through surrogacy. Mr. Rogerson noted that clients often present themselves to practitioners after a child has been born, and the practitioners must try to find solutions to the situations the families find themselves in.

Practitioners in the UK cannot advise on the terms of surrogacy arrangements without running afoul of the criminal sanctions against assisting surrogacy. The prohibition on involvement of practitioners up front poses multiple consequences to the process. Chief among the consequences are the lack of supporting documentation for the parental order process, and provisions in surrogacy agreements that may not be ideal. Practitioners thus focus primarily on issues of parentage.

Understanding the scale of surrogacy in the UK is difficult to do, because the statistics are incomplete. Domestically, while there are several not-for-profit entities that facilitate surrogacies, there are still a significant number of independent surrogacy arrangements. The number of parental orders sought per year can be determined, but this obviously excludes families that do not apply for a parental order. Some families cannot practically manage without a parental order (such as a same-sex male couple who have a child through domestic surrogacy), but many others can to a great extent. In general, it is more likely that parental orders are sought with domestic surrogacy arrangements. Numbers of international surrogacy arrangements is much more difficult to determine, partly because in many cases intended parents can return to the UK with their child's birth certificate listing both of them as the parents. Mr. Rogerson estimates that, in his practice, about half or slightly more of the surrogacies he sees are international in nature.

As to the process of applying for a parental order, there is a requirement that the court hold a first hearing on the application within four weeks of the application. In reality, this requirement is often not met – there are delays. In the first hearing, the court will order that a parental order reporter¹⁷ prepare a report on the statutory requirements of the order and the welfare of the family. Assuming all the papers are in order, the timeframe for obtaining a parental order is generally on the order of six to eight months. International surrogacy cases typically take longer than domestic cases.

While domestic and international cases are governed by the same law, they nevertheless follow two separate processes. Domestic cases are heard by lay magistrates in the family court and are more informal, whilst international cases are heard by high court judges. The preparation and presentation of the cases by practitioners is different depending on whether the case is domestic or international, with the main issue being how payments to the surrogate are handled. Specifically, section 54 of the current law provides that no payments above reasonable expenses are made to the surrogate unless the payments are authorised by the court. With international cases, there is often strong documentation of the compensation and reimbursements paid, which is often described in detail in the surrogacy agreement, and the high court will review these in order to determine whether authorisation should be granted. For domestic cases, however, the magistrates generally dispense with the authorisation of payments as long as the total amount falls within a general range (the “going rate”).

Mr. Rogerson also addressed how the terms “altruistic” and “commercial” are unhelpful, as they may mean different things to different people. Specifically, even when there is compensation involved in a surrogacy arrangement, altruism may be involved. Colin shared a story of UK residents who had children through surrogacy in the USA. Each year, the parents rent a vacation home in the USA and invite the surrogates and egg donors that they worked with to join them and their family for vacation. The children in this family have a clear understanding of their origin story, and the strong relationships at the center of the story elevate the process beyond a simple commercial transaction.

¹⁷ The reporter is a qualified social worker that is part of the court welfare service.

C. Personal experience within the Tolerant approach

Rachel Kapila and her husband have twin sons that were born through surrogacy in the UK. Due to a medical condition, Ms. Kapila was unable to carry a pregnancy. However, Mr. and Ms. Kapila were able to form embryos with their own gametes. A surrogate carried two of these embryos for the Kapilas, and the twin boys were the result. Ms. Kapila stated that she will always be grateful to the surrogate, and that they keep no secrets with their children regarding the process.

Ms. Kapila stated that the parentage order law in the UK is navigable, if all goes smoothly. However, in her family's case, things did not quite go as expected. As has been discussed, one requirement of the parentage order process is that the surrogate give consent to the parental order. In the Kapila's case, the surrogate withheld consent. As a result, Mr. and Ms. Kapila are not the legal parents of their biological children: the surrogate and the surrogate's husband are the children's legal parents, even though they do not wish to have any role in the children's lives. Mr. and Ms. Kapila have therefore had to cobble together other legal protections for their family. Currently, Mr. and Ms. Kapila have parental responsibility for their children through the age of 18. Should the surrogate grant consent at some point in the future, a parental order may be given. In the current parental order process, the balance of power is tipped toward the surrogate in that she can tie the judge's hands and completely block the grant of the parental order for whatever reason.

Ms. Kapila states that while their situation is "not ideal", they are "doing OK." They lead relatively normal lives, and there is a community of families that they connect with. Their children continue to thrive and to be more concerned with their active lives rather than their legal status.

D. Discussion

A delegate asked why the legislature made no provision in the current UK law to dispense with the requirement for the surrogate's consent in certain circumstances. Sir James Munby, who was present for the discussion, commented that there was virtually no debate in Parliament about the legislation.

Another delegate asked Colin Rogerson if there was a published list of “allowable expenses” in surrogacy arrangements. Mr. Rogerson replied that there is no published list, but guidelines exist in case law.

Another delegate asked what the thinking is behind the six-month period for a requesting a parental order, and what is the legal status of the child during the period before a parental order is granted. Mr. Rogerson responded that the six-month limit may be because the child is living with the intended parents during this time, and a longer period may preclude any other finding than parentage for the intended parents. As to the child’s legal status prior to the grant of a parentage order, it one of legal limbo.

Another delegate commented that societal concerns are being taken out on children, and that there is a need to separate subjective values with the process for giving children legal status. Dr. Fenton-Glynn concurred that children may be victims of moral positions and that practitioners need to think like lawyers to find solutions under the law.

Another delegate asked if the law in the UK would recognise parentage established in another country if one of the parents holds dual citizenship with that country and the UK. Mr. Rogerson responded that UK law would still require that a parental order be obtained for the child.

THE FREE MARKET APPROACH

A. Legal framework of the approach

Professor Courtney Joslin (UC Davis School of Law) provided an overview of the law and the legal trends in the United States. She pointed out that surrogacy has been and continues to be a contested issue in the United States, and therefore the law is mixed.¹⁸ However, the trend is in favor of legislation that permits and regulates surrogacy.

¹⁸ Family law in particular is a matter left to individual states to regulate: federal law does not regulate parentage of children born within the United States.

The first wave of surrogacy legislation in the US was prohibitive. This wave occurred in the 1980s and early 1990s, and saw statutory bans along with criminal and civil penalties in several states. National attention was focused on surrogacy with the contested case of Baby M, which involved a genetic (or “traditional”) surrogate who sought to keep the child that she carried after entering into a surrogacy arrangement with the intended parents.¹⁹ The fact that this was a genetic surrogacy contributed to the backlash, including the concern that surrogacy would be harmful to the children, the surrogates, and society in general. The bans were also in response to the dominant public feminist stance that surrogacy was exploitative of women and defined women by their reproductive capacity. The second wave of surrogacy legislation began in the mid 1990s.²⁰ In this wave, we see surrogacy permitted and regulated. This second wave of legislation was prompted by several factors. Notably, the concerns of the first wave (exploitation of women, damage to children and society) did not come to pass. Surrogates reported positive experiences, and bans on surrogacy did not eliminate the practice. Further, there was a recognition that if protections for participants in surrogacy are the goal, then regulation is a more appropriate solution. Also, the arguments against surrogacy were seen as too similar to other arguments against reproductive freedom for women. In general, legislation in this wave tends to make parentage in surrogacy work the same way as parentage in other forms of assisted procreation, and allows the intended parents to become legal parents as a matter of law if the parties comply with the rules.

In current legislation, we see several specific trends. The reality of more diverse forms of families have driven more inclusive definitions of intended parents. Women’s rights groups, who have been active in the conversation, have championed more protections for surrogates, such as requirements for legal representation and recognition of bodily autonomy. There is a small, but growing, push for regulation of surrogacy intermediaries.²¹ We are also seeing an emerging trend to regulate the access to information about gamete donors more directly. Finally, one trend that is very much in flux is the

¹⁹ *In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1988).

²⁰ It is worthwhile to note that this timing corresponds to the emergence and rise of the practice of gestational surrogacy (where the surrogate has no genetic connection to the child).

