The future of surrogacy: a review of current global trends and national landscapes

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Abstract
The practice of surrogacy is frequently the subject of media, scientific, social, regulatory and policy attention. Though it is, for many, an accepted form of assisted reproduction for those who would otherwise not be able to have children, surrogacy often generates strong feeling, particularly where there is any possibility of exploitation. Therefore, there is disagreement about how it should be regulated. In some countries, surrogacy is prohibited in any form, though this does not stop people using it. In others, it is unregulated but still practised. In some nations it is regulated in either a 'commercial' or 'altruistic' model. This review article considers the possible regulatory future of surrogacy, initially from a UK perspective considering a recent review of the legal framework in a country where surrogacy works well (though some cross borders to access it), and then through an assessment of global trends and other national perspectives. It concludes that international regulation of surrogacy, though potentially desirable, is unlikely. This being the case, it would be preferable for individual nations to regulate surrogacy so it can be undertaken in ways that are safe, ethical and protective of the best interests of children, surrogates, intended parents and families.

1. Introduction

There has never been a time when surrogacy has generated so many headlines or research articles. Barely a week goes by without another celebrity parent welcoming a baby born from surrogacy, there being news from somewhere where attempts to regulate the practice (positively or negatively) are being considered or attempted (see, e.g., Au, 2023; Errigo, 2023; Page, 2023) or, unfortunately, a scandal has broken (Lynam, 2018; Thu, 2023; Neofytou, 2023). At the same time, the practice of surrogacy is now regularly the subject of academic study, both theoretical and (increasingly) empirical, by sociologists, psychologists, legal scholars, anthropologists and others.

Surrogacy is the practice where one woman carries and gives birth to a baby that she intends to give to others – the intended parent(s) (IPs) – to raise, following a pre-conception agreement. A surrogate pregnancy can be established using IVF or IUI performed in a fertility clinic, using an embryo the IPs have created using their gametes (with either a fresh or frozen embryo transfer), or one or both of the IPs' gametes may be substituted by donor egg or sperm where necessary. In either case, the surrogate will not be genetically related to the resulting child. IVF surrogacy (also known as 'gestational' or 'host' surrogacy) is the most common form of surrogacy in today's context, but some 'traditional' surrogacy is practised, whereby a surrogate is inseminated (or self-inseminates, often at home) with an intended father's sperm. In this case, evidently, she is genetically related to the baby she carries.

Surrogacy is a means of family formation for infertile heterosexual couples, often after a long and painful journey through IVF and/or experience of recurrent miscarriage, or for same sex couples. It can also be used – among other examples – by women who have had fertility-ending cancer treatment, or who were born with a congenital condition such as Mayer-Rokitansky-Küster-Hauser (MRKH) Syndrome meaning they were always unable to carry a child, or who suffer from tokophobia, or are otherwise medically advised against pregnancy. It can also be used by single people.

This review article, written from a UK standpoint but also looking outwards, outlines the current 'state of the art' in relation to surrogacy and considers what future worldwide trends and patterns of surrogacy – in law and in practice – might look like. The UK was the first jurisdiction to regulate surrogacy, in the 1980s, and is still one of a minority of nations with a regulatory framework in place. It is also largely unique, in the sense that its 'altruistic' surrogacy framework is explicitly supported by government as a form of family building (DHSC, 2018), while at the same time not being a destination for IPs from overseas. That said, it is also one of several places currently attempting to (re)regulate surrogacy to modernise the law, and the context and implications of this for UK-based IPs will be examined. Setting the scene in this way will enable the fact that modern surrogacy also has an ever-growing international presence to be discussed, and consequently this article will also consider emerging and established global trends, and the potential for international regulation.

2. Materials and methods

Literature Search

A literature search was conducted up to 10 October 2023 using Scopus, PubMed, Google Scholar and LexisNexis. The following terms were used in searches: 'surrogacy', 'surrogacy arrangement', 'commercial surrogacy', 'altruistic surrogacy', 'parental order'. Peer-reviewed papers written in English were selected and read, primarily dating from 2010 onwards. The aim was to discover articles in (inter alia) clinical, sociological, anthropological, cultural studies and legal journals reporting on where and how surrogacy is practised, including the experiences of surrogates and IPs, as well as to identify any regional, nation-specific or global trends, including in the regulation of surrogacy. The academic search was supplemented by a search for the same terms among news publications, official policy

papers and reports, and British reported surrogacy cases (on Bailii). Some material was identified using a 'snowball' effect from previously identified sources.

