

INTERNATIONAL FAMILY LAW SYMPOSIUM IAFL WITH EALS AND CLA 2 September 2025

Session Resources Pack Session 6 Surrogacy and Reproductive Rights

*Tuesday 2 September 2025
15:15 - 16:15*

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PATRICIA MUNDIA

**PWM Advocates
Nairobi
Kenya**

Email: patricia@pwmadvocates.co.ke



Patricia Wanjiru Mundia is an Advocate of the High Court of Kenya, founder of PWM Advocates, Chairperson of the East Africa Law Society Family Law Committee and Partner at Ngigi Mundia Advocates LLP.

She possesses over 12 years of specialized experience and dedicated legal support in family law. Her expertise extends beyond borders.

She represents the Law Society of Kenya as a member of the NCAJ Standing Committee on Access to and Administration of Justice for Children in Kenya.

A certified professional mediator, she is currently exploring innovative approaches to family law particularly what is proposed through alternative justice systems.

**THE HON. MILLIE GRACE AKOTH ODHIAMBO
MABONA**

**Member of Parliament
Kenya**



Hon. Millie Odhiambo is a human rights lawyer with a special bias towards children and women's rights issues. She has won several national and international awards and accolades for this work, including a presidential award. She is a graduate of the University of Nairobi and New York University. She is an advocate of the High court of Kenya with over 30 years standing. She is serving her 4th term or mandate in Parliament, thus making her the longest serving Woman MP in the current Parliament. She is serving as the Chief Whip for the Minority Leadership. She has also served in the Pan African Parliament; she has served as Member of international council of Parliamentarians for Global Action and Chair Kenya Chapter. She has served as the President of the Committee on the Rights of Parliamentarians in the Inter-Parliamentary Union.

Before joining parliament, she had served as Legal Counsel with Kamau and Kamau Advocates; State Counsel with the Office of the Attorney General, Litigation Counsel with FIDA; Project Officer Gender and Judiciary for ICJ (K); Regional Manager for Treaty based rights of Women and Children in East and Southern Africa with Le'twal International; Founding Director of The CRADLE and Founding CEO of The Maiden Institute of Leadership, Law and Innovation- The Millie Institute.

She has consulted widely internationally and been in several advisory committees of several UN Agencies; several Ministries of the Government of Kenya; international NGOs, and parliaments.

KARABO OZAH

**Centre for Child Law
University of Pretoria
Pretoria
South Africa**

**Email: karabo.ozah@up.ac.za
Website: www.centreforchildlaw.co.za**



Karabo Ozah is the Director at the Centre for Child and a Lecturer in the Department of Private Law of the University of Pretoria in South Africa. Karabo holds an LLB; a Certificate in Advanced Labour Law; LLM in Child Law (cum laude); Certificate in Environmental Law and LLM (Constitutional and Administrative Law) from the University of Pretoria. She serves on the Advisory Committee of the South African Law Reform Commission's Project 100D on Care of and Contact with Children. Karabo is also a member of the Hague Working Group on International Parentage and Surrogacy that is tasked with researching the possibility of a Hague treaty to regulate international parentage and surrogacy. Karabo chaired the Special Commission of the Hague Conference on Private International Law focusing on Inter-country Adoptions in 2022.

**PROF. DR. JENS M. SCHERPE MJUR (OXON), MA
(CANTAB)**

**Nordic Centre for Comparative and International
Family Law (NorFam)
Aalborg Universitet
Aalborg Øst
Denmark**

Email: jscherpe@law.aau.dk

**Website: [www.law.aau.dk/forskning/
forskningsgrupper/nordic-centre-for-comparative-
and-international-family-law-norfam](http://www.law.aau.dk/forskning/forskningsgrupper/nordic-centre-for-comparative-and-international-family-law-norfam)**



Jens is Professor of Comparative Law at Aalborg University, founding director of the Nordic Centre for Comparative and International Family Law (NorFam), Extraordinary Professor at the University of the Western Cape and an Academic Door Tenant at Queen Elizabeth Building, London. Until August 2022, he was Professor of Comparative Law at the University of Cambridge.

Jens is the editor of the International Journal of Law, Policy and the Family and book series editor of the 'Elgar Comparative Family Law Series'. He recently was appointed as independent expert to the Council of Europe's Committee of Experts on Access to Origins.

