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## Law as Antikinship: The Colonial Present in Global Surrogacy

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### Abstract

Law and regulation are often seen as the panacea for the ills of science and markets: regulation minimizes risks by setting out clear rules, calls out abuses when those rules are not obeyed, and disciplines actors, institutions, and states to behave according to collectively agreed upon principles. In this article I challenge this liberal narrative of regulation by looking at how cross-border surrogacy arrangements are currently debated in private international law. I first demonstrate that technosciences are intimately linked to regulatory and legal frameworks. Here, recombinant knowledge has led to new formations of legal parenthood while obscuring other forms of kinship in quite paradoxical ways. Second, the liberal story of law and regulation erodes the history and political economy in which law has come to represent itself as universal and moveable. I examine how a gendered, racialized, and (post)colonial context of global fertility chains is lost in the legal instruments designed to protect the people involved in international surrogacy arrangements, preferring instead neoliberal forms of kinship. Finally, the liberal story of law also embraces the story of individualism. I show the conflicts that arise when such individualist forms of law are transplanted to non-individualist contexts, both in non-Western and Western contexts. I argue that by subjecting non-liberal others (across the Global North-South divide) to bioethical frameworks that intervene in kinship ontologies, private international law runs the risk of prolonging the logic of colonial and imperial thinking.

### Keywords

Cross-border surrogacy, private international law, transnational regulation, reproductive technologies, reproductive markets, Hague Adoption Convention, anti-kinship

### Introduction

In this article I address what work regulation does in the realm of global surrogacy. Public controversies and highly mediated court cases around international surrogacy arrangements (ISAs) have pushed the need for a regulatory framework at the transnational level. The appropriate instrument for this purpose is private international law, and the permanent bureau of the Hague Conference was assigned in 2010 to deliberate a future convention on ISAs. By analyzing the proceedings and reflections of these discussions (held with experts and lawyers in the field) and comparing them to the development and debate around the convention on international adoption that is being upheld as a possible template, I want to examine what it means for society to regulate surrogacy and what it does to kinship knowledge in an age of biotechnology and globalization.1

Law and regulation are often seen as the solution for the ills of the market: regulation minimizes risks by setting out clear rules, calls out abuses when those rules are not obeyed, and disciplines actors, institutions, and states to behave according to collectively agreed upon principles. At least, that is the progressive narrative of regulation, the promise of law, and the hope of good governance. This progressive narrative, however, dismisses three things that I would like to explore further. First, it contradicts the idea that law is a technology in itself, one which often assists in shaping markets and society. As science and technology studies scholars have argued, technosciences are intimately linked to regulatory and legal frameworks: they co-produce knowledge, materiality, and sociality (Riles 2005; Jasanoff 2007; Silbey 2010). In the brave new world of reproductive technologies, this means that regulatory frameworks have steered the industry to some countries while staying clear of others. Moreover, many would argue co-productions of law and recombinant knowledge have also allowed new formations of kinship while obscuring others in quite paradoxical ways.

Second, the liberal story of law and regulation erodes the history and political economy of particular technosciences; law and regulation represent themselves as universal and moveable. Legal anthropologists and postcolonial legal scholars have made this point in the past, describing how law plays a central role in shaping the normative course of history, including imperial and postcolonial histories (Esmeir 2012; Bhandar 2018). A focus on the political economy of reproduction shows the complex ways in which class, race, and gender inform contemporary practices. Below I will chart how law—in a variety of ways—makes this political economy invisible and depoliticizes the subject of surrogacy. Moreover, to take up the central trope of this special section, I explain how the colonial present (Gregory 2004) gets lost in the legal instruments designed to protect the people involved in ISAs, and how they instead facilitate economic rationales and produce neoliberal forms of kinship thinking.

Third, the liberal story of law also embraces the story of individualism. While my aim is to show the conflicts that arise when such individualist forms of law are transplanted to non-individualist contexts (both in non-Western and Western contexts), my hope is also to articulate ways in which actors (including individuals, communities, institutions, or states) and actants (including regulatory devices, legal forms, cultural documents) refuse, negate, or negotiate the premise of individualism. My take from this network approach is that the realm of reproductive technologies is a site par excellence to find conducive approaches to thinking kinship and relations individually and collectively.