Terminology

It is common practice among those discussing surrogacy to refer to 'altruistic' or 'commercial' surrogacy. However, the reality is that no such binary distinction exists. As noted by the Law Commission of England and Wales and the Scottish Law Commission in their recent joint consultation on the UK's surrogacy laws, the terms unhelpfully mean different things to different people and in different contexts (Law Commission of England and Wales, Scottish Law Commission, 2019, para 2.14). Variations in the types of payments allowed, and to whom, as well as service models or activities undertaken by third parties in support of surrogacy arrangements, in conjunction with the type of contractual framework permitted, all affect whether an arrangement could be deemed 'altruistic' or 'commercial' (see Horsey, 2018, pp 16-19). As König et al have argued (2022), we should note that there is no singular mode of surrogacy, and that surrogacy arrangements take many forms, thus we should think of 'surrogacies' when discussing diverse practices and experiences. In addition, even in commercial surrogacy jurisdictions, the motivations of *surrogates* (even if they are personally compensated) can be altruistic. Altruism and payment are not necessarily mutually exclusive (see e.g., Smietana, 2017; Alghrani and Griffiths, 2017; Ferolino et al, 2020; Riddle, 2021; Mahmoud, 2023). Nevertheless, payment to surrogates, or 'reimbursement that goes beyond reasonable and itemized expenses incurred as a direct result of the surrogacy arrangement', can be one indicator of commercial surrogacy, as identified in the report of the UN Special Rapporteur on the sale and sexual exploitation of children (de Boer-Buquicchio, 2018, para 39).

For the purposes of this review article, I will use the term 'commercial surrogacy' to mean a framework in which profit-making entities are involved in the surrogacy process, such as agencies, brokers etc, who make profit from arranging, negotiating, facilitating, and/or managing surrogacy arrangements. In such regimes it is also usual for the surrogate to be compensated (paid), though the sums she may receive (and their relationship with local costs of living) vary considerably. It is also usual for surrogacy agreements to be enforceable by the IPs, though the extent of this enforceability varies. Many places where commercial surrogacy is the norm offer surrogacy to IPs from abroad. Some commercial surrogacy systems operate within regulation, whereas others develop precisely because of a *lack of* regulation.

Some commercial surrogacy destinations seek to put safeguards in place to protect all parties. A recent example can be seen in New York's Child-Parent Security Act: Gestational Surrogacy Agreements, Acknowledgment of Parentage and Orders of Parentage 2021 which legalised gestational surrogacy and provides a simple path to establish legal parental rights for IPs in the context of licensed surrogacy agencies and alongside a 'Gestational Surrogates' Bill of Rights'. However, a commercial approach to surrogacy – particularly when this takes place in low- or middle-income countries – can raise ethical concerns because of the dual risk that profit-making entities will act primarily to further their own advantage, and that paying a woman to have a child renders her vulnerable to exploitation by wealthier and more powerful IPs or third parties (de Boer-Buquicchio, 2018; Bowers et al, 2022).

Furthermore, there is often a wide disparity between agency and other fees and the amount surrogates are paid: in many cases what the surrogate receives is a small fraction of the total IPs spend.

In contrast, I will use 'altruistic' surrogacy to mean systems in which no profit-making intermediaries are involved in brokering or managing arrangements, and where surrogates are typically not formally compensated but are reimbursed for expenses they incur connected to the surrogate pregnancy. Of course, in these systems there will be others who are paid for their services, such as fertility treatment providers and lawyers or counsellors who advise those going through surrogacy. On that basis, there are some who argue that it is unfair that the surrogate is the only one not to benefit financially (Prosser and Gamble, 2016; Alghrani and Griffiths, 2017) and some even ask whether surrogacy should be better thought of as 'work', with the labour law protections that would bring (Armstrong, 2021; see also van Zyl and Walker, 2013). Others suggest that a distinction can be drawn between 'truly altruistic' models and 'compensation' or 'paid' models (Fenton-Glynn and Scherpe, 2019). Expenses-based models could be argued to fall into the latter category (Law Commission of England and Wales, Scottish Law Commission, 2019, para 2.15). Moreover, it is evidently not the case that in altruistic systems there are no risks of exploitation or sharp practice, as individual reported cases in the UK context have shown (see, e.g. *H v S (Surrogacy Agreement)* [2015]; *Z (surrogacy agreements: Child arrangement orders)* [2016]).

3. Results and Discussion

Surrogacy in the UK context

Surrogacy in the UK is legal, though commercialised aspects of it are not, including profit-making agencies or intermediaries, or advertising for or as a surrogate (Surrogacy Arrangements Act 1985, ss2 and 3). Since 2009, non-profit organisations may charge reasonable sums to cover costs they incur in supporting surrogates and IPs with surrogacy arrangements (Surrogacy Arrangements Act 1985, s2(2A)). All surrogacy arrangements are wholly unenforceable by or against any of the parties (Surrogacy Arrangements Act 1985, s1A). Legal parenthood rests with the surrogate at birth (and usually her spouse or partner if she has one), even where she is genetically unrelated to the child (Human Fertilisation and Embryology Act 2008, ss33, 35 and 42). If the surrogate is single, one IP – male or female – can be registered as a legal parent from birth alongside her. After the birth, and under certain conditions, legal parenthood may be transferred to (both) IPs – and, crucially, removed from the surrogate – upon their application for a bespoke court order known as a parental order (Human Fertilisation and Embryology Act 2008, ss54 and 54A). It is not compulsory to apply for such an order, but not obtaining legal parenthood has implications in terms of inheritance, citizenship and nationality rights, and means that no enduring legal relationship is formed between the child and those bringing them up, nor wider family members. Around 420-450 parental orders are granted by the courts each year, which includes children born via surrogacy overseas (Ministry of Justice, 2023).

