

OUTSOURCING ETHICAL DILEMMAS: REGULATING INTERNATIONAL SURROGACY ARRANGEMENTS

Summary

This article argues that the English legislative regime is ineffective in regulating international surrogacy, particularly with regard to commercial payments. It suggests that if English law views surrogacy as exploitative, we have a responsibility to protect women both in England and abroad, and the only way to do so effectively is to create a domestic system of regulation that caters adequately for the demand in this country. This requires a system of authorisation for surrogacy before it is undertaken; ex-post facto examinations of agreements completed in other jurisdictions, after the child is already living with the commissioning parents, cannot be seen as an acceptable compromise, as authorisation will inevitably be granted in the child's best interests.

Keywords: best interests of the child, international surrogacy, Human Fertilisation and Embryology Act 2008, medical tourism

It is unknown how many surrogate births take place each year, let alone the number of international surrogacy arrangements, however, statistics suggest that the use of foreign surrogates is an expanding practice, increasing from 2% of all parental orders in 2008, to 13% in 2010 and 26% in 2011.¹ Surrogacy in England is an informal and uncertain procedure, where demand for surrogates far outstrips supply; as a result, couples are seeking jurisdictions where the legislation is more permissive and surrogates more easily available.

The high proportion of intended parents using overseas instead of domestic surrogacy arrangements shows that English public policy in this area is failing.² The shortage of donors and surrogates resulting from restrictions on payments and opaque laws has meant that couples are flowing abroad to avoid English statutory provisions, often to places where market laws of supply and demand drive arrangements between commissioning parents, surrogacy agencies, and potential surrogates. As such, prohibitive practices in England are leading to the expansion foreign markets, and opening up exploitation dynamics in other countries.³ In 1999, Margaret Brazier hypothesised that '[t]he international ramifications of the reproductive business may prove to be a more stringent test of the strength of British law than all the different ethical dilemmas that have gone before.'⁴ Currently, we are failing this test.

This article will show that despite English law holding international surrogacy agreements to high standards in principle, in reality couples meet with few problems in obtaining recognition of their parenthood, in spite of evidence of commercial transactions. England has a responsibility to regulate more strictly both domestic and international agreements, in order to provide protection from exploitation for women involved in surrogacy, both within and outside its jurisdiction. In this light, the article will advocate for a system of regulation that requires prior authorisation of all surrogate pregnancies and payments.⁵ It is only with strong action that the market in surrogacy can be curbed and surrogacy carried out in a way that ensures autonomous decision-making, and respect for all parties involved.

I. ENGLISH REGULATION OF SURROGACY ARRANGEMENTS

For some years now, England has been struggling with the dilemma of how to approach international surrogacy agreements that do not meet with the requirements of English law. To understand the approach that has been taken, it is necessary to look to the history of the legislative regulation of surrogacy, and the development of law in this area.

England was one of the first countries in the world to introduce legislation concerning surrogacy in the hastily enacted Surrogacy Arrangements Act 1985. Michael Freeman has suggested that '[t]here are few better modern examples of morally panicked legislation than [this Act]',⁶ which was drafted in response to the 'babies for cash' scandal arising from the high-profile case of Kim Cotton (*Re C (A Minor) (Wardship: Surrogacy)*).⁷ As a result, the

¹ M Crawshaw, E Blyth and O van den Akker, 'The Changing Profile of Surrogacy in the UK – Implications for national and international policy and practice' (2013) 34(3) *Journal of Social Welfare and Family Law* 1, 3.

² This was the comment was also made in relation to Australian surrogacy laws: SG Everingham, MA Stafford-Bell and K Hammarberg, 'Australians' use of surrogacy' (2014) 201(5) *Medical Journal of Australia* 1, 4

³ See Brunet et al, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Union: Brussels, 2013) 35.

⁴ M Brazier, 'Regulating the Reproduction Business' (1999) 7 *Medical Law Review* 169, 193.

⁵ The discussion of the regulation of surrogacy in this article is restricted to surrogacy in which artificial insemination techniques have been used, such as would fall under the existing Human Fertilisation and Embryology Act.

⁶ M Freeman, 'Does Surrogacy Have a Future After Brazier?' (1999) 7 *Medical Law Journal* 1, 12.

⁷ [1985] FLR 846.

Act provided that all surrogacy arrangements would be unenforceable. Commercial surrogacy was also prohibited, with criminal offences created for those who initiated or took part in negotiations for a surrogacy arrangement on a commercial basis, or who advertise to enter into, or facilitate, a surrogacy arrangement.

This followed on from the recommendations of the Warnock Committee, which in 1984 had taken a very antipathetic view of surrogacy.⁸ This Committee, established to inquire into the technologies of IVF and embryology, believed that regulation would encourage recourse to surrogacy, and thus recommended that any legislation reinforce the prohibition on the recruitment of women and render criminal the operation of agencies for such purposes. This was the position taken when Parliament came to consider more fully the implications of the advances in reproductive technology and embryonic research five years later. Under the Human Fertilisation and Embryology Bill, the only specific references to surrogacy were in the provisions that emphasised the unenforceable nature of surrogacy arrangements.⁹ The status provisions in ss 27, 28 and 29 of that Act were not designed with surrogacy in mind, but instead were intended to cater to children born through IVF treatment, allocating parenthood to the couple who bore the child, rather than the genetic gamete donors. What would later become s30, which provided for applications for parental orders for commissioning parents in surrogacy, was only inserted at the Report stage of the Bill, as a result of the complaint of a constituent to their MP that they were having to adopt their 'own' children born as a result of a gestational surrogacy agreement.¹⁰ As such, a provision was rapidly drafted to grant legal parenthood to married couples who had entered into a surrogacy arrangement, provided that they fulfil certain conditions.