Rather than take law and regulation at face value by examining, for instance, the norms and principles of international conventions and whether the implementation of these principles have been effective with regards to their aims, my intention in this article is to point to some of the unintended effects of regulation, including ways in which a possible convention on surrogacy could become mobilized by various actors and institutions to do different things. My aim is also to see what meanings are attached to these unforeseen consequences in the broader network of culture and relations of authority and power. Here I draw from scholarship in legal anthropology and science and technology studies that looks at the relational aspect of law; the co-productions of law with science, society, and materiality (Riles 2005; Strathern 2005; Jasanoff 2007; Pottage 2007). My analysis will remain speculative and theoretical for there is no Hague convention for surrogacy yet: at this stage the permanent bureau is still researching the desirability and feasibility of a possible convention.2 Nonetheless, much has been written about the necessity of such a convention and the ways in which transnational regulation should be approached. My analysis will focus on these proposals and draw from my earlier work on the Hague Adoption Convention.

I start by describing the call for regulation from different stakeholders in the field and point to the expectation that regulation could serve as a universal remedy to combat the ills of cross-border surrogacy. After describing the socio-historical context of private international law and the Hague Conference, and the work that the permanent bureau has done in the field of international adoption, I turn to analyze contemporary debates around a possible transnational regulatory instrument within the broader framework of legitimacy and that of its knowledge effects. I argue that private international law both curbs as well as facilitates reproductive markets and that this contradictory movement is central to the neoliberalization of global governance. Moreover, I further contend that shifting knowledge production of kinship, parenthood, and childhood because of scientific knowledge, which further consolidates biogenetic knowledge, is prolonging the logic of colonial and imperial thinking. In other words, as a postcolonial technoscience, private international law subjects non-liberal others (across the Global North–South divide) to bioethical frameworks that intervene in ontologies of kin and relatedness.

### International Regulation as Panacea

The past decade witnessed the surge of cross-border surrogacy arrangements and commentators speak of a booming industry.3 While wealthy intending parents (often from OECD countries) flock to the United States, couples or individuals with less significant resources have traveled to alternating countries in Asia (Thailand, Cambodia, and India), Latin America (Mexico), and Eastern Europe (Ukraine and Georgia).4 Emerging from this development are stories of freedom, choice, and reproductive rights that occupy the moral space of intending parents, and that provide the legitimating framework for lawyers and practitioners in the field. That narrative, however, is overshadowed by the disruptive nature of the industry (Whittaker 2018. Lack of regulatory oversight and conflicting legal frameworks induce situations where legal parentage cannot be guaranteed, and where children can become stateless.

Alongside these narratives of freedom and impediments to those freedoms are stories of exploitation, abuse, and suffering. Poor economic circumstances draw surrogates from the Global South into the industry, and anthropologists have described their liminal experiences (Pande 2014; Vora 2015; Deomampo 2016). Subjected to strict regimes of diet and exercise, and often confined to institutional settings (keeping them away from their communities and families), surrogates have limited political capacity to assert their rights. When things go awry, for instance, when medical complications arise for the surrogate or baby, they are often left to their own devices. The exploitation narrative extends to the children born from surrogacy arrangements. Controversies such as the Baby Gammy case—where an Australian couple abandoned a child with Down syndrome born from a Thai surrogacy arrangement—illuminate the abuses that are occurring in cross border surrogacy (see van Wichelen 2016 for a discussion of this case). Here too, critics and commentators emphasize the unregulated nature of ISAs.

Of course, the unmediated realities of individual cases are much more complex than portrayed by the mass media and its publics; surrogacy arrangements can be exploitative and capacitating at the same time. Nonetheless, it is this highly charged moral and feminist debate that informs calls for regulation. While there are many opposing sides to the contemporary phenomenon of cross-border and commercial surrogacy, most groups seem to agree that there is a need for a transnational legal instrument to regulate the practice (see Dearle 2015), either directly focused on ISAs (Trimmings and Beaumont 2011) or focused on other sections of private international law, which would bring solutions to not only surrogacy issues but also parentage issues in general (Hale 2013). Transnational regulation, then, is seen as the panacea to the outgrowths of reproductive markets.

