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## The regulation of surrogacy: a children's rights perspective

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### Abstract

This article examines the current regulation of surrogacy in England from a children's rights perspective. It draws on the UN Convention on the Rights of the Child 1989 and its Optional Protocols, as well as General Comments and Concluding Observations from the Committee on the Rights of the Child, in order to analyse the extent to which the current regulatory framework on surrogacy is in line with a children's rights approach. A children's rights approach draws attention to the need for a holistic framework that protects the various rights of children at all stages of their childhood. It stresses the importance of ensuring the framework is participatory, in that it incorporates the views and experiences of children. It also recognises the central role of parents in protecting children's rights and the need for state support in this regard. The article makes suggestions for reform, focusing primarily on children's right to know and be cared for by their parents, commercial surrogacy, the involvement of children in counselling and the protection of children's rights in inter-country surrogacy arrangements.

### Keywords

Surrogacy; children's rights; UN Convention on the Rights of the Child 1989

### Introduction

The practice of surrogacy raises complex legal and ethical concerns. The legal regulation of this area must balance the rights of all involved, including surrogate mothers, intending parents, gamete donors, and children who are born as a result of surrogacy arrangements. Calls for legal reform in this area have been increasing, with the Law Commission including surrogacy in the consultation for its Thirteenth Programme of Law Reform in 2016. This article examines how a perspective based on international children's rights law could inform recommendations for legal change. This is based on the United Nations Convention on the Rights of the Child 1989 (CRC). It is argued that a children's rights approach could contribute significantly to reform in this area in three central ways. First, such an approach emphasises the need for a holistic framework of law and policy that protects the various rights of children throughout their childhood. Second, it adopts a participatory approach, by emphasising the importance of taking into account individual children's views in decisions that affect them, as well as ensuring that law, policy and practice is shaped by research on

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children's experiences. Third, it draws attention to the role of parents in the protection of children's rights and the requirement for state support in this respect.

The article begins by setting out the relevance of the CRC in this context and the importance of incorporating a children's rights perspective. Secondly, it analyses the extent to which the current English legal framework for surrogacy arrangements reflects the key elements of a children's rights approach, as outlined above. Thirdly, it identifies areas in the English legal framework where particular children's rights concerns arise and makes some recommendations for reform, focusing on the right of children to know and be cared for by their parents, commercial surrogacy, the involvement of children in counselling arrangements and the protection of children's rights in inter-country surrogacy arrangements.

## Surrogacy and children's rights

A children's rights approach is based on the premise that children of every age are independent rights-holders. This idea gained almost universal recognition in international law with the adoption of the CRC in 1989, the implementation of which is overseen by the Committee on the Rights of the Child (the Committee). The CRC was ratified by the UK in 1990 and came into effect in 1992. It is not incorporated into English law and, therefore, is not binding in this jurisdiction. However, the UK is bound under international law to abide by the provisions of the CRC 'in good faith',<sup>1</sup> and its ratification by the UK represents a commitment in international law to 'take action to ensure the realisation of all rights in the Convention for all children in their jurisdiction'.<sup>2</sup> The Committee is also clear that implementation of the Convention requires states continually to review how law, policy and practice affect children's rights.<sup>3</sup> This should involve predicting the impact of any proposed measures on children's rights, and measuring the impact of existing ones.<sup>4</sup> Given the possibility of a future Law Commission project in this area, it is imperative that the opportunity is taken to undertake a children's rights-based impact assessment as part of this.

In undertaking such a review of the law, three central themes are important. First, the regulation of surrogacy should reflect the concept of the child as an independent holder of a range of comprehensive rights. This requires the development of a holistic regulatory framework that protects these rights, such as the right to a nationality and the right to know and be cared for by their parents. Under Article 3 of the CRC, states are obliged to ensure that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. In this respect, children's best interests must be assessed by reference to all of their other CRC rights.<sup>5</sup> A measure cannot be said to

<sup>1</sup>Article 26, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See, however, the dissenting judgment of Lord Kerr in *R (SG and Others (previously JS and Others)) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, in which he argued that the CRC ought to be directly applicable in English law.

<sup>2</sup>Committee on the Rights of the Child, General Comment No 5 (2003), General Measures of Implementation of the CRC (arts 2, 42 and 44, para 6), (CRC/GC/2003/5), at para 1.

<sup>3</sup>*Ibid.*, at para 45.

<sup>4</sup>*Ibid.*

reflect the best interests principle if it violates other CRC rights.<sup>6</sup> Additionally, Article 2 requires States Parties to respect the rights of each child in their jurisdiction without discrimination of any kind, including discrimination based on ‘birth or other status’. Moreover, the Committee has urged States Parties to combat discrimination that children may experience due to being born in circumstances ‘that deviate from traditional values’.<sup>7</sup> Therefore, all decisions that have implications for children in the context of surrogacy should not violate their rights and children should not be discriminated against in the enjoyment of their rights owing to the manner of their birth through surrogacy.

A second important aspect of a children’s rights-based approach is the recognition that the fulfilment of parental responsibilities is central to children’s enjoyment of their rights. Under Article 18(1) of the CRC, parents are identified as having ‘primary responsibility for the upbringing and development of the child’ and that the ‘best interest of the child will be their basic concern’. Furthermore, Article 18(2) is clear that: ‘States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children’. Therefore, the regulatory framework for surrogacy should support parents in the protection of their children’s rights, such as the right to know their parents under Article 7 or the right to have their views taken into account under Article 12.

Thirdly, the regulatory framework for surrogacy must be shaped by the principle of child participation. Article 12 of the CRC protects the right of the child who is capable of forming his or her own views to express these views freely in all matters affecting him or her and to have them be given ‘due weight in accordance with the age and maturity of the child’. Moreover, Article 12 incorporates a more general right to participation, in the sense that children’s opinions should shape law, policy and practice. General Comment No 12 states that ‘the views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation’.<sup>8</sup> This ties in with the emphasis placed by the Committee on the importance of using reliable data on children ‘to identify problems and to inform all policy development for children’.<sup>9</sup>

## The current regulatory framework for surrogacy arrangements: a children’s rights analysis

The following section analyses the main ways in which the current legal framework addresses the protection of children’s rights. It focuses on the extent to which the current

<sup>5</sup>See Committee on the Rights of the Child, General Comment No 14 (2013), On the Right of the Child to Have his or her Best Interests taken as a Primary Consideration (art 3, para 1), (CRC/C/GC/14).

<sup>6</sup>J Wolf, ‘The concept of the “best interests” in terms of the UN Convention on the Rights of the Child’ in M Freeman and P Veerman (eds), *Ideologies of Children’s Rights* (Martinus Nijhoff, 2012), at p 129.

<sup>7</sup>Committee on the Rights of the Child, General Comment No 7 (2005), Implementing Child Rights in Early Childhood (CRC/C/GC/Rev 1), at para 12. See P Gerber and K O’Byrne, ‘Souls in the house of tomorrow: the rights of children born via surrogacy’ in P Gerber and K O’Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2016), at p 97.

<sup>8</sup>Committee on the Rights of the Child, General Comment No 12 (2009), The Right of the Child to be Heard (CRC/C/GC/12), at para 12.

<sup>9</sup>Committee on the Rights of the Child, General Comment No 5 (2003), General Measures of Implementation of the CRC (arts 2, 42 and 44, para 6), (CRC/GC/2003/5), at para 48.

framework reflects the important aspects of a children's rights approach outlined above, focusing on pre- and post-birth welfare assessments, as well as the requirements for parental orders (POs). It is shown that English law has focused primarily on the assessment of intending parents and commercial surrogacy. It is argued that while these aspects are important in the protection of children's rights, a more holistic and participatory framework should be developed, which addresses not only the various ways in which the rights of the child may be affected throughout their childhood, but also the role of the parents and the state in guaranteeing their protection.

### Assessment of welfare before and after birth

The current regulatory framework for surrogacy focuses on assessing the welfare of children, both before and after their birth. In a surrogacy arrangement involving in vitro fertilisation (IVF), those providing the treatment must consider the welfare of the future child under section 13(5) of the Human Fertilisation and Embryology Act 1990 (HFE Act 1990). This states:

‘A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.’