The Parental Order criteria

The legislation lists several criteria that should be met by IPs seeking to obtain legal parenthood (Human Fertilisation and Embryology Act 2008, ss.54 and 54A), including that they should be over 18, domiciled in the UK, and make their application between six weeks and six months after the birth of the child(ren). Where they are joint applicants, they should be married, in a civil partnership, or 'living as partners in an enduring family relationship'. At least one of them (or the solo applicant where there is only one IP) must be genetically related to the child(ren). Additionally, the child's home must be with the IPs at the time of the application being made and granted, and the surrogate (and her partner where they are also the legal parent) must have given free and informed consent to the making of the order (unless she cannot be found or lacks capacity to consent). No money beyond that considered 'reasonable expenses' for the surrogacy should have been paid or accepted (not just by the surrogate and IPs but also by any third-party intermediaries).

In reality, many of these so-called requirements no longer subsist, having been circumvented in various decisions of the UK's High Court (see Horsey, 2016) or even challenged on human rights grounds (*Z (A Child) (No. 2)* [2016]; Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018). The family court is obliged to ensure that the lifelong welfare of any children is its paramount consideration, an obligation that also applies in surrogacy cases (Human Fertilisation and Embryology (Parental Orders) Regulations 2010). In practice this means that child welfare considerations outweigh literal interpretations of the legislation and a purposive approach is favoured (that is, finding the construction of the provisions that is necessary to achieve the intended purpose of the legislation: to ensure that IPs could secure legal recognition of their relationship with their children born through surrogacy). In any case, not meeting one or more of the requirements is no obstacle to *surrogacy* itself, only a barrier to subsequently securing the appropriate legal link between the IPs and any resulting child.

i) Application between six weeks and six months after birth

Several cases have allowed parental orders even where the application has supposedly been made out of time. In a seminal judgment, Sir James Munby P called the time limit 'almost nonsensical' and asked: 'Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so' (*Re X* [2014], [55]). This opened the door for other judgments to follow suit (see e.g. *A and B* [2015]; *AB v CD* [2015]; *A & B (No 2—Parental Order)* [2015]; *Re A* [2020]; *X & Anor v B & Anor* [2022]), including in Scotland (*AB and XY* [2023]). Furthermore, in recognition of the need to consider the lifelong welfare interests of those born from surrogacy, a parental order has even been granted in favour of an *adult* child (*X v Z* [2022]), as this was the only way he could be legally and rightly connected to the parents who had raised him since birth.

ii) 'Enduring family relationship' and child's home 'with' the applicants

Both the concept of being 'partners in an enduring family relationship' and whether a child can be said to have his/her home 'with' the applicants for a parental order have been interpreted flexibly by the courts. The courts do and should have the capacity to recognise diverse family structures, including unconventional ones, where these are not contrary to the best interests of the children concerned. Wholly platonic relationships have been

recognised (*Re X* [2018]), including where a couple had never cohabited and had no intention of doing so, as well as where one party was married to someone else (*X & Anor v B & Anor* [2022]). Similarly, an order has been granted where the applicants had never lived together before deciding to have children (*Re DM & LK* [2016]) and where one IP died after the application for a parental order was made (*A & Anor v P & Ors* [2011]), or during the surrogate pregnancy (*Re X* [2020] EWFC 39). Furthermore, in several reported cases, the IPs were separated and living in different properties when the parental order application was made, but this did not stop the courts recognising that the children's homes were 'with' both applicants (see e.g., *Re X* [2014]; *A & B (No 2—Parental Order)* [2015]; *Re N* [2019] and, for Scotland, *AB and XY* [2023]).

iii) No more than reasonable expenses

While the legislation sets out that no more than reasonable expenses should have changed hands if a parental order is to be made, there is no definition of what 'reasonable expenses' is, despite this being expressly considered by a government inquiry in the 1990s (HMSO, 1998, para 5.25). Further, the court has the power to retrospectively authorise any payments made (HFE Act 2008, s.54(8)) and, as outlined above, is obliged to make decisions reflecting the child's lifelong welfare interests. Payments beyond what may be considered 'reasonable expenses' have been authorised in cases going back decades (see e.g., *Re MW* [1995]; *Re Q* [1996]; *Re C* [2002]). In *Re X and Y* [2008], the first parental order case in the English courts dealing with overseas commercial surrogacy, Hedley J outlined that the test to apply was whether the money paid was 'disproportionate' to reasonable expenses, whether the applicants acted in good faith, and whether they were attempting to defraud the authorities. Satisfying himself this was not the case, he granted the order, in a judgment that set the tone for subsequent cases and made it common to see the court authorising such payments (see e.g., *Re L* [2010]; *Re X & Y* [2011]). In their 2019 consultation paper, the Law Commissions found no case in which a parental order has been refused because of payments exceeding reasonable expenses (Law Commissions, 2019, para 5.93).

