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***Surrogacy in Latin America*, Nicolás Espejo-Yaksic, Claire Fenton-Glynn and Jens M. Scherpe (eds.), Intersentia, Cambridge 2023, 254p, €99, paperback, ISBN 9781839703812.**

Surrogacy in Latin America, edited by Nicolás Espejo-Yaksic, Claire Fenton-Glynn and Jens M. Scherpe, was published in May 2023 and launched at the 2nd International Surrogacy Forum in Copenhagen in June 2023. The book, based on a joint research project by the Centre for Constitutional Studies of the Supreme Court of Justice of Mexico and the Cambridge Family Law Centre, follows an earlier project which focused on the regulation of surrogacy in Eastern and Western jurisdictions, *Eastern and Western perspectives on surrogacy*.¹ The focus of this book, as the title suggests, is to provide an insight into how the practice of surrogacy is regulated in jurisdictions in Latin America. 12 jurisdictions are examined within the book, with contributions from legal academics, practitioners, judges and members of relevant Committees. The jurisdictions covered are: Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Mexico, Peru, Puerto Rico and Uruguay.

Chapter 1, 'An Introduction', written by the editors, sets the context for the project and the book, with the rest of the book dedicating a chapter to each jurisdiction. Various aims of the book can be extracted from the introduction. First, it is an aim for the book to expand upon, and 'fill the gap' of, *Eastern and Western perspectives on surrogacy* by examining jurisdictions in Latin America. Secondly, the purpose is stated to be to 'inform about the current state of, and developments on, surrogacy laws in Latin America',² particularly considering the impact of the global surrogacy market. Thirdly, there is the aim to contextualise the current approaches to surrogacy against historical, cultural and religious influences. These three aims combined would therefore meet the final expressed aim of the book, being to contribute to debates and legal reform, both within Latin America and beyond.

For those that have read *Eastern and Western perspectives on surrogacy*, much of the introduction will serve as a reminder of the key findings of that first project. It provides a concise overview of the different approaches that can be taken to the regulation of surrogacy, before examining some of the emerging trends and difficulties with each approach. The authors have established 4 categorisations for approaches to surrogacy,

¹ Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2019)

² Nicolas Espejo-Yaksic, Claire Fenton-Glynn and Jens M Scherpe (eds), *Surrogacy in Latin America* (Intersentia 2023) 3.

which have since been used by the UN Special Rapporteur on the sale and sexual exploitation of children in her report on surrogacy.³

The prohibitive approach, aimed at preventing the practice of surrogacy, is stated to be an ineffective regulatory approach, given that it merely has the effect of encouraging intended parents to embark on surrogacy overseas, thus exporting the problem. The tolerant approach, which fails to directly regulate the practice of surrogacy, instead dealing only with the transfer of parenthood, is the categorisation that England and Wales currently falls within.⁴ In the view of the authors, this tolerant approach also lacks effectiveness because it has had to yield to the reality that, once a surrogacy arrangement has taken place, it becomes inevitable that the child's interests will necessitate a transfer of parenthood. The free-market approach, lacking regulatory oversight and instead allowing parties to determine the scope of the arrangement, is stated to be an 'anathema to the very purpose of family law',⁵ leaving all those involved in the arrangement in a potentially vulnerable position.

This therefore leaves the regulatory approach, which facilitates surrogacy by having procedures in place overseen by appropriate authorities, before the conception of the child. Given the criticisms of the other approaches, the authors posit the regulatory approach, particularly in a global surrogacy market, would best ensure protection of the surrogate, intended parents and children.