The accompanying Code of Practice defines supportive parenting as ‘a commitment to the health, well-being and development of the child’.<sup>10</sup> Guidance from the Human Fertilisation and Embryology Authority (HFEA) sets out that this assessment should apply to ‘all those involved in surrogacy arrangements’.<sup>11</sup> The second circumstance in which the welfare of the child is addressed in surrogacy arrangements occurs in the application for a PO. This is made by intending parents after the child is born in order to gain legal parenthood.<sup>12</sup> The child's welfare is assessed by the courts, which apply the test that ‘the paramount consideration of the court must be the child's welfare, throughout his life’.<sup>13</sup> The court must take into account the ascertainable wishes and feelings of the child, his or her physical, emotional and educational needs, the likely effect on him or her of any change in his circumstances, his or her age, sex and background, any harm which he or she suffered or is at risk of suffering, and how capable each of his or her parents and any other relevant person is of meeting his or her needs.<sup>14</sup> This process clearly plays a role in assessing and protecting the rights of children. As noted, Article 3 states that when public or private institutions make decisions about children, ‘the best interests of the child shall be a primary consideration’. This process is also important in protecting children's rights under Article 19 of the CRC, which requires states to take ‘all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence,

<sup>10</sup>Human Fertilisation and Embryology Authority, *Code of Practice* (HFEA, 8th edn, 2013), at para 8.11 (*HFEA Code of Practice*).

<sup>11</sup>*HFEA Code of Practice*, at para 14.1.

<sup>12</sup>The reallocation of parenthood through a PO is required owing to the laws on parenthood. In England and Wales, the surrogate woman is the legal mother of a child (Human Fertilisation and Embryology Act 2008 (HFE Act 2008), s 33). In the case of fatherhood, legal parenthood will be based on genetics, in the absence of a statutory provision to the contrary, notably HFE Act 2008, ss 35 and 42. In some cases, one of the intending parents can be the legal parent of the child upon birth (HFE Act 2008, ss 36–37 and 43–44).

<sup>13</sup>The Parental Orders Regulations 2010 (SI 2010/985), Sch 1 applies the Adoption and Children Act 2002, s 1(2) to PO applications.

<sup>14</sup>The 2010 Regulations (*ibid*) apply s 1(4) of the 2002 Act to PO applications.

injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’.

The pre-birth assessment of parents has, however, proven controversial. It has been argued that section 13(5) treats infertile people unfairly, since their suitability to become parents is assessed, while those who procreate naturally are not subject to similar assessments.<sup>15</sup> Furthermore, it must be noted that when a pre-birth assessment is made, no child yet exists. For this reason, the question arises as to whether, and if so when, a subsequently born child *can* be harmed by any decision made at this time.<sup>16</sup> It is arguable that such a child can only be harmed by the decision to permit his or her birth if he or she is born into a life ‘not worth living’.<sup>17</sup> For example, in the wrongful life case of *McKay v Essex Area Health Authority*<sup>18</sup> it was noted that only ‘... a life of severe and unremitting suffering’ could be said to be worse than non-existence.<sup>19</sup> For some, ‘... even serious child abuse does not appear to cause a life of such unremitting suffering that its life is wrongful, eg, that the child would have preferred no life at all’.<sup>20</sup> In other words, ‘... the parents who create a child – so long as it enjoyed at least barely endurable existence – do no harm and do no wrong’.<sup>21</sup> Others see this approach as fundamentally flawed, arguing that while a particular child might not be harmed by being born, it can still be *wronged*, in the sense that it is not given a reasonable prospect of a minimally decent life.<sup>22</sup> Therefore, because the exercise of one’s rights cannot be at the expense of another’s, ‘exercising one’s procreative liberty in such a way as to create a human being who cannot enjoy most of their rights is morally wrong’.<sup>23</sup> Understood in this way, it can be said that such a provision is morally acceptable. When the issue is framed in terms of the possibility of a future child being wronged by particular decisions, as opposed to harm being caused to a particular child, pre-conception welfare considerations in the context of surrogacy arrangements can be more readily justified.

However, and importantly, it should be noted that section 13(5) is *not* about formulating standards of *ideal* parenting. The Code of Practice emphasises that clinics should consider factors that are likely to cause a risk of ‘serious physical and psychological harm or neglect’, including criminal convictions or protection measures relating to children, as well as violence or serious discord in the family environment.<sup>24</sup> It also states that mental or physical

<sup>15</sup>See E Jackson, ‘Conception and irrelevance of the welfare principle’ (2002) 65 MLR 176. See also, House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law, Fifth Report* (2005), at para 107.

<sup>16</sup>See D Parfit, *Reasons and Persons* (Oxford University Press, 1984), chapter 16. See also J Harris, ‘The welfare of the child’ (2000) 8 *Health Care Analysis* 27 and J Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, 1994), at p 152.

<sup>17</sup>See A Buchanan et al, *From Chance to Choice: Genetics and Justice* (Cambridge University Press, 2000), at p 236.

<sup>18</sup>[1982] QB 1166.

<sup>19</sup>*Ibid*, at para 105, per Stephenson J. See R Scott, ‘Reconsidering “wrongful life” in England after thirty years: legislative mistakes and unjustifiable anomalies’ (2013) 72(1) *Cambridge Law Journal* 115.

<sup>20</sup>J Harris, ‘Wrongful Birth’ in ME Dalton and J Jackson (eds), *Philosophical Issues in Reproductive Medicine* (Manchester University Press, 1994), at 248 as cited in D Archard, ‘Wrongful Life’ (2004) 79 *Philosophy* 403, at 408.

<sup>21</sup>D Archard, ‘Wrongful life’ (2004) 79 *Philosophy* 403, at 412. He draws on the work of J Feinberg, *Harm to Others* (Oxford University Press, 1984), B Steinbock, ‘The Logical Case for “Wrongful Life”’ (1986) *Hastings Centre Report* 19 and G Kavka, ‘The paradox of future individuals’ (1981) 11(2) *Philosophy and Public Affairs* 105.

<sup>22</sup>*Ibid*, at 416. Archard notes that the concept of a ‘minimally decent life’ or a life where a person cannot enjoy ‘most of their rights’ is difficult to define, but suggests the use of the UN CRC for the formulation of benchmarks in this respect.

<sup>23</sup>*Ibid*, at 418.

<sup>24</sup>*HFEA Code of Practice*, para 8.10.

conditions, as well as drug and alcohol abuse on the part of the intending parents, should be taken into account in assessing the welfare of the future child.<sup>25</sup> In this way, the section aims to prevent significant harm to children in the context of surrogacy arrangements in the minority of cases where this might arise.<sup>26</sup> Accordingly, the section can be said to play a role from a children's rights perspective in fulfilling state obligations under both Article 3 and Article 19 of the CRC.

Furthermore, it can be argued that section 13(5) is appropriate in the particular context of surrogacy, as it requires the clinic to assess the likelihood of a breakdown in surrogacy arrangements. This involves an assessment of the extent to which the surrogate and her partner (if she has one) could provide supportive parenting in the case of a breakdown.<sup>27</sup> It also requires the clinic to assess whether a breakdown '... is likely to cause a risk of significant harm or neglect to any child who may be born or any existing children in the surrogate's family'.<sup>28</sup> These elements of the section 13(5) assessment should encourage the facilitation of a clear discussion of the parties' intentions, in order to lessen the likelihood of a dispute. Distress experienced by carers of a child owing to disputes over parenthood could have a negative impact on the child.<sup>29</sup> This is relevant for children's right to development under Article 6 of the CRC. As is noted in the Committee's General Comment on Implementing Child Rights in Early Childhood, '[y]oung children's earliest years are the foundation for their physical and mental health, emotional security, cultural and personal identity, and developing competencies'.<sup>30</sup> Additionally, if a child became aware of a dispute at a later stage, this could cause psychological harm, and distress could also be caused to existing children of both the intending parents and the surrogate. Therefore, section 13(5) can be seen as reflecting the particular circumstances of surrogacy arrangements by seeking to lessen the possibility of the breakdown of arrangements and potential harm to children.

### Welfare of the child and requirements for parental orders

It was noted above that a welfare assessment must be conducted when a PO is granted to intending parents. However, there are other requirements which parents must satisfy. For example, the gametes of at least one applicant must be used,<sup>31</sup> the application must be made by a couple<sup>32</sup> within 6 months of the birth,<sup>33</sup> and no money or other benefit (excluding reasonable expenses) can be exchanged without court authorisation.<sup>34</sup> While the issue of

<sup>25</sup>Ibid.

