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Park-Morton, Lottie ORCID logoORCID: <https://orcid.org/0000-0003-3864-7611> (2020) Book Review: Eastern and Western Perspectives on Surrogacy edited by Jens M. Scherpe, Claire Fenton-Glynn, and Terry Kaan, Cambridge, Intersentia, 2019. European Journal of Health Law, 27 (1). pp. 83-86. doi:10.1163/15718093-12271452

Official URL: <https://doi.org/10.1163/15718093-12271452>

DOI: <http://dx.doi.org/10.1163/15718093-12271452>

EPrint URI: <https://eprints.glos.ac.uk/id/eprint/10272>

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Book Review: Eastern and Western Perspectives on Surrogacy

Charlotte Park-Morton

The potential issues around the practice and regulation of surrogacy at a domestic level are well documented and receiving ever more attention in light of the Law Commission's consultation paper on the reform of the law in England and Wales and Scotland. As the evidence suggests intended parents are increasingly crossing borders to commission a surrogate¹, it is essential that the regulation of surrogacy is considered with an international perspective. The growing practice of international surrogacy raises important questions about how effective domestic laws can be in ensuring that international surrogacy arrangements are adequately regulated and there is work being undertaken at an international level to consider how the rights of surrogates, intended parents and children can be best ensured when borders are crossed. *Eastern and Western Perspectives on Surrogacy* edited by Scherpe, Fenton-Glynn and Kaan provides a comprehensive overview of how surrogacy is regulated at domestic level across a wide range of jurisdictions and is a valuable contribution to the growing question of how best to regulate the practice.

The book attempts to 'map emerging patterns in national legislations'² and does so through the use of a standardised questionnaire, developed by Scherpe and Fenton-Glynn, which commentators from each jurisdiction then provided information on. Accordingly, each chapter is written by a different author familiar with the law of the jurisdiction. The use of the questionnaire to obtain consistency in commentary across the individual jurisdictions is a highly effective mechanism and allows for meaningful comparisons to be made. Accordingly, each chapter follows the same format looking at the general legal framework, surrogacy arrangements in general, legal parenthood at the time of birth, eligibility for surrogacy (relating both to the commissioning parents and surrogate), transferring parenthood, agencies and criminalisation, and how international surrogacy arrangements are dealt with, before concluding as to the overall effectiveness of the law.

Whilst it is inevitable that some of these headings will be less significant or not applicable in some jurisdictions (for example, in jurisdictions that prohibit surrogacy, there will not be any eligibility criteria), the standardisation of approach is extremely reader-friendly and affords a level of clarity that can sometimes be lost in comparative work. Within each heading for consideration, however, there was scope for commentators to explore particularly pertinent areas of the law. For example, Esther Farnós Amorós, providing an overview of the prohibitive approach in Spain, when considering international surrogacy arrangements also provided an explanation of the impact on paternity and maternity leave (a discussion that was absent for other jurisdictions). The centralised, overarching approach, therefore, still allowed freedom for commentators to focus on specific areas of the law that they determined to be pertinent.

¹ Law Commission and Scottish Law Commission, *Building families through surrogacy: A new law, A joint consultation paper* (Law Com No 244, 2019) 62.

² Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2019) p. 2.

Broken down into three Parts, the book separates 'Eastern' and 'Western' perspectives for Part 1 & 2. However, within this overarching categorisation, different legal approaches are highlighted. Accordingly, under both Part 1 & 2, jurisdictions can be categorised as prohibitive, tolerant, regulatory, free market or undetermined. It is therefore clear that the categorisation of East and West does not determine a jurisdiction's approach to surrogacy; for example, whilst France and China both take a prohibitive approach, England & Wales and Hong Kong can be defined as taking a tolerant approach. As is acknowledged in the introduction, culture, history and religion have been determining factors in how jurisdictions approach the regulation of surrogacy and it is clear throughout the book that these factors remain influential in how the law is framed, or can develop.

