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EDITORIAL

Surrogacy: Prohibition, permission and protection

Debates concerning surrogacy, in particular international arrangements, have been wide ranging – from demands for complete prohibition to widest possible permission, and in between, a call for regulation. ISS centres its position on the need to prioritise the protection of the child, whatever the position.

Surrogacy arrangements involve multiple parties, multiple costs, multiple benefits and multiple risks. The multiplicity of power differentials in each of these possibilities arguably creates a 'market' for the creation of children, using surrogate mothers, for intending parents. Some argue that the market is illegal, others defend its self-regulating efficiency, whilst others call for safeguards as examined below.

Prohibition of surrogacy arrangements

Surrogacy has rightly or wrongly been linked to slavery, exploitation of women and prostitution, especially when viewed from the perspective of the surrogate mother. It is therefore not surprising that there have been clear demands to abolish such practices. For example, in a 2015 report on human rights and democracy, the European Parliament *'condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments'*¹.

Such calls for prohibition have, to date, primarily focused on the rights of surrogate mothers, yet debatably could be extended to the rights of children, particularly when their human

dignity is at stake. This is especially true, when the sale of children is possibly involved, as defined by Article 2(a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, whereby the *'(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'*.

Following on from the black letter law, would not almost all commercial surrogacy undoubtedly fall within this definition and therefore need to be prohibited? Can the law clearly distinguish between commercial surrogacy as the sale of a child, and a sale of 'services', when transfer of the child is an essential part of the bargain? Should purely altruistic arrangements be prohibited as well?

Permission of surrogacy arrangements

For those, who desire to parent, and for various reasons are unable to conceive and gestate a child, surrogacy arrangements can appear to offer a means of family formation. A 2017 article in *The Economist* pushed the idea that *'carrying a child for someone else should be celebrated – and paid'*². For the intending parents, often well-intentioned, they hope to have a child to love, if they are able to pay the often high sums involved. For the surrogate mother, she has an opportunity to carry the child, usually for a sum. Intermediaries, such as medical clinics, lawyers, middlemen, etc. have the opportunity to

facilitate the arrangement, always for a sum. This demand and supply for the child arguably creates a market, which – when efficient – ensures that all receive their dues, albeit perhaps not always equal. It has been contended that surrogacy arrangements should be permitted to allow the market forces to arrange what is best for all. Can we, however, avoid the exploitation of women or sale of children through a contract to ensure safe working conditions, etc.?

Likewise, in the flurry of such market transactions, one cannot help asking, what are the opportunities for the child within a surrogacy arrangement? Should the child view his or her ‘demand’ to be created, as an opportunity to be loved by intending parents, who were willing to show this love by spending thousands of dollars? In some cases, using whatever means necessary, including contravening national laws and sometimes international standards. Should the child be valued more or less by the fact that his or her surrogate mother received thousands of dollars, not to mention the fees received by intermediaries?

Protection of surrogacy arrangements

The ISS Experts’ Group working on Principles to better protect children in surrogacy arrangements seeks to address the divergent concerns and perspectives on surrogacy, while remaining focused on international human/children’s rights standards. The Principles stress the legal obligation to prohibit the sale of children, and to establish safeguards to ensure the sale of children does not occur and is not legitimised. The Principles take account of the rationale and legitimacy of prohibiting all surrogacy, while also providing an international framework to guide those States that choose to permit some forms of surrogacy. Furthermore, the Principles seek to provide protections for children, who are, nevertheless, born through surrogacy arrangements without having had an adequate regulatory framework in place to protect their rights. For example, one principle is dedicated to the importance of preserving and accessing information about the child’s origins. This is an important aspect to consider when evaluating and preparing intending parents (see p. 13). Thus, the Principles emphasise that children cannot be punished or stripped of their

rights as a means of enforcing prohibitions or regulations of surrogacy.

The ISS Experts’ Group met in Verona from 18 to 20 May 2017 (see p. 6), hosted by the University of Verona, and reviewed draft Principles and key agreed messages initially drafted by the core group. The key agreed messages have now been refined as a result of the fruitful discussions in Verona (see p. 7), and will be further strengthened in forthcoming months and meetings.

Finding a just balance between the competing views while ensuring that the child’s rights, as well as the rights of the surrogate mother and intending parents, are not compromised, is challenging. The ISS Experts’ Group, led by the core group of drafters, is committed to working towards this balance. The Principles will be guided by opinions and decisions, such as pronounced by the UN Committee on the Rights of the Child (see p. 9), the European Court of Human Rights (see p. 6), as well as the UN Special Rapporteur on Sale and Sexual Exploitation of Children, who will dedicate her 2018 report to the Human Rights Council to the sale of children in surrogacy arrangements. In her 2017 report on illegal adoptions, the Special Rapporteur noted that *‘[i]nternational commercial surrogacy is a growing phenomenon quickly overtaking the number of intercountry adoptions. The international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children and may lead to illegal adoption’*³. The work will also dovetail the work of the Hague Conference on Private International Law on parentage/surrogacy. There is indeed many lessons to be learnt from adoption-related discussions, even though the context of family construction is different.

Noting such views and decisions, it is clear that international standards based on human rights are needed. ISS is privileged to be working with leading experts to ensure that the child’s best interests are at the centre of surrogacy arrangements. Thus, independently of the context of the international surrogacy arrangement (altruistic, commercial, in

developing and developed countries, in different cultural environments, etc.), the Principles being drafted intend to protect all the parties involved, in particular the children born through

this form of reproductive technology, through a regulatory framework.

The ISS/IRC team
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