²¹ While this was not mentioned by Prof. Joslin specifically, see: ABA Model Act Governing ART Agencies, https://www.americanbar.org/content/dam/aba/uncategorized/family/Model_Act.authcheckdam.pdf.

differential treatment between genetic and gestational surrogacy. Some jurisdictions treat these types of surrogacy more similarly than others. Prof. Joslin believes that this last trend merits continued discussion due to the complex mix of legal, medical, and socio-economic issues involved.

B. Practice within the Free Market approach

Attorney Steve Snyder concurred with Prof. Joslin's analysis of the trends. He spoke specifically about how the Baby M case prompted a wave of legislation banning genetic surrogacy. However, as assisted reproductive technologies advanced, gestational surrogacy emerged. This advance in medical science led to the landmark decision from a California court in 1993 where competing claims of parentage (specifically, maternity) were evaluated, and the court found that, as between the woman with the gestational link to the child and the woman with the genetic link, the *intent* to parent held by the woman with the genetic link broke the tie in her favor.²² Thereafter, with the advent of gestational surrogacy, and with the recognition of the intent to parent, state statutes have slowly evolved to become more permissive of surrogacy generally, and gestational surrogacy specifically.

Standing over individual state statutes is the Constitution of the United States. The Constitution informs our perception of surrogacy in the US. Specifically, the Bill of Rights (amendments 1-10 to the US Constitution), and amendments 14, 15, 19, and 26 create a broad panoply of individual liberties and rights. Personal autonomy and individual freedom are concepts that are deeply engrained in the social consciousness of Americans, whether or not specific protections are entirely supported in law. With regards to procreation, the Supreme Court of the United States has found that the 14th Amendment to the US Constitution does protect the right to procreate, and that the right to procreate is a fundamental human right.²³ While these cases did not involve surrogacy specifically or medically-assisted procreation generally, they do stand for the principle that the government cannot interfere with individual procreative decisions without strong cause. More recently, a federal court in Utah found that state's law regarding surrogacy unconstitutional in part because it was violative of the

²² *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

²³ See *Meyer v. Nebraska*, 262 U.S. 390 (1923)(finding the 14th Amendment includes right to "bring up children"); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (declaring compulsory sterilization a violation of fundamental right to procreate).

right to procreate and precluded an assertion of genetic parentage.²⁴ Thus, surrogacy may have an elevated status in the United States as compared with other countries.

In the United States, there are three general types of approaches to surrogacy among the states. There are some states with statutes that address surrogacy, some states that only have case law that address surrogacy, and some states that have no law at all on surrogacy. Further, there are varying approaches among the states to determining parentage in surrogacy cases.²⁵ However, every parentage determination for a child born through surrogacy in the United States is subject to some sort of legislative structure or judicial oversight: something is done to ensure the due process of the parties. Further, under the US Constitution, a parentage order granted in one state is given full faith and credit by all the other states – even if another state has a different policy on surrogacy. It is this combination of constitutional protections (the right to procreate, due process, and full faith and credit) that may make the process in the United States reliable. Practitioners in the United States see these protections as a possible model for international comity among nations that have different approaches to surrogacy.

C. Personal experience within the Free Market approach

Dr Erika Fuchs (University of Texas Medical Branch) shared her experience as a gestational surrogate: she delivered twins as a gestational surrogate in 2006.

In her experience, and in research she has conducted since, the screening and matching process are key elements of surrogacy in the United States. Participants in surrogacy seek to reduce the risks to all parties as much as possible. There are certain basic requirements for surrogates²⁶, and candidates

²⁴ *J.R. v. Utah*, 261 F. Supp. 2d 1294, 1296-1298 (D. Utah 2002). The law challenged in this case has since been repealed.

²⁵ These may vary from a relatively simple administrative process in one state to a complex set of legal proceedings in another.

²⁶ Basic requirements may be described in state statutes that regulate surrogacy, and they may also be dictated by the medical standard of care followed by the medical professionals involved.

who meet these requirements have subsequent medical and mental health screening. Working with an agency, as the majority of surrogates do, may help with the administration of the process.²⁷

In the matching process, multiple factors may be taken into account by the participants and the matching entity, if any. For example, basic demographics of the parties are considered. The surrogate may have a preference for intended parents located nearby or in another country, for a same-sex or an opposite-sex couple, for a single intended parent, or for intended parents of a particular religion. Surrogates and intended parents must also be aligned on financial terms, conditions for termination of pregnancy, and overall expectations of the surrogacy process – from the medical process to begin the pregnancy, to the method of childbirth, to the post-delivery relationship between the parties. Of course, there are legal considerations as well, such as how parentage will be established and how much, if any, of the surrogacy agreement would be enforced.²⁸

In her personal experience, Dr. Fuchs finds that three elements are particularly necessary for surrogates: a supportive family, financial stability, and back-up childcare. These were all in place for her when she acted as a surrogate, and made the process much easier for her. However, she notes that there are difficulties involved. During Dr. Fuchs's surrogate pregnancy, her mother was diagnosed with cancer. This made her personal life and emotional process more difficult. Also, logistically, she was required to appear in court multiple times, including while sick and within days of giving birth. After the surrogacy was completed, she resumed her "normal life" which was parenting her own child and continuing her studies.

In hindsight, Dr. Fuchs found several things to be very important to her personally. First was the screening process, which was for everyone's protection. Next was the agency support that made the process flow more easily. Third was the legal contracts that were important when things went as expected or not. And finally, her social support system which helped to mitigate stress.

²⁷ Fuchs, Erika L., and Abbey B. Berenson, *Screening of gestational carriers in the United States*, *Fertility and Sterility* 106.6 (2016): A1-A12

²⁸ As an example, provisions in surrogacy agreements that would be interpreted to require a surrogate to terminate or not terminate a pregnancy are presumed to be unenforceable on their face, as such provisions would be violative of individual bodily autonomy.

D. Discussion

A delegate asked the panel why gestational surrogacy is preferred over genetic surrogacy. Prof. Joslin responded that there is a perception that gestational surrogacy reduces the risk of a bond between the gestational carrier and the child, and that the legal claims may be different for the gestational versus the genetic surrogate. However, she also suggested that the general perception that people are just more comfortable with gestational surrogacy is likely a factor. Mr. Snyder added that the rise of IVF and the advancements in fertility medicine have made the process of gestational surrogacy more reliable medically.

The same delegate asked Erika Fuchs a two-part question. First, the delegate asked why she became a surrogate. Second, the delegate asked her about the terminology of surrogacy - specifically what term she applies to herself. Dr. Fuchs explained that she had an adoption experience within her family that caused her to think more deeply about alternate methods of family-building. In the adoption experience, she saw that it was not necessarily easier for the intended parents than surrogacy would be. So, she decided to be a surrogate to help someone build a family. As for the terminology, Dr. Fuchs stated that she generally prefers the term “surrogate”. She explained that “surrogate mother” is not an appropriate term because she is not and does not want to be considered a “mother” to the children she carried. In the end, she stated, the term “gestational carrier” is easier to use.

Another delegate asked the panel to discuss the distinction, if any, between the ‘right to a child’ and the ‘right to procreate’. Mr. Snyder answered that the societal perspective informs the distinction. In adoption, there is no ‘right to a child’ for the parties who seek to adopt. However, surrogacy is not adoption, it is a method of procreation. In the US there is a strong right to procreate without governmental interference. Therefore, these two rights are distinct.

Another delegate asked if there are any statistics on the number of Americans who engage in surrogacy arrangements outside of the US. This delegate further posited that protections are best when all parties are in the same jurisdiction. Prof. Joslin responded by saying that the numbers are

unclear. What is clear, however, is that bans on surrogacy do not work – rather, they push people elsewhere.

Another delegate asked what happens to parentage in a surrogacy situation when the parties don't comply with statutory requirements. Prof. Joslin stated that the answer is state-specific. In some states, the parentage may attach to the surrogate. In other states, the court may have discretion to adjudicate parentage in favor of the intended parents. In other states, there may be other parentage law that applies. Attorney Snyder added that the best interests of the child would drive the parentage determination. Judge Amy Pellman added that if there is failure to strictly comply with the applicable statute "substantial compliance" with the statute may suffice as the court is not restricted from entering a parental order in such a situation.

