

# TABLE OF CONTENTS

<b>Abbreviations</b>	<b>xiii</b>
<b>Glossary of key terms used in this research</b>	<b>xv</b>
<b>1 Introduction</b>	<b>1</b>
1.1 Background	1
1.2 Setting the scene	1
1.3 Jurisdictional approaches	8
1.4 Developing the existing research	13
1.5 Research questions	18
1.6 Research aims	19
1.7 Research approach and methodology	21
1.8 The importance of Europe for this research	24
1.9 Research structure	25
1.9.1 Chapter Two: Mapping the policy issues	25
1.9.2 Chapter Three: A comparative perspective	26
1.9.3 Chapter Four: Surrogacy and human rights	27
1.9.4 Chapter Five: The right to a nationality and the prevention of statelessness	30
1.9.5 Chapter Six: Where to from here?	31
1.10 Difficulties and restrictions	32
<b>2 Mapping the policy issues</b>	<b>35</b>
2.1 What is surrogacy?	35
2.1.1 What are the types of surrogacy?	37
2.1.2 Parenthood and ART	39
2.1.3 What is a surrogacy agreement?	39
2.1.4 Empirical data	40
2.2 Arguments over surrogacy	42
2.2.1 Arguments against surrogacy	42
2.2.2 The effects of surrogacy on the child	46
2.2.3 The effects of surrogacy on the surrogate	48
2.2.4 The effects of surrogacy on the intending parents	50
2.2.5 The effects of surrogacy on gamete providers	51
2.2.6 Arguments for surrogacy	51

## TABLE OF CONTENTS

2.3	Reproductive tourism	54
2.4	'Cyber procreation' and surrogacy as a business	55
2.5	Agencies, brokers, and intermediaries	56
2.6	Fees for and cost of a surrogacy arrangement	56
2.7	Concluding remarks	58
<b>3</b>	<b>A comparative perspective</b>	<b>61</b>
3.1	Introductory remarks	61
3.2	Establishment of legal parentage	63
3.2.1	The question of applicable law	63
3.2.2	The question of recognition of foreign judgments concerning parent- age	66
3.2.3	The question of recognition of foreign authentic acts concerning parentage	66
3.2.4	The acceptability of foreign law	67
3.3	France	73
3.3.1	Overview of domestic approach	73
3.3.2	Legal parenthood in the context of surrogacy	76
3.3.3	Inter-country surrogacy and parentage	79
3.3.4	Nationality of the child	86
3.3.5	Birth registration and records	88
3.3.6	National considerations	88
3.4	Switzerland	89
3.4.1	Overview of domestic approach	89
3.4.2	Legal parenthood in the context of surrogacy	91
3.4.3	Inter-country surrogacy and on parentage	93
3.4.4	Nationality of the child	99
3.4.5	Birth registration and records	100
3.4.6	National considerations	101
3.5	Austria	103
3.5.1	Overview of domestic approach to surrogacy	103
3.5.2	Legal parenthood in the context of surrogacy	103
3.5.3	Inter-country surrogacy and parentage	104
3.5.4	Best interests of the child, family life, and public policy	106
3.5.5	Nationality of the child	107
3.5.6	Birth registration and records	108
3.5.7	National considerations	108
3.6	Belgium	109
3.6.1	Overview of domestic approach to surrogacy	109

3.6.2	Parenthood in the context of surrogacy	112
3.6.3	Payments in surrogacy	126
3.6.4	Nationality of the child	127
3.6.5	Birth registration and records	129
3.6.6	National considerations	130
3.7	The Netherlands	132
3.7.1	Overview of the domestic approach to surrogacy	132
3.7.2	Legal parenthood in the context of surrogacy	135
3.7.3	Payments in surrogacy	144
3.7.4	Nationality of the child	145
3.7.5	Birth registration and records	146
3.7.6	National considerations	147
3.8	United Kingdom	149
3.8.1	Overview of the domestic approach to surrogacy	149
3.8.2	Legal parenthood in the context of surrogacy	151
3.8.3	Legal requirements on a surrogate and the commissioning parents	156
3.8.4	Enforceability of surrogacy agreements	164
3.8.5	Payments in surrogacy	166
3.8.6	Nationality of the child	174
3.8.7	Birth registration and records	176
3.8.8	Advertisement	177
3.8.9	National considerations	179
3.9	India	181
3.9.1	Overview of the domestic approach to surrogacy	181
3.9.2	Legal parenthood	181
3.9.3	Payments in surrogacy	185
3.9.4	Nationality of the child	186
3.9.5	Birth registration and records	188
3.9.6	National considerations	188
3.10	California (USA)	196
3.10.1	Overview of the domestic approach to surrogacy	196
3.10.2	Legal parenthood in the context of surrogacy	199
3.10.3	Surrogacy agreements	204
3.10.4	Payments in surrogacy	208
3.10.5	Advertisement	208
3.10.6	Nationality of the child	209
3.10.7	Birth registration and records	210
3.10.8	National considerations	211
3.11	Analysis of findings	211