<sup>26</sup>See E Lee, J Macvarish and S Sheldon, *Assessing Child Welfare under the Human Fertilisation and Embryology Act: The New Law* (University of Kent, 2012). Seven clinics stated that because refusals were so rare, the average refusal rate per year was zero; two clinics reported that refusals happened only once every couple of years; eight clinics reported an average of one to two refusals per year, two clinics reported three to four, and one clinic reported an average of seven cases of refusal per year.

<sup>27</sup>HFEA Code of Practice, at para 8.4.

<sup>28</sup>Ibid, at para 8.12.

<sup>29</sup>On the effect of parental stress on babies, see A Asok et al, 'Parental responsiveness moderates the association between early-life stress and reduced telomere length' (2013) *Development and Psychopathology* 577 and J Luby et al, 'The effects of poverty on childhood brain development: the mediating effect of caregiving and stressful life events' (2013) 167(12) *JAMA Pediatrics* 3139.

<sup>30</sup>Committee on the Rights of the Child, General Comment No 7 (2005), Implementing Child Rights in Early Childhood, (CRC/C/GC/7/Rev 1), at para 6(e).

<sup>31</sup>HFE Act 2008, s 54(1)(b).

<sup>32</sup>Ibid, s 54(2). This can be spouses, civil partners or two persons in an enduring family relationship.

<sup>33</sup>Ibid, s 54(11). While earlier cases held the limit was non-extendable, later cases held that it was. See *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, where an application was made after two years.

<sup>34</sup>HFE Act 2008, s 54(8).

commercial surrogacy is addressed below, some of the other requirements raise particular issues.

Regarding the need for a genetic link, it has been argued that the rationale for this is to 'legitimise the relationship'<sup>35</sup> and to protect against parents 'commissioning' children for adoption.<sup>36</sup> However, it is difficult to justify this requirement in surrogacy, since it is already accepted that no such requirement exists in the case of non-surrogate birth following double gamete donation.<sup>37</sup> In the latter case, a woman can give birth to a child with no genetic link to her or her partner, and these individuals will automatically be the legal parents (if the requirements of the applicable HFE Act provisions conferring parenthood have been satisfied).<sup>38</sup> Such a practice recognises the acceptability of parenthood that is not based on a genetic link with the child. In a recent constitutional case in South Africa, an equivalent requirement in surrogacy cases was found to be unconstitutional.<sup>39</sup> This was because it excludes single people and couples who cannot produce gametes from entering surrogacy arrangements. It was said to encroach upon individuals' human dignity, as it prohibited them from exercising their right to autonomy and also reinforced the profound negative psychological effects of infertility.<sup>40</sup> Moreover, it was held that the argument that the welfare of the child was best served by a requirement for a genetic link with one intending parent constituted 'an insult to all those families that do not have a parent-child genetic link'.<sup>41</sup>

Indeed, the requirement for a genetic link does not seem to align with considerations based on the welfare of the child. Studies with children born through assisted reproduction indicate that they are as well-adjusted as those from natural conception families and have positive relationships with their parents.<sup>42</sup> Therefore, a genetic link to their parents does not appear

<sup>35</sup>See K Horsey et al, 'Surrogacy in the UK: myth busting and reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform' (Surrogacy UK, 2015), at para 4.4. The report also notes that the requirement may also aim to stop individuals being pressured into, or criminally embarking on, an arrangement whereby a child is conceived with the intention of giving it away. However, it notes that without evidence of such pressure or the inability to stop such criminal behaviour, the requirement is difficult to justify. It should be noted, however, that if individuals embark on inter-country surrogacy and return to their state with a child who does not have a genetic relation to either of them, this could amount to a violation of international adoption law. This raises complex legal issues which are outside the scope of this article. See in particular *Paradiso and Campanelli v Italy* (Application No 25358/12) (unreported) 24 January 2017.

<sup>36</sup>*AB and Another v Minister of Social Development as Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580 (12 August 2015).

<sup>37</sup>See N Gamble, 'A better framework for United Kingdom surrogacy?' in S Golombok et al (eds), *Regulating Reproductive Donation* (Cambridge University Press, 2016), at p 152.

<sup>38</sup>See HFE Act 2008, s 33 et seq.

<sup>39</sup>*AB and Another v Minister of Social Development as Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580 (12 August 2015), at para 76.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*, at para 84.

<sup>42</sup>See S Golombok et al, 'The European Study of Assisted Reproduction Families: the transition to adolescence' (2002) 17(3) *Human Reproduction* 830; S Golombok et al, 'Parenting infants conceived by gamete donation' (2004) 18(3) *Journal of Family Psychology* 443; S Golombok et al, 'Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21 *Human Reproduction* 1918; E Ilioi and S Golombok, 'Psychological adjustment in adolescents conceived by assisted reproduction techniques: a systematic review' (2015) 21(1) *Human Reproduction Update* 84. Some studies indicate that donor conceived children are better adjusted than their naturally conceived peers. See S Golombok et al, 'The European study of assisted reproduction families' (1996) 11(10) *Human Reproduction* 2324. See also S Golombok et al, 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47(2) *Journal of Child Psychology and Psychiatry* 213. However, compare S Golombok et al, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653, in which surrogacy children showed higher levels of adjustment difficulties at age seven than children conceived by gamete donation. Given these contrasting results, it would be useful to obtain further research on this issue.

to be crucial to the realisation of children's well-being. Similar arguments can be made regarding the requirement that the application for a PO must be made by a couple.<sup>43</sup> Not only has it been successfully argued in a recent English case that this requirement is discriminatory,<sup>44</sup> but studies also indicate that children's psychological adjustment is not detrimentally affected by being raised by a single parent, as compared with children in two-parent families.<sup>45</sup> Such a stance can also be said to be reflective of the CRC and the views of the Committee. Although there is no definition of family in the Convention, the Committee's General Comment No 14 states that the term 'family' must be interpreted in a broad sense to include 'biological, adoptive or foster parents, or members of the extended family or community'.<sup>46</sup> It is also clear that a 'family', however defined, is central to the realisation of children's rights. The Preamble to the CRC states that 'for the full and harmonious development of his or her personality, [the child] should grow up in a family environment, in an atmosphere of happiness, love and understanding' and that the 'best interests of the child will be parents' basic concern'. It is clear that the CRC does not adhere to a particular family form but instead emphasises the quality of parenting and the ability to care for the child in a way that facilitates the realisation of his or her rights. Therefore, these requirements are difficult to justify. The legal requirements for POs should reflect current research data on children's lives. This would be more in keeping with the Committee's guidance that law and policy should be participatory and reflect the views of children and relevant data on their experiences.

### The position on commercial surrogacy in English law

The other main focus of English law is the regulation of commercial surrogacy. Section 2 of the Surrogacy Act 1985 prohibits individuals from initiating, taking part in, negotiating or compiling information about surrogacy arrangements on a commercial basis. As noted, one of the requirements for granting a PO is that no money or other benefit (other than reasonable expenses) has been given or received by either of the applicants unless authorised by the court.<sup>47</sup> Notwithstanding the clear legislative stance against commercial surrogacy, the courts may retrospectively allow payments.<sup>48</sup> Such payments can often be quite substantial, with approvals of \$23,000<sup>49</sup> and \$53,000<sup>50</sup> for US surrogacy arrangements. The question that arises is whether this position is in keeping with a children's rights approach.

The CRC and the Committee's General Comments do not give any direct guidance on commercial surrogacy. However, in its Concluding Observations to India in 2014, the Committee stated that '... commercial use of surrogacy, which is not properly regulated, is

<sup>43</sup>HFE Act 2008, s 54(2).

<sup>44</sup>*In the Matter of Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), [2016] 3 WLR 1369 held that this requirement constitutes a violation of a single person's right to respect for private and family life under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, in conjunction with Art 14, which protects against discrimination in the enjoyment of Convention rights.

<sup>45</sup>S Golombok et al, 'Single mothers by choice: mother-child relationships and children's psychological adjustment' (2016) 30(4) *Journal of Family Psychology* 409.

