

The Handmaid's Tale on the horizon: Surrogacy policy in the UK

Introduction

The recent development and emergence of assisted reproductive technologies, or ARTs, creates new legal and ethical dilemmas regarding if and how these innovations should be incorporated into society. ARTs make it possible to separate fertility from the simple act of sex between two people and instead generate a technology-enabled phenomenon that includes many stakeholders (1). As fertility has evolved into an exchangeable act that can involve a variety of participants, a market has formed (2). The availability of ARTs within a neoliberal, capitalist world quickly commercialized the fertility business into a multi-million-dollar industry and shifted how society views and creates families (2). Globalization propelled this massive market forward, further empowering some individuals to travel in search of optimal reproductive options, an action known as cross-border reproductive travel (3). In the context of these global transformations, ARTs have enabled life-changing solutions for infertile couples, same-sex couples, and single individuals who wish to have children and are now able to form families in ways that previously were impossible.

However, the recent spread of this industry has created a host of uncharted circumstances which are not absolved from consequence (2). At a macro scale, the fertility industry is influenced by the continued practices of sexism, heteronormativity, racism, and neocolonialism that stratify society (4). At an individual level, technological advancements require greater involvement of female bodies. While women already disproportionately carry the responsibility of fertility, ARTs further shift the focus onto females (5, 6). In order to fragment and commodify fertility, the female bodies must also be fragmented and commodified, further perpetuating the idea of women as “wombs and childbearing machines, rather than whole persons” (7).

Navigating this new territory in regard to reproduction, requires policy to uphold ethics regarding the international movement of biological commodities which previously could not be transferred before the existence of ARTs. Surrogacy, in particular, gives rise to a host of ethical considerations. Surrogacy is defined as “the practice of becoming pregnant and giving birth to a baby in order to give it to someone who cannot have children” (8). There are two different forms of surrogacy. Traditional surrogacy involves a woman becoming impregnated with the intended father’s sperm and gestational surrogacy is when the transfer of an embryo that was separately created in a fertility clinic is transferred to a surrogate’s uterus (9 s. 1). With the increasing adoption of this new biotechnology, the rules regarding whether or not surrogacy should be allowed, as well as how and which stakeholders should be compensated, is left in question.

Often, this topic has been reduced to an issue of whether or not compensating women is objectifying or empowering (7, 10). However, narrowing this issue to a simple, ideological dilemma is short-sighted. Surrogacy technology exists and now plays an instrumental role in family-making for many individuals. Thus, reverting to a world without surrogacy is no longer a viable option. The surrogacy market alone is projected to be a 27.8-billion-dollar industry by 2025 and a 40-billion-dollar industry by 2036 (11, 12). Therefore, the question of permitting commercialization is not one of determining whether or not the practice should exist in the

world, but of assessing whether to limit accessibility or create regulations regarding technology that is available and accessible elsewhere.

In the United Kingdom, surrogacy is legal, but the commercialization of surrogacy is not. When a preferred circumstance can be found somewhere around the world, the laws set in the United Kingdom do not simply permit or ban the practice of surrogacy, but rather influence the way British citizens engage or disengage with the global fertility economy. This paper will address the current law as it stands, the implications of these regulations, ethical issues to be considered, and potential solutions for reform. Ultimately, the current anti-commercialization policy is determined to be misrepresentative, inadequate, and unethical with necessity for reform.

Analysis

In the United Kingdom, regulations regarding surrogacy were first put in place with The *Surrogacy Arrangements Act 1985* (9). This act authorized surrogacy within the United Kingdom, but also stated that surrogacy agreements are unenforceable by law, surrogacy cannot be negotiated on a commercial basis, and advertising for surrogacy services is illegal (9 s. 1-3). The intention behind these policies was to cause surrogacy to “wither on the vine” (13, 14). In 1985, lawmakers did not foresee the rapid, global adoption of technological advances. Yet, surrogacy is now “firmly on the map” and seen as a viable option for hopeful parents who are not biologically able to procreate (10).