Another delegate mentioned that the women's groups in the delegate's country oppose surrogacy, and asked for more information about the perspective of the women's groups in the USA that support surrogacy. Prof. Joslin stated that the support of surrogacy among women's groups in the USA is linked to the idea of the woman's autonomy and agency. Mr. Snyder pointed to the latest wave of feminism in the USA, and stated that the idea of individualism – the idea of "don't tell me I can't" – is influential. Finally, Dr. Fuchs offered that the women's groups who oppose surrogacy are placing judgment without taking the time and effort to talk to surrogates.

THE REGULATORY APPROACH

A. Legal framework of the approach

Professor Julia Sloth-Nielsen (University of Western Cape, South Africa) discussed the evolution of current trends in South African law as it related to surrogacy, which she described as the "epitome" of the regulatory approach.²⁹ Surrogacy law in South Africa came to be considered as a result of the

²⁹ For more information about the law in South Africa, see: J Sloth-Nielsen, "Surrogacy in South Africa" in JM Scherpe, C Fenton-Glynn and T Kaan (eds.), *Eastern and Western Perspectives on Surrogacy*, pp. 185-201, Intersentia, 2019.

report of the South African Law Reform Commission in 1990.³⁰ Ultimately, however, the language on surrogacy was tacked on to the Children's Act 38 of 2005 without much discussion or debate. It went into effect in 2007. The language of the surrogacy legislation had largely been developed in the pre-1994 era, and therefore was not written through the lens of children's rights.³¹ Further, the law lacks regulations, does not establish a central authority or other regulatory body, and does not address intermediaries.

Under current law, only altruistic (non-compensated) surrogacy is permitted. Expenses may be paid, but there may be no lump sum payments³², and no third-party payments not related to the medical treatment. Intended Parents must be domiciled in South Africa, and there must be a genetic link to at least one of the intended parents.³³ There are a number of other requirements, including that a surrogacy arrangement must receive approval by a high court judge prior to the start of the pregnancy.³⁴ If the parties comply with the requirements of the law, the intended parents will be the parents of the child born through the process. If the parties do not comply with the law, then the surrogate will be considered the legal parent of the child.³⁵

Although the law requires that the intended parents be domiciled in South Africa, there are nevertheless cases with international elements. There have been cases where non-citizen residents of South Africa have had children through surrogacy in South Africa. There have also been cases where non-citizens and perhaps non-residents have had children through surrogacy in South Africa. Finally,

³⁰ The South African Law Reform Commission was appointed following the story of a gestational surrogate who gestated and delivered triplets for the intended mother, who was also the daughter of the surrogate, in 1987. See: <https://www.latimes.com/archives/la-xpm-1987-04-07-mn-317-story.html>.

³¹ The current Constitution of the Republic of South Africa was adopted in 1994. Chapter 2, section 28 of the 1994 constitution contains a list of rights that apply to children, including the statement that "A child's best interests are of paramount importance in every matter concerning the child."

³² See: *Ex Parte WH and others* 2011 (6) SA 514. Note that this is among the requirements that have been elaborated through case law rather than the statute.

³³ A high court decision found this requirement of a genetic link discriminatory as applied to a single female intended parent who had no genetic connection to the child, but this was reversed by the Constitutional Court. See: *AB and others v Minister of Social Development and Others (Centre of Child Law intervening as Amicus Curiae)* CCT 155/15 (2016).

³⁴ This particular requirement ensures that surrogacy is only accessible to the wealthy, as starting a judicial process in a high court requires a significant amount of money.

³⁵ However, judges have applied the best interests of the child standard to allow parentage to attach to the intended parents in cases where the arrangement was not completely in compliance. Judges are known to go through the papers in detail in surrogacy cases.

there have been cases where children have been born to intended parents that may have been domiciled in South Africa at the time of the birth, but the family now resides elsewhere. The bottom line is that there seems to have been some efforts to work around the domicile requirement in order to achieve ISAs.

Current developments under consideration in South Africa include further protections for the child's right to know her genetic origins, new suitability requirements for the parties, increased scrutiny of the arrangement itself and how it came to be, and a reconsideration of the requirement for a genetic link. Notably, there is no movement toward allowing lower courts to review surrogacy cases: these will likely remain in the jurisdiction of the high court for the foreseeable future.

B. Practice within the Regulatory approach

Attorney Robynne Friedman discussed the implications that the regulations in South Africa have on the practice of surrogacy. Some of the requirements provide excellent safeguards to the process, and some of the requirements are barriers to participants. One reality of the regulations is that surrogacy arrangements include significant involvement by medical professionals, and require careful documentation.

In South Africa, a broad spectrum of intended parents may apply to pursue surrogacy. South Africa allows opposite-sex couples, same-sex couples, single individuals, and people with medical issues that prevent gestation (including transgender status). While there is a requirement that one intended parent have a genetic link to the child, this has been challenged as discriminatory.³⁶

The requirement that payments be limited to "reasonable expenses" has been interpreted widely by judges. However, there may be criminal penalties applied to violations of this requirement. As a result, practitioners must document expenses carefully. Further, the financial position of the surrogate must be disclosed in detail.

³⁶ It is worth noting that where surrogacy is not involved, an intended mother in South Africa who can gestate a child is allowed to gestate an embryo formed from donor gametes.

In South Africa, there is a significant population of people who are HIV positive. The interest in this population to pursue surrogacy has been on the rise. In cases where at least one intended parent is HIV positive, there is increased complexity with disclosures, as the surrogate has the right to know the HIV status of the intended parents. Apart from HIV, the health status of the intended parents is examined closely. Intended parents may be barred from pursuing surrogacy in South Africa if their life expectancy is unduly compromised.

C. Personal Experience within the Regulatory approach

Ms. Friedman is not only an attorney practicing in the area of surrogacy law, but she is also a parent through surrogacy in South Africa. In this capacity, she shared her personal experiences.

After struggling with infertility, the treatments eventually triggered an auto-immune response that rendered further treatment impossible. So, she turned to surrogacy – and was one of the first to pursue surrogacy, as it was very uncommon at the time in the 1990s. It was a very lonely place to be, as there was no support and surrogacy was not widely discussed.

Unfortunately for Ms. Friedman, her surrogacy journey was also a struggle. She did not achieve pregnancy with her first surrogate after multiple tries, and so they parted ways. Her second surrogate made last-minute demands right before the embryo transfer, at the hospital. Ms. Friedman acquiesced to the demands, but the transfer was not successful. Again, Ms. Friedman terminated the surrogacy agreement. She felt that another door was closing to her after so many struggles. As surrogacy was not working for her, Ms. Friedman adopted two children. However, a third surrogate presented herself, and Ms. Friedman found her to be a wonderful, empathetic person. They put in place an agreement that was based on reciprocal needs, changed fertility clinics, and the surrogate became pregnant on the first try. Ms. Friedman was able to be very involved in the pregnancy, and the child is now 10 years old, and remains close friends with the surrogate.

D. Discussion

One delegate asked for further clarification about the justification for a genetic link between the intended parents and the child born through surrogacy. Ms. Friedman offered two justifications: first,

that the fact that there are multiple cultural communities in South Africa was a driver for this requirement, and second, that there is a right of the child to access information about her origins. Professor Sloth-Nielsen expanded on this by stating that the right of the child to know her origins is considered to be an important right of the child. Further, while there is no such requirement for assisted procreation absent surrogacy (where an intended parent gestates a child she intends to parent, but with whom she has no genetic link), the distinction in the non-surrogacy case is that the courts may find that a “gestational bond” exists.

Another delegate asked whether, in situations where the arrangement is not in compliance with the regulations, the surrogate would be forced to be the parent of the child. Ms. Friedman shared that there has been at least one case where the court granted approval of the arrangement after conception (which is against regulations) but before the birth of the child. There is also a case – as yet unresolved – where the intended parents of a child born through surrogacy over a decade ago are seeing to secure their legal status. Prof. Sloth-Nielsen stated that she believes that in cases where a child has already been born, the court would evaluate a parentage petition based on the best interests of the child.

Another delegate asked whether South Africa recognises parentage orders granted in other jurisdictions, such as when South African nationals have a child through surrogacy in another country. Prof. Sloth-Nielsen stated that normal rules of private international law would apply, and that South Africa would likely recognise parentage established in another country. Ms. Friedman suggested that legal limbo may result for the parentage, and that perhaps only one parent would be considered to be the legal parent in South Africa. She continued to state that intended parents who pursue surrogacy in other countries must think carefully and research the other potential jurisdictions thoroughly.