iv) Where flexibility meets its limits

Three legislative criteria have proved to be less flexible than those outlined above. The domicile requirement has led to detailed scrutiny of IPs' lives and potential future lives and some parental order applications being refused (*Re G (Surrogacy: Foreign Domicile)* [2007]). IPs must prove that they have the intention to reside in the UK 'permanently and definitely'. That said, some recent cases have shown that the courts are able to intricately consider domicile status and find for the IPs even where this would initially have looked to be problematic (*Re G and M* [2014]; *X & Anor v Z & Ors* [2023]). Further, the requirement that at least one applicant must have a genetic link to the child who is the subject of the order has proved immutable. Where this has not been possible (for example where IPs separate after the birth, with the only genetic parent no longer wishing to be a parent, or where a single IP undertakes surrogacy using 'double donation'), adoption is the only available route to legal parenthood (as in *B (Adoption: Surrogacy and Parental Responsibility)* [2018] and *J v K (Adoption)* [2021], respectively). However, adoption can prove problematic in contexts where money has changed hands, such as in commercial surrogacy arrangements undertaken overseas.

The criterion that has proved the bastion of the parental order requirements, where the courts have been immovable, is the requirement that the surrogate gives her free, informed and unconditional consent, even in situations where it might be deemed that consent has been unreasonably withheld (*Re AB* [2016]; comparatively, in UK adoption law, the court has the ability to set aside the consent requirement if it is unreasonably withheld: Adoption and Children Act 2002, s.52). This has even led to a parental order application being overturned by the England and Wales Court of Appeal (*Re C (Surrogacy: Consent)* [2023]), when it was found that the consent given had not been 'unconditional'.

Overall, surrogacy as practised in the UK is viewed as a 'a positive option for those seeking to start a family through assisted reproduction' (DHSC, 2018) and creates much wanted families for those who would otherwise have been unable to have (or were medically advised against having) children themselves. But the UK is a unique, if not special, context for surrogacy. The courts, through their facilitation of families created in situations where it may seem the law would not allow for a parental order, have contributed to what is now a 'contradictory and confusing' regulatory framework (Alghrani and Griffiths, 2017) which has developed piecemeal over the past few decades. Good practice has had to develop against a legislated-for altruistic model and in the shadow of the fear and criticism of surrogacy contained in the Warnock Report (HMSO, 1984), which formed the basis for the original legislation. This has led to the creation of several non-profit surrogacy support organisations, four of which are 'endorsed' by government (DHSC, 2018), and a thriving though not always unproblematic 'independent' surrogacy sector largely operating via social media.

When considering UK surrogacy in the round, we can identify an understanding that:

A) In domestic surrogacy cases, family circumstances can be flexible, diverse and unconventional and, while financial arrangements regarding the recompense of the surrogate's expenses vary, this largely reflects different patterns of life and a desire to stay within the law.
B) For overseas cases, unless there is evidence of the 'clearest abuse of public policy' (*Re L* [2010], at [10], per Hedley J), agreements (and payments to surrogates and other intermediaries) will be ratified.

Neither route to surrogacy has escaped judicial criticism, including that parties to domestic arrangements can only be assisted by 'well-meaning amateurs' rather than organisations 'covered by any statutory or regulatory umbrella' and 'therefore not required to perform to any recognised standard of competence' (*Re G (Surrogacy: Foreign Domicile)* [2007] at [29]). There are also examples where there is clear evidence of unethical behaviours. Additionally, sharp judicial comments have been directed at cross border agreements and some of the actors therein. It is in this context that the suggested reforms in the UK context may prove educative for those looking to regulate surrogacy in other jurisdictions – and where, conversely, the UK can learn from good practice elsewhere.

Lived experience

There are many references to surrogacy in popular culture, both in the UK and in global media. Largely these are based on one-off events, assumptions, or myth, with little

consideration or explanation of the context or the reality behind the headlines or storyline. Though there are some true surrogacy scandals involving criminal activity and exploitation (Lynam, 2018; Thu, 2023; Neofytou, 2023) or painful situations such as happened with 'Baby Gammy' (Whittaker, 2016), they remain the exception, rather than the rule. Nevertheless, popular culture – and those with an anti-surrogacy agenda – often paints a picture of surrogacy as always and inevitably fraught with risk, drama and exploitation.

It is therefore important that real lived experience is studied and understood to demonstrate the context of how surrogacy can operate well, and have sensible regulation based on this, not what others' perceptions of surrogacy are. In the UK some empirical studies have attempted to foreground the lived experience of those involved in surrogacy arrangements, and such studies helped to inform the Law Commissions' review of surrogacy laws. Studies have been conducted where surrogates, IPs and others involved with surrogacy have been surveyed to ascertain data on types of surrogacy arrangements entered into, how many times people did so, what kind of contact is maintained, how and when parents have told or plan to tell their children about the method of their conception and what kinds of expenses or compensation were covered and views on legal parenthood (Horsey, 2015; 2018). Latterly, studies undertaken in a clinical context have shown who surrogates are, what motivates them and how they navigate the social and legal processes involved (Horsey et al, 2022). Similar findings exist regarding IPs (Horsey et al, 2023). An earlier study considered the views and experiences of parental order reporters (specialist social workers involved in surrogacy court applications (Crawshaw et al, 2012; Purewal et al, 2012)).