While England is often lauded as a jurisdiction that has permissive laws on surrogacy, in reality, the legislative framework for recognising a birth through a surrogacy arrangement is highly restrictive. Although it does provide a mechanism for transferring parental status from the surrogate to commissioning parents – unlike in so many countries where adoption laws have been co-opted to this purpose – the circumstances in which this can be granted are narrow.

A court can only make a parental order under s54 within six months of the child's birth, and he or she must already be living with the applicant parents, who must be domiciled in the United Kingdom. Furthermore, the child must be genetically related to one of the applicant parents. In addition, a parental order can only be made with the consent of the surrogate, and her husband if he has consented to the surrogacy. While this can be dispensed with if the surrogate or husband cannot be found, or is incapable of giving consent, there is no mechanism to override a refusal to consent, even if it is withheld unreasonably, or if it is in the 'child's best interests'. Importantly, s54 applies irrespective of whether the woman was in the United Kingdom at the time of her impregnation, gestation and birth.¹¹

When setting out its opposition to surrogacy, the fundamental objection of the Warnock Report rested on two grounds: first, the exploitation of women, and in particular the dangers of financial gain in surrogacy arrangements; and second, the commodification of children through payments made. Following from this, surrogacy in England is required to be based on a 'gift relationship', and the use of our procreative capacities to assist others should be an

⁸ Report of the Committee of Inquiry into Human Fertilisation and Embryology (HMSO: London, 1988) Cm 9314 ('Warnock Report')

⁹ Under s36. See Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team' (HMSO: London, 1998) Cm 4068, 4.36-4.37 ('Brazier Report') [3.12].

¹⁰ Brazier Report, [3.12].

¹¹ This has led to considerable difficulties where laws on attribution of parenthood do not coincide with those in the United Kingdom (see *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733).

altruistic offering, not a commercial transaction.¹² As such, in addition to the restrictions on the enforceability of arrangements, the Human Fertilisation and Embryology Act 2008 requires that money has not been given or received, except for reasonable expenses. Section 54(8) states:

The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of--

- (a) the making of the order,
- (b) any agreement required by subsection (6) [of the surrogate to the order],
- (c) the handing over of the child to the applicants, or
- (d) the making of arrangements with a view to the making of the order,

unless authorised by the court.

The importance of the final clause, permitting judicial authorisation of expenses, cannot be underestimated. This is particularly the case since the 2010 Regulations (Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provision) Order 2010) incorporated into s 54 applications the provisions of s 1 of the Adoption and Children Act 2002. As a result, when deciding whether to authorise payments and allow the parental order, the child's welfare is the paramount consideration, which has meant an undermining of the principle of altruism and the gift relationship, as it will rarely be in the child's best interests to refuse to recognise the parenthood of the persons who are acting as such.

Given the ease at which individuals and couples can cross national borders, we have seen that couples seeking a child can easily sidestep domestic restrictions, presenting English courts with a fait accompli. As the High Court made clear in the recent case of *Re PM*: 'The reality is there is a legal commercial framework which is driven by supply and demand.'¹³

The dilemma faced by the courts when presented with a case of overseas commercial surrogacy was expressed by Hedley J in the case of *Re X and Y (Foreign Surrogacy)*.¹⁴ In this case, the Ukrainian surrogate was given monthly payments of €235, plus a lump sum of €25,000 for a live birth; sums significantly exceeding what could be described as 'reasonable expenses'.¹⁵ Hedley J remarked:

I feel bound to observe that I find this process of authorisation most uncomfortable. 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.¹⁶

While he set out the questions that the court should be asking itself when deciding whether to

¹² See Brazier Report.

¹³ *Re PM* [2013] EWHC 2328 (Fam); [2014] 1 FLR 725, at 730.

¹⁴ [2009] 1 FLR 733.

¹⁵ This particularly the case as part of the sum had been used to put a deposit down on a house.

¹⁶ at 743.

retrospectively approve the payments – whether the sum was disproportionate to reasonable expenses; whether the applicants were acting in good faith in their dealings with the surrogate; and whether there had been any attempt to defraud the authorities – Hedley J admitted that ‘[t]he point of admission to the country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.’¹⁷

Subsequent decisions have proven the truth of this statement. In the last five years we have seen the courts approve compensation payments of US\$23,000¹⁸ and US\$53,000¹⁹ in California, around £3,000 in India,²⁰ and £8,812 in Russia,²¹ and when faced with this dilemma again in the case of *Re L (Commercial Surrogacy)*, Hedley J emphasised that it would ‘only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations supports its making.’²² As a result, where the arrangement is in accordance with the law of the jurisdiction in which it takes place, then the English courts will recognise parenthood.²³

Similarly, other breaches of English law, including applications outside the six-month time limit,²⁴ large payments to agents and mediators,²⁵ deception of the Foreign Office,²⁶ and lack of truthful information about the surrogate,²⁷ have all been insufficient to justify refusal of a parental order.

As such, we can see that the restrictions placed by the English legislature have been largely ineffective in stopping payments to surrogates, or in regulating the practice of surrogacy. Couples have had little difficulty circumventing the law, and commercial surrogacy is permitted through the back door. In effect, if a surrogacy arrangement is undertaken in another jurisdiction, there will be little real scrutiny of its terms and impact, and little chance for judges to be able to refuse recognition by denying a parental order. The child’s best interests must be paramount.

What we are seeing is that domestically prohibitive laws are not operating effectively to prevent commercial surrogacy: the desire for a child for those parents who require surrogacy appears to be greater than the barriers erected by the British parliament.²⁸ So we are faced with a dilemma: our laws are based on the presumption that commercial surrogacy exploits women and commodifies children, yet we know that British citizens are undertaking this in other jurisdictions. This article will not challenge these presumptions, although many have.²⁹

¹⁷ at 743.

¹⁸ *Re S (Parental Order)* [2009] EWHC 2977 (Fam) [2010] 1 FLR 1156.

¹⁹ *J v G* [2014] 1 FLR 297.

²⁰ *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2012] 1 FLR 1347; *Re A and B (surrogacy: domicile)* [2013] EWHC 426 (Fam); [2014] 1 FLR 169.

²¹ *Re C* [2014] 1 FLR 654.

²² [2010] EWHC 3146 (Fam) [2011] 1 FLR 1423, at 1425.

²³ *Re PM* [2013] EWHC 2328 (Fam); [2014] 1 FLR 725.

²⁴ *Re X (A Child)* [2014] EWHC 3135 (Fam). See C Fenton-Glynn, ‘The Difficulty of Enforcing Surrogacy Regulations’ (2015) 74(1) *Cambridge Law Journal* 34.

²⁵ *Re PM* [2013] EWHC 2328 (Fam); [2014] 1 FLR 725

²⁶ *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

²⁷ *Re D (A Child)* [2014] EWHC 2121 (Fam); *Re D and L (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam); [2013] 2 FLR 275.

²⁸ For a more detailed discussion of the tension between English law and international surrogacy, see C Fenton-Glynn, ‘The Regulation and Recognition of Surrogacy in English Law’ (2015) 27(1) *Child and Family Law Quarterly* 83.

²⁹ See, for example, RJ Arneson, ‘Commodification and Commercial Surrogacy’ (1992) 21(2) *Philosophy and Public Affairs* 132; ES Scott, ‘Surrogacy and the Politics of Commodification’ (2009) 72(3) *Law and Contemporary Problems* 109; HV McLachlan and JK Swales, ‘Commercial Surrogate Motherhood and the Alleged Commodification of Children: A defense of legally enforceable contracts’

Instead, it will consider whether, if we do in fact hold these positions to be true, and consider commercial surrogacy exploitative and a commodification of children, how should we legislate in light of the growing trend of international surrogacy?

II. AN EXERCISE IN MORAL PLURALISM?

In a comparative study of surrogacy laws produced by the European Union, it was suggested that notwithstanding its inconsistency with domestic law, allowing international surrogacy may be desirable as a deliberate safety valve to reduce internal pressure for law reform.³⁰ In a similar way, Guido Pennings has suggested that reproductive tourism is simply an exercise in moral pluralism, which allows the peaceful co-existence of different ethical views. He argues that:

The final result of a policy of external tolerance is that a certain norm is applicable and applied in society as wanted by the majority while simultaneously the members of the minority can still act according to their moral view by going abroad. On deeply felt moral issues concerning life and death (such as reproduction, abortion, euthanasia etc), this policy prevents a frontal clash of opinions which may jeopardise social peace. Obtaining the desired treatment by travelling partially defuses the conflict and prevents the frustration and indignation of the minority group from accumulating.³¹

This view endorses reproductive tourism as a solution to restrictive legislation, rather than a problem that arises out of it. However, this may lead to stricter domestic laws than would otherwise be the case. As Storrow suggests, '[t]hose who desire a procedure are apt to be less concerned about whether it becomes outlawed, at least if they have the means to travel in order to acquire it. Those who wish to prohibit the procedure may feel justified in assuming a harsher position than they otherwise might, knowing that cross-border reproductive care will temper resistance to the law.'³²

This was the argument used by the Grand Chamber of the ECtHR in the case of *SH v Austria*.³³ Austrian law forbids ova donation under all circumstances, and only allows sperm donation where it is used for in vivo, as opposed to in vitro, fertilization. When considering the compliance of Austrian law with the ECHR, the possibility for couples to go abroad for treatment contributed to the finding that the ban could be considered proportionate. The implication is that Austria was permitted to impose more restrictive laws than would otherwise be the case, as individuals could always go to another jurisdiction to avoid them.

Despite the approval of the ECtHR, such lenience must be seen as a threat the integrity and coherence of the domestic legal system – both practically and symbolically. It creates a serious legal inconsistency, giving legal effect to a situation that the legislation has expressly forbidden and facilitating a practice that is considered domestically harmful.³⁴ While this may demonstrate respect for the moral autonomy of the minority, especially surrounding issues in ethical dispute, such deference is not always warranted. External tolerance is difficult to

(2009) 72(3) *Law and Contemporary Problems* 109; MM Ertman, 'What's Wrong With a Parenthood Market? A New and Improved Theory of Commodification' (2003) 82 *North Carolina Law Review* 2.

³⁰ Brunet et al, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Union: Brussels, 2013) 36.

³¹ G Pennings, 'Reproductive Tourism as Moral Pluralism in Motion' (2002) 28(6) *Journal of Medical Ethics* 337, 340

³² RF Storrow, 'The Pluralism Problem in Cross-Border Reproductive Care' (2010) *Human Reproduction* 1, 1.

³³ (Appl. No. 57813/00) Judgment of 3 November 2011.

³⁴ This is also the French position on the matter. See Conseil d'état, *une étude sur la révision des lois de bioéthique adoptée par son assemblée générale plénière le 9 avril 2009* (La documentation française, 2009).

reconcile with the underlying assumption that commercial surrogacy involves exploitation and commodification. When the objection to the practice lies in exploitation, can we justify sacrificing women in other jurisdictions while protecting them within our own? In this context, we must examine the fundamental purpose underlying our laws: are they intended to prevent immoral acts only within our territory, or should they also prevent our citizens from doing the wrong thing?

In relation to exploitation, it can be argued that where the 'victim' is subject to the laws of another jurisdiction, it is not the job of English law to protect her. Based on the territorial principle of jurisdiction, it is for her own state to decide whether she is exploited by surrogacy or not. We should thus defer to that country's own judgment about what victimises its citizens, especially when it is not a matter of physical harm.³⁵ To a certain extent, this has been the approach of the English courts: when considering whether to retrospectively approve payments beyond reasonable expenses, a key factor will be whether the payments were permitted under the legal framework of the jurisdiction in which the birth took place.³⁶

However, this thesis relies on the exploited party being adequately represented and respected within the community and government. In an unequal society, the powerful may choose to ignore the exploitation of certain groups, as a result of discrimination, or as they have taken a decision that the benefits they receive outweigh the costs to those exploited. Destination countries may receive significant advantages from having more relaxed laws concerning surrogacy, in particular in the form of financial benefits. Surrogacy is a multi-million pound industry, and there may be an economic interest in maintaining access for international tourists. Indeed, the Confederation of Indian Industry estimates the annual contribution of Reproductive Technology Techniques to the Indian economy to be US\$2 billion, leaving the government with a vested interest in leaving it unregulated.³⁷

When considering whether to recognise practices that have been carried out legally abroad, but that are prohibited domestically, I. Glenn Cohen suggests that it can be useful to draw a distinction between 'core' or 'central' conflicts between the domestic law and the destination country, and lesser, 'peripheral', differences. He argues that where there is a core conflict between the laws in question, governments are less likely to accept their citizens going abroad to avoid their domestic prohibition. However, '[w]here the difference is smaller, a detail in largely simpatico criminal schemes of the two jurisdictions, the home country is more likely, out of comity-like principles, to tolerate that difference.'³⁸ He contends that '[t]he more peripheral the divergence between the home and the destination country's [...] law on the issue, the more apt we should be to defer to the destination country and refrain from extraterritorial application',³⁹

In this respect laws are seen as being only peripherally different if the two countries are committed to the same moral goals in their law, but differ in some of the details as to how these goals should be achieved. Cohen gives an example of two countries prohibiting murder, but having different rules concerning self-defence and whether you can stand your ground or must retreat.⁴⁰ On the other hand, if the jurisdictions have different moral standpoints on an issue, and the very ethical foundations of the laws conflict, then tolerance may not be similarly justified.

³⁵ See IG Cohen, 'Circumvention Tourism' (2011) 97 *Cornell Law Review* 1309, 1384.

³⁶ See *J v G; Re A and B* [2014] 1 FLR 169.

³⁷ L Bishop, 'India's new surrogacy laws are only part of the equation' (14 March 2013) <http://monash.edu/news/show/indias-new-surrogacy-laws-are-only-part-of-the-equation> (accessed 2 September 2014).

³⁸ IG Cohen, 'Circumvention Tourism' (2011) 97 *Cornell Law Review* 1309, 1353-4.

³⁹ *Ibid.*, 1354.

⁴⁰ *Ibid.*

The difference between surrogacy laws that require all transactions to be altruistic, and those that operate on a market basis, appears to speak to the very foundations of the regulation of surrogacy.⁴¹ However, I would suggest that there is an important distinction to be made between the prohibition of commercial surrogacy because it is inherently exploitative or reduces children to commodities, and prohibition based on commercialisation as a contextual wrong, exploitative and capable of commodification only when it is undertaken in circumstances where it infringes on the surrogate's autonomy.⁴² This difference plays a central role in the choice of appropriate regulation for international transactions.

III. SURROGACY AS EXPLOITATION OF WOMEN

A. *Payments to surrogates: an intrinsic or contextual wrong?*

If undertaking a commercial surrogacy agreement involves an intrinsic wrong – at least according to our conceptions – then it is morally irrelevant where the act takes place: allowing our citizens to undertake commercial surrogacy in any jurisdiction involves a cost to our society. This is the position in France, where surrogacy, even without remuneration, is seen to offend the principle of the inviolability of the human body as well as the inalienability of personal status.⁴³

This was also the argument put forward by the majority of the Warnock Committee in 1984, which stated that the use of a woman's uterus for financial profit, as an incubator for someone else's child, is inconsistent with human dignity. The Committee argued:

That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved.

This view suggests that commercial surrogacy is inherently morally suspect, even if the surrogate agreed to this transaction. It is not about the individual, but about the way in which it treats female body parts as a means to an end, rather than for their essential value as part of humanity.⁴⁴ It does violence to the way we think about the body, life and women's reproductive capacities in commodifying them, and thus reducing them to an economic value.⁴⁵ As such, if we believe that by entering into a commercial surrogacy agreement a couple is commodifying the human body, then there would appear to be a core conflict between a law prohibiting such arrangements and one that permits them, and as such, external tolerance does not seem justified.

However, it appears that despite the opinions of the majority of the Warnock Committee in 1984, English law, as developed through the jurisprudence of the High Court in the 30 years since, does not view commercial surrogacy as an intrinsic wrong. Instead, there can be seen to be acceptance that some payments can be made to surrogates without tainting the arrangement. As such, the wrong is a contextual one, only arising where there has been an

⁴¹ Of course, as Cohen acknowledges, the distinction suffers from a denominator problem, in that the divergence is more peripheral the wider we perceive the common denominator (ibid).

⁴² Wilkinson describes these as “wrongful use” and “unfair advantage” exploitation respectively (‘The Exploitation Argument Against Commercial Surrogacy’ (2003) 17(2) *Bioethics* 169).

⁴³ Cass. ass. plén. 31 mai 1991 : Bulletin 1991 A.P., no 4, p. 5. Although it should be noted that the European Court of Human Rights has recently found France's refusal to recognise international surrogacy arrangements on these grounds in the case of *Menesson and Labassee v France* (Application No 65941/11) Judgment of 26 June 2014, as is discussed below.

⁴⁴ See P Laufer-Ukeles, ‘Mothering for Money: Regulating Commercial Intimacy’ (2013) 88 *Indiana Law Journal* 1223, 1238.

⁴⁵ IG Cohen, ‘Circumvention Tourism’ (2011) 97 *Cornell Law Review* 1309, 1376.

exploitation of the individual woman.