Within Part 1 (Western perspectives), 'views from the bench' were incorporated through chapters providing judicial perspectives from Germany, Australia and England & Wales. The chapters provided an insight into how the judiciary have dealt with issues around the regulation of surrogacy, particularly with a focus on international arrangements. These chapters are an invaluable asset to the book by providing a different perspective on the law to the academic approach adopted throughout most of the commentary. In addition, these judicial insights allow for a more detailed consideration of how the judiciary deal with conflict of laws and associated problems of international surrogacy arrangements. It is clear from these chapters how the judiciary have been left grappling with the complexity of the law when borders are crossed. The absence of judicial perspectives in Part 2 (Eastern perspectives) is notable, but mitigated by the fact that the insights came both from prohibitive (Germany) and tolerant (United Kingdom & Australia) jurisdictions in Part 1.

Another notable element within Part 1 was Beaumont and Trimming's chapter on the influence of the European Court of Human Rights (ECHR) in the area of surrogacy. This chapter discusses the impact of the *Paradiso and Campanelli* judgment³ in the ECHR with a view to considering how international law might help States reach consensus on how best to regulate international surrogacy arrangements. Given the significance of the judgment, the case analysis in this chapter was clear and concise, providing an accessible overview of the Grand Chambers decision. Whilst the commentators opine that international regulation is required, they raise concerns over the ability of the work being done by the Hague Conference⁴ to overcome the human rights issues raised by surrogacy given the project's emphasis on parenthood following surrogacy arrangements rather than the practice itself.

Given that surrogacy is growing as a practice, it is unsurprising that some of the jurisdictions considered within the book are currently reviewing and changing their legal approach. In both Iceland and India, there are current Bills that would change the way surrogacy is regulated and practiced; whilst much within those chapters were therefore speculative, it provides an interesting insight into how different jurisdictions are shifting in how they think best to regulate. As discussed by Prabha Kotiswaran, India is moving from an open, free-market approach to a much more restrictive law whereby surrogacy is only available to married Indian nationals on an altruistic basis where the surrogate is a relative. Contrastingly, the chapter from

³ *Paradiso and Campanelli v Italy* ECHR 034 (2017)

⁴ Hague Conference on Private International Law, 'The Parentage/Surrogacy Project' (HCCH) <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>> accessed 31.10.2019.

Hrefna Fridriksdóttir explains how the Bill in Iceland would move the jurisdiction from a prohibitive approach whereby surrogacy is not permitted to a more tolerant approach whereby surrogacy would be allowed even if not enforceable. What these two jurisdictions then starkly demonstrate is that, whilst individual jurisdictions may be shifting in opinion and approach towards surrogacy, it is by no means the case that global attitudes are moving in the same direction. This highlights further potential difficulties around reaching international consensus on the best way to regulate the practice.

The book concludes with Part 3, authored by Fenton-Glynn and Scherpe, which undertakes a comparative analysis of the jurisdictions. Whilst Parts 1 & 2 provide an interesting insight into domestic legislations, Part 3 is where the true value of the book as a comparative piece lays. Again using the questionnaire headings as a basis upon which to look across jurisdictions, this final chapter lays bare the true problem of regulating surrogacy on an international basis; the wide spectrum of approaches adopted across the jurisdictions makes it clear that consensus between legislators across jurisdictions will be extremely difficult, if not impossible. Using the jurisdictions discussed throughout the book, this chapter emphasises the problems around the prohibitive, tolerant and free market approaches. Concluding that a regulatory approach, whilst not perfect, would best overcome some of the problems with other approaches, questions remain over *how* that regulation should look in relation to, inter alia, payment, enforceability of the agreement and eligibility requirements. As Fenton-Glynn and Scherpe state, the regulation of surrogacy 'exposes deep tensions between domestic regulation and international consequences; between individual autonomy and protection from exploitation; and between adult desires and children's rights'.⁵

Whilst the book does not, nor does it profess to, find a solution as to how surrogacy should be regulated, it has demonstrated, through its comparative analysis of 21 jurisdictions with very different approaches to surrogacy, that the current approaches adopted are not working in a domestic context, particularly when commissioning parents cross borders. The book will be insightful and useful for a wide readership: anyone with an interest in differing approaches to the regulation of surrogacy; anyone concerned with how domestic law can be reformed; and anyone considering how international regulation might solve the current problems we can see with surrogacy as currently practiced.

⁵ *Supra* note 2, 591.