The swift rise of surrogacy arrangements over the past few decades exposed a loophole within The *Surrogacy Arrangements Act 1985*. While the law technically declares that commercialization is illegal, Section 2(2)(c) also states that there shall be no consequences for paying a “reasonable amount” (9). Parents and surrogates therefore cannot be criminalized for the exchange of funds (10). While commercialized surrogacy is written into law as illegal, in reality, many surrogacy arrangements in the United Kingdom are paid and all are authorized by law (15). In order to fully understand the intricacy of this circumstance, one must understand the legal structure in the United Kingdom for obtaining a parental order.

Parental order protocols are determined by the second seminal piece of surrogacy legislation, the *Human Fertilisation and Embryology Act 2008*, amended from the original version in 1990 (16). This act determines that the woman who carries a child, in this case, the surrogate, is the legal mother of that child (17, 18). Moreover, the husband is legally considered to be the father (19). In order to transfer parental order from the surrogate to the intended parents, they must submit an application to the court, who then approves or denies the transfer (18). A further requirement for approval of a parental order transfer is that no money is exchanged (20). However, similar to Section 2(2)(c) in the *Surrogacy Arrangements Act 1985*, Section 54(8) of *Human Fertilisation and Embryology Act 2008* also restates the exclusion of “reasonably incurred” expenses (20, 21). By linking the no expenses policy to the granting of a parental order, as well as reiterating the authorization of reasonable expenses, all surrogacy payments can be authorized in the parental order transfer process.

A precedent of using this interconnected process to legalize payments was first established in the ruling of *Re C (Surrogacy: Payments)*, in which expenses of £12,000 were called into question

(22). While this sum was ultimately deemed larger than “expenses reasonably incurred”, the court authorized the payments anyway. The judge ruled that to penalize the intended parents for this payment by not authorizing their parental rights would be detrimental to the child, and the child’s welfare is paramount (22). This precedent was further demonstrated in *X (Children) (Parental Order: Foreign Surrogacy)*, a case of a British couple who paid a Ukrainian surrogate £25,000 pounds. The judge ruled that while commercialized surrogacy was unlawful, the child’s welfare outweighed the public policy considerations (23). The welfare of the child was ruled to be of the largest importance in both *S (Parental Order)* and *L (A Child) (Parental Order: Foreign Surrogacy)* as well and has been maintained across surrogacy cases ever since (24-29). There has never been a case in which an abuse of the above policies has been deemed more important than the welfare of the child (15). The ruling of *A (A Child)* in particular, which approved compensation of \$52,493 as a non-controversial issue, firmly clarified that no sum is large enough to penalize the involved parties under the current precedent (30). The UK legal system currently grants permission for all parties involved in surrogacy to defy the commercialization policies in place.

Thus, while these two Acts clearly state that commercialized surrogacy is against the law, it is actually not ‘illegal’ for a surrogacy agreement to involve the exchange of money. Commercialized surrogacy can therefore be seen as both legal and illegal. Regardless of whether or not one believes that commercialized surrogacy should be banned or permitted, the surrogacy policies in place serve little purpose. From a consequentialist viewpoint, the child welfare outcome holds primary importance above the disobedience of rules, defying the deontological perspective that rules are meant to be followed. Maintaining the misnomer that commercialized surrogacy is illegal, when it is legally authorized in practice, creates ethical issues that would be avoided if policies were rewritten to formalize, clarify, and regulate the existing practices.

Ethical implications of a convoluted surrogacy system

The UK’s current surrogacy policies obstruct individuals from doing the right thing as well as create consequences that do not benefit the greater good. In this way, they can be considered ethically flawed from both deontological and consequentialist perspectives. While there has been an increase in same-sex couples, infertile couples, and single individuals who wish to be parents, advertisement and commercialization are both formally illegal. Therefore, it is difficult for this growing number of parents to find willing surrogates (10). From a utilitarian perspective, this is objectively not the solution that maximizes the greatest good for the greatest number of people, as willing parties are made unable to find each other to pursue a common goal. At the same time, surrogacy is not a legally binding contract in the United Kingdom and parental orders and expenses must be approved retroactively, contributing additional, unnecessarily difficulties and risk for both the intended parents and the surrogate (10). In a survey of intended parents in the UK, the main reason for seeking services abroad was due to the lack of legal frameworks within the UK (31). This creates a potential for poor outcomes on either side and does not protect the basic rights of either party as adequately as possible.

