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Background

The practice of surrogacy
Surrogacy is an increasingly common reproductive practice. Today, stories about surrogacy regularly appear in popular culture and news outlets, while the number of organisations offering surrogacy services is clearly on the rise, as is the number of cases involving surrogacy in courts across the EU. Surrogacy raises important legal issues, such as whether surrogacy contracts should be enforceable, as well as questions pertaining to the legal parenthood of a child born to a surrogate mother and his/her citizenship and nationality. There are also significant policy and regulatory concerns relating to: payment; autonomy; child welfare; gender, sexual orientation and socio-economic inequality; reproductive health; and globalisation.

Legal responses
There is no straightforward legal response to surrogacy and different Member States (MS) have contrasting legal regimes: from those which expressly prohibit surrogacy; to those with some form of legal facilitation; to those with no specific legal rules on surrogacy. The increasingly transnational context of the reproductive arena means that in addition to surrogacy taking place within particular national contexts, it also takes place across nations, bringing multiple legal systems into play. Indeed, a key feature of the recent case-law involving surrogacy has been the difficulties associated with cross-border surrogacy arrangements, such as children not having clear legal parent(s) and/or the same nationality as their parent(s).

This case-law also reminds us that just because surrogacy is prohibited or not otherwise legally provided for, it does not follow that people from that country do not engage in surrogacy. On the contrary, the judiciary is increasingly confronted with the consequences of such prohibitions and/or legal vacuums and, if possible, must try to interpret and apply specific provisions of general civil law or family law principles in order to render a satisfactory outcome for the parties involved. Even in those MS were surrogacy is to some extent legally facilitated, mismatches between national legal positions and the lack of specific provision for cross-border arrangements means that similarly difficult cases ensue.

Existing research
The rise of these difficulties has led to a recent focus on cross-border surrogacy arrangements. Various studies have proposed private international law (PIL) measures in response to the legal difficulties relating to the recognition of the child’s civil status and legal parenthood following a surrogacy arrangement.

While this research has addressed a number of key legal concerns pertaining to surrogacy, the PIL focus has produced a narrower line of inquiry than might otherwise be desirable in this controversial area. Also, these proposals are modelled on existing measures pertaining to international adoption, which raises different demographic, political and social concerns compared to surrogacy.
Developing existing research

Therefore, while this PIL research offers valuable ways forward, dealing only with the consequences of cross-border surrogacy arrangements does not necessarily address some of the underlying reasons as to why people travel to other countries for surrogacy. There is a lack of research that considers the role of law in managing surrogacy as a reproductive practice, at least in the context of transnational legal measures. This study will therefore develop the existing PIL and national research on surrogacy by considering the wider role of any potential EU legal response to surrogacy beyond the management of consequential disputes. While this may seem a challenging proposition, there is historical precedent for EU legal measures being used to bring about progressive social change and it is in this context of aspiration-rising legal aims, as much as practical legal solutions, that this study will be pursued.

Aims of Study

The objective of this study is to provide a piece of research that will usefully inform an assessment of whether the EU should adopt uniform rules in this controversial field. As the first major EU study in this area, our research aims:

1. To provide a number of indicative empirical case-studies from which conclusions about the practices and attitudes towards surrogacy across the EU may be drawn;
2. To provide an outline of the important policy issues raised by surrogacy;
3. To catalogue how different MS currently approach surrogacy in legal terms;
4. To provide comparative analysis of the different legal frameworks for surrogacy across the EU and in a selected number of other countries;
5. To analyse the problems and difficulties stemming from current legal approaches;
6. To provide comparative analysis of how the judiciary across the EU and in a selected number of other countries and international courts resolve these problems and difficulties;
7. To provide an analysis of the potential remit of the EU in this area and what role any EU legal measures and uniform rules should play;
8. To consider what further research may be required before any EU legal measures could be developed.

Structure of the Study

The study is divided into three main parts, the analysis of which will be integrated to inform the concluding discussion and recommendations sections of the Final Report.
Part 1: Empirical and policy background
Existing research will be drawn upon and the team will collect original data by conducting a survey with identified fertility clinics and surrogacy organisations, as well as a number of follow-up interviews in four indicative countries. Any available professional guidelines will also be analysed.

Part 2: (i) Legal frameworks and (ii) case-law
(i) We have categorised the legal approaches to surrogacy across the EU and identified the MS with either an express legislative framework for facilitating surrogacy, draft legislation and/or formal guidelines relating to cross-border surrogacy arrangements. Detailed data is being collected on EU countries and a number of countries beyond the EU to act as useful comparators. The effectiveness of the various legal approaches will be thoroughly analysed in light of the key legal issues that we catalogue from the case-law (see below).

(ii) We identified all the relevant case-law from across the EU and schematically organised the cases according to the key legal issues addressed. We also identified some useful comparative case-law from countries beyond the EU and from international courts. With the aid of a core question-set, these cases are being analysed closely by the research team, according to language competencies.

Part 3: Potential remit and role of the EU
This analysis is forming around four central questions:
- Why should the EU regulate in the area of surrogacy?
- Where would the EU get competence for doing so?
- What would the EU regulate in this area?
- How would the EU regulate in this area?

Project management and final report
A member of the team is leading on each of the key components, as guided by their research expertise. Data collection and a preliminary analysis will be conducted in order to draw up the Interim Report on the study in January 2013. Further detailed analysis, including a much closer consideration of the potential role of the EU in this area, will be pursued in advance of the preparation of the Final Report in March 2013.
Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents