

Surrogacy

In agreement with a number of other European countries, such as France, Germany, Italy, Spain, Switzerland and Norway, the Scottish Council on Human Bioethics is of the opinion that surrogacy, in all its forms, should be prohibited. This is because of the grave psychological and social risks created by such a procedure for (1) the surrogate mother, her possible partner and existing children, as well as (2) the child created. More specifically, the following concerns exist:

1. Concerns relating to the surrogate woman

1.1. The psychological risk of detachment towards the gestating child

Generally, a gestating woman feels very strong bonds of mutual belonging towards her growing prenatal child. In other words, one of the central objections to surrogacy is that a woman is expected to deliberately become pregnant while trying to detach herself from her gestating child with the aim of giving him or her up after birth.¹ Thus, since the woman's disengagement from her child in the womb is accepted and even encouraged, it is a process which cannot, in any way, be seen as appropriate.² Indeed, it requires a setting which would very much be discouraged in any traditional pregnancy.³

In this respect, the New Zealand neuroscientist and bioethicist, D. Gareth Jones, explains: "*Relationships are critical to what we are as human persons.*"⁴ Adding: "*Surrogacy ... places the development of a crucial relationship in jeopardy, and it does this intentionally ... This is a very high price to pay for providing an infertile couple with a child.*"⁵

Jones further comments: "*However numerous our objections to surrogacy, a central one is the deliberate breaking of that intimate relationship between the biological or carrying mother and the child. Relationships are critical to what we are as human persons. Surrogacy therefore places the development of a crucial relationship in jeopardy, and it does this intentionally.*"⁶

1.2. The psychological risk of relinquishing the child at birth

Concerns also exist as to what actually happens when the surrogate mother relinquishes the child at birth because, as already noted, she may feel a very strong bond of mutual belonging with the child arising from the gestational experience. But even if it was possible for a surrogate to relinquish the child to whom she has given birth, it is not a psychological feature that society should ever encourage even on the basis of altruism. As Jones explains:

*"The welfare of the surrogate mother also needs to be considered from another angle, and this is her own reaction to the loss of 'her' baby. Far too little attention has been paid to this, or to the guilt and despair she may experience in later years. While the reactions of surrogates will undoubtedly vary, the loss of the child is as real for her as for the woman whose child has been adopted or the woman who has had a still-birth."*⁷

¹ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204-205.

² Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984, London: Her Majesty's Stationery Office, p.44-45.

³ Scott B. Rae and D. Joy Riley, *Outside the Womb: Moral Guidance for Assisted Reproduction*, Chicago: Moody Publishers, 2011, p. 183.

⁴ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204-205.

⁵ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204-205.

⁶ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204.

⁷ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 206.

Of course, it may be suggested that surrogacy may be similar to adoption in that the surrogate mother relinquishes the child at birth to the commissioning parents. But in adoption the adoptive legal parents are not deliberately bringing into existence a child to be relinquished. In this regard, the American bioethicists, Gilbert Meilaender, explains that adoption is not comparable to surrogacy, adding:

*“The child adopted is not conceived in order to be given up. The child is already on the scene presenting in his person a need for care. Adoption is a procedure designed to answer that need already present. By contrast, perhaps the greatest moral difficulty with surrogacy is that the surrogate is being invited to conceive a human being as a means to satisfying someone else’s desire to have a child.”*⁸

Some courts in the USA have already compared gestational surrogacy (in which the surrogate does not use her eggs) to a form of baby-sitting lasting nine months. But, as already indicated, very deep emotional bonds may develop between the surrogate and her gestating child which would have to be broken when the child is given over to the intended parents. Moreover, just because a genetic link may exist with one or both of the intended parents, this cannot be seen as having priority over all other aspects. This means that a woman should never legally be forced to relinquish a child after birth against her will.⁹ For example, in the UK, current legislation always recognises the birth mother as the legal parent including for surrogates. It is only in subsequent legal proceedings for surrogacy that the child may be relinquished to the commissioning parents (but this is not automatic).

Even when surrogacy is undertaken for altruistic aims in a spirit of compassion, the dangers of psychological harm are substantial. For instance, when surrogacy takes place within an extended family setting between sisters, surrogate arrangements are fraught with unforeseen complications for all involved and should never be encouraged.¹⁰

1.3. Risks of dispute between the surrogate and commissioning parents

When a number of participants are involved in a surrogacy procedure, real difficulties may arise after the initial arrangements. In this regard, the following examples demonstrate the potential complications and significant ethical difficulties that may develop from surrogate arrangements. This can especially happen when a child is no longer wanted by the intended parents who then refuse to accept this child whom they ‘commissioned’.

In 2010, it was reported that a couple in Canada had engaged a surrogate to carry their child but then discovered, during an ultrasound examination in the first trimester of the pregnancy, that the foetus was likely to be affected by Down’s syndrome.¹¹ The couple then asked the surrogate to have an abortion for which she expressed some concerns. But the couple had entered into a contract with the surrogate before the gestation began stating that if she refused the eventual request for an abortion, then the couple would be absolved of all further responsibility towards the child. In the end, the surrogate agreed to the abortion.¹²

One of the most famous surrogacy disputes, which exemplifies the risks of bringing a child into existence outside the exclusive embodied loving relationship of a married couple, took place in 1997 in California. This arose when an infertile couple, Luanne and John Buzzanca, contracted three separate adults - a sperm donor, an egg donor and a surrogate woman - to bring ‘their’ child into existence through *in vitro* fertilisation. A baby girl was subsequently born in 1995 called Jaycee. But before the birth took place, and after the Buzzancas signed a contract with the surrogate, John decided to leave his wife and filed for divorce. At the divorce hearing, it was ruled that John should pay child support which he later appealed since he considered that the baby was not a child of the marriage. In the meantime, the surrogate filed for custody of

⁸ Gilbert Meilaender, *Bioethics: A Primer for Christians* (Third Edition), Grand Rapids: Eedermans Publishing Co. 2013. p. 23.

⁹ Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984, London: Her Majesty’s Stationery Office, p.44-45.

¹⁰ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, pp. 205-206.

¹¹ Hyder, N. (2010). ‘Couple request surrogate mum to abort over disability’. *BioNews*, 579.

¹² Andrea Braverman, Polly Casey and Vasanti Jadva, *Reproduction through surrogacy: the UK and US experience*, in *Reproductive Donation*, Martin Richards, Guido Pennings and John B. Appleby (eds.) Cambridge: Cambridge University Press, 2012, p. 294.

the child which she later dropped, and Luanne took responsibility of the baby girl while continuing to sue her estranged husband for child support.

In 1997, a superior court ruled that the child had no legal parents responsible for her care and that John Buzzanca was not obliged to pay child support. This was because the baby girl had two genetic, two commissioning non-biological parents and a surrogate mother who had relinquished her parental rights through the surrogacy agreement.

The case eventually went to an appeal court in 1998¹³ whereby a panel of three-judges ruled unanimously that both John and Luanne were to be considered the legal parents of the baby girl because she would never have been born had not Luanne and John both agreed to have a fertilised egg implanted into a surrogate mother. In other words, the judges found that the child's conception was every bit as much the responsibility of the Buzzancas as if things had been done the old-fashioned way.

1.4. The risk of Commodification and Objectification of the Surrogate Woman

Very real concerns exist when surrogate women allow themselves to be used as a kind of human incubator for someone else's child. Indeed, it may still be very difficult, in practice, to ensure that such a relationship does not reflect some form of exploitation.¹⁴ A real risk of commodification of the women's body then exists which describes the treatment of a human being as an interchangeable marketable commodity which can give rise to commerce. But with surrogacy there is also a danger of 'objectification' which describes the treatment of a woman as a thing or an object, disregarding her personality and inherent dignity.

Risks of commodification and objectification are very real when it is the women most needing money who become surrogates. Society could then be faced with the unacceptable situation where the use of human bodies, as such, could have a price with the possibility of contracts being written up. As Meilaender explains: *"Clearly, the child then becomes an object, and, if money is paid [to] the surrogate, a commodity. She makes of the child's person and of her body and its procreative powers instruments in service of others' purposes."*¹⁵

For example, the UK based sociologist, Christina Weis, argues that, with respect to the biological stratifications and the commodification of reproductive capital in Russia:

*"... surrogacy workers and client parents are socially stratified. Client parents possess more economic, social and cultural capital than their surrogacy workers, and have access to resources that the latter do not. Further, I have shown that surrogacy in Russia is framed as an economic transaction and that consequently, surrogacy workers perceive carrying a contracted and commissioned pregnancy as a form of work/temporary employment."*¹⁶

The inherent value and worth of a woman are also assaulted when she uses her uterus for financial profit while being considered as an incubator for someone else's child. But even when no commercial transaction exists in the surrogacy arrangement, a risk remains that the woman may just be considered as a kind of 'container' or 'incubator' divorced of any natural maternal relationships with her child.¹⁷

1.5. Risk of Exploitation

Because many European countries have prohibited all forms of surrogacy for ethical reasons, an international market has developed in which wealthy commissioning parents pay poor surrogate women to gestate their children for them in countries where surrogacy regulations are weak or not really enforced. Because of this, a real risk of exploitation exists. The Swedish journalist, Kajsa Ekman, asks *"how can we justify a situation in which wealthy people use poor people as breeders, inject them full of hormones, take children away from them and leave pocket money in exchange?"*¹⁸

¹³ Buzzanca v. Buzzanca (1998 Cal. App. Lexis 180), 10 March 1998.

¹⁴ D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 203.

¹⁵ Gilbert Meilaender, *Bioethics: A Primer for Christians* (Third Edition), Grand Rapids: Eedermans Publishing Co. 2013. p. 23.

¹⁶ Christina Weis, 'Reproductive Migrations Surrogacy workers and stratified reproduction in St Petersburg', PhD thesis De Montfort University September 2017 Section 6.2. (p. 187).
See also <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/workers-or-mothers-business-of-surrogacy-in-russia/>

¹⁷ Normam M. Ford, *The Prenatal Person: Ethics from Conception to Birth*, Blackwell, Oxford, 2002, p. 115.

¹⁸ Ekman, K. E. 2014. *Being and being bought: Prostitution, surrogacy and the split self*. Victoria: Spinifex Press. p. 150. Mentioned in: Clara Watson, *Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?* Journal, *The New Bioethics*, Volume 22, 2016 - Issue 3, pp. 212-228 (p. 220).

This is a very real concern and cannot be ignored in the countries in which the relatively wealthy commissioning parents originate.

1.6. Biological risks for the woman

Because real biomedical risks exist in gestating a child, no woman should ever be asked to undertake a pregnancy for another woman, especially for the exchange of money.¹⁹ Indeed, tragic outcomes do, unfortunately, happen. For example, a wife and mother of two (who wanted to help another family) in the USA actually died giving birth to a baby for another couple in 2020. Apparently, she was the victim of a rare complication, but the baby survived.²⁰

2. Concerns for the resulting child

2.1. Psychological risks for the resulting child

As already noted, a gestating woman feels very strong bonds of mutual belonging towards her future prenatal child. But this child may similarly experience a strong psychological bond towards his or her gestational mother. This is because gestation is one of the most important times in his or her life. One where the prenatal child is most vulnerable and entirely dependent on the gestational mother while requiring unconditional acceptance for his or her very survival and protection. Thus, a pregnancy cannot be seen as being unimportant, psychologically, for the child.

Questions may also exist relating to the way the resulting child may consider his or her commissioning, surrogate or other parents. For example, the child may want to know, and even have a relationship with, the surrogate woman when he or she grows up since he or she knows that without her, he or she would not exist. But this also means that the resulting children may struggle, psychologically, when they find out about the manner in which they were brought into existence and that this may have happened by prioritising the intended parent's personal autonomy over all other factors. Norman Ford indicates:

"An individualistic notion of personal autonomy opens the way to overlook the personal identity and dignity of the child who may be treated as an object. As a result, the notion of harm can be so narrowed as to exclude the psychological damage to the child's sense of personal identity. It is not a question of it being better to be than not to be. Accepting this line of argument could lead to justifying the conception of children from adulterous affairs. Adultery is immoral and ought not to be committed even if it gives rise to children who may live happy lives."²¹

In addition, because a child born from surrogacy may have many different kinds of parents, new regulations may be required to determine who the legal parents of a child really are while ensuring that other possible parents cannot legally challenge this decision - challenges that may be detrimental to the child. If a dispute does arise because of legal ambiguity between the genetic, gestational and intended parents, the child may eventually become parentless which may also mean that he or she does not have a nationality. The American bioethicist, Ben Mitchell explains: *"For the sake of the children we should resist the temptation to create the conditions that cause a child to ask, 'who are my parents?'"²²*

Thus, surrogacy may be damaging to the child, whose relational bonds with the surrogate are considered to be significant and whose wellbeing should be seen as having paramount importance. Moreover, a surrogacy agreement may be degrading to the resulting child since, for all practical purposes, he or she would have been brought into the world through a legal and/or monetary transaction.²³ This means that, in the case of commercial surrogacy, children may be asking themselves if they only actually exist because a certain amount of money was exchanged to the surrogate and that their very existence has a price.²⁴

¹⁹ Department of Health & Social Security, Report of the Committee of Inquiry into Human Fertilisation and Embryology, 1984, London: Her Majesty's Stationery Office, p.44-45.

²⁰ <https://www.bioedge.org/bioethics/surrogate-mother-dies-in-california/13303>

²¹ Norman M. Ford, *The Prenatal Person: Ethics from Conception to Birth*, Blackwell, Oxford, 2002, p. 115-116.

²² Ben Mitchell, *Shouldn't Children Want Parents of Their Own?*, *Ethics & Medicine*, Vol. 30:2 Summer 2014, p. 69.

²³ Department of Health & Social Security, Report of the Committee of Inquiry into Human Fertilisation and Embryology, 1984, London: Her Majesty's Stationery Office, p.44-45.

²⁴ Clara Watson, *Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?* *Journal, The New Bioethics*, Volume 22, 2016 - Issue 3, pp. 212-228.

2.2. Biological risks for the resulting child

Being born from a surrogate is also not without real medical risks for the resulting child. Indeed, a 2017 study claimed that: *“Neonates born from commissioned embryos and carried by gestational surrogates have increased adverse perinatal outcomes ... compared with singletons conceived spontaneously and carried by the same woman.”* These included preterm birth, low birth weight, hypertension, and maternal gestational diabetes. The researchers suggested that it may be the assisted reproductive procedures, themselves, which may possibly affect embryo quality and that their negative impact cannot be overcome even when a surrogate provides a healthy uterine environment.²⁵

3. Commercial surrogacy should never be allowed

When surrogacy arrangements involve a financial incentive, they become commercial surrogacies. But encouraging a mother to give up the child she has gestated through payment does not make it any more ethical. Instead, it represents one of the most unacceptable forms of exploitation being done against women.²⁶

In addition, it is not because the arguments use words making surrogacy seem nuanced and careful that the procedure is any less controversial. Calling a woman a ‘carrier’ or ‘gestator’ is unacceptable in relation to any human being since it reduces her to a biological process. Erasing any reference to the woman's humanity and her status as a mother can never be seen as responsible or ethically appropriate. Such a manipulation and misuse of the language encourages the surrogate and society to disconnect and deny what the woman is really experiencing in order for her to be able to separate herself from the child. This is because it is necessary for her to believe that this child is not really her child, to repress her emotions, to convince herself that this abandonment is done for the good of others. Furthermore, such ‘linguistic cleansing’ may be aimed at making invisible the market aspect of contractual transactions which amounts to the sale of babies.

The industrialisation of births has already begun, and biomedical reproductive capitalism introduces an exploitative aspect that is more pernicious and more effective than any other. Indeed, a woman's agreement appears to be the green light to justify any practice related to her life or body. But to say that women are accepting to become commercial surrogates is to forget the conditions which led them to such a decision and to neglect the reasons why they have agreed to be exploited. An agreement is not always a desire or based on freedom.