Ethical implications of cross-border reproductive travel

The most impactful outcome of the current UK structure is that these legal inadequacies disincentivize local surrogacy and act as a driving factor that pushes hopeful parents to search elsewhere. When met with challenges locally, individuals look to solutions abroad that may permit greater affordability or those that may provide more structure (12). While many parents report frustrations with having to travel abroad for the resources they need, international surrogacy now exceeds UK surrogacy (10, 32). This can be seen as a consequentialist issue as it excludes many intended parents who cannot afford to internationally travel in order to procreate, and thus does not maximize the greatest good. The outdated policies in the United Kingdom also drive well-intentioned individuals to participate in the global fertility market, which presents challenges that disregard the deontological perspective of basic human rights as well.

The traveling of individuals to other countries in search of reproductive services is a subset of medical tourism that is known as cross-border reproductive travel (33). One implication of cross-border reproductive travel from the United Kingdom to other regions in search of a surrogate is the continuation and enhancement of post-colonial divides (34, 35). While international surrogacy is often marketed as an example of transnational collaboration, cross border reproductive travel does not “produce a newly ‘flat’ world but instead a traditionally stratified one” (36). This is exemplified by the customer base for ART services as well as price differences for donors and surrogates, all of which parallel racial, class, and opportunity structures (4, 12). A transnational, neoliberal, fertility market has emerged far more quickly than any international, bioethical regulatory policies (4). Bioavailability, or the willingness to disaggregate one’s biology for an exchange of resources, increases in resource-poor settings, meaning that those who are less privileged are more likely to participate in making their biological resources available to others (37). Consequently, marginalized women are often used as surrogates for the benefit of more privileged couples in other parts of the world (4). Irrespective of the argument about whether surrogacy provides agency or exploitation, the influence of racism, colonialism, militarism, and capitalism in the provision of a surrogacy service simply cannot be overlooked (38, 39). This is further demonstrated in many UK law cases, such as *AB v CD (Surrogacy: Time Limit and Consent)*, which determined that there was no indication that the surrogacy papers were ever read or translated to the surrogate. The international surrogacy market perpetuates structural inequalities, conflicting with the moral imperative of virtue ethics and the importance of human rights. Until there are more international regulations in place, it is unethical for the United Kingdom to maintain the legal status quo.

The minimal monitoring associated with international surrogacy arrangements further reinforces the earlier point that the current convoluted laws in place make regulating an ethical form of surrogacy significantly more difficult (32). For international surrogacy cases, there is not one specific legal process. Given the structure of parental orders, some parents may even choose not to obtain one, for fear of penalisation by the law. A consequence of this is that the true number of children born to international surrogates is unknown (10). If the welfare of the children is supposedly of the utmost importance, then a legal system that pushes families towards an outsourced system with less oversight on child welfare is an insufficient solution.

In summary, the current policies drive intended parents towards a morally ambiguous situation, increase engagement with a currently unregulated and often exploitative system, and escalate the potential for legal complications that may put the welfare of children at risk. This is morally

wrong, does not create the best outcome for the largest number of people, and blatantly defies the rules and in some cases, human rights. Overall, there is an ethical imperative to create a more formalized, straightforward way to regulate this domestically.