Rather than public international law—which deals with laws between nations—private international law is the system called upon in regulating surrogacy because they concern the governance of individuals. Private international law is a system of law established to harmonize and determine “conflict of law” situations when private and non-state disputes cross jurisdictions. These issues usually pertain to marriage, birth, divorce, property, or commercial disputes. The Hague Conference on Private International Law (hereafter HccH) is one of the world’s leading organization for cross-border co-operation and commercial matters. It is an intergovernmental organization responsible for the regulation of private matters across different jurisdictions.5 Since 2010, the Permanent Bureau of the HccH has engaged in investigations to tackle the issue of cross-border surrogacy (HccH, n.d.). Preliminary documents have been drawn up that describe the information gathered from HccH member states and the consultations performed with experts and/or practitioners in the field of surrogacy. After five years of preparation, the Experts Group on Parentage/Surrogacy came together for their first meeting in 2016 and met almost every year until the time of writing in 2021. The meetings included a varied mix of experts from twenty-two states, including so-called receiving states and states of origin in relation to ISAs. Experts included judges, governmental officials from justice or health departments, legal scholars, and bioethicists.6

The issues identified from the investigations and consultations of the Permanent Bureau can be summarized around two main concerns. First, discussions predominantly centered on the legal status of children and parents because of conflict of laws pertaining to the recognition of birth certificates and legal parentage. Here, *statelessness* of children (children ending up with no citizenship because of the current legislations) and what is referred to as “limping” legal parentage (intended parents ending up with no legal recognition of parenthood) can be regarded as the core impetus of HccH’s research initiatives.7 The Permanent Bureau draws on a number of cases to highlight that children born from cross-border surrogacy arrangements, and who travel to the country of their intended parents where the state prohibits such arrangements, are left vulnerable in light of their fundamental right to an identity as well as their legal status with regards to nationality, maintenance (financial support), and inheritance.

Second, it was clear that wider concerns were implicated in the practice of cross-border surrogacy as well: concerns of exploitation, inequality, children’s reproductive rights, and health policy. The surrogacy market is not just any market. The picture gets complicated by the nature of the “product” (a child) and the reproductive labor performed to produce it. These are issues pertaining to public policy and therefore highly charged and variable among the different member states of HccH. Because they involve difficult public policy matters, to reach consensus on these issues will be a major challenge. The scope and nature of the future convention will be important in trying to negotiate appropriate processes, standards, and tools in regulating ISAs.

### Markets, Law, and Legitimacy

The concerns around surrogacy echo early reasons for drafting the convention on international adoption in the 1990s (see Van Wichelen 2019). In conceptualizing a Hague Convention for International Surrogacy Arrangements many turn to the Hague Adoption Convention as a useful template. As a private international law instrument, the Hague Adoption Convention works to eradicate “limping adoptions,” referring to weak or unrecognized adoptions, in either states of origin or receiving states, which can leave children stateless or without formal legal parentage. The Hague Adoption Convention can also be qualified as a human rights instrument, for it incorporates and complements the principles and norms of the United Nations Convention on the Rights of the Child. The Hague Adoption Convention, therefore, similar to the current proposals for a Hague Surrogacy Convention, is a multidimensional instrument: at the same time that it is an instrument for judicial and administrative cooperation, it is also a human rights instrument (Van Loon 1990; see also Baker 2013, 420).

According to Katarina Trimmings and Paul Beaumont (2011), the Hague Adoption Convention has all the elements in place to secure women’s and children’s rights that can be transplanted to the field of surrogacy. First, the rights of the surrogate much resemble the rights of the birthmother in adoption. The surrogate would have to give informed consent, and conditions will be put in place to make sure the consent is indeed informed and not coerced by assessing conditions of choice and autonomy. Conditions include age limits, marital status, caps on fees, and only allowing women to become surrogates who already have given birth to their own children. While some or all these conditions already exist in many state laws (for instance, India’s surrogacy regulation bill), the international instrument would provide a minimal standard that works across states. Second, intending parents will need to be scrutinized, perhaps not as exhaustively as adoptive parents, but discussions of age limits in commissioning surrogacy and limits to the number of children conceived have been raised following certain high-profile cases.8 Third, only accredited institutions and central authorities can broker any surrogacy arrangements. Guidelines and good practice guides will be developed from these institutional experiences, and agencies will be audited to make sure they are complying with the latest standards. Finally, a mechanism will be put in place to make sure the children are aware of their genetic background. It is argued that questions of genetic heritage and “roots” that inform international adoptees also apply to children born from surrogacy arrangements.

The scholarship reflecting on the Hague Adoption Convention after its implementation describes three different perspectives in relation to the question of whether the convention is an effective instrument of regulation. One considers the global instrument a success: it is effective in resolving limping parentage by creating clearer rules about nationality and citizenship; it is more ethical because it generates formal standards, guidelines, and accreditations, and curbs the market where non-compliancy and abuse of the system is detected (see, e.g., Trimmings and Beaumont 2011; Beaumont and Trimmings 2016). Others contend that the Hague Adoption Convention prevents people from adopting by becoming a bureaucratic beast that invokes enormous delays and the languishing of orphans in institutional settings (e.g., Bartholet 2007). Then there are the commentators who argue that the Hague Adoption Convention is not effective enough: that abuse is still evident, that corruption is made invisible through the bureaucratic apparatus, and that children’s right to access the knowledge, culture, and citizenship of their birth parents and country are not sufficiently recognized by the current system (e.g., Smolin 2007).

It is not difficult to see how similar perspectives could emerge vis-à-vis a future global instrument for cross-border surrogacy. Drawing on my earlier work, in which I examined the Hague Adoption Convention as “transparency device” (van Wichelen 2019), I would argue that global international law does not so much challenge the state as replicate their methods, bureaucratic forms, and best practices (see also Riles 2008). I am not saying that a Hague convention on surrogacy would replicate the regulatory practices of states, but that the method and form of international law follows the same logic of the state and cannot operate without their active involvement. Rather than describing law as a means to an end, I examined the use of the Hague Adoption Convention in institutional practice, in particular adoption agencies. For agencies and states in the Global North, the convention functioned as a transparency device, forging a technology that measured how well agreed-upon norms and standards were being met. Such a transnational legal technology enabled the formation of legal adoptive families and produced a distinct knowledge about kinship relations. The Hague Adoption Convention enacted the tenets of choice and autonomy and underpinned the legitimacy of moving children from one part of the world to the other. The enactment of legitimacy through the Hague Adoption Convention has also depoliticized adoption, specifically in relation to the politics of value. One could even go so far as to say that it has sanctified adoption. It has obscured political, social, and cultural histories of child welfare, foster care, child circulation, and different knowledge practices of kinship and reproduction.

Of course, the analysis that regulation—or legal formalism more broadly—fails to bring a common platform for democracy and the market has been argued by critical legal scholars and is not new (Johns 2018). Some of these critiques have concentrated on the “plunder” produced by law (Mattei and Nader 2008) and have explained that law facilitates what David Harvey (2003) calls “accumulation by dispossession” leading to disorder and forms of illegality rather than the much-hailed principle of the “rule of law.” Drawing from my previous work on the Hague Adoption Convention and its implementation in contemporary practices of cross-border adoption, I underscore such a process when assessing the possibility for a future convention on ISAs. My speculation is that a private international law instrument for surrogacy will legitimate the facilitation of reproductive markets and depoliticize the subject of surrogacy (this is what arguably happened with Chinese adoptions in the late 1990s and early 2000s). As it formalizes surrogacy, it simultaneously depoliticizes and legitimizes and might therefore increase the flow of children. At the same time—like the Hague Adoption Convention—it will also legitimate the halt to the flow of children in certain jurisdictions where requirements of the Hague convention are deemed difficult to attain. In the case of adoption, Guatemala would be a good example where oversight, accountability, and transparency were lacking, and agencies were not able to comply to these formalisms (Posocco 2011).

In sum, regulation cannot be said to either facilitate or curb the flow of children. It has the potential to do both, at the same time, in different jurisdictions, and in different geopolitical situations. This does not simply mean that it curbs the practice where the situation seems fraught or fraudulent (an argument often made about Guatemala), or facilitates the practice where the situation seems stable and ethical (China). The point that I want to make is that because law cannot consider the reality of political economies or include the politics of economic and moral value inherent to global fertility chains, it risks creating disorder as much as order in their legitimating practices. The next section describes the consequences that this reordering of law has on knowledge production.

### Knowledge Effects of Regulation

Legitimating forces and justificatory frameworks are part and parcel of the performativity of law in transnational regulation. They resemble, as Emilie Cloatre argues, the “silent ways in which law may work through the travels of materials that are already loaded with meanings, yet go on to, relationally, ‘do their own thing’ with it” (2018, 657). Beyond the framework of legitimacy lies a concern with knowledge and the knowledge effects of regulation. To put it differently, besides the production of legitimating orders, regulation and law also produce “a set of institutions, actors, doctrines, ideas, [and] material documents [of] knowledge practice” (Riles 2008, 607). These practices do not cohere in ways that connect parts to global network in which certain truths are being produced. Instead, as Annelise Riles (2008) argues, they represent the “anti-network,” in which practices under the umbrella of private international law create unstable and contingent situations. This instability on the level of practice, however, stands in stark contrast to the stabilization of legitimacy. Procedures, routines, and bureaucracies allow for the fading of normative controversiality and for a depoliticizing process. In this section, I describe how the examination of knowledge effects can assist in turning our attention back to the question of justice. I will do this through two figurations of (legal) knowledge: the person and the human.

