

Legal and Ethical Issues in Cross-Border Gestational Surrogacy

Noelia Igareda González¹, PhD.
Serra Hunter Lecturer in Philosophy of Law
Autonomous University of Barcelona
Bellaterra, Barcelona, Spain

Abstract

This article aims to identify the main legal and ethical issues around international surrogacy. Due to the legal diversity and ethical background of such a globalised practice, a review of the key existing literature on these two matters has been identified and analysed. The article also identifies and analyses the most significant legal solutions provided by supranational jurisdictions when dealing with cases of international surrogacy. The scope of the article includes the efforts to reach a minimum legal framework at international level, with the aim not to standardise but to provide common legal solutions to those travelling abroad to have a child by means of surrogacy.

Capsule

International surrogacy entails ethical and legal issues. Various legal provisions are in place when parents return home with children conceived through international surrogacy. Whereas the interest of the child always prevails, there is a need for an international legal framework.

Key words: international surrogacy, ethics, law, cross-border gestational surrogacy

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Introduction

This article aims to identify the main legal and ethical issues around international surrogacy. The intended parents may face legal problems before returning to their countries of origin or when trying to have their children legally recognised in their countries. The greatest legal obstacles are the recognition of these children's nationality and filiation. Due to the legal diversity and ethical background of a globalised practice, a review of the key existing literature on these two matters has been identified and analysed here. The scope of the article includes the legal solutions available at national level, based on the prevailing interest of the children, and the legal responses by some supranational jurisdiction when dealing with international surrogacy cases. It also includes the efforts to reach a minimum legal framework at international level with the aim not to standardise but to provide common legal solutions to those people travelling abroad to have a child through surrogacy.

¹ Noelia Igareda González, PhD. Universitat Autònoma de Barcelona, Edifici B – campus UAB – Bellaterra (Cerdanyola del Vallès), Barcelona, 08193, Spain. Email: noelia.igareda@uab.cat. Tel. +34 935812239.

The state of the art on international surrogacy

Surrogacy is subject to diverse legal treatments around the world. Since the broader application of assisted reproductive techniques in the 1980s and 1990s, surrogacy has emerged as a way for individuals or couples to have a child, using their own gametes, or those provided by a donor (Caldwell, 2019). The increasingly limited opportunities for international adoption has also contributed to the generalisation of international surrogacy (Trimmings and Beaumont, 2011). In parallel to this increased utilization of surrogacy, different countries around the world decided to allow surrogacy only in certain cases: some countries, such as the United Kingdom², Canada³, Greece⁴, Portugal⁵, Israel⁶, Thailand⁷ and South Africa⁸ accept only the altruistic model; other countries (e.g. some states in the United States, Ukraine, and some states in Mexico) permit both the commercial and altruistic model; and other countries have decided to expressly forbid it (e.g., Germany or Spain⁹) or even consider it a crime (e.g., France¹⁰ or when commercial surrogacy takes place with extraterritorial effect in the Australian states of New South Wales and Queensland¹¹ and the Australian Capital Territory) (European Parliament, 2013; Fenton-Glynn, 2017).

Countries that allow surrogacy might consider it one assisted reproductive technique (e.g. Portugal) or they might recognise surrogacy as a new form of filiation, unlike natural filiation or adoption (this is the case of Greece by virtue of article 179 of the Greek Civil Code). In countries where surrogacy is allowed, there might be a specific piece of legislation regulating it (e.g. the British Surrogacy Arrangements Act 1985) or surrogacy is permitted without any particular law, by applying the principle of law whereby 'whatever is not prohibited is allowed' (e.g. Belgium and the Netherlands). When surrogacy is legal (be it the altruistic or commercial model) it can be limited to nationals or legal residents (e.g. in the United Kingdom, Israel, Portugal, India or Thailand¹²) or open to anyone (e.g. in those USA states where surrogacy is permitted, Canada, Ukraine or Greece) (Stoll, 2013; Igareda, 2019).