Despite outlining and critiquing these approaches in Chapter 1, there is no systematic categorisation of the Latin American jurisdictions to structure the book around. This can be contrasted with the methodology in *Eastern and Western perspectives on surrogacy*, where the book was structured around the categorisations. It is stated that the social, political and cultural realities and norms of the jurisdictions, alongside largely an absence of any regulation, made concrete classifications difficult.⁶ Nonetheless, where a jurisdiction examined within the book could be identified within a category, this was acknowledged in the introduction. For example, two states in Mexico, Puerto Rico and Uruguay have adopted a regulatory approach, whilst Guatemala prohibits surrogacy. No jurisdictions within the project appeared to be explicitly adopting a free market approach, although the absence of regulation in some jurisdictions led to concerns from contributing authors that clinics were, in effect, able to self-regulate (discussed further below). The predominant approach within the

³ United Nations Human Rights Council, 'Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material' (2019) A/74/162 para 13.

⁴ Human Fertilisation and Embryology Act 2008 s 54.

⁵ Nicolas Espejo-Yaksic, Claire Fenton-Glynn and Jens M Scherpe (eds), *Surrogacy in Latin America* (Intersentia 2023) 17.

⁶ Espejo-Yaksic, Fenton-Glynn and Scherpe (n 2) 7.

Latin American jurisdictions examined therefore appears to be the tolerant approach, whereby the lack of legal regulation of surrogacy has resulted in the judiciary being left to resolve the problems presented when both domestic and cross-border surrogacy has taken place.

Therefore, despite the assertion that categorising the approach of the jurisdictions was more difficult, it is still possible to broadly set each jurisdiction within a defined approach. With this context set in the introduction, it is tempting to continue to try to broadly categorise each jurisdiction when reading the chapters for ease of comparison.

To allow each chapter to address similar themes relating to the legal framework within the jurisdiction, the book uses the same questionnaire as in *Eastern and Western perspectives on surrogacy*, developed by Fenton-Glynn and Scherpe. Contributing authors were asked questions relating to: the general legal framework, the nature and content of surrogacy arrangements, eligibility of surrogates and intended parents, how legal parenthood is allocated at birth and any mechanisms for transferring that parenthood, regulation of agencies and criminalisation, and the approach to international surrogacy arrangements. As with the previous project,⁷ the standardised questionnaire was a useful tool in ensuring a level of consistency, whilst still allowing deviation for nuances or certain aspects to be outlined in greater detail. However, there were differing extents to which each author followed the structure, and answered the questions, of the questionnaire. As discussed further below, this may be attributable in part due to the dearth of legal regulation of surrogacy in many of the jurisdictions examined, but it did make direct comparison of the jurisdictions more difficult at times.

It would be ineffective, to provide a summary of each chapter of the book, given that each chapter is in itself a summary of the legal framework (or lack thereof) of surrogacy within the jurisdiction. Instead, themes or insights that emerged when reading across the different chapters are outlined below.

Diverging approaches to regulation

Of the 12 jurisdictions covered in the book, only three have any legislative framework relating to surrogacy. For most of the jurisdictions explored, therefore, there is a regulatory vacuum within which surrogacy can operate. As discussed further below, this has, in many of the jurisdictions, meant that the judiciary have had to determine what the effect of the

⁷ Lottie Park-Morton, 'Book Review: Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspective on Surrogacy* (Cambridge: Intersentia, 2019)' (2020) *European Journal of Health Law* 27, 83.

surrogacy arrangement should be as it relates to legal parenthood. This therefore supports the contention of the editors that the overarching approach to surrogacy within Latin America can be categorised as tolerant – it is not expressly prohibited, but the lack of regulation means it falls to state bodies (either the court or those in charge of birth registration) to decide the extent to which the surrogacy arrangement can be given effect.

Even of the few jurisdictions that do have a legal framework relating to surrogacy, there is not a uniform approach to its regulation. This demonstrates that even within one geographical region, surrogacy remains a divisive issue in terms of public policy.

Some of the jurisdictions that regulate surrogacy have limited the type of arrangements that can be entered into. For example, in Uruguay, traditional surrogacy (meaning the surrogate is not genetically related to the child) is permitted where it is altruistic in nature, and only where the surrogate is a blood relative of an intended parent. In Puerto Rico, similarly the surrogacy arrangement must be traditional and altruistic. In both jurisdictions, complying with the legal framework enables the intended parents to be the legal parents of the child from birth.