#### Legal Personhood and the Thingification of Surrogates

The discrepancy between the political realities of global reproduction and the depoliticization of international law brings into view the mythological core of transnational regulation and international law—namely, that “the Westphalian notion that the governance of the social order can be cleaved from that of international relations” (Ergas 2012, 109). States are central to the architecture and interventions of private and public international law and while international law purports to bring order, it can certainly create disorder. These instances, however, are often interpreted as an anomaly of application or integration.

Disorder works silently through interventions in knowledge production. In the case of regulating global reproduction, an instrument like the Hague convention actively mediates in complex understandings of reproduction and kinship. In general, regulation prevents recognition of “dispersed kinship” (Strathern 1992b) in which the whole suite of “procreators”—as mediated by technoscience, property forms, and knowledge production—are acknowledged in their assistance to reproductive acts. Though this is changing in recent times, where, for instance, “third” parents’ rights are recognized in regulations around mitochondrial donation in reproductive situations needing mitochondrial replacement techniques.

The problem with conventions regulating family-making in private international law—though really it extends to any form of bureaucratization or standardization in global fertility markets—is that it intervenes in vernacular understandings of life and kinship. By universalizing modern and (neo)liberal norms of autonomy, kinship, property, and contract, regulation reproduces not only imperial logics of capital but also Euro-American understandings of kin and relationality. Bob Simpson has referred to this intervention as “antikinship” and “antimagic”; he uses the term *antikinship* “to refer to the designation of some relationships as unwanted or at the very least ambivalent and the term ‘antimagic’ to refer to the desire to deny or negate the effects that a person might wish to generate in another person or object though the use of law, bureaucracy, official classification, or implementation of guidelines or codes of practice” (2013, 594).

Simpson describes the ways in which debts associated with gifts are intervened by laws, guidelines, and regulations. Bioethical frameworks require gametes and embryos to be “donated,” or, in other words, “gifted”—and the “gift of life” has been the central legitimating force behind surrogacy. As we know from anthropological scholarship, gifting in cultural practice—both outside as inside the West—assumes debts and relationality: it is a social and *socializing* phenomenon. These core dimensions of kinship get lost in the universalizing language and apparatus of international law and reproduce—albeit implicitly—the interests of the Euro-American and (neo)liberal subject.

Within a global context of inequality and unequal distribution, largely inherited from colonialism, antikinship necessitates imperializing elements. Legal technologies such as “informed consent” or “anonymity” intervene in kinship in ways that cut or make breaks with past or future forms and imaginaries of relatedness. Informed consent for surrogate women who agree to an ISA, for instance, untethers the gestational relation she has with the child she gestates, while anonymous donations of gametes erases their genetic provenance. These legal technologies not only represent a dominant and modern form of personhood and kinship far removed from local forms, but their universal and legal force assumes the natural desire of developing countries to work toward these modern legal forms. Although not explicitly present, civilizational missions are implicitly and silently present in the application of such techniques.

As many scholars have observed, the ethics behind informed consent are based on Euro-American ideas of freedom, autonomy, and choice (Cooper and Waldby 2014, 223). These moral notions are central in legal thinking, particularly in human rights domains, and confer the legal status of personhood to the subject. Individuals are seen as “freestanding, information-processing, cognitively controlled executioners of rights and personal judgments” (Lock and Farquhar 2007, 2). Within this framework, informed consent epitomizes a legal technique that functions as a moral and ethical safeguard against coercion and exploitation. Critics in the field of international adoption argue, however, that informed consent conceals power dynamics underpinning decision making for birth mothers or birth parents and that knowledge on the legal consequences of adoption vary enormously across cultures (see Fonseca 2011; Johnson 2005; Leinaweaver 2008; van Wichelen 2018). Claudia Fonseca (2004, 2011) describes poignantly, for instance, how birthmothers in Brazil, who draw from their local cultures of child circulation, are not aware of the finality of legal adoption. When transplanting legal techniques in other localities, differing accounts of autonomy and choice are not sufficiently considered. Private international law’s upholding of “transparency,” “choice,” and “informed consent” ignore foundational inequalities informing reproductive exchangeability, thereby depoliticizing adoption and rendering invisible the politics of value.