Additionally, studies have analysed the perspective of children born from or connected to surrogacy. For example, a longitudinal study conducted by the Centre for Family Research at Cambridge University has followed surrogacy-created families in England since 2000, with several visits from the researchers at various stages of the children's life (a summary of the whole study appears in Golombok, 2020). The researchers found that children born from surrogacy are well-adjusted and psychologically undamaged. In fact, at age 14, the surrogacy-born children were doing better on various metrics than comparative groups of children studied. The same centre also studied surrogates and their own families, finding that there were a range of reasons women became surrogates, that close relationships were often formed between surrogates and IPs, that contact between them was largely ongoing, and that surrogates' own children were supportive and proud of what their mothers had done (Imrie et al, 2014; Jadva et al, 2015; Golombok, 2020; see also Berend, 2014). Importantly, we are also now beginning to have a better idea what children and young people – including those who were born from surrogacy or whose mother was a surrogate – understand about surrogacy and the law (Wade et al., 2023a and 2023b).

Elsewhere, in the international context, empirical studies exist focusing on experiences in countries including India (Saravanan, 2013; Pande, 2014), Canada (Gruben, et al, 2018; White, 2018; Yee et al, 2019), the USA (Mahmoud, 2023) and Denmark (Tanderup et al, 2023), among others (Söderström-Anttila et al, 2016; Kneebone et al, 2022). Other studies focus on particular groups of IPs and their experiences (Carone, 2017a, 2017b; Smietana, 2017; Nebeling Petersen, 2018). Such studies are invaluable, as they mean that we can learn more about who undertakes surrogacy (either as a potential parent or as a surrogate), their reasons for doing so and their experiences of the process.

Despite being unique, and having generated much empirical data, the UK context is by no means perfect. The difficult and sometimes contentious case law on parental orders illustrated above has been telling us for some time that legal reform is necessary (Horsey, 2016), and this has been supplemented by empirical findings. It is for this reason that the Law Commission of England and Wales and the Scottish Law Commission jointly undertook their multi-year project analysing the UK's laws on surrogacy, starting with a public consultation (Law Commissions, 2019) and culminating in a final report with recommendations and a draft new surrogacy Bill in March 2023 (Law Commissions, 2023).

Globalisation of surrogacy

Surrogacy is a global practice. In fact, there is a fluid global surrogacy *industry* in which many additional facets surround the relatively simple practice of one woman carrying a baby for someone else (though it is accepted that this is not without risk). Global demand for surrogacy is driven primarily by IPs from comparatively wealthy Western nations, and 'almost always entails individuals from one economic setting purchasing surrogacy services from those in a less affluent setting' (Hodson et al, 2019, see also Arvidsson, 2015; Timms, 2018; Stuvøy, 2018). Many IPs seek surrogacy outside their own country to avoid delay caused by long waiting times to be 'matched' with a surrogate, higher cost at home, or because domestic laws either prohibit surrogacy or exclude specific groups such as same sex or unmarried couples (Jackson et al, 2017; Igareda, 2020; Piersanti et al, 2021; Kneebone et al, 2022).

Few jurisdictions have a regulated version of surrogacy (e.g., the UK, Canada, Israel, South Africa, Greece, some US states and states and territories of Australia) though many have laws prohibiting it (e.g., France, Germany, Italy, Switzerland, Spain, People's Republic of China) or some aspects of it (e.g., Denmark, the Netherlands, Portugal, Czech Republic, Brazil, Uruguay, Russia, India) (Piersanti et al, 2021). Opposition to surrogacy tends to come from the religious right or conservative groups and often reflects local cultural and religious values (Crockin, 2013; Momigliano, 2017). Fewer countries still have laws expressly allowing surrogates to be paid (e.g., some states of the US, Ukraine, and Georgia). Most nations have no laws in place specific to surrogacy at all (including most of South America: Torres et al, 2019) or, at best, have laws or judicial decisions about parenthood that allow, in some cases, one or both IPs to be legally recognised as parents or to adopt and/or to pass citizenship rights to their children (Surrogacy360.org).

In some jurisdictions, the fact surrogacy is either prohibited or not tolerated despite being unregulated does not mean it does not take place domestically (e.g., Nigeria, Japan, People's Republic of China, Sweden), or that citizens refrain from pursuing overseas surrogacy arrangements. Nor does prohibiting surrogacy mean that problems with exploitation, including of precarious socioeconomic positions of women, go away, as prohibition can 'give rise to an underground market, very likely to jeopardize and harm the interests and rights of women' (Piersanti et al, 2021; see also Makinde et al, 2015; Rudrappa, 2018; Hodson et al, 2019). Even war does not always deter people seeking surrogacy (Motluk, 2022; König, 2023). Additionally, new 'markets' are constantly emerging, as demonstrated by the

Ugandan government's recent 'invitation' for US surrogacy agencies to establish operations there, and passage of laws allowing foreigners to access surrogacy and be named as parents on the birth certificate (Growing Families, 2023c).

There is no international regulation of surrogacy (Fenton-Glynn, 2016), though there have been attempts to promote what some groups working on surrogacy consider to be best practice (International Social Service, 2021; Surrogacy360.org) and work undertaken towards drafting international treaties or conventions on surrogacy that nations can sign (e.g., Hague Conference on Private International Law; Optional Protocol to the UN Convention on the Rights of the Child (UNCRC) on the sale of children, linked to the 2018 and 2019 reports of the UN Special Rapporteur on surrogacy (de Boer-Buquicchio, 2018; 2019)). As things stand, there is little consensus or compromise between different countries' legal, normative or ethical positions on surrogacy, including their approach to legal parenthood, and there are different public policy issues at play (Igareda, 2020; Park-Morton, 2023a; Scherpe et al, 2019).

In most countries where commercial surrogacy is available to foreign IPs, agents, brokers, lawyers and others are able to profit enormously, so much so that while it was estimated that the global surrogacy industry had a value of $14 billion in 2022, increasing to $17.9 billion in 2023, this is expected to reach $139 billion by 2032 (Roeloffs, 2023; Oliver, 2023; The Economist, 2023). Reasons for this exponential increase, it is suggested, include increasing levels of infertility, increasing numbers of same sex couples seeking to have children (and for both heterosexual and same sex couples, children genetically linked to one of them; of course this also links to a decline in the number of children available for adoption (Trimmings and Beaumont, 2011)), greater social acceptance of different family forms, advancements in medical technology, an increase in the number of fertility clinics worldwide, including in countries where such service was previously sparse, and so-called 'celebrity endorsers' (Roeloffs, 2023; Oliver, 2023).

It is not a new thing for famous people to have children by surrogacy (or by IVF, or for them to adopt, but we are not concerned with that here, and surrogacy is headline-grabbing), just as it is not new for other people. Celebrity parents through surrogacy include Elton John and David Furnish, George Lucas, Christiano Ronaldo, Sarah Jessica-Parker and Matthew Broderick, Jimmy Fallon and his wife, Nicole Kidman and Keith Urban, Kim Kardashian and Kanye West and many others. More recently we have heard that a surrogate gave birth to children for Rebel Wilson, Priyanka Chopra and Nick Jonas, Khloe Kardashian, Chrissy Teigen and John Legend and Paris Hilton and her husband, among others, all with varying degrees of criticism and public comment (Oliver, 2023). But it is questionable – given the level of criticism aimed at some of these people – whether celebrity 'endorsement' drives people to seek to use surrogacy to create their own families. Perhaps the best that can be said is that it increases surrogacy's visibility.

Worse, though, is the fact that some of the global surrogacy industry is exploitative and/or employs unethical practices, including but not limited to trafficking of women, coercion by agencies of both surrogates and IPs, failure to respect bodily autonomy or obtain informed consent, 'sham' procedures and multiple embryo replacement (see e.g., Oladunjoye 2023a and 2023b; Neofytou 2023; The Economist, 2023; Thu, 2023; Anon., 2023). Although

surrogacy in most states of the US, for example, is highly professionalised and backed up with doctors' and psychologists' reports, pre-birth scrutiny of arrangements and ongoing counselling and support, it is also incredibly expensive (Blaxall, 2023). Regulated altruistic destinations that welcome foreign IPs, like Canada, inevitably suffer from excess demand (Dalwood, 2023), meaning that waiting lists for IPs are long, or even that the conditions in which unconscionable practices develop are created (Motluk, 2023; Dalwood, 2023; Neofytou, 2023).

These factors lead to increased demand for 'cheaper' destinations, which are often those where surrogacy is unregulated. There are concerns that commercial surrogacy in less-developed nations may drive exploitation and/or trafficking of women for profit (Wilkinson, 2016; Bowers et al, 2022) or practices which run counter to women's best interests and/or their autonomy (The Economist, 2023). While concerns a decade ago or more focused on surrogacy in the Global South (e.g. Saravanan, 2013; Pande, 2014; Deomampo, 2015), these days concerns are more widespread including eastern Europe and emerging markets in Africa (Moll et al, 2022) and South America (Surrogacy360). A 2022 investigation into a surrogacy agency operating in the Republic of Georgia, Ukraine, Mexico and other places showed that multiple embryo transfers and sex selection of embryos were occurring, among other things (Bowers et al, 2022; also see *Y & Anor v V & Ors* [2022]). The same organisation was shown in 2023, in respect of its dealings with UK-based IPs, to be routinely breaking UK corporate law and the criminal provisions in the law on surrogacy in the UK (Bowers, 2023). Although the UK's Metropolitan Police Service has warned the agency not to come onto UK soil to advertise at fertility trade fairs, as doing so will mean it commits a criminal offence, it is unclear what action would actually be taken. And, inevitably, where one agency (or a regional branch of an agency) closes, another opens elsewhere. The practice of unregulated surrogacy simply moves around and is facilitated by demand that the organisers know they can exploit.