When market norms are applied to the way parental rights and responsibilities are allocated and understood, children are reduced from subjects of love to objects of use.²⁷ Moreover, while contracts to sell children may not automatically turn them into a commodity (permanently), they still treat them (temporarily) as a commodity. The short duration of such an insult makes it no less disparaging and no less able to undermine the child's sense of self-worth.²⁸

On this account, presenting and showcasing commercial surrogacy in a positive manner in the media, as some commercial agencies and lobby groups are doing, should be seen as being as shameful as presenting slavery in a positive manner. This is because a woman would be selling her body for reproduction which is completely unethical.

Of course, a lot of compassion should be shown to the very real suffering of persons who cannot gestate their own children, but compassion also demands protecting women from unacceptable exploitation.

²⁵ Woo, Irene et al. Perinatal outcomes after natural conception versus in vitro fertilization (IVF) in gestational surrogates: a model to evaluate IVF treatment versus maternal effects. 2017. *Fertility and Sterility*, Volume 108, Issue 6, 993 - 998

²⁶ In France, the National Consultative Ethics Committee has already clearly stated, in 2018, its opposition to international commercial surrogacy on the basis, amongst other things, of respect for the human person who cannot be exploited.

²⁷ E S Anderson, “Is Women's Labor a Commodity?” (1990) 19 *Philosophy and Public Affairs*, 71, 76 and 92.

²⁸ M J Meyer, “The Idea of Selling in Surrogate Motherhood” (1990) 4 *Public Affairs Quarterly* 175, 182.

Surrogacy

1. Definitions and general information

Surrogate woman: The woman who carries and gives birth to the child in a surrogacy arrangement, with the intention of handing him or her over to the intended parents shortly after birth and transferring legal parenthood to them.

Gestational (also known as host) surrogacy: A surrogacy arrangement in which the surrogate is not genetically related to the child since her own eggs are not used.

Altruistic (non-commercial) surrogacy: A surrogacy arrangement in which neither the woman who becomes the surrogate, nor any involved surrogacy agency, makes a profit. Moreover, the arrangement is not enforceable as a matter of contract law.

Genetic (also known as traditional, straight or natural) surrogacy: A surrogacy arrangement in which the surrogate is genetically related to the child she carries because her own egg is used to conceive the child.

Biological parent/parentage: A term which can be used to refer to gestational and/or genetic parentage.

Commercial surrogacy: A surrogacy arrangement in which the woman who becomes the surrogate and any involved surrogacy agency charge the intended parents a fee which includes an element of profit.

Intended (or commissioning) parents: The persons who have commissioned the surrogacy arrangement, and who intend to become the legal parents of a child born through surrogacy.

Legal parenthood: A person or persons being recognised by law as being the parent(s) of a child.

Parental order: A court order which transfers legal parenthood from the surrogate (and in some cases her spouse or civil partner) to the intended parents and extinguishes the legal parenthood of the surrogate and her spouse or civil partner, if any.

Double Donation: surrogacy arrangements which involve both donated sperm and donated eggs.

2. Principles and purpose

Surrogacy is the practice of a woman becoming pregnant with a child (who may, or may not, be genetically related to her), carrying the child, and giving birth to the child for intended parents. This can involve:

- Gestational surrogacy which involves the implantation of the surrogate with an embryo or embryos created in a process known as IVF. These embryos may be formed of the intended mother's egg and the intended father's sperm, although donor sperm or a donor egg can also be used.
- Genetic surrogacy which involved the deliberate introduction of sperm (generally using artificial insemination) from the intended male parent or donor into the surrogate woman for the purpose of achieving a pregnancy.

Surrogacy today is a possible solution for those people who, for a number of reasons (whether relating to gender or physical and mental health) are unable to gestate a foetus to term or deliver a healthy baby. As a result, the intended parents who enter into surrogacy arrangements include:

- (1) opposite-sex couples, or single women, who experience infertility, meaning that there are unable to carry a foetus to term; and

(2) same-sex male couples or single men, who for reasons of gender, cannot carry a foetus.