The first indication of this view came in the dissenting opinion attached to the Report of the Warnock Committee. Although this minority still felt there was no place for the commercialisation of surrogacy, they suggested that ‘the question of exploitation of the surrogate mother, or the treating of her as a means to other people’s ends, is not as clear cut a moral issue as our colleagues assert.’⁴⁶ They argued that surrogacy should be seen as a practice that ‘could be beneficial to couples as a last resort’⁴⁷ and that regulation was needed to ensure that it was carried out in the best interests of all involved.

The clearest evidence of this contextual position, however, can be seen in the reasoning of the English courts when considering whether to grant a parental order despite payments in excess of reasonable expenses under s54(8): indeed, the very fact that such authorisation is possible under the HFEA 2008 indicates that commercial surrogacy is not regarded as an innate wrong. In a recent line of cases, judges can be seen to be evaluating the extent to which a surrogate is able to make an individual choice, notwithstanding the payments made, taking into account the availability of legal advice and support given to her.

This approach was epitomised in the case of *J v G* in 2013.⁴⁸ In this case, two civil partners from England had entered into a surrogacy arrangement in California. Overall, US\$56,750 was paid to the surrogate, US\$53,000 of which was purely compensation. From no possible perspective could this be seen as anything less than a pure commercial arrangement, however the court found that the payments were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy. In support of this, the court emphasised that there was no evidence to suggest that the payments overbore the will of the surrogate. She was a ‘mature woman with financial means’, who had acted as a surrogate twice before, and had had legal advice before entering into the agreement. Furthermore, the Court considered the fact that she was able to negotiate a higher level of payment to be an advantage, as it showed that she was in charge of the situation.

A similar discussion arose in relation to a surrogacy arrangement in Russia, where nearly £40,000 had been paid to the surrogacy agency, including £8,812 in compensation to the surrogate. The court noted that this was not ‘unusually high’, despite the fact that it equated to between one and two years’ wages in Russia. In approving the payments, the court focused on the fact that the surrogate had support and advice from the agency, and that all negotiations were conducted through a third party.⁴⁹

In this way, we see that the courts are conducting an investigation into whether there has been true consent to the agreement on the part of the surrogate, with the commercialisation of the agreement only relevant to whether her will was overborne.⁵⁰ This echoes the discussion of the Brazier Report of 1998, as to whether payment is exploitative in and of itself. The Report took a different view from the Warnock Report 14 years earlier, and stated that to be treated as an end, rather than a means, individuals must be able to exercise moral agency, and make a free and informed choice to carry out an act to serve the ends of others. In this light, it acknowledged that payment in itself does not make a surrogate a ‘means to an end’, and in fact, a lack of payment might be much more exploitative.⁵¹ As such, according to the Brazier

⁴⁶ Warnock Report, 87.

⁴⁷ Warnock Report, 87.

⁴⁸ *J v G* [2014] 1 FLR 297.

⁴⁹ *Re C* [2014] 1 FLR 654.

⁵⁰ See also *Re A and B (Surrogacy: Domicile)* [2013] EWHC 426 (Fam); [2014] 1 FLR 169. It should be noted, however, that the courts are not consistent in this respect, and do not always undertake such an investigation.

⁵¹ Brazier Report, [4.23].

Report, the issue of exploitation rests on the capacity of the surrogate to fully understand the risks that surrogacy entails, and the ability to make an informed decision regarding these.⁵²

In this way, what this discussion lays bare is that the English approach to surrogacy rests on the assumption that exploitation only occurs when the decision hasn't been free and informed. Compensation and payment beyond reasonable expenses are not inimical to valid consent, but are only contextual factors in deciding whether or not the surrogate has exercised autonomy in the decision.

B. A new approach to the regulation of domestic surrogacy

If commercial surrogacy is viewed as a contextual wrong by English law, this suggests that rather than prohibiting citizens from undertaking such arrangements, England should be trying to ensure that the requisite domestic regulation is in place so that arrangements can be adequately supervised and controlled. This cannot occur in international transactions as they are currently practised, where the court is forced to undertake a retrospective investigation of an agreement that has taken place outside their jurisdiction, with no opportunity to interview the surrogate or explore her circumstances. The futility of such an exercise has been emphasised in several cases where the courts have sought to clarify issues relating to the consent of the surrogate and her husband, only to find that the information provided has been found to be untruthful, with foreign agencies unwilling to provide assistance.⁵³

The lack of control over foreign transactions has already shaped the legislative landscapes of other jurisdictions. In 2000, when the Swiss government was proposing the prohibition of IVF and use of donor gametes, the Federal Council argued that the only consequence of such a law would be that couples would travel to neighbouring countries, leaving the Swiss government with little ability to exercise control.⁵⁴ This is what we have seen in the context of English surrogacy; individuals and couples going abroad resulting in a loss of ability to effectively ensure that exploitation is not occurring. Since commercial surrogacy is being permitted in any case through retrospective approval, it would be more appropriate to regulate domestic surrogacy in a way that gives the legislature and the courts greater control over the practice, and ensure that when a commercial agreement does take place, the surrogate has truly made a free and informed decision.

Such a lack of control is not only important for the issue of consent, but can also relate to the medical and ethical issues surrounding the fertilisation and pregnancy of the surrogate. While the HFEA is able to regulate this within the jurisdiction, it has no control over foreign arrangements. When couples go abroad, there is no chance to ascertain, or regulate, whether the surrogacy has involved medical procedures that are medically and psychologically damaging. Nor is there the ability to evaluate the quality and safety standards of procedures, or whether there are unprofessional or unethical practices. Furthermore, there is no opportunity to regulate whether there has been adequate counselling or social assistance for the surrogate, or whether there has been independent advice.⁵⁵

⁵² The Brazier report did not believe that any surrogate mother could, by the very nature of the activity, fully understand or predict the risks involved. It considered that some risks only become fully evidence after the agreement has been entered into, and maybe even only after the baby has been handed over to the intended parents ([4.25]).