Regulating anonymity could entail similar problems in cross-border surrogacy. The global practice often (though not in all jurisdictions) depends on the anonymity of donors: sperm donors and oocyte donors. In this regime, donors are not aware, or are not allowed to be aware, of the people who make use of their donated gametes. In turn, this disallows recipients to return any debts sustained or acquired by the gift (Simpson 2013, 94).

Now, one could argue that this is a cultural issue, one in which a Western culture of kinship is pitted against a non-Western culture of kinship, but my persuasion is that relational ontologies are existent in both contexts. One merely needs to think about blended families after divorce or LGBTIQ families in Euro-American settings to think beyond the (neo)liberalized version of the “nuclear family” (though LGBTIQ and blended families can be neoliberal too). This stance complicates contemporary responses toward international law—namely, that including the “cultural context” will enhance its efficacy.

Anthropologists have raised the importance of including cultural perspectives to the making of law and the formulation of rights (Rapport 1998; Wilson 1996). Indeed, in the preparatory material examining a potential Hague convention for ISAs, efforts were made to reach as many states as possible, particularly states of origin of the surrogates. Many of these efforts, however, appeared unproductive. For instance, all member and non-member states were requested to return a questionnaire on the future of surrogacy arrangements (HccH 2014). Responses were clearly skewed toward Euro-American states with already some kind of regulatory framework in place (very few states were involved that condoned commercial surrogacy). Only two African states responded, while states with Islamic law did not respond at all. One could argue that this unevenness in representation would first need to be corrected before there is any chance to craft an international convention. The same unevenness in the preliminary discussions around adoption in the 1990s, however, did not stop the drafting of the Hague Adoption Convention. African and Islamic states were hesitant to regulate a form of kinship (adoption) that was either forbidden by Islam or against local forms of adoption.9

Yet the point that I want to make is that “bringing in culture” will not fully address inequality as a constitutive force of cross-border surrogacy. Nor will it remedy the imperial logics behind global governance and international law. As Marilyn Strathern so aptly notes, “individuals do not interact with culture—they interact with persons with whom they have relationships” (2004, 231). Strathern’s observation has a particular resonance in the field of law where the very idea of modern personhood does not entertain this relational dimension. This is also true for the “human” in “human rights.” Hence, she argues that the deficit of human rights is not only in cultural understanding: “it is a deficit in social analysis” (232).

A social analysis of regulation is key to understanding the central moral and conceptual problem with the globalization of reproduction. The antikinship structures embedded in regulatory devices, legal decrees, documents, and guidelines, which cut off relations, can be understood as informing what Italian philosopher Roberto Esposito calls the “depersonalization dispositive” (2015, 27). In his book *Persons and Things,* Esposito (2015) theorizes the core distinction in Euro-American thought between persons and things—a binary that during colonialism collapsed for colonized subjects. Rather than personhood, the legal status acquired by colonized people was that of inanimate objects epitomized by the idea of property (Zolkos 2018). While reproductive markets abstract vitality and extract biological labor from surrogates (Vora 2015; Pande 2014), the apparatus of international law “thingifies” surrogates: reproducing colonial relations by bringing third-world bodies—though not exclusively10—to operate under the logic of property relations. While I am not arguing—as other critics of surrogacy have done—that the practice of surrogacy itself amounts to a form of slavery, the legal technologies that allow surrogacy to take place in a global marketplace follow the logic of labor and capital not different from other types of embodied work in which third-world bodies are brought under the logic of property relations, that is sex workers, domestic workers, and care workers (Davidson 2014). Following Magdalena Zolkos in her interpretation of Esposito, depersonalization dispositive reduces the surrogate to a “thing-like” body that is now “commodifiable, dispensable, and appropriable” (2018, 17).

#### Humanity and the Gendered Bondage to Law

The intervention in kinship knowledge described above could be argued to take place within the private sphere of the convention, the one most true to the original goals of private international law. But like the Hague Adoption Convention, a convention on ISAs would entail public elements because of the many references to human rights, particularly women’s and children’s rights. By including frameworks of human rights, private international law has partly joined the tendency for global institutions of law (e.g., the International Criminal Tribunal) to stress a human-centered approach over a state-centered approach (Van Beers 2015, 1).