<sup>46</sup>Committee on the Rights of the Child, General Comment No 14 (2013), On the Right of the Child to have his or her Best Interests taken as a Primary Consideration (art 3, para 1), (CRC/C/GC/14) at para 59.

<sup>47</sup>HFE Act 2008, s 54(8).

<sup>48</sup>See C Fenton-Glynn, 'The difficulty of enforcing surrogacy regulations' (2015) 74(1) *Cambridge Law Journal* 34, at 35.

<sup>49</sup>*Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

<sup>50</sup>*J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297.



widespread, leading to the sale of children and the violation of children's rights'.<sup>51</sup> This gives little guidance on the children's rights implications of commercial surrogacy. First, it is unclear on what basis commercial surrogacy can be said to amount to the 'sale of children' and which particular rights are violated. Second, it is stated that the *improper regulation* of commercial surrogacy leads to the sale of children. It is unclear whether this means that *inadequate* regulation for commercial surrogacy is problematic or whether the Committee is referring instead to the failure to *ban* commercial surrogacy.

In terms of possible guidance from the CRC itself, Article 35 states:

'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.'

Article 2(a) of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP) defines the term 'sale' as '... any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'.<sup>52</sup> The OP contains a list of prohibited practices for the sale of a child, namely, sexual exploitation, transfer of organs for profit, and engagement in forced labour.<sup>53</sup> John Tobin argues that given the ordinary meanings of the terms 'transfer', 'remuneration' and 'consideration' in Article 35, it would appear that a commercial surrogacy agreement falls within the definition of the sale of a child.<sup>54</sup> He also maintains that since Article 2(a) of the OP refers to 'any act' involving the transfer of a child, the broad nature of the term means that the purpose of the transfer is irrelevant.<sup>55</sup> There is also no ambiguity in the phrase that a child cannot be sold 'for any purpose or in any form' in Article 35 of the CRC, which indicates that the reason for the sale is irrelevant, even if it is non-exploitative.<sup>56</sup>

A differing approach relies on a purposive interpretation of the CRC. As Paula Gerber and Katie O'Byrne note:

'There remains the more fundamental requirement to interpret treaty terms in their context and in the light of the object and purpose of the treaty (Vienna 31(1)). It is clear that the object and purpose of the CRC and OP is to prevent harm to children, to protect children's rights and to promote their best interests.'<sup>57</sup>

With regard to the list in the OP, they note that sexual exploitation, transfer of organs for profit and forced labour clearly involve exploitation and degradation of the child. By contrast, the intended purpose of surrogacy is non-exploitative and aims to ensure that a

<sup>51</sup>Committee on the Rights of the Child, Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India (CRC/C/IND/CO/3-4) (2014), at para 57(b). Committee on the Rights of the Child, Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography, (CRC/C/OPSC/USA/CO/2) (2013).

<sup>52</sup>Optional Protocol to the CRC and the Sale of Children, Child Prostitution and Child Pornography A/RES/54/263 of 25 May 2000.

<sup>53</sup>Ibid, at art 3(a)(i).

<sup>54</sup>J Tobin, 'To prohibit or permit: what is the (human) rights responses to the practice of international commercial surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317, at 335.

<sup>55</sup>Ibid, at 336.

<sup>56</sup>Ibid.

<sup>57</sup>See P Gerber and K O'Byrne, 'Souls in the house of tomorrow: the rights of children born via surrogacy' in P Gerber and K O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2016), at p 97.

child is given to parents who will provide appropriate care and support.<sup>58</sup> This approach makes sense. As Jason Hanna notes, commercial surrogacy contracts do not presuppose that parents have ownership rights, and thus unfettered control, over their children.<sup>59</sup> Child abuse and neglect laws still apply, with criminal and civil sanctions for mistreatment.<sup>60</sup> Therefore, it can be argued that the OP seeks to guard against practices involving the *ownership* of children which would be detrimental to the enjoyment of their rights. Under such a reading, commercial surrogacy can be said not to contravene the prohibition on the sale of children.

While a purposive interpretation of the CRC means that commercial surrogacy may not fall under the definition of the 'sale' of a child, the practice could nonetheless involve harm to children. In this respect, the justification for the legislative stance against commercial surrogacy appears to be partly related to considerations of children's welfare. The Warnock Report stated that surrogacy in general was 'degrading to the child who is to be the outcome of it, since for all practical purposes, the child will have been bought for money'.<sup>61</sup> Similarly, the Brazier Report argued that commercial surrogacy may be 'psychologically damaging' for children and that it was 'not necessarily in children's best interests to learn that their surrogate mother benefitted financially from their birth or from giving them away to the commissioning couple'.<sup>62</sup> However, these reports do not provide a detailed analysis of why commercial surrogacy may be 'degrading' or 'psychologically damaging', and the Brazier Report did in fact allude to the lack of knowledge on this issue.<sup>63</sup> As noted, the Committee on the Rights of the Child emphasises that relevant data on children should be used to inform all law and policy affecting children. Therefore, there is a need for research on the impact of commercial surrogacy on children's rights that includes the opinions of children, in order to shape the law in this area in a child-focused way. As has been stressed, such measures are important in developing a more participatory framework in line with Article 12 of the CRC.

Two recommendations for reform can be made, however, which could be useful in reducing any possible psychologically harmful effects of commercial surrogacy on children. First, it would be advantageous for the commercial aspects of a surrogacy agreement to be approved beforehand by a court or an approvals committee. In Israel, for example, this process is overseen by such a committee and involves separate interviewing and psychological assessment of all parties, with a view to ensuring that the surrogate is giving free and informed consent.<sup>64</sup> Second, as is the case in Israel, payments to the surrogate could be made through an intermediary agency, in order to avoid the possibility of intending parents refusing to pay a surrogate in an attempt to control her behaviour during pregnancy.<sup>65</sup>

<sup>58</sup>Ibid.

<sup>59</sup>J Hanna, 'Revisiting child-based objections to commercial surrogacy' (2010) 24(7) *Bioethics* 341, at 342, citing R Arneson, 'Commodification and commercial surrogacy' (1992) 21 *Public Affairs* 132.

<sup>60</sup>J Robertson, 'Surrogate motherhood: not so novel after all' in K Alpern (ed), *Ethics of Reproductive Technology* (Oxford University Press, 1992), at p 53.

<sup>61</sup>Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Her Majesty's Stationery Office, 1984), at para 8.11.

<sup>62</sup>*Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team* (Her Majesty's Stationery Office, 1998), at paras 5.18–5.19.

<sup>63</sup>Ibid.

<sup>64</sup>See Surrogate Motherhood Arrangements Act 5756–1996.

<sup>65</sup>See K Weisberg, *The Birth of Surrogacy in Israel* (University Press of Florida, 2005), at p 197.

Introducing such a system in English law would be beneficial. It would mean moving from retrospective allowance of commercial surrogacy to appropriate oversight of payments that seeks to ensure that the surrogate has made a truly free and informed decision.<sup>66</sup> It may also be a positive development for children, in that they may be less likely to be negatively affected by the knowledge that they were born as a result of a commercial surrogacy arrangement if the practice is seen as legally permitted, transparent and fair to all parties involved.<sup>67</sup>

As is clear from the above sections, the current framework for the regulation of surrogacy in England is focused on the assessment of children's welfare both before and after birth and on the regulation of commercial surrogacy. While these are important aspects of protecting children's interests in surrogacy, additional measures could be developed to reflect a more children's rights-based framework. It was argued that there is a lack of a participatory approach in the sense that some legislative requirements for POs fail to reflect evidence relevant to children's experiences. Additional research should also be carried out on the potential implications of commercial surrogacy on the psychological well-being of children. However, the current framework could also do more to recognise the various ways in which surrogacy can have implications for children's rights throughout their childhood and the role of parents and the state in protecting these. It is to these issues that this article now turns.

## **Moving towards a children's rights-based framework for surrogacy: key areas for reform**

This section identifies key areas that raise children's rights issues, focusing on the protection of the child's right to know and be cared for by their parents, the involvement of children in surrogacy-related counselling and the protection of children's rights in inter-country surrogacy arrangements. It draws on the three aspects of a children's rights approach outlined above, arguing for the need to draw attention to the impact surrogacy may have on the rights of children throughout their childhood, the requirement for a more participatory framework, and the role of parents in protecting children's rights.