⁵³ *Re D and L (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 2 FLR 275; *Re D (A Child)* [2014] EWHC 2121 (Fam).

⁵⁴ Conseil Federal Suisse. Avis du conseil federal. Initiative 'pour une procreation respectant la dignite humaine'(2000) <http://www.admin.ch/ch/f/pore/va/20000312/explic/index.html> (accessed 2 November 2015)

⁵⁵ For example, the Centre for Social Research in India undertook interviews with 100 women serving as surrogates, and 50 couples who had commissioned pregnancies. It found that in 70% of cases the

A reconsideration of the regulation of surrogacy in England does not mean that we must descend into a surrogacy market driven by supply and demand, but instead requires that the optimal conditions for autonomous decision-making are developed, and adequately enforced.⁵⁶ Most importantly, this requires a shift away from the current model of ex-post facto regulation, to one in which authorities are able to exercise control over the agreement before it takes place. This could involve a requirement that the details of the arrangement – either domestic or international – are put before the court, or an independent specialised body, and their details approved *before* the impregnation of the surrogate takes place. The English courts have proven over the last six years that attempting to do it on an ex-post facto basis is futile, whereas requiring the registration and examination of arrangements before they are implemented gives a level of control over the transaction not currently exercised.

Other states have already moved to such a model; for example, Greece, Israel and South Africa. In Israel, any surrogacy agreement must be approved by a State appointed Committee, which will evaluate the compatibility of all parties with the process, and oversee the agreement. Before it approved a surrogacy arrangement, it must be confident of the commissioning mother's inability to carry a pregnancy, and the compatibility of all parties with the process, and have received confirmation that intended parents have received adequate counselling. Moreover, a mediator must be appointed to resolve any disputes that may arise throughout the agreement.⁵⁷

Likewise, in Greece, judicial authorisation is required before a surrogacy arrangement can go ahead.⁵⁸ The Court can only consider whether the legal conditions have been met, and parties can enter into their own arrangements as to other conditions, as long as these do not limit the autonomy of the surrogate in an unacceptable way – either through preventing her from making decisions concerning her own body, or for compensation over the legally determined amount.⁵⁹

On the other hand, in South Africa, the *Children Act* requires the surrogacy agreement to be confirmed by the High Court, who must be satisfied that it makes adequate contact, care, upbringing and general welfare of the child. To ensure that the surrogate is not being exploited, she must not be using surrogacy as a source of income, and the court will require expert psychological and medical reports, specifics of payments and full details of the surrogate's financial background.⁶⁰ In this way, both couples and surrogates are clear on their rights and responsibilities, and an independent body is able to monitor the agreement itself, and its implementation, to ensure that consent is free, and exploitation does not occur.

IV. THE COMMODIFICATION OF CHILDREN

While pre-birth regulation of surrogacy arrangements may ensure that women are provided with the optimal conditions for autonomous decision-making, there still remains the concern regarding the commodification of children caused by allowing commercial payments to be

agent who had recruited them was their primary source of information about the procedure (G Maranto, 'The Sorry State of Indian Surrogates' (6 August 2013)

<http://www.geneticsandsociety.org/article.php?id=7071> (accessed 2 September 2014)).

⁵⁶ P Laufer-Ukeles, 'Mothering for Money: Regulating Commercial Intimacy' (2013) 88 *Indiana Law Journal* 1223, 1250.

⁵⁷ See Embryo Carrying Agreement Act.

⁵⁸ Law 3089/2002 on Medically Assisted Reproduction and Law 3305/2005 on Application of Medically Assisted Reproduction.

⁵⁹ See KA Rokas, "National report: Greece" in K Trimmings and P Beaumont (eds), *International Surrogacy Arrangements* (Hart: Oxford, 2013).

⁶⁰ Although it should be noted that in South Africa, commercial surrogacy is prohibited, although payments can still be made for reasonable expenses, including loss of earnings.

made. Elizabeth Anderson has argued that such commodification psychologically threatens all children, by changing the way that people value children: “from being worthy of love by their parents and respect by others, to being sometimes the alienated objects of commercial profit making.”⁶¹

This was considered in detail in the Brazier Report, which found that the operative condition for commodification was the creation of an enforceable contract that obliges the surrogate to hand over the child at birth. The Report argued that if payments were permitted in surrogacy arrangements, it would make the transaction a commercial one, and it followed that ‘any fully commercial transaction of this kind should be subject to the normal laws of contract. It is unimaginable that a commissioning couple should enter into a contract that required simply that the surrogate become pregnant and give birth.’ As such, the contract would have to contain a requirement to hand over the child in return for the fee paid, with penalties for non-compliance, which the Report considered could only be viewed as a form of child purchase.⁶² While advocates of commercial surrogacy have tried to frame the debate in terms of payment for services, rather than payment for a child, the Report dismissed this argument in light of the obligation to relinquish the baby.⁶³

There are two possible ways to resolve this dilemma and to allow limited payments without falling foul of laws concerning child sale. The first is to recognise that the surrogate is not in fact the mother of the child, but rather the intended mother is. If this is the case, then there is no sale or purchase of the child. This approach has been adopted in Ukraine, for example, and was the cause of the conflict between English and Ukrainian law seen in *Re X and Y (Foreign Surrogacy)*.⁶⁴

The second – less radical – option in the English context is to follow the lead of Israel in this regard. When entering into a surrogacy agreement in Israel, all sums to be paid are entrusted to a bank account run by a trustee, with funds only allocated with the permission of the State appointed Surrogacy Committee. While in Israel this can be dispensed as monthly compensation payments, a more suitable option might be to hold all funds on account until the final decision has been made to hand over the child or not. Of course, some expenses would still have to be paid upfront, including insemination and IVF, counselling, and legal fees, but the rest of the fees, including any element of compensation that legislation permits, may be retained until six weeks after birth when consent can be legally given. Although this will still involve handing over the child in exchange for money, it at least ensures that the surrogate is not penalised for non-compliance through being required to pay back compensation already received if she wishes to keep the child.⁶⁵

⁶¹ Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press: Cambridge, USA, 1995) 172.