Arguably, having a regulated surrogacy system allows for safeguards for all concerned – children, surrogates, and IPs – minimising the potential for exploitation. However, we know people cross borders for surrogacy, including from the UK where there is a regulated system, and are beginning to understand the motivations – both push and pull factors – for this (Hammarberg et al, 2015; Jackson et al, 2017; Jadva et al, 2021; Fenton-Glynn, 2022; Kneebone et al, 2022). But when surrogacy is banned completely, those push and pull factors are even stronger, even where the risk of non-recognition of one's family upon returning home exists, as many cases that have been heard before the ECtHR demonstrate (Park-Morton, 2023; Tanderup et al, 2023, Iliadou, forthcoming 2024). In turn, this creates risks of exploitation, not only of surrogates in unregulated or poorly regulated surrogacy destinations, but also of IPs.

4. The future for surrogacy in the UK

As indicated above, the Law Commission of England and Wales and the Scottish Law Commission have made recommendations for reform of the law on surrogacy in the UK, with the aim of modernising the law and better reflecting the lived realities of those involved, while protecting the best interests of children, surrogates and parents (Law Commissions,

2023). Their frame of reference did not include prohibition of surrogacy, given the fact that surrogacy has been legal and regulated in the UK for almost 40 years.

The main proposals, which are also drafted into a new Surrogacy Bill, include the creation of Regulated Surrogacy Organisations (RSOs), which will operate on a non-profit basis to help establish and facilitate surrogacy arrangements, and be regulated by a newly created arm of the UK's fertility regulator, the Human Fertilisation and Embryology Authority. IPs will be able – with the support of an RSO – to enter onto a new 'pathway to parenthood' whereby, if specified pre-conception checks, independent legal advice, counselling etc for IPs and surrogates are undertaken, a 'regulated surrogacy agreement' (RSA) will be entered into. Within this, it is proposed that certain permitted expenses connected to the surrogate pregnancy (against a list of prohibited costs) will be able to be recovered by the surrogate, where the parties, including the RSO, attest to these finances in a 'regulated surrogacy statement'.

If this model is followed, IPs will attain legal parenthood at birth, which can be viewed as a significant incentive for both IPs and surrogates (Horsey, 2015; 2022; 2023) and in the best interests of children, surrogates and IPs (Jackson, 2016). The surrogate retains the right to withdraw her consent, though if she did this after the birth of the child, the IPs would still be legal parents and she would (if she wished) be required to apply to have legal parenthood transferred to her by parental order. IPs who choose not to or cannot meet the terms of the new 'pathway' (for example by entering 'independent' or unregulated domestic arrangements, or surrogacy arrangements overseas) will still be able to pursue surrogacy, but the surrogate would be the legal mother at birth in these cases and achieving legal parenthood would rely on the IPs applying successfully for a parental order, as is the case now, but with updated criteria (including the ability for the court to dispense with the surrogate's consent where the child's welfare demands it). For both arrangements on the new pathway and for parental orders, the requirement that at least one IP has a genetic link to the child will be retained (Park-Morton, 2023b).

Though there are some who have criticised the Law Commissions for not going far enough in their proposals (e.g., Brilliant Beginnings, 2023), it is arguable that seeking to maintain an altruistic system (as defined above) and attempting to build in more safeguards for all parties is laudable, particularly in the current global climate. In addition, there are some risks in *not* doing so, such as not being able to get any of the proposed reforms through parliament. In the UK context, it is unlikely that there would be widespread support for a commercial model of surrogacy. Undoubtedly, too, the Law Commissions have adopted an ideological position in that they are clear that a particular model of supported altruistic surrogacy is preferred, with surrogacy taking place outside this model not attracting the same benefits (of automatic legal parenthood for the IPs).

Critics of the proposals suggest that they do not do enough to encourage more women to come forward as surrogates (Brilliant Beginnings, 2023) and, as such, will not solve the problem of there being too few surrogates available for IPs in the UK. Further criticism suggests that the net effect of the proposals, if passed into law, will be to make surrogacy more expensive in the UK, thus rendering it inaccessible to some IPs (and potentially creating a two-tier system where those who cannot afford 'the pathway' are left to seek

surrogacy by independent means, or at low-cost overseas destinations, making it more likely for both the IPs and surrogates to be exploited). In addition, criticism has been aimed at the fact the Law Commissions – contrary to a possibility they suggested in their consultation (Law Commissions, 2019) – proposed no route to easier recognition of legal parenthood for the parents of children born through surrogacy in certain 'certified' overseas jurisdictions, where it is recognised that safeguards are on a par with those in the UK. All this means, it is suggested, that there will be no decrease in the number of IPs who seek surrogacy overseas.