### **The right to know and be cared for by one's parents**

Under Article 7(1) a child has the 'right to know and be cared for by his or her parents ... as far as possible'. First, regarding the right to be '*cared for*' by one's parents, surrogacy raises interesting questions, since the woman who gives birth to the child is usually not the person who raises him or her. The CRC does not define the term 'parents', and therefore, it could be interpreted as the right to be cared for by one's genetic, gestational or intending parents.<sup>68</sup> As noted, the Committee interprets 'family' in a broad sense to include 'biological, adoptive or foster parents, or members of the extended family or community'.<sup>69</sup> Therefore, in assessing the compliance of surrogacy arrangements with Article 7(1), it cannot be said that

<sup>66</sup>See C Fenton-Glynn, 'Outsourcing ethical dilemmas: regulating international surrogacy arrangements' (2016) *Med Law Rev* 1, at 11.

<sup>67</sup>To accommodate such an approach, the prohibition on commercial surrogacy in s 2 of the Surrogacy Act 1985 would have to be removed. However, an offence could be retained for those who do not use the pre-approval system.

<sup>68</sup>P Gerber and K O'Byrne, 'Souls in the house of tomorrow: the rights of children born via surrogacy' in P Gerber and K O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2016), at p 93.

the CRC advocates that children should be cared for by particular parents, such as gestational or genetic parents. This position corresponds with the research set out above which shows that it is the quality of parenting that is important for children's well-being.

Second, regarding the right to 'know one's parents' under Article 7(1), surrogacy again raises interesting questions, including whether a child should know of the manner of their birth, as well as the identity of their surrogate mother. Since surrogacy can involve the use of IVF, the issue of children being able to identify their gamete donor also arises. It can be argued that the right to know one's genetic origins is also important in terms of the protection of the stand-alone 'right to identity' under Article 8 of the CRC. While this right is undefined, the negotiations of the Working Group on the CRC allude to the idea that this refers to 'true and genuine personal, legal and family identity'.<sup>70</sup> Regarding the meaning of the right to know one's parents under Article 7(1), some guidance can be found in the Committee's Concluding Observations on State Parties' reports. For example, in its Concluding Observations to Uzbekistan, it urged the State Party '... to ensure that adopted children at the appropriate age have the right to access the identity of their biological parents'.<sup>71</sup> Similarly, the Committee has expressed concerns about laws permitting anonymous births, urging countries to eliminate the practice and to take all necessary measures to enable children to know their 'parents'.<sup>72</sup> While this is a strong stance, it must be recognised that a child's right to know his or her biological parents can conflict with the rights of others to privacy, or conflict with his or her own best interests.<sup>73</sup> In this respect, Article 7 states that the child's right must be protected 'as far as possible'. Rachel Hodgkin and Peter Newell argue that this wording appears to create a strict qualification, whereby it would only be in extreme circumstances that children should be precluded from access to information about their biological parents.<sup>74</sup>

This approach is similar to that of the European Court of Human Rights (ECtHR). The court has stated that 'the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life', as protected under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention).<sup>75</sup> While some cases have focused on the right of adults to know their origins,<sup>76</sup> others have engaged with the child's right *qua* child. In *Mikulic v Croatia* it was

<sup>69</sup>Committee on the Rights of the Child, General Comment No 14 (2013), On the Right of the Child to Have his or her Best Interests taken as a Primary Consideration (art 3, para 1), (CRC/C/GC/14), at para 59.

<sup>70</sup>Report of the Working Group on a Draft Convention on the Rights of the Child (1985) E/CN.4/1985/6 4 Annex 11 1, at para 35 as cited in D Hodgson, 'The international legal protection of the child's rights to a legal identity and the problem of statelessness' (1993) *International Journal of Law, Policy and the Family* 255, at 265. A full discussion of the potential meaning of a right to identity is outside the scope of this article.

<sup>71</sup>Uzbekistan CRC/C/UZB/CO/2, at paras 40 and 41. See also Armenia CRC/C/15/Add.225, at para 38, Kazakhstan (UN Doc CRC/C/15/Add 213, 2003), at paras 45–46, Uruguay CRC/C/15/Add 62, at para 11 as cited in R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd edn, 1996), at pp 106–107. Luxembourg CRC/C/15/Add 250, at paras 28–29. See also Austria CRC/C/15/Add 251, at para 29.

<sup>72</sup>Luxembourg CRC/C/15/Add. 250, at paras 28–29. See also Austria CRC/C/15/Add. 251, at para 29.

<sup>73</sup>S Besson, 'Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 137, at 147.

<sup>74</sup>R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (UNICEF, 3rd edn, 1996), at p 107.

<sup>75</sup>*Godelli v Italy* (Application No 33783/09) (unreported) 25 September 2012, at para 52.

<sup>76</sup>See also *Bensaid v United Kingdom* (Application No 44599/98) (2001) 33 EHRR 205 and *Gaskin v United Kingdom* (Application No 10454/83) (1989) 12 EHRR 36.

held that the failure by the domestic courts to require the putative father of the five-year-old applicant to undergo a paternity test constituted an interference with her rights under Article 8.<sup>77</sup> This was because the law failed to ‘strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests’.<sup>78</sup> The court held that people have a ‘vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity’.<sup>79</sup> In *Odièvre v France*, it was also emphasised that ‘[b]irth, and *in particular the circumstances in which a child is born*, forms part of a child’s, and subsequently the adult’s, private life as protected by Article 8 of the Convention’.<sup>80</sup> As is the case under the CRC, the ECtHR recognises that the right to know about one’s parentage is not absolute and must be balanced against the rights of others, such as the right of women to give birth anonymously, as was the case in *Odièvre v France*.<sup>81</sup> However, the ECtHR has emphasised that when the right to know one’s parentage is at issue ‘particularly rigorous scrutiny is called for when weighing up the competing interests’.<sup>82</sup>

It is clear that there is a growing recognition of the importance of telling children about their origins at an early age to ensure that they develop an integrated and narrative sense of self.<sup>83</sup> It has been noted that donor-conceived individuals have consistently, although not universally, reported the need to know their genetic origins,<sup>84</sup> and studies indicate that non-disclosure can lead to psychological damage, low self-esteem and issues relating to trust, for example.<sup>85</sup> The importance of knowing one’s genetic identity was emphasised in *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority*.<sup>86</sup> In this case, it was held that Article 8 of the European Convention included a right of access to information about biological parents in the context of donor conception, which in turn led to legislative change eliminating donor anonymity.<sup>87</sup> The general trend in favour of openness is also reflected in English law relating to paternity testing, which emphasises the prioritisation of children’s right to know their genetic origins in the absence of compelling reasons based on the welfare of the child.<sup>88</sup>

<sup>77</sup>(Application No 52176/99) (2002) 11 BHRC 689.

<sup>78</sup>*Ibid*, at para 65. See E Steiner, ‘*Odièvre v France* – Desperately seeking mother – anonymous births in the European Court of Human Rights’ [2003] CFLQ 425.

<sup>79</sup>*Ibid*, at para 64.

<sup>80</sup>(Application No 42326/98) (2003) 38 EHRR 871, at para 29 (emphasis added).

<sup>81</sup>It was held that this law pursued the legitimate aims of avoiding abortions and the abandonment of children. The court also observed that the applicant had been able to trace some of her roots. The strong dissenting opinion stated that French law allowed no balancing of interests and there were no reliable data to show that the law reduced the risk of abortion or infanticide. Moreover, they noted the failure of the court to refer to Art 7 of the CRC in determining the margin of appreciation.

<sup>82</sup>*Godelli v Italy* (Application No 33783/09) (unreported) 25 September 2012, at para 52. See also *Jaggi v Switzerland* (Application No 58757/00) (2006) EHRR 702.

<sup>83</sup>Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing* (Nuffield Council on Bioethics, 2016), at pp 13 and 64.

<sup>84</sup>See J Tobin, ‘The *Convention on the Rights of the Child*: the rights and best interests of children conceived through assisted reproduction’ (Victorian Law Reform Commission, 2004), at 144 citing R McNair, ‘Outcomes for children born of ART in a diverse range of families’ (2004) Victorian Law Reform Commission’s Occasional Paper, pp 39–55.