EMPIRICAL RESEARCH FINDINGS

A. Longitudinal study in the UK

Professor Susan Golombok (Center for Family Research, University of Cambridge) presented findings from two studies. The first study is a longitudinal study of families formed through

surrogacy and headed by opposite-sex parents. The second study is of families formed through surrogacy headed by same-sex male parents.³⁷

1. Longitudinal study of families headed by opposite-sex parents

This study focuses on several perceived concerns about surrogacy, and the effect they may have on the children specifically and the family as a whole. The first concern is about the lack of opportunity for pre-natal bonding. The second concern is that the surrogate may remain in contact with the family over time. The third concern is that the family may face disapproval from family and friends for having engaged in surrogacy. Finally, the fourth primary concern is that there may be psychological harm to the children due to their having been relinquished by the surrogate (especially if the surrogate is a genetic surrogate and money was exchanged).

The sample for the study includes 42 families where a child was born through surrogacy. Of these, 38% involved a gestational surrogacy arrangement, and 62% involved a genetic surrogacy arrangement. Overall, 31% of these families worked with surrogates who were previously known to them. The other 69% involved surrogates who were previously unknown to the family. These families were identified and selected through the Office of National Statistics (ONS)³⁸ and COTS.³⁹

In addition to these families, there are two control groups. The first is a group of 51 families where egg donation was a factor in having a child. The purpose of this control group is to control for third-party assisted procreation. The second control group consists of 80 families that were formed through natural conception. The demographics of these families were matched as closely as possible to the demographics of the other groups.

The research questions are devised to discern whether the families formed through surrogacy differ from the control groups in terms of the quality of the relationships between the parents and the children, and the psychological development of the children. Specifically, the study seeks to

³⁷ Funding for the research came from the Wellcome Trust and the US National Institutes of Health.

³⁸ The General Register Office of the United Kingdom Office for National Statistics covers England and Wales.

³⁹ COTS is the organisation Childlessness Overcome Through Surrogacy. This organisation was asked to participate in the identification of families because the ONS would only be able to identify families where legal parentage had been secured by the parents.

understand how the children born through surrogacy perceive the circumstances of their birth. In addition, the study investigates the relationship between the families and the surrogates over time.

Assessments of the families have been performed at various ages of the children who were born through surrogacy: age 1, 2, 3, 7, 10, and 14. A further assessment is planned when the children reach the age of 19.⁴⁰ Assessments include data from the parents, the children, and teachers.⁴¹ The data is comprised of interviews, observational assessments, questionnaires, and ratings by a child psychiatrist.

Overall, when the children born through surrogacy were aged 1 through 3, the families demonstrated more positive outcomes than families formed through natural conception.⁴² By the time the children had reached the age of 7, almost all of the parents had told the children about their involvement with surrogacy. While there was no difference shown with the mother-child relationships between these families and families built with natural conception, the children showed raised levels of adjustment difficulties. These difficulties are seen to be consistent with observed difficulties in children who came to families through international adoption. The subsequent assessment of the children at age 10 showed no difference in adjustment difficulties as compared to the naturally-conceived children. This again is seen to be consistent with studies of international adoptees. The assessment at age 14 showed more positive relationships between the children born through surrogacy and their mothers than for the naturally-conceived children, and the children born through surrogacy had high levels of psychological adjustment. This assessment is in contrast to other research on adoptees, who tend to experience another period of identity adjustment at this age.

The children themselves reported generally positive feelings about surrogacy at ages 7 and 10. For those who had an ongoing relationship with their surrogate, the comments were also positive. By the time the children reached the age of 14, the comments were more neutral – surrogacy was seen as one more aspect of their life. The parents reported generally positive relationships with the surrogates

⁴⁰ The families selected have children born in the same year, so the assessment of each family can occur within the same timeframe.

⁴¹ Teachers were included as a source of data independent from the family.

⁴² Positive outcomes included greater warmth and sensitivity, higher levels of emotional involvement, lower levels of parenting stress. Child development was normal.

through the children's age of 10. The frequency of contact between the parents and the surrogates tended to decline over time.

2. Study of families headed by same-sex male parents

For the study of families formed through surrogacy where the parents are a same-sex male couple, this study examined 40 of these families, with children between the ages of 3 and 9. In each of these families, the children were conceived with eggs donated from an egg donor and the sperm of one of the two fathers. Thus, one father lacks a direct genetic connection to the child. The vast majority of the surrogacy arrangements were gestational in nature, and almost all of the parents in these gestational arrangements worked with an egg donor who was previously unknown to them. Most of these egg donors, however, were open-identity.

These families were compared with a control group of 55 families where the parents are a same-sex female couple. This control group was selected in order to control for same-sex parents and the use of donor gametes. In addition, this control group was selected because there is a large body of research comparing (and showing no significant difference between) children of same-sex female parents with children of opposite-sex parents.

The research focused on two areas. First, the study examined the quality of parenting between the same-sex male and same-sex female parents. Second, the study compared the psychological adjustment of the children in both types of families. On the first point, the study found no difference between the parenting quality of the two groups. Both groups demonstrated high levels of positive parenting and low levels of negative parenting. On the second point relating to the adjustment of the children, slight differences were seen. While both groups had lower levels of behavioral and emotional problems than population norms, there were even lower levels of emotional problems in the children with same-sex male parents. The child psychiatrist ratings similarly showed that while the children raised by same-sex female parents demonstrated emotional and behavioural problems

consistent with population norms, the children raised by same-sex male parents had levels of the problems below population norms.⁴³

In addition, the study looked at the ongoing relationship with the surrogate and the egg donor. The study found that the same-sex male parents were much more likely to maintain contact with the surrogate than with the egg donor over time. A slight majority of the fathers had been in contact with the surrogate within the year prior to the study, while few had been in contact with the egg donor in the same period. Overall, the relationships between the families and the surrogates were described in positive or neutral terms. Only one family reported a negative relationship with their surrogate.

B. Study of psychological wellbeing of surrogates and their families

Dr. Vasanti Jadvā (Center for Family Research, University of Cambridge) presented findings from a follow-up study of women in the UK who acted as surrogates, and their families. The research focused on several areas. First, whether women who act as surrogates experience psychological problems in the long term. Second, whether the surrogates stay in contact with the children they delivered and their parents. Third, how the surrogates view their relationship with the families. Fourth, whether the children of the surrogate experience any psychological problems linked to their mother's involvement in surrogacy. And fifth, how the children of the surrogates view their relationship to the children carried by their mothers for others.

The surrogates in this study began with 34 surrogates that were seen one year after the birth of the child they carried in a 2003 study. Ten years later, 20 of these surrogates agreed to participate. Another 14 surrogates were found through fertility clinics in the UK in order to increase the sample size back to 34. Of these surrogates, approximately a third had acted as genetic surrogates, approximately forty percent had acted as gestational surrogates, and nearly a quarter had acted as *both* genetic and gestational surrogates. The surrogates came from a range of demographic backgrounds. In all, 102 separate surrogacy arrangements were involved.

⁴³ The study was also controlled for family income.

The surrogates stated their motivations for acting as surrogates. The most common reasons given were a desire to help a childless couple and the enjoyment of pregnancy. For the surrogates who went on to do subsequent surrogacies, their motivations for the subsequent surrogacies were consistent with the initial surrogacy motivations.

On the first question of the long-term psychological impact to the women who acted as surrogates, 10 years later the women were found to have average or above average self-esteem and no difference in levels of depression. These results were consistent no matter which type of surrogacy the surrogate engaged in.

Looking at the question of whether the surrogates stayed in contact with the families, the study found that the surrogates stayed in contact with 77% of the children they delivered, 76% of the fathers of those children, and 85% of the mothers of those children. There was a wide range of frequency and modality of contact. As to how the surrogates viewed the quality of the contact, the majority of the surrogates stated that the contact was “about right”. An even stronger majority of the surrogates viewed their relationship with the child and with the parents as positive. Here again, the results were consistent no matter the type of surrogacy, although gestational surrogates did report a higher level of contact and bond with the children and families.