A Comparative View on Surrogacy

Professor Dr. Jens M. Scherpe, MJur (Oxon), MA (Cantab)



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INTERSENTIA STUDIES IN COMPARATIVE FAMILY LAW

Eastern and Western Perspectives on Surrogacy

Jens M. Scherpe, Claire Fenton-Glynn,
Terry Kaan (eds.)



 intersentia

- 604 pages, published in 2019.
- Contains national reports from 21 jurisdictions as well as a 78 pages of comparative analysis.
- South Africa only African jurisdiction to be included.
- Foundation for the future work, in particular the classifications of jurisdictions into groups:

- Prohibitive
- Tolerant
- Free Market
- Regulated

Surrogacy in Latin America

Nicolás Espejo-Yaksic, Claire Fenton-Glynn and Jens M. Scherpe (eds.)



INTERSENTIA



In 2023....

...we then published the next comparative surrogacy project in 2023, filling a geographical gap left by the previous project.

The book contains national reports on Argentina, Brazil, Chile, Colombia, Costa Rica, The Dominican Republic, Ecuador, Guatemala, Mexico, Peru, Puerto Rico and Uruguay as well as an updated comparative analysis.

The book is also available in Spanish!

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Forthcoming in 2026....

Jens M. Scherpe, Lene Wachter Lenz and Daisy Cheung (eds.),
Criminalising Surrogacy
Edward Elgar Publishing, forthcoming in 2026



This comparative study canvasses 25 jurisdictions around the globe that have legal provisions that criminalise actions relating to surrogacy. In light of the repeated calls for banning surrogacy, most recently by the *UN Rapporteur on violence against women and girls, its causes and consequences*, this study specifically looks at the efficacy of criminalisation in achieving the aims of protecting women and children.



4

Classification of approaches to surrogacy

(Fenton-Glynn/Scherpe, 2019):

- Prohibitive Approach
- Tolerant Approach
- Free Market
- Regulatory Approach

The Failure of the Prohibitive Approach and the Capitulation of the Tolerant Approach

(Good!) Reasons:

Ethical concerns, commodification, exploitation.

→ "Therefore all/commercial surrogacies must be prohibited."

Result:

- No surrogacies (officially) taking place in the jurisdiction/only 'altruistic' ones.

BUT

- Practice potentially driven underground?
- Mostly citizens just go elsewhere for their surrogacy and return home with child.
- Surrogacy thus becomes a privilege of the wealthy.
- Exploitation and commodification simply 'exported' elsewhere.
- Problems with recognition of legal parenthood when they return, to the detriment of the best interest of the child.
- Gender discrimination?

Best interest of the child??

What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. **The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.**

Mr Justice Hedley, *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), at [24].

Case of K.K. and others v. Denmark Application no. 25212/21, 6 December 2022

Facts:

Commercial surrogacy in the Ukraine, intended father legal father because his sperm was used, intended mother was refused adoption.



K.K. v. Denmark – The ECtHR decision



- Violation of the child's right to respect of private life as this outweighed the public interests at stake
- Being like a parent is not the same as being a legal parent.
- There has to be a pathway to legal parenthood.

NF

The fallacy of (old) Danish law

- **Gender discrimination:**
 - the man gets what he wants because his sperm was used.
 - the woman cannot become the legal mother, whether or not her eggs were used. Same for second male partner.
- **Failure to achieve policy aim of general prevention (!):**
 - If ONE partner can become a parent and the other can become 'like a parent', this remains attractive enough to couples who want/prefer to have a child genetically related with one (or even both) partners.

The Problems of the Free Market Approach

- Where the market works, it works.
- Where the market fails, it fails.
- Failure MUCH more common because wealth disparities undermine autonomy of surrogates and lead to exploitation and commodification.
 - ➔ If you could buy your own family, your own children a future by selling your gestational function (and your dignity?), would you?
- That is not to say that there aren't many, many amazing surrogates out there who undertake surrogacies freely and autonomously, but globally that may well be the minority....
- Exploitation IS happening, and (as outlined) prohibition of all or some forms of surrogacy does NOT prevent it from happening.