# TABLE OF CONTENTS

3.12	Comparative table	212
3.13	Initial conclusions drawn from the comparative review in the context of parentage	214
3.13.1	Jurisdictions which are anti-surrogacy: Express prohibition	215
3.13.2	Jurisdictions where surrogacy is largely unregulated: neutral stance	220
3.13.3	Jurisdictions which are pro-surrogacy: Express permission and regulation	222
3.14	Determining the basis for legal parentage following surrogacy arrangements	225
3.14.1	The legal mother	227
3.14.2	The legal father	229
3.14.3	The co- or second parent	230
3.14.4	Conclusion on applicable law in matters concerning parentage	231
3.14.5	Conclusion on the recognition of legal parentage established abroad	232
3.14.6	Public policy in the context of inter-country surrogacy	233
3.14.7	Tensions between genetic and social conceptions of parenthood	240
3.15	Initial conclusions drawn from the comparative review in the context of nationality at birth	243
3.16	Emerging problem areas	244
3.16.1	Terminology	245
3.16.2	Uncertain civil status	246
3.16.3	Birth records and registration	247
3.16.4	Possible lack of political will to respond to the problems created by surrogacy	248
3.16.5	An unregulated international market	248
3.16.6	Wide variation and absence of limits, specifically on fees and costs	249
3.16.7	Reproductive travel and surrogacy	257
3.16.8	Real dangers, weak sanctions, and ineffective deterrents	258
3.17	Where does that leave us?	260
<b>4</b>	<b>Surrogacy and human rights</b>	<b>263</b>
4.1	Introductory remarks	263
4.2	Sources of international law	266
4.3	International and regional human rights regimes	269
4.3.1	Europe	274
4.3.2	The Americas	276
4.3.3	Africa	276

4.3.4	Arab states	277
4.4	An overview of the relevant international obligations	279
4.5	International covenant on economic, social, and cultural rights	279
4.5.1	Child's rights and parent-child relationships	280
4.5.2	Relevance to surrogacy	280
4.6	International covenant on civil and political rights	281
4.6.1	The child's rights	281
4.6.2	Parent-child relationship	281
4.6.3	Relevance to surrogacy	282
4.7	Convention on the rights of the child	283
4.7.1	The child's rights	286
4.7.2	Parent-child relationship	289
4.7.3	Relevance to surrogacy	293
4.7.4	Birth records, birth name, and registration	296
4.7.5	Possible advocacy points	298
4.8	Convention on the elimination of discrimination against women	300
4.8.1	Relevance to surrogacy	304
4.9	UN Conventions relevant to prohibition and prevention of the sale of children and women and trafficking	306
4.10	Hague Conference on Private International Law	315
4.10.1	Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of children	316
4.10.2	The child's rights	316
4.10.3	Parent-child relationship	317
4.10.4	Relevance to surrogacy	317
4.10.5	Convention on the protection of children and cooperation in respect of Inter-country adoption	318
4.10.6	The relationship between inter-country surrogacy and inter-country adoption	320
4.10.7	Relevance to surrogacy	326
4.11	Council of Europe	333
4.11.1	European convention on human rights	333
4.11.2	The role and approach of the European Court of Human Rights	336
4.11.3	Examples from the case law of the Strasbourg Court	342
4.11.4	Specific lessons from the European Court of Human Rights	376
4.11.5	Towards a child-centred approach	383
4.12	The CEFL Principles	384
4.13	International Commission on Civil Status	385



## TABLE OF CONTENTS

4.14	European Union	386
4.14.1	EU instruments relevant to family law	388
4.14.2	The child's rights	390
4.14.3	Parent-child relationship	391
4.14.4	Relevance to surrogacy	395
4.15	Conclusions and recommendations	402
4.15.1	The influence of European and international human rights law	404
4.15.2	The importance and elements of unconditional and informed consent	405
4.15.3	The child's best interests	408
4.15.4	A child's right to be heard and to express views	409
4.15.5	A child's right to information about his or her origins	410
4.15.6	A child's right to registration at birth	411
4.15.7	A right to continuity of a personal (civil) status	412
4.15.8	A child's right to parents or a parent's right to a child?	414
<b>5</b>	<b>The right to a nationality and the prevention of statelessness</b>	<b>419</b>
5.1	Introductory remarks	419
5.2	The attribution of citizenship	420
5.3	Defining the right to a nationality	423
5.4	International instruments relevant to the prevention of statelessness and the right to and preservation of a nationality	425
5.4.1	Convention on the rights of the child	426
5.4.2	Specific UN conventions on preventing statelessness	428
5.4.3	Relevant UN bodies and other UN instruments	438
5.4.4	Regional instruments	439
5.4.5	European convention on nationality	442
5.5	Some concluding observations on a surrogate-born child's right to a nationality	447
5.6	Conclusions and recommendations	451
<b>6</b>	<b>Where to from here?</b>	<b>457</b>
6.1	Key findings	457
6.2	Domestic action	464
6.2.1	National review	465
6.2.2	Type of surrogacy arrangements	467
6.2.3	Determination of legal parenthood	468
6.2.4	Unconditional and informed consent	477
6.2.5	Birth registration and records	478

6.2.6	Nationality and immigration status	478
6.3	International action	479
6.3.1	Bilateral cooperation	480
6.3.2	Multilateral cooperation	481
6.4	Joint general comment/recommendation of the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women	498
6.5	Final reflections: A work in progress	499
<b>Appendix 1 Human rights of particular significance to children</b>		<b>503</b>
<b>Appendix 2 Human rights of particular significance to women</b>		<b>505</b>
<b>Appendix 3 Summary responses to 1993 Hague Adoption Convention</b>		<b>507</b>
<b>Appendix 4 Abstract</b>		<b>513</b>
<b>Appendix 5 Bibliography and literature</b>		<b>515</b>
<b>Appendix 6 Acknowledgments</b>		<b>547</b>