The surrogates’ own children were found to have levels of self-esteem that were mostly average or above average.⁴⁴ The families (children and partners) of the surrogates reported a wide range of involvement in the surrogacy process, but the vast majority of these children and partners were found to have a positive view of the process and the involvement of their mother or partner. There were low reports about notably difficult aspects about surrogacy by the surrogates’ children. Also low, but somewhat higher, were reports of notable positive aspects of surrogacy. For the children of the surrogates who are in contact with the child their mother delivered for another family, a wide range of relationships and terminologies were reported. Here again, there was no distinction based on the type of surrogacy involved.

⁴⁴ The surrogates’ children who were evaluated were over the age of 12, so that detailed questions about their mothers’ involvement in surrogacy could be asked.

C. Study of surrogates in India

In contrast to the study presented above on the outcomes of surrogates in the UK, Dr. Jadva presented a brief overview of a study she worked on that evaluated surrogates in India. In this study, 50 surrogates were compared with 69 expectant mothers. The surrogates were all working with one fertility clinic in Mumbai, and were carrying for intended parents from outside India. The expectant mothers came from Mumbai and Delhi. The women were seen at 2 different points in time: once during the pregnancy (4th month or later), and once 4 to 6 months after the birth. The study collected data on anxiety, depression and stress of the women. It also looked at the level and type of prenatal bonding engaged in by the women.⁴⁵

Overall, the study found that the surrogates had a comparatively higher levels of depression during the pregnancy and after the birth. However, there were no differences between the groups in terms of the anxiety and stress experienced by the women. The surrogates were found to have lower levels of emotional prenatal bonding than the expectant mothers. However, the surrogates were found to have higher levels of instrumental prenatal bonding.

The study considered possible factors associated with these outcomes. Higher levels of depression in the surrogates after the birth were predicted by factors such a lower levels of support during the pregnancy, hiding the surrogacy, and receiving criticism for engaging in surrogacy. While surrogates had lower levels of prenatal emotional bonding than the expectant mothers, those surrogates with a positive experience during the pregnancy and who had a lower educational status were more likely to engage in prenatal emotional bonding.

D. Cultural perspectives from surrogacy in India

Lopamudra Goswami (PhD candidate at Griffiths University, Australia) has been conducting research with surrogates in India since 2014, and presented some of her findings about the surrogate

⁴⁵ A distinction is made between “instrumental” and “emotional” prenatal bonding. The former is focused on care and attentiveness, while the latter is focused on interaction and attribution of characteristics.

experience in that country.⁴⁶ For context, Ms. Goswami reminded the delegates that India is a country of 1.35 billion people, 22% of whom live below a poverty line of about \$390 US per year.

Surrogacy officially became legal in 2002, and then was banned officially in 2016. There are questions, however, as to how strong – and how permanent - the current ban may be, in particular because of the significant investment in surrogacy that has already been made. Surrogacy flourished in India for a variety of reasons. India obviously has a large supply of people, which increases the potential to find prospective surrogates. Medical technology, including with fertility treatment, is cutting-edge in India. The legal structure in India allows people coming from other legal structures around the world to find solutions. Economically, the costs of surrogacy in India are generally lower. Fertility clinics and others around the country engaged in a strong marketing effort to build India as a surrogacy destination. Women who have acted as surrogates in India are seeing surrogacy as an accepted option for them to earn money (versus less desirable work).⁴⁷ Western interest in working with surrogates in India is strong due to the fact that Indian women are culturally less likely to use alcohol and drugs, which reduces the medical risk to the child. Further, surrogates in India have an economic dis-incentive to keep the child that they gestate, reducing the risk of a contested relinquishment of the child.

Ms. Goswami conducted a field visit in 2014 to meet with surrogates in India. The goal of this field visit was to understand the perspective of surrogates themselves, including their understanding of exploitations and whether the surrogates themselves felt it was present. They interviewed roughly 25 surrogates between the ages of 26 and 45 in Gujarat. Economically, these women had a household income that ranged from about 2000 to 25000 rupees per month. There was an educational range from illiteracy to some college-level education.

⁴⁶ Ms. Goswami used the term “surrogate mother” throughout her presentation in reference to the surrogates, stating that “surrogate mother” is the term preferred by surrogates in India due to the culturally significant concept of shared blood. While the gestational surrogate in India understands that she is not the legal or social “mother” of the child, she nevertheless prefers the term “surrogate mother”. For the sake of consistency, and not out of a lack of respect for these women, this report continues the use of the term “surrogate” here without “mother”.

⁴⁷ Earnings for a 9-month investment in surrogacy may be on the order of 10 years’ worth of earnings from work as a domestic worker or in a sweatshop.

One of the questions asked of these women was why they became a surrogate. Here, while many of the answers had a financial component, there was a wide range in rationale. Some women stated that they wanted the money for basic living expenses, such as to feed their family.⁴⁸ Others expressed an interest in earning money to purchase a house, to save for their children's education, or for a daughter's wedding. There were also answers that were more altruistic in nature, such as the desire to help a childless family. Some women viewed the arrangement as a "win-win" in that they received what they wanted (money) and the intended parents received what they wanted (a child).

Another question asked was how the surrogates felt about handing over the child to the intended parents. Here again was a range of responses. Most responses expressed happiness, but mixed with statements such as "I miss the child" or "I wish they would send me photographs". On opposite ends of this, there were some surrogates who reported that they "felt nothing" and others who "cried for days".

The main question posed to the surrogates was whether they felt taken advantage of or exploited in any way. Here, the answers were unequivocally "No." However, some of the responses showed nuance, such as: "No...it was my situation that pushed me into becoming a surrogate."

Another field visit was conducted in 2016, right after the ban on international commercial surrogacy was implemented. In this visit, they interviewed other women in the same community who had not acted as surrogates. The goal was to see if there was information that these women would share that might not have been offered by the surrogates. Here again, there were about 25 women interviewed along a similar range of age and educational level. They asked these women why they had not acted as surrogates, and the responses included statements that the women didn't need the money, that surrogacy was taboo, and that they were concerned for their own children's perception of the surrogate pregnancy. When asked what would make them consider being a surrogate, they responded that they would consider it if they needed the money. When asked what these women thought about the newly-implemented ban on surrogacy, the response was overwhelmingly negative. These women viewed surrogacy as helpful to the women who acted as surrogates, to the community as a whole, and

⁴⁸ This sentiment was a reflection of the severe poverty of some of the women.

to the intended parents. Regulation was seen as helpful, but a complete ban was seen as counter-productive.

Ms. Goswami then shared some additional thoughts about the Indian perspective on surrogacy. First, the current ban on all surrogacy that is not domestic and altruistic in nature may be fragile. Already, one can find people who misrepresent the relationship between intended parent and surrogate in order to qualify for surrogacy. Ms. Goswami also noted that as in other countries, the thinking of feminist groups is sharply divided in India. Further, Ms. Goswami stated that informed consent may vary widely among the clinics.

On terminology, Ms. Goswami noted the cultural differences between the terminology used in South Africa and India on the one hand and the USA and the UK on the other hand. Specifically, “commissioning parents” and “surrogate mother” in the former, and “intending parents” and “surrogate” (or “carrier”) in the latter. Ms. Goswami wondered whether this terminology difference was a way of removing the surrogate from the process and showing more favor to the intended parents. As noted above in footnote 46, the concept of blood is very culturally significant in India. And the surrogate in India may say “Of course I’m not the child’s mother, but I’m the child’s mother” and many expressed the hope that the child would connect with her again someday.

Ms. Goswami stated that she is continuing her research, and in particular will focus on mental health issues of surrogates, and whether there are psycho-social or other factors involved. Currently, the medical doctor is the primary clinician involved with the process, and there is only limited involvement of mental health professionals. Multiple data points, including an ongoing desire to remain connected to the child, suggest that more research on the mental health impact of surrogacy on the surrogated in India is needed.

E. Public perception of surrogacy in New Zealand

Professor Debra Wilson (University of Canterbury, New Zealand) studied the public perception of surrogacy in New Zealand, including the views of medical and legal practitioners.⁴⁹ Current law in

⁴⁹ Publication of her study was expected within the months following the Forum.

New Zealand regarding surrogacy was enacted in 2004⁵⁰, and there was little discussion or debate on the matter. However, the choice was made to regulate surrogacy in a specific way. The goal of the study was to see if the public perception of surrogacy and how it is regulated align with the concerns that shaped the regulation.

Prof. Wilson reminded the delegates of the legal framework for surrogacy in New Zealand. Altruistic surrogacy is permitted in New Zealand. Participants in surrogacy who work with a fertility clinic must follow a specific process that includes approval by the ethics committee. If approval by the ethics committee is not given (or sought), the fertility clinic may be charged with a criminal offense for proceeding with treatment. If the participants choose not to work with a fertility clinic, then the regulatory process need not be followed. In either situation, adoption is the only method available in New Zealand for the intended parents to secure their parental rights.

In her research, Prof. Wilson has talked with all of the fertility clinics in New Zealand, surveyed attorneys with a practice in this area, interviewed a number of family court judges, and conducted a public perception survey. It was highlights of this public perception survey that she presented. The public perception survey was sent out to every 20th person on the general electoral role.⁵¹

One of the questions asked on the survey was whether domestic surrogacy should be legal, and whether surrogates should be paid. This question had 532 respondents. Of these respondents, 54.5% stated that surrogacy should be legal and surrogates should be compensated,⁵² 27.6% stated that commercial surrogacy should be legal,⁵³ 8.9% stated that they were unsure, 6.6% stated that altruistic surrogacy should be legal, and 3% stated that surrogacy should not be legal. When these results are filtered by age, they show that compensated surrogacy is favored by the young, with altruistic surrogacy having its strongest support among the older population. Commercial surrogacy held a stable level of support across age groups. When the results were filtered by education level, the results were relatively stable. The indigenous population strongly favored compensated and

⁵⁰ Human Assisted Reproductive Technology Act 2004 (the 'HART Act').

⁵¹ The general electoral role represents about 95% of the population and was made available to Prof. Wilson due to the nature of her research.

⁵² Compensated surrogacy means that the surrogates receive compensation for expenses incurred.

⁵³ Commercial surrogacy means that the surrogate may receive payment for her gestational services.

commercial surrogacy, with no support for altruistic surrogacy.⁵⁴ No significant difference was noted by gender, although women of in the age range of 45-55 had a higher level of support for commercial surrogacy.

Another question asked is whether there should be a requirement for a genetic link between the intended parents and the child. When asked this question directly, 47.2% of respondents answered “no”, and 39.6% of respondents answered “yes”. In general, a genetic link between the intended parents and the child seemed to be more important to groups with lower education levels, certain ethnic groups, people who had a history of involvement in fertility treatment, and people who with experience in surrogacy. But the responses to indirect questions tell a different story. When asked about difficult situations, such as when the parties have a dispute over parentage, the role of a genetic link became more important to the respondents. The genetic link became a means of resolving the situations.

The most surprising finding to Prof. Wilson was on the question that asked what should happen to the child if the surrogate changes her mind and does not wish to relinquish the child to the intended parents. In this situation, 51.8% of respondents would grant custody to intended parents, 15.7% would grant custody to surrogate, 12.8% would grant some sort of joint custody if possible, and 6.7% responded “other.” The support for granting custody to intended parents varied somewhat across demographics, but was consistently the most favored response.

F. Discussion

A delegate asked Ms. Goswami how the surrogates who were interviewed became aware of surrogacy in the first place. Ms. Goswami responded that there was a recruiting effort made, and then word of mouth spread.

Another delegate asked Ms. Goswami about the process of medical screening of surrogates in India, and what attention is given to surrogates as patients. Ms. Goswami responded that there are medical standards on paper, but this is viewed with a certain amount of skepticism. In reality, the relationship

⁵⁴ Culturally, the indigenous population of New Zealand values reciprocal relationships.

between the doctor and the surrogacy contains a significant amount of paternalism. Professor Sital Kalantry (Cornell Law) added that the standards are weak, and that the same doctor often takes the dual role of fertility doctor and OBGYN for the surrogate.

Another delegate asked about the effect of the ban on international surrogacy in India – specifically reports that some clinics have moved operations to other countries to serve international populations. Prof. Kalantry responded, observing that, with a population over one billion people, the domestic fertility industry is robust.

Another question was asked of Ms. Goswami, about the level of risk that surrogates in India would not receive the payment that they had been promised. Ms. Goswami responded that the doctors involved ensure that the surrogates are paid.

Another delegate asked if genetic (or “traditional”) surrogacy is on the decline. Responses from the panel were that India bans genetic surrogacy, while the practice still occurs in the UK.

Another delegate asked Ms. Goswami to comment further on the legal situation of international surrogacy in India. Ms. Goswami responded that the ban came as a result of scandals in the media that called the practice of international surrogacy into question. Today, international surrogacy arrangements can result in situations where the children remain with the surrogate for several months after the birth while the parentage situation is adjudicated.

Another delegate asked for comments about the process for screening, particularly mental health screening, of surrogates in India. Ms. Goswami stated that in India, surrogates usually have medical screening only. Further, due to the deference shown to doctors by the women, it is not likely that the surrogates would say anything alarming to the doctor during the screening process. Dr. Jadva added that mental health screening is not mandatory in the UK either.

Another delegate asked whether the data show any rationale for drawing a distinction between genetic and gestational surrogacy (and what that distinction should be). Dr. Jadva responded that the data showed little or no difference between the two in terms of outcomes, including for the women who have acted in both capacities.

Another delegate asked Professor Golombok to comment on criticism that the longitudinal study has received, particularly from those who are opposed to surrogacy: specifically that the sample size is too small to be meaningful. Prof. Golombok offered several points in response. First, she acknowledged that, in general, people will always try to tear research apart – that is a fact of life in research. However, she continued, now we know something rather than nothing. Here at least the study is helpful. Prof. Golombok explained that the sample was small, but importantly it was representative. She reminded the delegates that the sample size was constructed across demographic lines with help from a governmental agency. Further, standard methods and models were used to conduct the study. Prof. Golombok also noted that the study started when the children born through surrogacy were 1 year old – at this point, no one knew how they would turn out, and the study could have gone in any number of directions. She stated that even in the small sample, big problems – if there were any - would likely show up. She acknowledged that the smaller sample size could lead to a loss of nuance, but not major trends. And finally, in response directly to those who use the limitations of the study as a means to bolster an anti-surrogacy agenda: there are no studies that contradict the findings.

Another delegate noted that in the United States, a relationship between the intended parents and the surrogate is strongly encouraged – but that such relationship-building seems to be discouraged in India. The delegate asked Ms. Goswami for comment. Ms. Goswami acknowledged that meetings between Indian surrogates and intended parents from other countries are generally tightly controlled or even scripted by intermediaries. She offered several thoughts. Ms. Goswami believes that the resistance from the intermediaries in India to allow relationships to develop comes from a perspective of trying to protect intended parents. There is a massive language barrier between an Indian surrogate and intended parents from another country, which may be exacerbated by illiteracy in some cases. A direct relationship with the surrogate would also expose the intended parents to the poverty of the surrogate, and some intermediaries may be concerned that the surrogate would ask the intended parents for more than what is provided in their agreement. Overall, she said, cultural differences are very important in international surrogacy arrangements and should be explained to all parties (surrogate and intended parents) in detail.

INTERNATIONAL LAW DIMENSION

A. Private International Law: the HCCH Parentage/Surrogacy project

Dr. Michael Wells-Greco is a consultant lawyer to the Permanent Bureau of the Hague Conference on Private International Law (HCCH), and described the history and current status of the Parentage/Surrogacy project of the HCCH.⁵⁵ The project received a mandate in 2015 to consider the “feasibility of advancing work” on the “[p]rivate international law issues surrounding the status of children, including issues arising from international surrogacy arrangements.”⁵⁶ To date, the focus of the project has been on cross-border continuity of parentage, no matter how that parentage has been established. While discussion of parentage of children born through ISAs has certainly been a topic of discussion, the HCCH project is not an endorsement of surrogacy in general or ISAs in particular by the Permanent Bureau. Rather, the project is intended to recommend a solution or solutions to address issues of limping parentage and citizenship for children, including those children born through ISAs.