In the whole of the UK about 400 parental orders following surrogacy are given out each year. The numbers of intended parents being helped by UK surrogacy organisations is about 60 to 80 each year.²⁹ In this regard, the organisation 'Surrogacy UK' indicated that, of the 218 births that they recorded from the founding of the organisation in 2002 until 2018, about 33% resulted from a genetic (traditional) surrogacy arrangement.³⁰

Intended parents in the UK may pay the following compensations during the surrogacy journey:

- To surrogacy organisations: Fees might be fixed or calculated according to time spent, and might be payable in tranches, for example, on matching and on signature of the surrogacy agreement (these vary from £5,000 to £25,000).

- To surrogates: In order to cover expenses (these vary from £12,000 to £15,000).

Most surrogacy organisations in the UK have noticed a significant increase in the proportion of male same-sex couples over the last few years reaching 30-50% of their intended parents.³¹

International Surrogacy Arrangements

International surrogacy arrangements take place where intended parents from the UK enter into an arrangement to have a baby with a surrogate from outside the UK, and the baby is born outside the UK. In this regard, the vast majority of international surrogacy arrangements are for gestational surrogacy arrangements.

There has been a significant increase in the proportion of parental order applications where the surrogacy arrangement took place outside the UK. Indeed, international surrogacy arrangements may now account for up to half of parental order applications representing over 150 surrogacy arrangements each year.³² The countries most frequently mentioned as destinations for intended parents from the UK seeking an international surrogacy arrangement were the USA, Ukraine and Georgia.³³

As international surrogacy arrangements are commercial in nature, they are more costly than domestic arrangements. The total cost of a surrogacy arrangement in the USA was around £140,000 to £150,000 for one child and £200,000 for twins.³⁴ The surrogate received about £24,000 to £40,000 by way of compensation and other expenses.

Concerns relating to surrogacy

Interestingly, no extensive discussion and attitudinal research amongst members of society in the UK relating to surrogacy procedures has taken place.³⁵ This is surprising since any investigation should normally be carried out before legislation is proposed or amended. Moreover, an enquiry would be very useful since, even for the most informed of commentators, many of the questions relating to surrogacy are complex, such as:

- Should a woman ever be encouraged to detach herself, psychologically, from her gestating child?
- What do the intended parents mean when they say that they want a child 'of their own'?
- Can the ethical and relational identity challenges arising from the use of donor eggs and/or sperm ever be resolved for the donor, the intended parents, and the resulting child?

²⁹ Law Commission & Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 46.

³⁰ Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018).

³¹ Law Commission & Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 45.

³² Law Commission & Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 369.

³³ Law Commission & Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 62.

³⁴ Law Commission & Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 64.

³⁵ Law Commission & Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 3.

- Can persons ever own (or rent) their bodies, as such, in a civilised society?
- Is there a risk of commodification of children born from commercial surrogacy both in the UK and abroad? How will the children resulting from commercial surrogacy understand, or consider, the manner in which they were brought into existence, when they become more mature?
- Should procedures, which are prohibited in the UK, be legalised just because some individuals are going abroad to bypass the law?
- What kinds of psychological risks would exist for the surrogate or the child if the latter is immediately taken away after birth?
- Why is there no requirement for discussion and agreement concerning the detection of disability and its management (such as a termination of the pregnancy)? What would the rights and interests be of a disabled foetus or those of the surrogate if she disagrees with the intended couple on the definition of acceptable risks of disability?

In this regard, if the principle of providing appropriate information in the consent procedure is seen as important for patients, then it is also important for democratic societies and parliaments before they make decisions, such as in considering different forms of surrogacy.

3. History

Genetic (traditional) surrogacy (where the surrogate uses her own egg) as a form of assisted reproduction has long-standing historical origins. Examples (of sorts) are found in the Bible, in the Book of Genesis with the stories of Sarah, Rachel and Leah³⁶ but, unlike today, conception was achieved sexually, rather than through artificial insemination.