Ethical implications of misrepresented work

The final problem with the current structure is that the outward condemning of commercialized surrogacy masks and misconstrues the reality of reproductive labour in a way that disadvantages women overall. The United Kingdom presents surrogacy as an altruistic “gift”, rather than a monetary exchange, even though a monetary exchange occurs in almost all cases. The development of surrogacy in the United Kingdom throughout the past few decades provides a clear example that in a capitalist, patriarchal society, individuals will find a way to trade commodities for capital. Those who want a formalized and transparent monetary exchange go abroad, creating the issues described above, and others jump through hoops to participate in the circumvented system within the United Kingdom. Either way, payments are made. The intent of the law was to protect women from being objectified, commercialized, and fragmented by limiting surrogacy entirely. But surrogacy has not been limited, and instead this law only succeeds in stripping women of their right to a stake in this market, under the guise that it is “protecting” them. In practice, women are now the only stakeholder without a stake.

Furthermore, when surrogacy is considered a “gift”, rather than a commercial exchange, it trivializes the work that women provide to solving the issue of infertility. The fact that these women are actually paid is immaterial to the fact that the UK’s formal policy perpetuates a long, discriminating history of assuming “women’s work”, such as housework or childrearing, should be done for free at the expense of women. In a multi-billion-dollar industry where everyone else makes a profit, claiming that women alone are expected to be “gift-givers”, rather than recipients of a return, reinforces this sexist norm and blatantly disenfranchises women (7, 12). From a consequentialist perspective, this cannot be seen as the best outcome for the greatest good, as women make up half of the population. From a deontological perspective, it is an infringement of human rights. Furthermore, when surrogacy is seen as a gift rather than a transaction, surrogates are not respected or protected by the structures that typically regulate work exchanges (12). Surrogates are not given salaries, but compensation fees. If a health issue arises, they cannot file for workman’s compensation, but are perceived to have a personal health problem. Perpetuating this idea of altruistic surrogacy, when it is commercialized surrogacy in practice, does nothing but cut women out of a market that they are central to and strip them of their rights within it (7).

Conclusion

Surrogacy, and the global market it operates within, is here to stay. The law is a necessary tool for regulating this, but the current policies regarding commercialized surrogacy are outdated and impractical. Asking whether or not commercialized surrogacy should be legalized in the United Kingdom ineffectively frames the issue. In the United Kingdom, surrogacy arrangements are made, children are born, and courts authorize payments for this exchange. Therefore, the question is actually whether the law should continue to uphold this risky, convoluted, and retrospective process that avoids confronting the issue, or be amended to regulate

commercialization transparently. The current regulations create difficulty for parents, children, and surrogates, promote capitalizing on marginalized populations, and disenfranchise women by perpetuating the idea that women should work for free. From consequential, deontological, and moral perspectives, amending the law to allow and regulate commercialized surrogacy would provide the best outcomes for the most people, protect basic human rights, and be the morally right thing to do. Even further, creating a structure that allows for the preauthorization of parental orders would further preserve the sanctity of law as this would separate the welfare of children from the obedience or defiance of public policy. With a more transparent system, more research on surrogacy outcomes is possible, providing more data so ethical reasoning can be based on real circumstances rather than assumption. This is particularly valuable regarding research from the perspective of surrogates, which is often overlooked. Overall, formally legalizing surrogacy is an ethical imperative.

References

1. Frank ZB. *Google Baby*. New York, NY: NYL Filmmakers Library; 2009.
2. Spar DL. *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception*. Boston: Harvard Business School Press.
3. Inhorn MC, Gürtin ZB. Cross-border reproductive care: a future research agenda. *Reproductive biomedicine online*. 2011 Nov 1;23(5):665-76. ***find other places to cite this
4. Smietana M, Thompson C, Twine FW. Making and breaking families—reading queer reproductions, stratified reproduction and reproductive justice together. *Reproductive Biomedicine & Society Online*. 2018 Nov 1;7:112-30.
5. Thompson C. Fertile ground: Feminists theorize infertility.
6. Inhorn MC, Patrizio P. Infertility around the globe: new thinking on gender, reproductive technologies and global movements in the 21st century. *Human reproduction update*. 2015 Jul 1;21(4):411-26.
7. Gupta JA, Richters A. Embodied subjects and fragmented objects: Women’s bodies, assisted reproduction technologies and the right to self-determination. *Journal of Bioethical Inquiry*. 2008 Dec 1;5(4):239-49.
8. Merriam Webster [Internet]. 1st ed. Merriam Webster. 2020 [cited 24 April 2020]. Available from: <http://www.merriam-webster.com/dictionary/surrogacy>
9. *Surrogacy Arrangements Act 1985 c. 49*
10. Prosser H, Gamble N. Modern surrogacy practice and the need for reform. *Journal of Medical Law and Ethics*. 2016 Dec 30;4(3):257-74.