The HCCH Parentage/Surrogacy project has convened an Experts’ Group to work on these issues in detail.⁵⁷ To date, there have been five Experts’ Group meetings. Under primary consideration is a hard law solution (such as a convention) that could provide a solution. Complicating the discussion is the diverse approaches to establishing legal parentage among the states. An initial approach to work through this diversity is to focus on cross-border recognition of judicial orders that establish parentage.⁵⁸ Further complicating the discussion is the differing policies among the states to surrogacy. Options for hard law solutions include: an instrument on legal parentage where parentage

⁵⁵ Detailed information about the project may be found here : <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>

⁵⁶ Prel. Doc. No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, available on the website indicated in footnote 55, and at : <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf>

⁵⁷ The Experts’ Groups is geographically diverse, with the first meeting by experts who “represented 21 States from all regions, including some States of origin as well as some receiving States in relation to international surrogacy arrangements...” See : *Report of the February 2016 Meeting of the Experts’ Group on Parentage/Surrogacy*, available at : <https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf>

⁵⁸ Noting that most people do not have a judicial order establishing their parentage, Dr. Wells-Greco posited that perhaps a presumption of parentage, as based on a public document, could be considered.

of children born through ISAs is excluded, an instrument on legal parentage that would be inclusive of children born through ISAs without specificity, and an instrument on legal parentage with specific provisions for children born through ISAs. Regulations could be considered as pre-conditions for cross-border recognition of parentage, which could lead to jurisdictional filters among states.

From the latest meeting of the Experts' Group, a two-track approach emerged:

Most Experts recommend that future work focus on developing both:

1. a general PIL instrument on the recognition of foreign judicial decisions on legal parentage; and
2. a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from ISAs for recognition of foreign judicial decisions on legal parentage.⁵⁹

This two-track approach has an advantage in that it could be a path to consensus for the Experts' Group. However, by carving out a separate protocol for ISAs, this approach runs the risk of distinguishing one class of children against others.

In order to develop and implement a solution, the HCCH needs to develop consensus on multiple levels. First and foremost is the scope of an instrument, as noted above. Next are the grounds of jurisdiction, and whether the grounds would be direct or indirect, or a combination. Specific regulations as conditions for recognition are another point where consensus is needed. Further, there are questions as to whether any instrument would be restricted to HCCH member states only, or available to non-member states. The HCCH could consider other options as well, such as uniform law options or soft law approaches. Clearly more work is needed, and will continue.

Dr. Wells-Greco is also a consultant lawyer to International Social Services (ISS), which has convened a group of experts to draft international principles relating to ISAs.⁶⁰ ISS has called for “urgent regulation” of international surrogacy. The international principles are inspired by the Convention on the Rights of the Child and its optional protocol. New drafts of the principles are expected in the near future.

⁵⁹ See: *Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 28 January – 1 February 2019)*, paragraph 32, available at: <https://assets.hcch.net/docs/55032fc1-bec1-476b-8933-865d6ce106c2.pdf>.

⁶⁰ See more information about the ISS Surrogacy project here : <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>

B. Public International Law: the UN work on surrogacy

Maud de Boer-Buquicchio, UN Special Rapporteur on the sale of children, child prostitution and child pornography, clarified from the outset that she cannot speak on behalf of the UN. Rather, as an independent expert, she has been given a mandate to by the UN Human Rights Council to look at trends and patterns in the area of the sale and exploitation of children, and to advise them in this area. In this capacity, she has already issued a report on international surrogacy from the perspective of the sale of children,⁶¹ and is preparing another report that will be expected to be reported to the General Assembly in October.

As a starting point for the Special Rapporteur, there is no “right to a child” in international law. In the context of commercial surrogacy, there are serious concerns under the optional protocol of the Convention on the Right of the Child when the commercial value of the surrogacy transaction determines the whole process itself. For the Special Rapporteur, there must be a mechanism, and safeguards, to ensure that the best interests of the child are given paramount consideration. The Special Rapporteur accepts that there is a need for a balance between concerns of commodification and exploitation of the surrogate on the one hand right to make decisions concerning one’s body and reproductive health on the other hand. However, the Special Rapporteur wants to focus on the child, and recognises that countries where surrogacy is prohibited need guidance on how to respect the rights of the children in their country who may have been born through surrogacy.

In our current regulatory vacuum, the Special Rapporteur believes that attention needs to be focused on the intermediaries that may engage in bad surrogacy practices. The Special Rapporteur does not support criminalization of the surrogates themselves.

Prohibitive states should carefully conduct a post-birth, best-interests analysis with regards to the child’s right to identity and origin and make an independent parentage judgement for children born

⁶¹ See: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement> for the English version of the 2018 report, and <https://www.ohchr.org/EN/Issues/Children/Pages/Surrogacy.aspx> for more information.

through surrogacy. The Special Rapporteur notes that we have seen terrible issues, including abandonment and abuse, and that a post-birth assessment of parentage could alleviate these problems.

The Special Rapporteur observed, in the context of recent cases of the European Court of Human Rights (ECHR) relating to states that have a prohibitive approach to surrogacy,⁶² that it is important to remember that the ECHR has found that the paramount best interests of the child outweigh the state's interest in deterring the practice of surrogacy. However, the Special Rapporteur noted that follow-up judgments by the ECHR regarding the use of adoption processes to secure parentage did not discuss the safeguards involved in the adoption process. The Special Rapporteur finds the omission regrettable, as these safeguards having been developed over a long period of time by the international community.

According to the Special Rapporteur, a genetic link between the parent and the child should be considered in a best interest analysis, but a genetic link to an intended parent does not mean automatic parentage. When a child is conceived through gamete donation, we need to strike a balance between privacy for the gamete donor and the child's right to know her origins.

The Special Rapporteur is concerned about the enforceability of contracts where surrogacy takes place. In particular, how the enforceability of agreements should be handled by countries that take a prohibitive or regulatory approach. Additional criteria for assessment of these agreements may be needed.

The Special Rapporteur believes that the failure to regulate in this area can lead to the commodification of children and very serious risks to children's rights. Markets for children should be dismantled. Children should not be treated as commodities, nor should they be discriminated against based on the manner in which they were conceived. What is needed is a set of minimum rules to govern the practice from a multidimensional human rights perspective. We also need more consultation of ideas, research, and discussion.

⁶² See, e.g.: *Menesson v. France*, App. No 65192/11; *Labassée v. France*, App. No 65941/11

C. Discussion

One delegate addressed the Special Rapporteur with a critique of the 2018 report by the Special Rapporteur that discussed surrogacy in the context of baby-selling. This delegate commented that the report equating surrogacy with baby-selling was a moral judgment that stigmatizes children born through surrogacy, attacks their identity, and attacks their origin. The Special Rapporteur responded that she did not want to convey that impression in her 2018 report. However, the Special Rapporteur stated that she did want to punish a crime when it is committed, particularly by intermediaries in the surrogacy process. She added, “I’m all for it [surrogacy], provided there are safeguards.”

Another delegate addressed the Special Rapporteur with a request that the discussion about children’s rights be broadened to all parties involved in surrogacy arrangements, because the discussion also implicates the reproductive rights and choices of others. The delegate then followed this request by asking the Special Rapporteur if she had overstepped her mandate by bringing surrogacy under the umbrella of the sale and exploitation of children. The Special Rapporteur responded that she had not overstepped her mandate, but broadening the discussion to include the rights of the intended parents and others certainly would be an overstep.

Another delegate offered an observation on the topic of a child’s right to access information about their origins. Specifically, that approaches taken by some countries to provide access full information regarding genetic and/or gestational origin to an individual once that individual reaches the age of 18 may not be considered at that point a “child’s” right.

Another delegate addressed the Special Rapporteur to state that intermediaries in surrogacy arrangements are not by definition negative actors, but rather they provide stability in the process.

Another delegate asked the Special Rapporteur if she agreed that surrogacy is a valid procreative option, so long as there are some minimal standards to give the best interests of the child paramount consideration. The Special Rapporteur responded that she did agree. The delegate then asked if there was room in the Special Rapporteur’s position for compensation of the surrogate. The Special Rapporteur responded that yes, this is possible if there is agreement on reimbursement in advance.

THE WAY FORWARD

For this section of the Forum, the panelists from the prior section were joined by Prof. Sital Kalantry and Dame Lucy Morgan Theis before a general discussion was opened.

