STUDENT COLUMN

THE FOETAL STATE OF INTERNATIONAL SURROGANCY FRAMEWORK

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Assisted reproduction technologies have been in the public eye for multiple decades now, with surrogacy as the new frontier. With the increasing success rate of gestational surrogacy that a rising number of infertile couples (or individuals) have turned towards surrogacy as a method of procreation. However, as most states currently either limit or completely ban the practice, there is a vast disproportionality in the availability of treatment. This has led to an increase of reproductive tourism, where couples from a prohibitionist state travel to a pro-surrogacy destination in order to contract a surrogate. With the lack of any specific international cooperation in surrogacy, most international surrogacy arrangements bring forth complex legal problems, from the parentage of the child to recognising foreign court orders as well as the protection of women and children. Due to the global connectivity and information sharing of the Internet, cross-border surrogacy is believed to have increased, however, no general statistics exist concerning surrogacy. Yet, various national statistics can be utilised to demonstrate this current trend, for instance, observing the UK national statistics on parental orders, portrays an annual increase of surrogacy.

There are two primary reasons for international cooperation, the conflict of national parentage rules as well as the increasing procreational tourism. The public international law (PIL) issue is very delicate as surrogate born children have a high risk of becoming victims of the discrepancy of domestic law rules of different states over parentage. For instance, in the High Court of Justice's case X & Y *(Foreign Surrogacy)*[2], after a successful surrogacy in Ukraine, the Ukrainian birth mother relinquished her parentage over the children for the UK intended parents. Thus, the children lost their Ukrainian nationality as well as their residence permit. When the UK not recognise the initial change of parentage due to the compensations paid, the children were left in limbo, stateless. As a result, no one was required to take care of the children by law, not the intended parents, the surrogate nor the Ukrainian government, apart from providing accommodation as a basic act of humanity in an orphanage. Uncontrolled procreational tourism can create a space for a growing black market to exploit both the surrogates as well as the intended parents. As both factors are issues of an international scale, internationalisation is required to effectively combat them.

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2 High Court of Justice Family Division, United Kingdom, X & Y *(Foreign Surrogacy)*, judgement, 9 December 2008, EWHC 3030 (Fam) para. 27-28 (hereafter X & Y *(Foreign Surrogacy))*.

After observing how the national responses to surrogacy are vastly different, the aim should be to find compatibility rather than full regulatory harmonisation. However, to fulfil the general human rights obligations under the Article 3 of the United Nation Convention on the Rights of the Child, the 'best interest of the child' is elevated as the primary focus in all actions concerning children. As the interest of the child should be central in the considerations of the agreement, a more direct approach is needed. If the aim is to have a clear system of parentage, all signatory states should ensure that their individual legal systems would share the same outcome. This would call forth an approach similar to the European Union's directives, where a clear goal is proposed for the participating Member States to reach. However, the realisation of the new international agreement is determined by the signatory state, which would give adequate consideration to the individual natures of the different legal systems.

Public order considerations of surrogacy opposing states should be taken into account, as commercial surrogacy does indeed pose a threat of exploitation. To follow the lines of the European Court of Human Rights (ECtHR) from its surrogacy related case law, Contracting States should be left with the discretion to legislate against the commercial aspect of surrogacy. Nonetheless, seeing how jurisdictions in different countries will clash over the parentage of a surrogate born child, such policy considerations cannot be seen to justify states to ignore the arrangements made legally under a foreign jurisdiction. This was also evident in the judgements of *Mennesson v France*[3], and *Labassee v France*[4] under the ECtHR, where the French government overstep its margin of appreciation when it refused to acknowledge the American parental order identifying the children born through surrogacy to French parents as theirs. Thus, discretion should be given to states in the light of commercial surrogacy, and not in the acknowledgement of parentage.

As the internationalisation of the legal discussion over surrogacy is still relevantly recent, there have not been many concrete attempts to provide a platform for a convention. Trimmings and Beaumont have compiled proposals as to what a concrete convention should in theory tackle[5]. They propose a framework modelled after the Hague Conference on Private International Law Adoption Convention adopted 29 May 1993 to ensure mutual minimum standards for all parties at the proceedings as well as the recognition of court orders made under the Convention's jurisdiction. However, their proposition was criticised for the fact that surrogacy encompasses a vastly different scope of ethical and political issues than adoption. Reconceptualising parentage, changes to the mother-child bond as well as womanhood requires a more rights-based consideration before the

3 Mennesson v. France, 65192/11, 2014.

4 Labassee v. France, 65941/11, 2014.

5 Trimmings, K., Beaumont, P., 'International Surrogacy Arrangements: An urgent need for Legal Regulation at the International Level' *Journal of Private International Law*, Trimmings, K., Beaumont, P., General Report on Surrogacy, in: Trimmings, K., Beaumont, P. (eds), *International Surrogacy Arrangements - Legal Regulation at the International Level*

creation of a PIL instrument. It appears that both parties are correct, that a two-tiered system is most applicable in this case. The primary stage is the need to solve the current judicial disputes especially in the field of parentage, followed by the surrogate hotspots working together with the surrogate prohibiting states to enable each individual interest and rights to be properly balanced.

The ECtHR has provided much to consider for legislators and legal scholars, namely, to what extent signatory states are now required to accommodate the practice of surrogacy that may be contrary to the national law. However, surrogacy is a viable form of treatment for infertility and should be acknowledged as such. Clearly ignoring the current developments is not a viable solution. As long as there exist other jurisdictions with a more lenient approach to surrogacy, reproductive tourism will continue to grow. Ultimately, while it will, much like abortion, remain a contested topic for years to come, the protection of the best interest of the child requires action to be taken now. As identified by the ECtHR, Contracting States have a mandate to protect the private and family life of a child by acknowledging its parentage without discrimination to the means that the child was born from. With multiple cross border issues as well as the general applicability of PIL norms, there is a need for international cooperation and a framework to ensure that all parties receive the protection they need and deserve. A concrete start would be to harmonise the laws on the recognition of parentage, thus helping to prevent limping parental relations.