This movement in the context of private international law troubles the distinction between private and public international law and annoys conventional advocates who believe in the neutrality, objectivity, and technicity of private international law (Watt 2011). As explained by Horatia Watt, “methodologically, they [human rights] bring proportionality where the conflict of laws uses deductivism; and as a matter of epistemology, they [human rights] are no respecters of the public/private divide which remains so engrained in dominant private international law doctrine” (2011, 396). The consequences of this movement are that it *humanizes* the sovereign state (Peters 2009).11 The course of humanization includes the explicit defining, delimiting, and articulation of women’s and children’s rights in developing the legal safeguards to protect them from abuse and exploitation. While antikinship structures in private international law thingify the subjects whose labor or capital is extracted for the purposes of reproduction, public elements of the instrument—based on human rights regimes—set out to *humanize* subjects, to give them rights and “safeguards” against possible perils of the practice.

Women’s rights and children’s rights have specific tensions vis-à-vis the figuration of the human. As feminist legal scholarship pointed out, women’s rights are interpolated in the construction of human rights (Merry 2009). This tension is further complicated when women’s rights are placed in a racialized or colonized context. Drawing from her work on juridical humanity, Samera Esmeir (2011) examines this interpolation further in the ways juridical humanity evolved in colonial and postcolonial Egypt. She argues that “the regime of juridical humanity, akin to human rights campaigns today, interpolates the woman-human as a subject of human-made law. The law hails the gendered human. In return, the recourse to the law becomes one of the main mediums in political praxis to assert the humanity of excluded gendered subjects” (Esmeir 2011, 247).

Following Esmeir, we can argue that the assertion of women’s rights in the transnational regulation of adoption and surrogacy forces gendered subjects to appeal via law exclusively in their negotiation and assertion of rights. This creates a form of bondage between women and law: “But if the human is the teleology of modern law, as the gendered colonial history of Egypt shows, the human status of the now-included gendered subjects also introduces relationships of bondage with the law, making gender politics that rely on the figure of the human ever more juridical” (Esmeir 2011, 247). Indeed, one could say that the consolidation of women’s rights (as human rights) in the many clauses of the Hague Adoption Convention tied birthmothers (far more so than genetic fathers) to law in their assertion of humanity and human dignity. It is through the framework of international law that these gendered subjects of potential abuse and exploitation were understood to be safeguarded from *dehumanizing* elements.12

In sum, global fertility chains and their attendant effects in kinship thinking bring novel problems to legal thinking. Rather than assuming that law lags behind, or that future regulation will restore a previous equilibrium, it is more accurate to adopt the view that an active reorganization of legal and biological knowledge is taking place which displaces—or puts on hold—conventional understandings of kinship. By activating different legal domains with their own knowledge systems, law contributes to remodeling kinship.13 In society, such activation comes from our own engagements in who defines and howwe define our kin. Biology or nature can intervene but so can technologies, including legal technologies. Such an exchange can—as Sarah Franklin (2013) notes within the realm of biotechnology—produce new classifications of “biological relatives.” Translated to law, we can argue that *biolegal* exchange could similarly produce new forms of “legal relatives.”

### Concluding Thoughts

When genetics—or biology—can travel across borders, while social, intentional, or de facto relations cannot, how is one to think about regulating the private in the broader context of the social and the global?14

The legal scholar Horatia Muir Watt contends that the focus of private international law has always been on enabling capacities, rather than that of disciplining (2011, 427). Private international law, she further argues, is founded on the schism between law and politics, and between the public and the private. It is time, she argues, that private international law matures into an international law instrument where its political function is re-appropriated: “Private international law should reclaim its governance potential and work to fill the holes created either by excluding or denying non-state authority. Paradoxically, when domesticated and thus reduced to dealing with the ‘private’ sphere, it was actually disabled from taking the ‘private’ seriously. To a large extent, ‘privatising’ international law meant reducing its status—like that of classical private law—to the merely facilitative. Used to enable but not to discipline, it was prevented from identifying and regulating private economic power, which it was complicit in unleashing from public constraints” (Watt 2011, 389).