<sup>85</sup>*Ibid*, citing A Turner and A Coyle, ‘What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy’ (2000) 15 *Human Reproduction* 2041, at 2049.

<sup>86</sup>[2002] EWHC 1593 (Admin), [2002] 2 FLR 962.

<sup>87</sup>HFE Act 1990 (as amended), s 31(Z)(A).

<sup>88</sup>See, for example, *Re H (A Minor) (Blood Tests: Parental Rights)* [1997] Fam 89 and *Re T (Paternity: Ordering Blood Test)* [2001] 2 FLR 1190. See discussion in S Gilmore and L Glennon, *Hayes and Williams’ Family Law* (Oxford University Press, 5th edn, 2016), at pp 354–357.

In light of these developments, it is important to consider the extent to which English law protects children's rights under Article 7(1) of the CRC in surrogacy arrangements. In this regard, a person who has been the subject of a PO has a legal right to obtain his or her original birth certificate at age 18.<sup>89</sup> The surrogate mother will be named on the birth certificate and, if she is married, the spouse or civil partner may also be named.<sup>90</sup> Therefore, individuals who are born through surrogacy and have been the subject of a PO are able to access information about the identity of their surrogate mother. If donor gametes were used, such individuals will have access to non-identifying information about their donor at age 16 and identifying information at age 18.<sup>91</sup>

In determining whether the current position is in line with both the CRC and the European Convention, it must be noted that in the case of donor-conception a child's right to know their genetic origins is dependent on adults. While donor-conceived individuals can access identifying information about their donor, they will only be aware of the existence of such information if they are informed of the nature of their conception. Children whose surrogate mothers are their genetic mothers also rely on others to inform them of this, because the birth certificate will not indicate whether the surrogate is also an individual's genetic mother. In this respect, a study by Jadva et al involving 42 parents who used genetic surrogacy showed that just under half did not disclose that the surrogate was the child's genetic mother.<sup>92</sup>

In this regard, one approach that could be taken is for birth certificates to indicate whether the child is donor-conceived, so that the child is not reliant on this information being disclosed to them by parents.<sup>93</sup> For a comparable approach to be introduced in genetic surrogacy arrangements, birth certificates would have to indicate whether the surrogate is also the genetic mother. It can be argued that such an approach is preferable, since relying on parental disclosure means that for some, children's right to know their genetic origins is rendered essentially 'illusory'.<sup>94</sup> Given the importance of the legal right to know one's genetic origins, outlined above, it would seem that an approach that ensures that children know of their genetic origins is more in line with international children's rights law.<sup>95</sup>

However, children's right to know their genetic origins must always be interpreted in line with their best interests<sup>96</sup> and must take into account the 'specific circumstances that make

<sup>89</sup>Human Fertilisation and Embryology (Parental Orders) Regulations 1994 (SI 1994/2767) and Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Order 2010 (SI 2010/986). This is permitted at age 16 in Scotland. See Human Fertilisation and Embryology (Parental Orders) (Scotland) Regulations 1994 (SI 1994/2804) and Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SI 2009/314). See E Blyth, 'Parental orders and identity registration: one country three systems' (2010) 32(4) *Journal of Social Welfare and Family Law* 345, at 348. See also E Blyth, 'Access to genetic and birth origins information for people conceived following third party conception in the UK' (2012) 20 *International Journal of Children's Rights* 300, at 309–311.

<sup>90</sup>This is the case unless it can be shown that the husband or civil partner did not consent to the surrogacy arrangement. See s 35 et seq of the HFE Act 2008. If the surrogate is not married, she has control over who is registered on the birth certificate in the absence of a court order permitting a father or other legal parent to be registered. See Births and Deaths Registration Act 1953, s 10.

<sup>91</sup>HFE Act 1990 (as amended), s 31(Z)(A).

<sup>92</sup>V Jadva et al, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27(10) *Human Reproduction* 3008.

<sup>93</sup>See, for example, the Irish Family Relationships Act 2015.

<sup>94</sup>See A Bainham, 'Arguments about parentage' (2008) 67(2) *Cambridge Law Journal* 322, at 335.

<sup>95</sup>J Tobin, 'The Convention on the Rights of the Child: the rights and best interests of children conceived through assisted reproduction' (Victorian Law Reform Commission, 2004), at p 46.

<sup>96</sup>Ibid, at p 39.

the child unique'.<sup>97</sup> It could be argued that requiring parents to disclose such information or to have it placed on birth certificates constitutes an unjustifiable interference with the family and privacy of both the parents and the child.<sup>98</sup> This is particularly the case given the unique experiences of growth and development of each child,<sup>99</sup> and the requirement for parents to provide appropriate direction and guidance in children's exercise of their rights in a manner consistent with their 'evolving capacities', under Article 5 of the CRC. For example, in *exceptional circumstances* disclosure might cause family discord or upset the child to such an extent that it may not be in their best interests to have such information about their genetic origins.<sup>100</sup> Therefore, state obligations relating to the protection of Article 7 and 8 of the CRC should instead focus on the issue of providing information and guidance to parents about the importance of knowing one's genetic origins.<sup>101</sup> This would reflect the requirement under Article 18(2) of the CRC for states to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'.

In this regard, the HFE Act 1990 (as amended) states that a clinic which provides treatment services under the Act must give any woman receiving treatment and any man or woman who is treated together with her a suitable opportunity to receive proper counselling about the implications of the treatment.<sup>102</sup> This must include such information 'as is proper' about:

- '(a) the importance of informing any resulting child at an early age that the child results from the gametes of a person who is not a parent of the child, and
- (b) suitable methods of informing such a child of that fact.'<sup>103</sup>

This is certainly a positive step in terms of supporting parents' role in protecting their future child's rights to know their genetic origins. However, the Code of Practice should also stress the importance of openness about genetic origins for those involved in surrogacy arrangements where the surrogate is the genetic mother. It could also stress the importance of telling children about the manner of their birth through surrogacy even where there is no genetic link with the surrogate. This is particularly important given that surrogate-born individuals who were the subject of a PO can access their original birth certificates, containing the name of their birth mother, at the age of 18. Given the importance of the right to know one's genetic origins as recognised in both the European Convention and the CRC, attendance at counselling on the issue should be mandatory.<sup>104</sup>

<sup>97</sup>See Committee on the Rights of the Child, General Comment No 14 (2013), On the Right of the Child to Have his or her Best Interests taken as a Primary Consideration (art 3, para 1), (CRC/C/GC/14), at para 49.

<sup>98</sup>J Doek, *A Commentary on the United Nations Convention on the Rights of the Child: Article 8 and Article 9* (Martinus Nijhoff Publishers, 2006), at p 11. See generally 'Human-assisted reproduction and the child's right to identity' in C Breen, *Age Discrimination and Children's Rights* (Brill, 2005), at pp 73–106, and Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing* (Nuffield Council on Bioethics, 2013).

<sup>99</sup>Committee on the Rights of the Child, General Comment No 7 (2005), Implementing Child Rights in Early Childhood (CRC/C/GC/Rev 1) at para 6(e). Note that the Committee urged Uzbekistan to ensure adoptees have access to information about biological parents 'at the appropriate age'. Uzbekistan CRC/C/UZB/CO/2, at paras 40 and 41.

<sup>100</sup>For similar arguments relating to disclosure of paternity, see discussion in S Gilmore and L Glennon, *Hayes and Williams' Family Law* (Oxford University Press, 5th edn, 2016), at pp 361–362.

<sup>101</sup>J Doek, *A Commentary on the United Nations Convention on the Rights of the Child: Article 8 and Article 9* (Martinus Nijhoff Publishers, 2006), at p 12.

<sup>102</sup>HFE Act 1990 (as amended), s 13(6).

<sup>103</sup>See para 13(6)(C).

<sup>104</sup>This ties in with Article 42 which states: 'States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike'.