In two states of Mexico, Sinaloa and Tabasco, surrogacy is also permitted subject to certain requirements being met. Whilst in Sinaloa, the intended parents will be the legal parents from birth, in Tabasco, despite regulating surrogacy arrangements, the intended parents still need to undergo a full adoption procedure to be recognised as the child's legal parents. However, other states in Mexico have a legal framework in place that – rather than regulating surrogacy practice – prohibits it. In Queretaro, surrogacy is expressly prohibited, whilst in San Luis Potosi, it is stated within the legal framework that surrogacy is non-existent.

Mexico exemplifies that even within one country, yet alone one wider region, there is a lack of consensus as to how surrogacy is best regulated. Therefore, one lasting impression from the book is the reminder that any attempt at regulating surrogacy at an international level is highly likely to not be feasible.

Self-regulation of clinics

A jurisdiction failing to regulate surrogacy does not mean that the practice is not being undertaken. In every jurisdiction in the book, there is evidence of surrogacy taking place, whether that be through official data from clinics and the courts or anecdotal evidence. The failure of the legislature to put in place any regulations relating to the practice means that the role of treating clinics becomes significant. This theme is identified across various jurisdictions. In relation to Ecuador, it is stated that the lack of regulation is 'undoubtedly

convenient for clinics and practitioners to self-regulate the practice and follow their own protocols – and set their own prices’.⁸ Similarly, it is stated that in Guatemala, the limits of surrogacy are left to the ‘discretion of the specialised clinics, which may be more likely to be guided by economic interests than bioethics or the law’.⁹

Therefore, whilst the approach of these jurisdictions cannot accurately be defined as free-market, given that there appears to be a post-birth judicial determination relating to parenthood in most instances, there is an element of a market approach being taken. In the absence of a legal framework, clinics are free to determine who to provide treatment to, and for what price. It would seem inevitable that the motives of the clinics could become centred on profit, as opposed to bioethical concerns.

The chapter on Brazil offers an interesting perspective in this regard. Surrogacy in Brazil is regulated, but not legally. Rather than a legal framework being in place, the Federal Council of Medicine (CFM), a public administrative body that oversees the practice of medicine, have established a resolution within which surrogacy is permitted if it is altruistic and meets eligibility criteria. Provision of the appropriate paperwork then allows the intended parents to register the birth and be treated as the legal parents of the child. This form of non-legal clinical regulation overcomes some of the concerns raised above in relation to clinics being able to self-regulate, given that the doctors are accountable to the CFM. However, it is argued in the chapter that this approach lacks democratic legitimacy and allows a regulatory body to control who can access services.¹⁰

The role of the courts

Another apparent theme when reading the book is that absent legal regulation of surrogacy, alongside recognition that the practice is taking place, the role of the judiciary becomes important. It will be for the court to determine whether, and how, to recognise the effect of the surrogacy arrangement in relation to legal parenthood. In all the jurisdictions covered in the book, maternity is determined primarily through the process of gestation and giving birth: the *mater semper certa est* presumption. Except for regulatory approaches that allocate parenthood to the intended parents at birth (as outlined above), this means that the surrogate will be the child’s legal mother. Similarly, most of the jurisdictions determine paternity based on marriage to the mother. Whilst it is more likely that a genetic male

⁸ Sonia Merlyn, ‘Ecuador’ in Espejo-Yaksic, Fenton-Glynn and Scherpe (n 2) 157.

⁹ Jennie Aimee Molina Moran, ‘Guatemala’ in Espejo-Yaksic, Fenton-Glynn and Scherpe (n 2) 161.

¹⁰ Gustavo Ribeiro and Joyceane Bezerra de Menezes, ‘Brazil’ in Espejo-Yaksic, Fenton-Glynn and Scherpe (n 2) 80.

intended parent will be able to establish paternity, court intervention is still often needed to remove the surrogate's parenthood and transfer it to the female (or second) intended parent.

In all but two of the jurisdictions examined in the book, the courts have had to determine parenthood following surrogacy. In Ecuador and Colombia, there are no reported cases of the court judicially recognising parenthood following surrogacy within the jurisdiction. In the remaining jurisdictions, where there is case law relating to the determination of parenthood, it is evident that different mechanisms can be utilised.

In Peru, even absent a legal framework, it is possible for the intended parents to get a pre-birth court order for the intended parents to be registered as the legal parents upon birth of the child. In most other countries, however, the determination of parenthood happens post-birth through the transfer of parenthood from the surrogate to the intended parent(s) through either a maternity challenge or adoption. However, across the jurisdictions, it is evident that there could be difficulties with these processes. For example, maternity challenges are centred on the biological connection of the intended mother to the child. Therefore, if donor gametes were used, and the intended mother is not genetically related to the child, the challenge would fail. Further, there are some limits to adoption – for example, in Ecuador same-sex couples cannot adopt, and in Chile it is stated that adoption in the context of surrogacy may be viewed as a fraud.

Notwithstanding these potential hurdles, in most jurisdictions, it appears as though intended parents have been able to establish legal parenthood following surrogacy, whether it be from birth, through re-registration of the birth certificate, a maternity challenge or adoption. However, it must still be acknowledged that it is not desirable to leave surrogacy unregulated and for the judiciary to resolve. As Ribeiro and Bezerra de Menezes state in relation to Brazil, the lack of regulation leaves resolutions to 'the mercy of the argumentative efforts of those involved, and the idiosyncrasies of judges and courts'.¹¹ A case discussed in the chapter on Guatemala demonstrates this where an intended mother was refused recognition as the legal parent, and was also unable to adopt due to the adoption rules, leaving the child's legal parents as the surrogate and the intended father.

Reform attempts

In almost all of the chapters, the contributing authors have outlined attempts to legislate for surrogacy within the jurisdiction. With the exception of the Dominican Republic and Costa Rica,¹² there have been proposals or bills put forward across Latin America in order to try to

¹¹ *ibid.*

¹² There are academic proposals outlined in the chapter relating to Costa Rica, but these have not been advanced to the legislature.

regulate surrogacy. This demonstrates an awareness by law and policy makers within the region that surrogacy is being practised, and that the regulatory void is leaving parties to the arrangement vulnerable. Even in jurisdictions where surrogacy is regulated, further bills have been advanced to try to amend or change the current framework. For example, in Uruguay and Puerto Rico, there have been attempts to add to, or amend, the requirements and eligibility for surrogacy.

However, what the book has also demonstrated is that there is a lack of consensus within these reform proposals as to what the framework regulating surrogacy should look like. In some jurisdictions, such as Brazil, there have been several bills advanced with opposing aims to both permit and prohibit the practice. Of the bills across the region that are supportive of surrogacy, a trend does seem to be that any regulation of surrogacy should limit the practice to altruistic, or non-commercial, arrangements.

To conclude, the book has great value in providing an insight into the regulatory framework – or more accurately, lack thereof – in Latin America. Even without explicit commentary beyond the introduction as to trends within the region, it is possible to draw comparisons and analogies across the findings in each chapter. The book can be said to have met the aims of informing about the current state of the law and potential developments, as well as the historical, cultural and religious contexts. As to whether the final aim – of contributing to debates and domestic legal reform – will be achieved is yet to be seen. However, given the influence of the first project, *Eastern and Western perspectives on surrogacy*, it is highly likely that it will inform debate in Latin America and beyond.

The take away finding of the book, and as stated in the introduction by the editors, is that there is a ‘clear picture that *not* regulating surrogacy – or simply prohibiting it domestically – obviously does not deal with the issues arising from the global surrogacy market. Inactivity ultimately leads to the exportation of many social and legal problems to other jurisdictions’.¹³

Therefore, some form of regulation is necessary: what is yet to be seen is how the various jurisdictions will approach this regulation.

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¹³ Espejo-Yaksic, Fenton-Glynn and Scherpe (n 4) 13.