The first successful birth through a gestational surrogacy arrangement took place in 1985 and initiated discussions about the legal regulation of surrogacy. In the UK, these discussions took place in the preparation of two important reports:

- The Warnock Report:³⁷ The majority report was of the view that surrogacy becomes “*positively exploitative when financial interests are involved*”. It considered that even a limited, non-profit making surrogacy service, subject to regulation, was not appropriate as “*such a service would in itself encourage the growth of surrogacy*”.
- The Brazier Report:³⁸ This rejected any move to allow the surrogate woman to benefit financially from the surrogacy arrangement. Instead, the report recommended that payments to the surrogate woman should only cover genuine expenses associated with pregnancy. It concluded that all agencies involved in surrogacy arrangements should be required to be registered by the UK Health Departments and to operate in accordance with a statutory Code of Practice.

4. England and Wales – Legislation and Case Law

4.1. Developments

Parliamentary debates which prefaced the enactment of the *Surrogacy Arrangements Act 1985* reflected the abhorrence and reluctance which English courts reserved towards surrogacy.³⁹ However, at present, the practice seems to have become more acceptable in society. Indeed, 367 parental orders were granted in England and Wales in 2018 (up from 117 in 2011) though the exact numbers of UK children born each year as a result of a surrogacy arrangement are unknown.⁴⁰

³⁶ See, for example, Genesis 16:1-4; 30:1-10.

³⁷ Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314.

³⁸ Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068.

³⁹ Law Commission and Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 67.

⁴⁰ Law Commission and Scottish Law Commission, Building families through surrogacy: a new law, 2019, p. 1.

4.2. Present situation

The current law on surrogacy is a combination of primary legislation (Acts of Parliament), secondary legislation (regulations passed by Parliament) and case law. The most important legal documents in this regard are:

Surrogacy Arrangements Act 1985

This Act creates various criminal offences in relation to commercial surrogacy. Moreover, the UK rules on parenthood mean that the surrogate is the legal mother of the child when it is born in all cases. In some situations, her spouse or civil partner will also be the child's other legal parent. After the birth of the child, the intended parents can apply to the court to transfer legal parenthood from the surrogate (and her spouse or civil partner, if relevant) to themselves.

Human Fertilisation and Embryology Act 1990 (and as amended in 2008)

This generally explains the rules regarding who are the legal parents of a child born of a surrogacy arrangement. This requires that:

- The following must be addressed:

- (1) in the case of two applicants for a parental order, at least one of them is genetically related to the child; or
- (2) in the case of a single applicant for a parental order, he or she is genetically related to the child.⁴¹

These provisions mean that the current law prevents surrogacy arrangements which involve both donated sperm and donated eggs (so called 'double donation') from being eligible for the granting of a parental order.

- The intended parents must apply for a parental order within six months of the child's birth.⁴² Though exceptions may be considered.

- An application can only be made if the surrogate women (and potentially their spouses if they have also become a legal parent of the child) have "*freely, and with full understanding of what is involved, agreed unconditionally to the making of the order*". The surrogate woman cannot give her consent to the parental order less than six weeks after the child's birth.⁴³ This mirrors the requirement in UK adoption law that a mother cannot consent to the adoption of her child less than six weeks after giving birth.

- In order to make a parental order, the court must be satisfied that the intended parents gave no money or benefit other than "*expenses reasonably incurred*" unless retrospectively authorised by the court.⁴⁴

5. Scotland

5.1. Developments

In 2018, about 15 parental orders were granted by a Scottish court.⁴⁵

5.2. Present situation

Surrogacy arrangements and the subject-matter of the UK *Human Fertilisation and Embryology Act 1990* are reserved matters under the *Scotland Act 1998*, meaning that the UK Parliament retains the power to make laws in this area. In other words, the law on surrogacy in Scotland is similar to that of England and Wales. Immigration and nationality are also reserved under the *Scotland Act 1998*.

⁴¹ Sections 54(1)(b) and 54A(1)(b) of the HFEA 2008.

⁴² Sections 54(3) and 54A(2) of the HFEA 2008.

⁴³ Sections 54(6) and 54A(5) of the HFEA 2008.

⁴⁴ Sections 54(8) and 54A(7) of the HFEA 2008.