The Rise of the Regulatory Approach

Given ...

- that neither the **prohibitive** approach nor the **tolerant** approach achieve their self-proclaimed policy aims of preventing exploitation and commodification (as it just is exported elsewhere), and
- that the **free market** approach in many parts of the world fails to protect surrogates and children and indeed intended parents, and
- that comprehensive international treaties on surrogacy that cover the entire globe are EXTREMELY unlikely,

...it seems that **regulating** surrogacy on a national level is the only feasible way forward.

Eastern and Western Perspectives on Surrogacy

New

Over the past 10 years, a convergence of scientific, demographic, legal and social developments has led to a significant influx of cases of international surrogacy. What was previously a marginal form of parenthood has become a multi-billion dollar industry, raising concerns for surrogate mothers, commissioning parents, and children alike. Lawyers, philosophers and health care professionals have struggled to formulate a framework to ensure the protection of surrogate mothers from exploitation, whilst combatting the vulnerability of commissioning parents to agencies and intermediaries, and providing children born as a result of this practice with certainty regarding their identity, status, and nationality.

The transnational nature of the issues raised in relation to international surrogacy agreements means that individual states have struggled to take decisive action, and there remains a myriad of different responses to this issue. This book brings together experts from Eastern and Western backgrounds, to consider the way in which different jurisdictions have responded to surrogacy, both within their own borders, and when an international agreement takes place involving one of their citizens. Each chapter includes a discussion of the laws concerning the establishment and contestation of legal parentage through surrogacy under domestic law; the rules and laws concerning surrogacy arrangements on a domestic level; and approaches to recognition of legal parenthood acquired through surrogacy in other jurisdictions. In addition, the chapters consider the socio-economic context of surrogacy in the chosen jurisdictions, through questions concerning the profile of surrogate mothers and commissioning parents, the involvement of intermediaries, and the nature of the interactions between these parties. In this way, the book provides a comprehensive understanding of the confluences and tensions in the way surrogacy is approached in these jurisdictions, and seeks to identify trends emerging from these different regions.

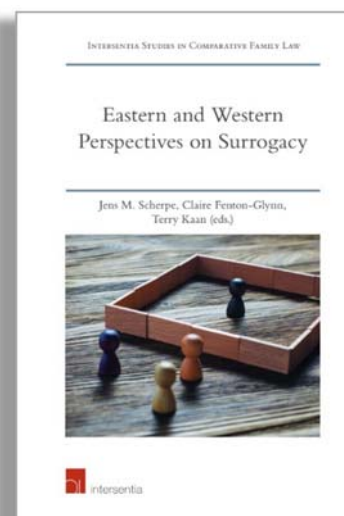
In doing so, *Eastern and Western Perspectives on Surrogacy* seeks to contribute to the greater understanding of the regulation of surrogacy throughout the world, and will serve as a reference work for anyone involved in practice, academia or law reform in this subject area.

JENS M. SCHERPE is a Reader in Comparative Law and Director of Cambridge Family Law at the University of Cambridge. He also is Cheng Yu Tung Visiting Professor in Law, University of Hong Kong, Honorary Professor at the University of Aalborg and an Academic Door Tenant at Queen Elizabeth Building in London.

CLAIRE FENTON-GLYNN is a Lecturer in Law at the University of Cambridge. She is an Associate Member of Harcourt Chambers in London.

TERRY KAAH is an Associate Professor of Law at Hong Kong University and Co-Director of the Centre for Medical Ethics and Law.

Session 6:
Surrogacy and Reproductive Rights



Jens M. Scherpe, Claire Fenton-Glynn
and Terry Kaan (eds.)

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intersentia

Groenstraat 31
2640 Mortsel
Belgium

T +32 3 680 15 50
F +32 3 658 71 21
mail@intersentia.be

Sheraton House | Castle Park
Cambridge CB3 0AX
United Kingdom

T +44 1223 370 170
F +44 1223 370 169
mail@intersentia.co.uk

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Intersentia Publishers
Groenstraat 31
BE-2640 Mortsel
Belgium

F +32 3 658 71 21
mail@intersentia.be

United Kingdom and Ireland

NBN International
Airport Business Centre
10 Thornbury Road
Plymouth PL6 7PP
United Kingdom

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