In agreement with this observation, I argue that a future multilateral private law instrument regulating surrogacy would need to make further efforts to ensure that solutions work against, rather than with reproductive markets and bioeconomies (van Wichelen 2017). Put differently, it would need to acknowledge the intricately linked social, political, and global context of private (family) lives. As in adoption, this would mean not only exploring the opportunities, needs, and rights of intending parents (or the limping legalities for their families). More importantly, it would also mean investigating and addressing the inherent global inequalities constitutive of global reproductive markets. This includes the recognition that Euro-American ideas of choice and individualism—coupled with biogenetic knowledge—continue to impose colonial and imperial thinking. While the work on parentage and kinship thinking seems separate from the problem of markets, I would contend that they are mutually constitutive. Without the legal recognition of genetic parenthood, one that cuts off parental claims from the surrogate, gestational surrogacy would lose its appeal; similarly, without the legal recognition of adoptive parenthood, one that cuts off parental claims from the birthmother, adoption would lose its appeal. In short, genetics and legalities are enabling forces of knowledge. Within a context of reproductive economies, such knowledges can *kin* or *de-kin* relations as much as they produce legitimate or illegitimate families.

### Notes

1 I use the term *kinship* here as it has been explored and theorized anew by the “new kinship studies” (Franklin and McKinnon 2002; Carsten 2000; Nash 2004; Strathern 1992a). Moving away from traditional anthropology that sees kinship as representing “natural facts,” new kinship studies does not take kinship as a pre-social fact but explores the cultural assumptions underpinning kinship. The emergence of reproductive technologies further consolidates the idea that “natural facts of kinship” cannot be sustained when that very nature is able to be engineered and designed. This has all kinds of consequences, one of which is manifested through Euro-American ideas of legal personhood and parenthood discussed in this article.

2 All documents concerning the preliminary investigations on cross-border surrogacy and the feasibility of a Hague convention on ISAs can be found at the Hague Conference on Private International Law (HccH), “The Parentage / Surrogacy Project,” <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

3 Actual figures for the financial picture of the global surrogacy industry are non-existent, but a report from 2010 speaks of a USD$2.3 billion industry by 2012 for India alone (see Burke 2010).

4 For an account of the shifts that have occurred in the countries facilitating cross-border surrogacy, see Whittaker 2018.

5 Established in 1892, the HccH today includes seventy-five states and the European Union. Over the years, it has adopted numerous conventions that aim to harmonize conflicts of law situations. The status of children has been a primary focus, and conventions in this area include child abduction, maintenance obligations, intercountry adoption, and now international surrogacy arrangements.

6 The representatives did not meet in 2020 and 2021 when meetings were moved online due to the global pandemic. Participants included representatives from the US, the Council of Europe, the International Social Service (ISS), and the International Academy of Family Lawyers (IAFL). In their first meeting the group addressed the critical importance of creating a unilateral method for establishing legal parentage in ISAs. Collectively, the group agreed the need exists to protect all children by creating a framework for establishing legal parentage, identifying the child’s nationality, and respecting the child’s right to know their history under an internationally agreed to set of rules or conditions. No such international law has been established as of this writing. At present, there have been eight meetings—and the group of experts continue to conclude that surrogacy and parentage remains an “urgent” matter and that work needs to be continued before a recommendation can be made about a viable convention.

7 The term *limping parentage* is often used in the legal scholarship around the challenges of international surrogacy, describing the lack of regulation in the field that impede on formal legal rights of parenthood. I note that there is an ableist undertone not formally recognized.

8 See Storrow 2005, who discusses a case involving a seventy-one-year-old Italian woman seeking a surrogacy arrangement in Russia and a Japanese man who produced twelve children with various surrogates in Thailand.

9 In Islam, adoption is forbidden and instead a form of fosteringis encouraged, which is called *kefala*. Moreover, many non-Western countries practice forms of simple adoptions where the parental ties are not severed.

10 We must be mindful that not all surrogates are former “third-world” bodies, many women from the “first” and “second” are now surrogates or egg donors, including for wealthier couples in the non-West (such as China and Korea). Nonetheless, similar logics of personhood and property apply to these women.

11 Anne Peters argues, for instance, that the principle of sovereignty is being ousted from its position as a *letztbegründung* (first principle) of international law, leading to the *humanization* of the state (2009, 513).

12 In a similar vein, children’s rights are subsumed in an uneven relationship to humans and humanity.

13 See Franklin 2014 for an account of “activation” in kinship thinking.

14 Of course, social relations are being facilitated across borders in a variety of ways. For instance, some open adoption practices allow for a continued relation between birth parents, adopted children, and the adoptive parents, and some surrogacy arrangements in the US allow surrogates to remain connected with the child they gestated—even if they reside in a different country. My point, however, is that these practices are often *extra-legal* and do not correspond to the formal legalities of their legal arrangements.

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