A. Comparative analysis of US and Indian surrogacy arrangements

Professor Sital Kalantry (Cornell Law) uses comparative and empirical research to understand feminist legal issues transnationally. She presented her comparative research on surrogacy contracts in the US and India, in the hopes that it informs several topics that have been discussed in the Forum.

First, Prof. Kalantry discussed the contrasting systems in India and the United States. India and the United States are similar in that neither country regulates surrogacy at the national level. In each country, surrogacy has flourished in the absence of regulation. The lack of regulation in India has resulted in surrogates bearing all the health risks, not being able to make independent medical decisions, and not having meaningful legal representation. By contrast, in the US the lack of regulation has led to the development of surrogate-protective norms, driven by the legal practitioners, medical professionals, and surrogacy intermediaries. Why such disparate outcomes? In the US, surrogacy operates in the shadow of the common law. The policing doctrines in contract law and the liability doctrines in tort law influence the negotiating positions of the parties to surrogacy contracts. The professionals involved operate in a highly litigious society, where there is a strong incentive to avoid liability and ensure that the surrogacy arrangements are enforceable. In India, however, surrogates have no access to courts, and even if they somehow managed to gain access, delays are endemic and punitive damage awards are low. Further, the relational inequality between the surrogates and the intended parents, medical professionals, and legal professionals leads to a vast difference in bargaining power. Countries that consider legislation should consider their specific context, taking into account their legal culture, social culture, and other factors in order to determine the best way for them to manage surrogacy.

Next, Prof. Kalantry discussed the dangers of the failure to contextualise. In Prof. Kalantry's work, she argues against tendencies to universalize legal problems, such as when a practice in one country

that leads to a certain outcome in that country is expected to lead to the same outcome in another country. Recently in New York State, groups opposed to surrogacy shrouded their ideological views in empirical predictions based on realities in other countries. Specifically, they asserted that if surrogacy were to be made legal in New York, then surrogates in New York would be subjected to the same types of abuses suffered by surrogates in India. This opposition gained traction, and halted a change in New York's prohibitive approach to surrogacy.⁶³

Finally, Prof. Kalantry introduced a feminist perspective on the right to work as applied to surrogacy. In recent debates on surrogacy law in India, Prof. Kalantry was struck by the absence of the perspective of the surrogates. There is no organisation that advocates for surrogates in India. By contrast, there are organisations for sex workers. Here, the surrogates bear all the risk of a dangerous activity without the protections - factory workers and construction workers have more protections. A right-to-work approach could be used to provide protections for surrogates, such as a legal protections, health insurance, and other conditions of employment such as a fair wage. Banning compensation for surrogates reinforces the idea that they should simply enjoy pregnancy and childbirth, while caps on compensation in surrogacy have no other comparative model. This approach makes many uncomfortable – it could make surrogacy more expensive for intended parents, some reject the imposition of market forces in yet another area of life, and others would object to surrogacy generally on religious or other moral grounds. Nor is this necessarily the right way to think about surrogacy in all countries, but it is a model that can help some as they consider regulation that is appropriate for their context.

B. Public Awareness and Debate

Mrs Justice Theis DBE is the lead judge dealing with surrogacy cases in the England and Wales. She offered a few brief remarks. First, her aim is to get the decisions with the difficult issues involved in the surrogacy cases that she has seen out into the public domain. These issues need to be debated, and she wants the judicial decisions to inform that debate. Second, she is strongly concerned about those

⁶³ This was in response to the introduction of the Child-Parent Security Act in the New York State legislature, available at : <https://www.nysenate.gov/legislation/bills/2019/s2071>

in the UK who have *not* sought a parental order for their children born through surrogacy, and hopes that increased public awareness about the legal issues that can result from this situation will encourage more to come forward to properly secure their families and their children's rights.

C. Discussion

A delegate offered key points from the UN Committee on the Rights of the Child (CRC). The delegate suggested that the CRC has no position on prohibition of surrogacy, but believes that surrogacy should be regulated. The delegate believed that the CRC is developing positions on the child's right to identity, nationality, and information on origins. The delegate suggested that the CRC is looking to avoid the legal limbo that children born through surrogacy sometimes suffer, and also looking to promote the best interests of the child. The Special Rapporteur responded that it was good to know that the CRC is considering this. Dr. Wells-Greco observed that the CRC has the ability to convene a "day of discussion" and encourages them to do so for children born through assisted procreation.

Another delegate asked Mrs Justice Theis for her thoughts on how well she believes the current UK system protects the rights of the child, particularly as regards the legal limbo children may remain in for a period of time. Mrs Justice Theis responded that the system works, with limitations. She again expressed her concern for those who do not seek a parental order, wondering how that situation could be in the interests of the child. Prof. Nick Hopkins of the UK Law Commission spoke up to remind the delegates that the Law Commission is looking to improve the process.

Another delegate asked the panel to comment on the problem of "invisible" children, or those born through an international surrogacy arrangement and returned to their home country without further regularisation of their legal status. The Special Rapporteur stated that legal limbo for children is unacceptable, and that states with a prohibitive approach to surrogacy must define clear paths to parentage for these children. Further, countries that lack regulation should at least keep medical records for the children born through surrogacy. Finally, the Special Rapporteur reiterated her belief that post-birth best interests assessments should be conducted by the receiving country.

Another delegate asked whether or not the stated concerns by the Special Rapporteur about the sale of children in the context of surrogacy should be a basis for the denial of parentage, particularly as regards a second parent that does not have a genetic connection to the child. The delegate referenced a specific country's policy regarding the recognition of foreign birth certificates. The Special Rapporteur responded that there should be multiple considerations for parentage, and declined to comment on a specific country's process. Dr. Wells-Greco added that the ECHR cases do not mandate that a second-parent adoption be used to establish, but that it is a process that could be used if available.

Another delegate brought up a current situation wherein one country (country A) has recently stopped accepting parentage documents from other countries, with the result that children born through surrogacy in another country are unable to travel to country A, where their legal (according to the other country) parents live. A delegate from country A stated that the government's position opposing surrogacy is the problem in this situation. This delegate continued to suggest that the Parentage/Surrogacy project of the HCCH is a significant opportunity to avoid this situation because an international solution could provide a mechanism to recognise parentage across borders without implicating the current politics of a specific country.

The final delegate to speak offered a rejection of the idea that recognition of a child's parentage should be contingent on politically imposed conditions. Rather, this delegate suggested, we must decouple safeguards that may be culture-specific and laden with judgment from the recognition of parentage. Recognition of parentage is the right of the child.

CLOSING REMARKS

Sir James Munby, the former President of the Family Division of the High Court of England and Wales, offered closing remarks. After calling the conference a "spectacular success", he offered several observations.

First, there is an increasing recognition of surrogacy as a legitimate means of forming a family, but there is still work to be done to sort out some of the problems.

Second, it is clear that the law has not kept up with science and society; this is seen with older laws on surrogacy that are now ineffective.

Third, the tolerant, free market, and regulatory approaches to surrogacy seem to be converging, likely toward the regulatory approach. The prohibitive approach to surrogacy is becoming increasingly anachronistic – and problematic.

In terms of the regulatory approach, the impression is that consensus is moving toward a pre-birth process for parentage. A pre-birth, or pre-conception, system of regulation and parentage allows protections to be put in place before the child is born or conceived. This seems to be the best for the interests of the child. Whether such regulation should be administrative or judicial in nature remains to be discussed.

Sir James Munby then offered thoughts on the way forward, given the private international law issues with ISAs. While model laws may be an answer, he suggested, the work of the Hague Conference on Private International Law is likely the best opportunity to develop workable rules on the recognition issue. This work should be encouraged to move forward as quickly as possible, because a rule of cross-border parentage recognition is urgent.

Understanding the human reality involved with surrogacy is critical. The actions of governments toward the participants in surrogacy are causing immense suffering, and this is not in the best interests of any child. One cannot ignore the inhumanity of a system of international non-recognition of parentage.

Sir James Munby closed with considerations for regulation. Exploitation of participants in surrogacy needs to be addressed - it would be idle to imagine that exploitation is not occurring. On the other hand, an onerous regulatory scheme can dramatically drive up costs. Thus, regulation must balance the need for protections of the parties while not creating a privilege for the wealthy.

With these remarks, the Forum closed.

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