⁶² Brazier Report, [4.34]-[4.35].

⁶³ *Ibid.*

⁶⁴ [2009] 1 FLR 733. See, for example, K Horsey, “Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements” (2010) 22(4) *Child and Family Law Quarterly* 449; E Jackson, ‘What is a Parent?’ in A Diduck and K O’Donovan, *Feminist Perspectives on Family Law* (Routledge-Cavendish: London, 2006), at pp 59-74; R Mackenzie, ‘Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation’ in K Horsey and H Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish: London, 2007); A Bainham, ‘Arguments About Parentage’ (2008) 67 *Cambridge Law Journal* 322.

⁶⁵ Though naturally mechanisms would have to be put in place to prevent surrogates from entering into such agreements in bad faith, with no intention of ever handing over the child. This could be something investigated during the authorisation stage. It should also be noted that the surrogate choosing to keep the child would not automatically be able to do so. As with the current legal position, such a determination would have to be made according to the best interests of the child, as with any other private law dispute between two parents (provided the intended father has a genetic relationship with the child). In this context, see *Re P* [2008] 1 FLR 177.

This mechanism would involve some risk on the part of the commissioning parents, but less so than the current English system. Some assumption of risk must be seen as unavoidable in a system that does not require the automatic handing over of the child, which would be anathematic to the English position.

V. WHAT OF AGREEMENTS OUTSIDE THIS FRAMEWORK?

A new, more strictly controlled, legislative regime for surrogacy still does not solve the problem of what to do if someone goes outside the legal framework.

As we saw above, English courts currently approve such arrangements, and recognise the parenthood of commissioning parents despite going outside the framework, as it is required in the best interests of the child. Despite the difficulties this creates for the integrity of the legal regime, this is not a position that can, or should, be changed. This is made particularly clear by the recent jurisprudence of the European Court of Human Rights. In the case of *Mennesson and Labassee v France*,⁶⁶ the Court found that France's refusal to recognise parenthood arising from a foreign surrogacy arrangement was in violation of Article 8, as it did not adequately protect the rights of the child. Similarly, in *Paradiso and Campanelli v Italy*,⁶⁷ the removal into public care of the child born through surrogacy from the commissioning parents was found to violate Article 8. The state had argued that the commissioning parents were unfit to care for a child, as they had circumvented Italian prohibitions on surrogacy in their "narcissistic" desire to have a child. The ECtHR held that public policy considerations underlying the prohibition on surrogacy arrangements could not take precedence over the best interests of the child.⁶⁸

As such, the hands of the English courts, and indeed the parliament in enacting new legislation, are tied in this respect. A refusal to recognise the legal connection between the child and his or her parents cannot be used as a deterrent to circumventing domestic law.

Trimming and Beaumont, when devising a draft international convention on surrogacy, proposed that any surrogacy agreement undertaken outside the framework of the convention should be viewed as child trafficking, and criminalised as such.⁶⁹ This has been the approach of the Australian states of New South Wales and Queensland, as well as the Australian Capital Territory, which have passed legislation prohibiting commercial surrogacy arrangements, giving extraterritorial effect for anyone ordinarily resident or domiciled within the state or territory.⁷⁰ Criminal sanctions are imposed on individuals, no matter where in the world the procedure is carried out: for example, in New South Wales, a fine of AU\$110,000 or two years' imprisonment can be applied. However, the Australian Family Law Council, in its recent review of the attribution of parentage under Australian federal law, noted that there is an apparent lack of interest in prosecuting people for breaches of such laws.⁷¹

England operates in a different socio-political sphere than does Australia, and its involvement in the European Union may limit its ability to impose such sanctions. A key example of this can be seen in the actions of the German authorities in the early 1990s, where border guards undertook forced gynaecological examinations upon women re-entering Germany at the

⁶⁶ (Appl. No. 65941/11) Judgment of 26 June 2014.

⁶⁷ (Appl. No. 25358/12) Judgment of 27 January 2015.

⁶⁸ This case has been referred to the Grand Chamber, whose judgment is forthcoming.

⁶⁹ K Trimming and P Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627.

⁷⁰ Surrogacy Act 2010 (NSW), s11; Surrogacy Act 2010 (Qld), s54(b); Parentage Act 2004 (ACT), s45(1).

⁷¹ Family Law Council, Report on Parentage and the Family Law Act (December 2013) 86.

Dutch border in search of evidence of extraterritorial abortions. In response, the European Parliament stated that “the internal borders of the [European] Community may not be used to threaten citizens with prosecution for activities that are perfectly legal in some Member States but not in others”⁷² EU laws on free movement of persons make it impossible to impose restrictions on couples seeking reproductive services in other states.⁷³ Similar issues were also addressed in Ireland in the seminal case of *Attorney General v X*,⁷⁴ where the Supreme Court overturned an injunction against a 14-year-old rape victim who wished to travel to England to have an abortion.

Limitations on the ability to impose restrictions within the EU are not fatal to wider extraterritorial sanctions in other countries. However, in the context of surrogacy in England, both the Warnock Committee and the later Brazier report explicitly rejected even the domestic criminalisation of commercial surrogacy arrangements. The Warnock Committee recognised that there was a ‘serious risk of commercial exploitation of surrogacy and that this would be difficult to prevent without the assistance of the criminal law’,⁷⁵ however, it did not want ‘children being born to mothers subject to the taint of criminality.’⁷⁶ This is a powerful argument, particularly when taken from the point of view of the child. To criminalise a surrogate mother and/or commissioning parents for a surrogate birth is akin to criminalising the birth of the child himself or herself. The fact of that child’s birth becomes a criminal offense. Even if we shift the parameters, and argue that it is the entering into an arrangement that is criminal, rather than the child’s birth, this still shrouds the circumstances of the child’s birth in criminality. Such a position cannot be in the best interests of the child.