Despite this legal diversity, we live in a globalised world, where citizens from one country ~~where~~ and surrogacy is not allowed can easily travel to another country where ~~surrogacy~~ **it** is legal, and have access to this practice to have their own child (Shenfield et al., 2010; Fenton-Glynn, 2017). Nevertheless, even if surrogacy is legal in their country of origin, other citizens may travel abroad for different reasons: to have access to surrogacy with a more advanced and innovative fertility care; lower costs; possibility to use genetic engineering using specific genetic material (Caldwell, 2019); seeking legislation where contracts can be enforced, donor gametes are more easily found or are anonymous (Nelson, 2013). This cross-border gestational surrogacy may cause some legal issues when those citizens return to their home country with children who have been 'illegally' or 'fraudulently' conceived. Surrogacy also poses important

² Surrogacy Arrangements Act 1985.

³ Assisted Human Reproduction Act, S.C. 2004.

⁴ Act 3089/2002 on Medically Assisted Human Reproduction

⁵ Act 25/2016, of 22 August, which regulates access to surrogate motherhood, introducing the 3rd modification of Act 32/2006

⁶ Embryo Carrying Agreement Act, 1996.

⁷ Protection of Children Born Through Assisted Reproduction Technologies Act, B.E. 2558, 2014.

⁸ South Africa Children's Act of 2005

⁹ Act 14/2006 of 26 May, on human assisted reproduction techniques

¹⁰ Article 227-13 French Penal Code

¹¹ Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Parentage Act 2004 (ACT).

¹² Protection of Children Born from Assisted Reproductive Technologies Act, 2015.

ethical issues which render the solution of these legal problems more difficult when international surrogacy takes place. This constitutes an important obstacle to achieving a common approach and a minimum international legal framework.

Major legal problems arising from international surrogacy

The diverse legal approaches to surrogacy facilitate cross-border gestational surrogacy. In other words, citizens living in a country where surrogacy is not permitted can travel to a country where surrogacy is legal to have their own child by means of this process. Apart from the differences between countries of origin where surrogacy is not permitted or not regulated, we may find different forms of granting parenthood and nationality in the country where surrogacy occurs. Some countries (e.g. the United Kingdom) apply the birth test in cases of surrogacy, i.e. the woman who gives birth is considered the child's legal mother. Other countries apply the genetic test, whereby the child's parents are determined on the basis of genetics - this has been the case in some controversial cases such as *Johnson vs Calvert*, No X633190, California Superior Court, 1990. Others apply the intent test, where legal parenthood is recognised to the intended parents, e.g. in Greece (Trimmings and Beaumont, 2011).

The legal problems usually begin when the individual or couple return to their country with the surrogate-conceived child and try to be recognised as the child's parent(s). On the other hand, issues can also start before travelling back to their country(s). For instance, a passport needs to be obtained for the infant, and their own embassy may not issue the needed documents as they may have evidence that that child was born from arguably a legal fraud. In other situations, the child can be a national of the country of birth (*ius solis*)¹³ or their nationality depends on their parents' nationality (*ius sanguinis*)¹⁴. In both cases, the passport can be denied because the child has not acquired a nationality yet or because, since the parenthood is not recognised, the child cannot acquire their parents' nationality (Nelson, 2013; Fenton-Glynn, 2017).

Further problems might arise when the child arrives in the country of origin of the parents, who want the child to be legally recognised and registered as their own child. Depending on the national legislation, the child may need to be legally recognised as a person along with its filiation; in some cases, this may happen when the child needs to be enrolled at school, given vaccines or covered by the national public health system. The national authorities of the parents' country of origin may interpose a wide range of legal problems to recognise that child as the couple's, although sooner or later, the superior interest of the child prevails and public authorities or national judges will concede the nationality and filiation of that child as long as the surrogacy arrangements were in accordance with the law of the jurisdiction in which it took place (Fenton-Glynn, 2016, 2017).