As is set out above, such counselling should encourage parents to tell children about their genetic origins and/or manner of the surrogate birth *during their childhood*. As was noted, the CRC and the ECtHR recognise the right of the child to know information about their genetic origins *qua* child, and not only as an adult.<sup>105</sup> However, it must be recognised that under the current law, if surrogacy arrangements involve gamete donation, identifying information about donors is only accessible at the age of 18. As Tobin notes, since the current data indicate the importance of openness in this context, regimes that deny access to identifying information about donors until a child turns 18 are difficult to justify.<sup>106</sup> Therefore, the law should be changed to allow parents to have access to identifying information about donors so that they can share this with their child at a time when they deem appropriate, in line with the child's development and evolving capacities.<sup>107</sup>

However, these recommendations raise particular issues in the context of inter-country surrogacy. In some countries, such as Russia, it is possible to purchase anonymous gametes for the purposes of surrogacy.<sup>108</sup> It can be argued that such a practice fails sufficiently to protect a child's right to know their parents under international law. As noted above, when the right to know one's genetic origins is at stake, the ECtHR has made it clear that 'particularly rigorous scrutiny is called for when weighing up the competing interests'.<sup>109</sup> Since the practice of anonymous donation seeks to preclude the donor-conceived individual from knowing their genetic origins, this does not allow for a balancing of interests, and is therefore inherently problematic.<sup>110</sup> Consequently, in providing information on surrogacy, clinics should emphasise the importance of the right to know one's genetic origins and the fact that certain practices in other countries may conflict with this.<sup>111</sup> However, many intending parents will not attend a clinic in England before embarking on inter-country surrogacy and therefore state obligations may need to involve more far-reaching projects, such as national campaigns on the issue. In this regard, there are other ways in which inter-country surrogacy may impact on children's rights and about which parents should be fully informed, as discussed further below.<sup>112</sup> Such measures are important in ensuring that the legal framework for surrogacy focuses on the parents' role in protecting children's rights and the provision of state support in this respect, in line with Article 18 of the CRC.

<sup>105</sup>See S Besson, 'Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 137, at 139, noting that Art 7 and 8 represent the first recognition of the right *qua* child.

<sup>106</sup>See J Tobin, 'The *Convention on the Rights of the Child*: the rights and best interests of children conceived through assisted reproduction' (Victorian Law Reform Commission, 2004), at p 144.

<sup>107</sup>See J Appleby, 'Regulating the provision of donor information to donor-conceived children: is there room for improvement', in S Golombok et al (eds), *Regulating Reproductive Donation* (Cambridge University Press, 2016), at pp 334–351.

<sup>108</sup>See *Paradiso and Campanelli v Italy* (Application No 25358/12) (unreported) 27 January 2015, at paras 8 and 65 about the purchase of anonymous gametes from a database.

<sup>109</sup>*Godelli v Italy* (Application No 33783/09) (unreported) 25 September 2012, at para 52. See also *Jäggi v Switzerland* (Application No 58757/00) (2006) EHRR 702.

<sup>110</sup>See M Wells-Greco, *The Status of Children arising from Inter-Country Surrogacy Arrangements* (Eleven International Publishing, 2016), at p 380.

<sup>111</sup>Currently, para 14.6 of the HFEA's Code of Practice requires centres to advise patients intending to travel to another country for surrogacy to seek legal advice about legal parenthood, immigration, adoption and PO procedures for that country and the degree to which those procedures would be recognised under UK law.

<sup>112</sup>See in particular the comments of Hedley J in *Re JJ (Foreign Surrogacy Agreement: Parental Order)* [2011] EWHC 921 (Fam), [2011] 2 FLR 646 urging intending parents to obtain legal advice on the problems that can arise in inter-country surrogacy.



## Child participation and counselling arrangements

Article 12 of the CRC states that a child who is capable of forming his or her own views has the right to ‘express those views freely’ and have those views be given ‘due weight’ in accordance with their age and maturity. The Committee has stated that this right concerns ‘information-sharing and dialogue between children and adults based on mutual respect’.<sup>113</sup> One important issue in this respect is the involvement of children in counselling. While the current framework offers counselling to those who are using IVF services,<sup>114</sup> counselling should also be available to children born as a result of surrogacy, whether or not donated gametes were used. First, it could be provided for children who are born as a result of surrogacy, in order to receive information and to have an opportunity to ask questions about the nature of their birth. In addition, counselling could also be available for children whose mothers act as surrogates, in order to provide them with information about the process and address any possible concerns the child may have on experiencing their mother carrying and then relinquishing a child.

Second, it was noted above that children who are born as a result of surrogacy and are the subject of a PO have access to their original birth certificates at the age of 18, which will indicate their birth mother. Counselling might also be appropriate for children who wish to seek contact with their surrogate mother. The availability of counselling might also be appropriate if the surrogate mother is known to the family or is a family relation, for example, but this information had not been disclosed to the child. Children who are genetically related to their surrogate mother may also have half-siblings, and counselling may be important for the facilitation of contact between such children. In providing appropriate counselling, child rights training may be necessary. It is regularly emphasised by the Committee that those working with children require training in children’s rights and that the Convention should be reflected in professional training curricula and codes of conduct.<sup>115</sup> Therefore, those who provide counselling should receive training which emphasises the concept of children as rights-bearers and the ways in which surrogacy can affect children’s rights.

## Inter-country surrogacy arrangements

It has been noted that inter-country arrangements can raise concerns about the extent to which children’s rights to know their genetic origins can be protected. Other problems that can arise relate to children’s right to a nationality and the legal recognition of the relationship with their parents. A particularly relevant example is the case of *Re X and Y*,<sup>116</sup> in which a British couple entered into a surrogacy arrangement with a Ukrainian surrogate, who gave birth to twins. The sperm of the intending father and anonymous ova were used. Under Ukrainian law, the Ukrainian parents did not have parental responsibility for the children and the intending parents were the legal parents. However, under English law, the

<sup>113</sup>Committee on the Rights of the Child, General Comment No 12 (2009), The Right of the Child to be Heard (CRC/C/GC12), at para 3.

<sup>114</sup>HFE Act 1990 (as amended), s 13(6). All parties to a surrogacy arrangement must also be informed of the legal parenthood provisions under the HFE Act 2008, POs and unenforceability of surrogacy arrangements (paras 14.2–14.4).

<sup>115</sup>General Comment No 5 (2003), General Measures of Implementation of the CRC (arts 2, 42 and 44, para 6), (CRC/GC/2003/5), at para 53.

<sup>116</sup>*Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733.

Ukrainian parents were the legal parents.<sup>117</sup> In addition, owing to differing law on nationality, the children were not entitled to either Ukrainian or British citizenship.<sup>118</sup> This case is examined further below.

Cases have also started to come before the ECtHR relating to the impact of inter-country surrogacy on children. For example, in *Menesson v France*<sup>119</sup> and *Labassee v France*<sup>120</sup> it was held that the refusal of the French authorities to recognise in law parent–child relationships that had been lawfully created in the US amounted to a violation of children’s right to respect for their private life under Article 8. In these cases, it was held that the children’s identity was undermined, since they were in a state of legal uncertainty due to their inability to obtain French nationality and their less favourable position under inheritance law. This was particularly the case given that one of the intending parents was the child’s biological father.<sup>121</sup>

In relation to the child’s right to a nationality, which often arises in these inter-country cases, Article 7(2) of the CRC has particular relevance. It provides that:

‘States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.’

While the implementation of the right to nationality is subject to national law, the CRC is clear that state procedures must accord with international obligations to seek to eliminate child statelessness.<sup>122</sup> The ECtHR has also stated that nationality is a key part of a child’s identity and that it is, in turn, an aspect of the right to respect for private life under Article 8 of the European Convention.<sup>123</sup> Since nationality is linked to a range of entitlements, such as the acquisition of a passport, the right to vote, as well as access to education and medical care,<sup>124</sup> statelessness can affect a range of other rights of the child, including their rights to education under Article 28 and access to healthcare services under Article 24. Clearly, it is not in a child’s best interests to have their access to such services impeded. Furthermore, States Parties must ensure the protection of children’s CRC rights without discrimination of any kind. Therefore, children should not be disadvantaged with regard to the enjoyment of

<sup>117</sup>Ibid, at para [5].

<sup>118</sup>Ibid, at para [9]. In this case a PO was granted based on considerations of the children’s welfare.

<sup>119</sup>(Application No 65192/11) (unreported) 26 June 2014.

<sup>120</sup>Ibid.

<sup>121</sup>Regarding the importance of a genetic link, see *Paradiso and Campanelli v Italy* (Application No 25358/12) (unreported) 24 January 2017 where it was held that the decision of Italian authorities to remove a child from non-biological intending parents did not breach the parents’ Art 8 rights. It was held that the decision struck a fair balance between the state’s interest in legally prohibiting the establishment of parental–child relationships outside cases of a biological tie or lawful adoption, on the one hand, and the intending parents’ rights to respect for their private life, on the other. It was also held that no ‘family life’ existed in this case, due to the absence of a genetic link.

<sup>122</sup>While the terms ‘in accordance with national law’ might indicate that Art 7 does not confer positive obligations on states, others argue that the right to nationality is part of customary international law. See A Ziemele, *A Commentary on the United Nations Convention on the Rights of the Child, Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (Martinus Nijhoff Publishers) citing J Chan, ‘The right to nationality as a human right: the current trend towards recognition (1991) 12 *Human Rights Law Journal* 1 and M Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (Engel Publishers, 1993).

<sup>123</sup>*Menesson v France* (Application No 65192/11) (unreported) 26 June 2014 and *Labassee v France* (Application No 65941/11) (unreported) 26 June 2014.

<sup>124</sup>B Ní Ghráinne and A McMahon, ‘A public international law approach to safeguard nationality for surrogate-born children’ (2016) *Legal Studies* DOI: [10.1111/lest.12146](https://doi.org/10.1111/lest.12146).

their rights due to their manner of birth through an inter-country surrogacy arrangement. As Michael Wells-Greco notes, a child's status should not be uncertain following surrogacy arrangements any more than it should be following natural birth or assisted reproduction.<sup>125</sup>

Some positive steps have been taken to try to deal with these legal problems. For example, since the introduction of the 2010 Parental Order Regulations, a child can obtain the nationality of the intending parents on the issuance of a PO.<sup>126</sup> Furthermore, the government has issued formal guidelines for citizenship and immigration rules in inter-country surrogacy.<sup>127</sup> Although these are welcome developments, which seek to safeguard the welfare of children, problems remain. For example, since English law recognises the surrogate as the legal mother, the intending mother will have no legal standing to apply for a child's travel documentation.<sup>128</sup> In addition, approval processes for nationality can be lengthy. In one case (reported in the media) involving a surrogacy arrangement by a British couple undertaken in India, there was reportedly a risk that the intending parents' visas would expire before a passport could be obtained for a child.<sup>129</sup> In such circumstances, a child could be separated from those who have been looking after him or her since birth. Returning to the *X and Y* case, the judge in that case emphasised the 'stress and anxiety' which must have been caused to the parents in trying to return to the UK with the twins, since this involved obtaining DNA tests from the UK, prolonged accommodation in the Ukraine, obtaining legal advice and the cost of immigration negotiations.<sup>130</sup> As it was, the judgment records that the parents managed to satisfy the immigration authorities that the father was the biological parent of the children (through DNA tests). They were thereafter granted discretionary leave to enter the UK 'outside the rules' in order to regulate the children's status under English law.<sup>131</sup> Such complications, especially if they might result in the removal of the child from those who are caring for him or her, could have a negative impact on the child's right to development, protected under Article 6 of the CRC.<sup>132</sup> It is important to address such matters as part of recognising how surrogacy arrangements can affect children's rights at all stages of their childhood, including as babies or young infants.

Such issues raise complex challenges for all states and require a considered response at an international level, a full exploration of which is outside the scope of this article. However, it should be noted that the Hague Conference on Private International Law (HCCH) has suggested a multilateral Convention on inter-country surrogacy,<sup>133</sup> which could involve agreements between states and the development of Central Authorities charged with

<sup>125</sup>125 M Wells-Greco, *The Status of Children arising from Inter-Country Surrogacy Arrangements* (Eleven International Publishing, 2016), at p 416.

<sup>126</sup>Parental Orders Regulations 2010 (SI 2010/985), Sch 4, s 7.

<sup>127</sup>Foreign and Commonwealth Office, 'Surrogacy overseas', available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/477720/new\\_1.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477720/new_1.pdf) (accessed: 2 November 2016).

<sup>128</sup>See generally M Wells-Greco, *The Status of Children arising from Inter-Country Surrogacy Arrangements* (Eleven International Publishing, 2016), at p 175.

<sup>129</sup>See N Smith, 'British couple could be forced to leave baby in India amid UK wrangling over surrogacy' *The Telegraph*, 13 September 2016.

<sup>130</sup>*Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, at para [23].

<sup>131</sup>*Ibid*, at para [10].

<sup>132</sup>For an application of bonding and attachment theories regarding babies to the area of inter-country adoption, see L Walker, 'Intercountry adoption and the best interests of the child: The Hague Convention of 1993 and the importance of bonding' [2015] CFLQ 355.

<sup>133</sup>See Hague Conference on Private International Law Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prel Doc No 10, March 2012.

overseeing all international surrogacy arrangements.<sup>134</sup> While this seems like a positive proposal, it would take many years and would prove exceedingly difficult to develop, owing to the variety of legal positions on parenthood, nationality, commercial surrogacy and the permissibility of surrogacy itself.<sup>135</sup> However, given its near universal ratification, the CRC would arguably be an appropriate starting point for the negotiation of an international treaty for inter-country surrogacy by the HCCH relating to the right to a nationality,<sup>136</sup> the legal recognition of parenthood and the right to know one's genetic origins.<sup>137</sup> Such an approach would be in keeping with Article 4 of the CRC, which stresses that state parties should implement the CRC 'within the framework of international co-operation', where needed.

## Conclusion

The practice of surrogacy can impact children's rights in a variety of ways. It is important that the implications of the current framework on children's rights are incorporated into any process of reform. This article argued that three aspects of a children's rights-based approach are important in this regard. First, the regulatory framework should reflect the fact that children are entitled to a range of rights under international law. While the current approach focuses on the assessment of children's welfare pre- and post-birth and on commercial surrogacy, attention was drawn to ways in which the child's right to know their surrogate mother and/or their genetic parents could be affected. It was also noted that children's rights to a nationality, education, access to healthcare and family life could be also affected through inter-country surrogacy. The rights of children at all stages of their childhood must also be addressed. Circumstances that could lead to distress for children in early childhood through disputes or separation from carers must also be taken into account in light of children's right to development. Given its comprehensive nature and near universal ratification, it was also argued that the CRC should inform the development of a convention on inter-country surrogacy.

Second, in shaping reform measures, a participatory approach should be developed. In this sense, children born through surrogacy or whose mothers are surrogates should be included in the current counselling framework. It was also argued that law and policy affecting children should be based on data relating to children's experiences. In particular, research is required on the implications of commercial surrogacy on children and it was also noted that some requirements for POs seem at variance with current data. Third, in order to facilitate children's rights-based reform in this area, there is a need to recognise and support the role of parents in the protection of children's rights. This should involve mandatory counselling for parents, as well as national campaigns on the importance of children knowing their genetic origins and the particular children's rights issues pertaining to inter-country surrogacy.

<sup>134</sup>See K Trimmings and P Beaumont, 'International surrogacy arrangements: an urgent need for legal regulation at the international level' (2011) 7(3) *Journal of Private International Law* 627.

<sup>135</sup>See B Ní Ghráinne and A McMahon, 'A public international law approach to safeguard nationality for surrogate-born children' (2016) *Legal Studies*, DOI: [10.1111/lest.12146](https://doi.org/10.1111/lest.12146).

<sup>136</sup>Ibid. They argue that the CRC can be used to decipher state obligations regarding children's rights to a nationality in inter-country surrogacy.

<sup>137</sup>See the repeated references to the CRC in the Hague Conference on Private International Law Permanent Bureau, *A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements*, Prel Doc No 3C March 2014.

The evaluation of the current legal framework for surrogacy through the lens of international children's rights is important. It identifies children's legal entitlements to have their rights realised by the state and its bodies, as well as by others who are responsible for the realisation of their rights. It encourages the development of a holistic framework which seeks to protect the comprehensive range of rights to which children are entitled, the inclusion of children's experiences and the facilitation of support for parents in the protection of children's rights. This is important in determining the extent of the UK's obligations under the CRC in the context of surrogacy, and it is hoped that the analysis and reform suggestions in this article could make a significant contribution to realising state obligations in this respect.

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