⁴⁵ Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law*, 2019, p. 1.

In Scotland, the man whose sperm fertilised the egg would only be the legal parent if he took steps to have himself named on the birth certificate, or a court order was made declaring that he was the child's parent.

6. Legislation, Case Law and Regulations - International

6.1. International

United Nations

The *UN Convention on the Rights of the Child* provides in Article 3 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.”

The *UN Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* indicated in 2018 that:

Paragraph 41: *“commercial surrogacy, as currently practised usually amounts to the sale of children as defined under international human rights law.”*⁴⁶

Paragraph 72. *“Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child.”* In other words, the following conditions would be necessary.

First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child.

Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract.

If the surrogate mother chose to maintain parentage and parental responsibility, she may be legally obligated to share parentage and parental responsibility with others, including the intending parent(s). However, the surrogate mother would not be obligated to relinquish her own status by the surrogacy arrangement.

Any choice by the surrogate mother after the birth to legally and physically transfer the child to the intending parent(s) must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation.

Council of Europe

Convention on Human Rights and Biomedicine

This Convention indicates in Article 21 that: *“The human body and its parts shall not, as such, give rise to financial gain.”*

European Court of Human Rights

The European Court of Human Rights has recognised that there is a lack of consensus concerning surrogacy, such as between states, and that states should be afforded a wide margin of appreciation concerning surrogacy arrangements.

The existence of a wide margin of appreciation means that, unless the result of choices made by the national authorities is clearly unreasonable or disproportionate, or the authorities have not provided the procedural protection required by the *European Convention on Human Rights*, the European Court of Human Rights is unlikely to find that Convention rights have been violated.⁴⁷

⁴⁶ M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/6 para 41.

⁴⁷ Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law*, 2019, p. 136.

The 2014 *Mennesson v France* court case in the European Court of Human Rights⁴⁸ eventually indicated that once the surrogacy has taken place and the child was legally relinquished to the commissioning parents in the country of birth, recognition of the relationship between the child and his or her intended parent(s) in their home country cannot be denied. This is especially the case where there is a genetic link with one of the commissioning parents. For the many countries that completely prohibit domestic surrogacy, this means that a denial of status to the child born from an international surrogate may no longer be used as a deterrent against the use of international surrogacy arrangements.

European Union

The *EU Charter of Fundamental Rights* indicates in Article 3 that: “*In the fields of medicine and biology, the following must be respected in particular ... the prohibition on making the human body and its parts as such a source of financial gain*”.

The Hague Conference on Private International Law

The Hague Conference on Private International Law (the “Hague Conference”) is an intergovernmental organisation, formally established in 1955, whose explicit purpose is “*to work for the progressive unification of the rules of private international law*”.

The Hague Conference has produced various notes and reports on the issues arising from international surrogacy arrangements in an attempt to find a workable compromise with national states. In its 2014 report, it admitted that work in this area would be difficult given the diverse approach of states to questions concerning legal parentage in internal and private international law. It also noted the difficult questions of public policy raised in an area traditionally strongly connected with states’ cultural and social milieu.⁴⁹

6.2. Other countries

All forms of surrogacy are prohibited in France, Germany, Italy, Spain, Switzerland, Austria, Norway, Finland and Iceland.

Altruistic surrogacy (but not commercial surrogacy) is legal in Portugal, Belgium, The Netherlands, the United Kingdom, and Greece.

Both commercial and altruistic surrogacy is possible, including for foreigners, in certain states of the USA, Russia, Georgia and the Ukraine.

India was previously a very popular destination for international surrogacy arrangements but has now closed its borders to overseas couples seeking a surrogacy arrangement. It did this by enacting its *Surrogacy (Regulation) Bill 2016* banning all international applications in order to protect vulnerable women from unscrupulous agents representing wealthy international clients.⁵⁰

⁴⁸ *Mennesson v France* (App No 65192/11).

⁴⁹ Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law*, 2019, p. 84.

⁵⁰ <https://www.telegraph.co.uk/news/2018/12/20/india-bans-commercial-surrogacy-stop-rent-womb-exploitation/>