Sometimes same-sex couples or single persons try international surrogacy as the ultimate option to create their own family, not because their own national legislation prohibits it but because same-sex couples and single persons might find it impossible to internationally adopt a child and the low numbers of national children to be adopted (Lamm, 2016; Horsey et al., 2018). Problems may arise when the intended parents are a same-sex couple or a single parent. Surrogacy may seem their only way to have their own child, but their national legal

¹³ For example, in the United States, the fourteenth Amendment ensures automatic citizenship upon birth in the United States.

¹⁴ For example, in Spain, the first point in article 17 of the Civil Code establishes that a child is Spanish if at least one of their parents is a Spanish national.

frameworks may not allow a same-sex couple or a single parent to have children. Upon returning home, they may encounter particular legal difficulties in being recognised as parents.

Issues may arise when the intended parents travel to another country to have a child using surrogacy arrangements despite surrogacy being legal in their country of origin. This may be the case for couples or single persons who do not fulfil the legal requirements stipulated by their national legislation (e.g. securing a genetic link with at least one of the intended parents¹⁵; being a couple; being a heterosexual couple¹⁶; etc.). When returning home, these parents will face the same legal problems when trying to be recognised as legal parents of that child (Horsey, 2015; Horsey et al., 2018).

Finally, problems may occur when international surrogacy has taken place in a country with no specific legislation on the matter. Consequently, if any issues arise, such as complications during pregnancy, lack of agreement between the intended parents and the surrogate, refusal by the surrogate to hand over the baby after the birth, divorce or separation of the intended parents during the process, the intended parents' change of heart once the pregnancy has started, there might be no legal provisions to cover these eventualities. Although a judge can always provide a legal solution to these potentially problematic situations by applying the existing national norms on filiation and contracts, they cause significant levels of legal uncertainty and contribute to a negativity surrounding surrogacy (Trimmings and Beaumont, 2013).

Key ethical issues about international surrogacy

As well as the aforementioned legal problems, some key ethical issues exist around surrogacy and in particular international surrogacy. These ethical issues can be grouped as exploitation; child trafficking

With respect to presumed exploitation, surrogacy is seen by some as an attack on human dignity, since the surrogate is used as an instrument and not as an end in herself (Adorno, 1998). Moreover, it could be argued that only poor or vulnerable women would accept such an arrangement, making international surrogacy another form of women's exploitation in the world. In western countries where surrogacy has been accepted and regulated, there is no evidence that surrogates are exploited (Ciccarelli and Beckman, 2005; Jadvá et al., 2003; Blyth, 1994; van den Akker, 2003). Additionally, the surrogate freely accepts the surrogacy arrangement and expresses her free will. Doubts regarding the surrogate's free consent to enter a surrogacy agreement and relinquish the baby to the intended parents after the birth reinforce gender stereotypes about women's changeable decisions and women's biological destiny (Farnós, 2010; Lamm, 2012; Igareda, 2019).

Child trafficking presents the fear that surrogacy may endanger the children's wellbeing in the sense that they are portrayed as an object of a sale since economic transactions are involved. Nevertheless, different studies show that children conceived through surrogacy are emotionally comparable or even better-adjusted than children who were conceived traditionally (Jadvá, 2012; Golombok et al., 2017; Zadeh et al., 2018; Jadvá et al., 2019)

International surrogacy postures itself as a negative form of cross-border reproductive care, so-called reproductive tourism, reproductive exile or procreative tourism (Pennings, 2004,

¹⁵ As required by British legislation.

¹⁶ As is the case in Portugal and Greece.

2006; Pennings et al., 2008; Shenfield et al., 2010; Ferraretti et al., 2010; Trimmings and Beaumont, 2011). This form of cross-border reproductive care appears as a threat because there is no way of monitoring the medical procedures, professional practices, ethical standards, the free consent of the surrogate or the independent counselling involved in the international surrogacy arrangement (Fenton-Glynn, 2016). Comparatively, some have portrayed cross-reproductive care as an example of moral pluralism that allows the peaceful co-existence of different and even opposite ethical points of view (Pennings, 2002).