A more pertinent concern is that criminalisation would drive the practice of surrogacy underground. There is currently no requirement that couples formalise the relationship through a parental order, and there is already evidence that suggests a large proportion of commissioning parents do not go through this formality, thus avoiding scrutiny by the courts.⁷⁷ Domestically, this is only an option available in relation to a traditional surrogacy, as a gestational surrogacy would necessarily involve the intervention of medical professionals, who are highly regulated in this country. However, where the arrangement takes place in another jurisdiction, such medical oversight is not always present. Moreover, in countries such as China and Guatemala, where surrogacy has been prohibited, there have been reports of men ‘having an affair’ with a woman that results in a pregnancy, then subsequently he and his wife adopting the baby – a form of surrogacy through the back door.

In this way, we can see that there is little that can really be done to curb such practices, and prevent circumvention tourism without compromising the welfare of the child who has been born. Family law remedies regulating the recognition of parenthood breach are unenforceable

⁷² Resolution on Compulsory Gynaecological Examinations at the Dutch-German Border of Mar. 14, 1991, 1991 O.J. (C 106) 13.

⁷³ In relation to cross-border movement for abortion, see the Opinion of Advocate General Van Gerven in the case of *Society for the Protection of Unborn Children Ireland Ltd v Grogan* (C-159/90) [1991] ECR I-4685, in which he found that a ‘medical operation, normally performed for remuneration, by which the pregnancy of a woman coming from another Member State is terminated in compliance with the law of the Member State in which the operation is carried out is a (cross-border) service within the meaning of Article 60 of the EEC Treaty’. The Court itself did not address this issue, having found that the provision of information (which was the issue at stake) was not an economic activity, and therefore it did not need to determine whether abortion constituted a ‘service’.

⁷⁴ *Attorney-General v X* (1992) IESC 1.

⁷⁵ Warnock Report, 8.18.

⁷⁶ Warnock Report, 8.19.

⁷⁷ Crawshaw, Blyth and van den Akker suggest that between 1995 and 1998, only half of all surrogate births were registered through obtaining a Parental Order (‘The Changing Profile of Surrogacy in the UK – Implications for national and international policy and practice’ (2013) 34(3) *Journal of Social Welfare and Family Law* 1, 3)

when taking into account the child's best interests, while criminal law remedies are not only unworkable, but also detrimental. We must face up to the reality that surrogacy cannot be regulated through punishment, but must work on safe and ethical facilitation. We must use the carrot, rather than the stick, and create a regime that is in line with our ethical beliefs, but is equally transparent and easily accessible, so that commissioning parents would not have any incentive to work outside it. This is what England is currently failing to do, and must be addressed as a matter of priority.

VI. CONCLUSION

One of the greatest flaws of the Warnock Report was its naïve hope that if surrogacy were prohibited it would simply disappear. Two lone voices spoke up in dissent on this issue, pointing out that:

Whatever we as an Inquiry may recommend, the demand for surrogacy in one form or another will continue, and even possibly grow...As a consequence couples may give up any hope of a child, may take further risks such as of more miscarriages, or may decide to venture into some sort of 'do-it-yourself' arrangement. The latter possibility – that couples are driven into making their own arrangements – is particularly unsatisfactory. These arrangements would be unsupported by medical and counseling services...⁷⁸

This has proven to be sadly accurate. Recourse to surrogacy, both within and outside England, has also become much more prevalent. Figures from the General Register Officer suggest that in 1995 only 52 parental orders were granted, in 2011 there were 149,⁷⁹ although information provided to Crawshaw et al from surrogacy agencies indicate that only half of surrogate births are registered through a Parental Order.⁸⁰

The lack of regulation that flowed from the Warnock Committee's reluctance to encourage surrogacy by formalising it in law has meant that the law has been unable to effectively regulate whether women are being exploited or children commodified. Ex-post facto examinations of agreements completed in other countries, after the child is already living with the commissioning parents, cannot be seen as an acceptable compromise, as recognition of parenthood will inevitably be granted in the child's best interests. As a result, the English law is at an impasse: we do not effectively ban commercial surrogacy, but we do not effectively regulate it either. As Margaret Brazier put it, 'the current state of the law on surrogacy suggests a scenario in which the most dangerous infertility 'activity' is the least regulated'.⁸¹

Conflicts of law between different jurisdictions, and the lack of ability to reject parental orders, have led to a call for greater international regulation. In the case of *Re D (A Child)*, Moylan J opened his judgment with this strong statement:

This case provides a clear example of the difficulties created as a result of surrogacy arrangements being subject to varying degrees of domestic regulation, from significant regulation to none at all, and also because of the existence of significant differences in the effect of such domestic regulation. There is, in my view, a compelling need for a uniform system of regulation to be created by an international

⁷⁸ Warnock Report, 88.

⁷⁹ M Crawshaw, E Blyth and O van den Akker, 'The Changing Profile of Surrogacy in the UK – Implications for national and international policy and practice' (2013) 34(3) *Journal of Social Welfare and Family Law* 1, 3.

⁸⁰ Ibid.

⁸¹ M Brazier, 'Regulating the Reproductive Business' (1999) 7 *Medical Law Review* 166, 181.

instrument in order to make available an appropriate structure in respect of what can only be described as the surrogacy market.⁸²

However, while an international convention in this area should be the ultimate aim, England cannot rely on the hope of such an instrument coming to pass to avoid the problems inherent in its own domestic legislation. We must first put our own house in order, creating clear rules that are principled and precise, allowing commissioning couples to know their rights and responsibilities, and for surrogate mothers to make autonomous, and informed, choices.

⁸² [2014] EWHC 2121, [1].