11. Ugalmgule S, Swain R. Surrogacy Market Share Report 2025: Global Projections [Internet]. Global Market Insights, Inc. 2019 [cited 2020April25]. Available from: <https://www.gminsights.com/industry-analysis/surrogacy-market>
12. Vertommen s. Surrogacy as Reproductive Labour. 2020 March 3.
13. Brazier M, Campbell A, Golombok S. Surrogacy: Review for health ministers of current arrangements for payments and regulation-Report of the review team.
14. Brazier M, Waxman S. Reforming the law regulating surrogacy: extending the family. *Journal of Medical Law and Ethics*. 2016 Dec 30;4(3):159-80.
15. Scott N, Dodson P. *Surrogacy and parenting*. London: Westlaw; 2018 [cited 2020 April 20]. Available from: <https://uk.westlaw.com/Document/IB02951F0FDA411E58F6D80C538AA3313>
16. *Human Fertilisation and Embryology Act 2008* c. 22
17. *ibid*, s. 33
18. *ibid*, s. 54
19. *ibid*, s. 35
20. *ibid*, s. 54 (8)
21. *Surrogacy Arrangements Act 1985* c. 49, s 2(2)(c)
22. *Re C (Surrogacy: Payments)*, 2002. 1 F.L.R. 909.
23. *X (Children) (Parental Order: Foreign Surrogacy)*, 2008. E.W.H.C. 3030.
24. *S (Parental Order)*, 2009. E.W.H.C. 2977.
25. *L (A Child) (Parental Order: Foreign Surrogacy)*, 2010. E.W.H.C. 3146.
26. *X (Children) (Parental Order: Retrospective Authorisation of Payments)*, 2011 E.W.H.C. 3147.
27. *J v G (Parental Orders)*, 2013. E.W.H.C. 1432.
28. *C (A Child) (Parental Order)*, 2013. E.W.H.C. 2413.
29. *P-M(Parental Order: Payments to Surrogacy Agency,)* 2013 .E.W.H.C. 2328.

30. *A (A Child)*, 2015. E.W.F.C. 63
31. Jadv V, Prosser H, Gamble N. Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making. *Human Fertility*. 2018 Nov 14;1-2.
32. Inhorn MC, Patrizio P. The global landscape of cross-border reproductive care: twenty key findings for the new millennium. *Current Opinion in Obstetrics and Gynecology*. 2012 Jun 1;24(3):158-63.
33. Pennings G. Reproductive tourism as moral pluralism in motion. *Journal of medical ethics*. 2002 Dec 1;28(6):337-41.
34. Deomampo D. *Transnational reproduction: Race, kinship, and commercial surrogacy in India*. NYU Press; 2016 Sep 27.
35. Rudrappa S. *Discounted life: The price of global surrogacy in India*. NYU Press; 2015 Dec 4.
36. Franklin S. Not a flat world: the future of cross-border reproductive care. *Reproductive biomedicine online*. 2011 Dec 1;23(7):814-6.
37. Cohen L. Operability, bioavailability, and exception. *Global assemblages: Technology, politics, and ethics as anthropological problems*. 2007 Nov 13:79-90.
38. Thompson C. Medical migrations afterword: science as a vacation?. *Body & Society*. 2011 Jun;17(2-3):205-13.
39. Twine FW, Gardener B, editors. *Geographies of privilege*. Routledge; 2013.
40. *AB v CD (Surrogacy: Time Limit and Consent)*, 2015. E.W.F.C. 12.