These ethical doubts, however, are not manifested when people travel to other countries to have access to other types of healthcare. In fact, these cross-border health movements are a significant source of financial income and in some cases, medical prestige for the receiving countries. With that said, the existence of profit or any type of intermediaries, automatically makes international surrogacy arrangements ethically debatable. Interestingly, this does not happen in other forms of assisted reproductive techniques, e.g. egg or sperm donations, where private reproductive clinics, gamete banks and intermediating agencies legally obtain an important financial profit from reproductive materials obtained through donation (Igareda, 2019).

Some have argued that surrogacy is an example of practices of 'first-world' countries taking advantage of the 'third-world' countries. Women from poorer countries are being used to satisfy the desired wishes of western couples, as questioned in India and Thailand (Gupta, 2006, 2012; Rudrappa, 2015). In fact, these countries have passed laws to limit surrogacy to their nationals or to only use the altruistic model¹⁷.

In summary, these ethical quandries in part explain why it is so difficult in some countries to reach a minimum consensus to legislate on the matter, to provide a legal solution to what already constitutes a social demand and reality. They also explain to some extent, countries' reluctance to admit and legislate on surrogacy, even if their nationals continue to travel abroad to have a child by means of surrogacy.

International efforts to solve the legal and ethical problems

Countries can legislate assisted human reproductive techniques, matters dealing with filiation and children's rights. However, these national competences are challenged by transnational practices such as surrogacy. International surrogacy constitutes part of the cross-border reproductive care, generally portrayed negatively as reproductive tourism (Matorras, 2005; Pennings et al., 2008).

Some supranational entities have had to deal with some of the legal problems arising from international surrogacy, even though they have not provided a standardised or unique response to them. For example, the European Court of Human Rights (ECHR), under the Council of Europe, has repeatedly ruled in cases of international surrogacy. In those cases, as in other dealings with assisted reproductive techniques, the ECHR has developed the concept of national margin of appreciation to balance the freedom of movement of people and the national moral options (Van Hoof and Pennings, 2012). Eventually, the ECHR ruled in favour of the legal recognition of the nationality and filiation of the child conceived through international surrogacy according to the intended parents, on the grounds of the child's right

¹⁷ Thailand limited access to nationals in its Protection of Children Born from Assisted Reproductive Technologies Act in 2015. India limited access to nationals and only altruistic surrogacy in the Surrogacy (Regulation) Bill, 2019.

to respect for private and family life (Farnos, 2016; Lamm and Rubaja, 2016; Fenton-Glynn, 2017).

Nevertheless, there is a lack of international regulation of surrogacy, since the existing legal instruments do not contain any provisions that could be applied to the potential legal problems of international surrogacy (Trimmings and Beaumont, 2011). A good model of inspiration could be the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Adoption Convention'). This Convention establishes a minimum standard of procedure and guarantee among participating countries, while respecting the different national legal approaches to international adoption (Trimmings and Beaumont, 2011). Yet, some authors highlight the difference between surrogacy as a way or procreation and adoption, which is essentially a transfer of legal parents' rights (Caldwell, 2019).

In 2011, the Permanent Bureau of the Hague Conference on Private International Law issued a Preliminary Report on International Surrogacy Arrangements. Negotiations are still in process to adopt a Hague Convention to regulate international surrogacy but it seems unlikely that a minimum consensus is reached in the near future.

Conclusion/Summary

In conclusion, international surrogacy still represents an important legal and ethical challenge in a globalised world. National legislations are necessary when international surrogacy is being omitted or ignored. International efforts to guarantee common procedures and basic fundamental children's rights must continue to advance in cases of international surrogacy.

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