Nevertheless, though these things may be true, it can still be argued that the Law Commissions' position is justified. In relation to the question of demand for surrogates exceeding the number of women prepared to become surrogates, some have suggested – including before the Law Commissions' involvement with surrogacy – that this problem could be solved by allowing surrogates in the UK to be paid (Alghrani and Griffiths, 2017). In their consultation document, precisely *because* the issue of what payments, compensation or reimbursements a surrogate should be allowed was found to be so divisive and contentious, there were no proposals for consultees to comment on (Law Commissions, 2019). Instead, a variety of possible contributions to surrogates were identified, with consultees invited to comment on their appropriateness or otherwise.

In terms of making surrogacy more expensive, it is perhaps inevitable that RSOs will pass on additional costs to IPs. However, we must weigh this up with the message we want to send about how surrogacy is best practised and the fact that more safeguards are built into the pathway than people who enter surrogacy arrangements at present currently have. The question of *how* reimbursement of expenses is to be managed does need to be reassessed and it is to be hoped that some amendments will come before parliament enabling any new law to reflect the good practice and goodwill that already exists.

The fact that there is no proposed recognition of parenthood from equivalent overseas jurisdictions is consistent with principles of maintaining an altruistic model. It would be internally contradictory, as the Law Commissions recognise, to have a route to automatic legal parenthood via commercial surrogacy when the underlying ideological foundations of the recommendations are that surrogacy should rest on altruism and safeguarding of all parties, not least children born from surrogacy. Indeed, much of the criticism levelled at the existing law is that the courts have to retrospectively condone commercial arrangements when presented with a fait accompli (Jadva et al, 2021). This will still be the case – in fact more overt – and so is no worse, yet still sends a clear message about the principles surrogacy should rest on in the UK.

5. The future elsewhere: what trends are we seeing?

Surrogacy as a global industry is well-established, even making it onto discussion pieces on travel/holiday websites (Travel Daily News, 2023). As we know that one of the drivers towards cross-border surrogacy is how easy (or not) it is to access surrogacy at home (Jadva et al, 2021; Fenton-Glynn, 2022), it is at least arguable that when surrogacy is well-regulated domestically, with the best interests of all parties in mind, the demand for cross-border arrangements may decrease. Banning surrogacy or denying access to it (or to legal parenthood for IPs and/or citizenship rights for the child) for certain groups only makes it

more likely that people will seek cross-border solutions (Hammarberg et al, 2015; Jackson et al., 2017; Arvidsson et al., 2019; Yee et al., 2020; Kneebone et al., 2022). Divergent laws in both home nations and surrogacy destinations encourage cross-border surrogacy arrangements (González, 2020) and evoke a 'demography of permanently infertile couples moving around depending on which country or state permits transnational gestational surrogacy' (Tanderup, 2023).

Market fluctuations

As already indicated, there are continuous fluctuations in the destinations that IPs choose when they are seeking surrogacy. Alongside those few places where surrogacy is both legal and regulated, popular unregulated destinations emerge and subside over time. This depends on multiple factors and is often driven by a series of underlying trends, including availability, cost, access to particular treatment types (including genetic testing or sex selection of embryos) and contract enforceability (González, 2020; Jadva et al., 2021).

At any given time, available destinations include jurisdictions where international surrogacy is unregulated, or those where regulation makes it specifically available or catered for. These have become known as 'reprohubs' (Inhorn, 2015) – though in this context may be better termed 'surrohubs' – for IPs from countries all over the world. Clearly, a regulated model is safest for both surrogates and IPs, as well as children, who may face barriers to being taken 'home' depending on rules relating to citizenship and parenthood. Even when a commercial surrogacy destination is unregulated, it may still be heavily marketed to IPs and purport to include many benefits, including cost, the recording of IPs' names on birth certificates, etc. However, while the pursuit of surrogacy in such places is not in itself illegal, IPs may encounter difficulties with aspects of their surrogacy journey, such as obtaining a passport or visa documentation for exit with their baby (and/or return to their own country).

'External' factors also play a part. Obviously, the Covid-19 pandemic affected all surrogacy around the world, especially cross-border arrangements, albeit temporarily as the adaptability of the market flexed to accommodate global disruption (Motluk, 2020; König, 2023; Tanderup et al, 2023). However, notwithstanding market resilience, the pandemic highlighted the realities of global commercial surrogacy and 'became a magnifying lens through which the surrogacy industry and its weaknesses became more visible' (König, 2023; see also König et al, 2020), resulting in considerable condemnation. A more current driver of fluctuations in the global surrogacy market is the ongoing war in Ukraine (Gilchrist, 2023; König, 2023) in conjunction with increased waiting times and costs in the US and Canada. This has led to – according to industry experts – 'renewed interest in older and emerging destinations' including some in south and central America, where 'older' markets include Mexico and Colombia and 'emerging' markets include Argentina (Buenos Aires), which is described as 'open to singles and couples, regardless of their marital status, sexuality or nationality'. In Buenos Aires, only the intended parent(s) are recorded on the birth certificate. Surrogacy-born children are also entitled to an Argentine passport' (Growing Families, 2023a). The 'going rate' for compensation paid to surrogates is around $15,000 (with some payments exceeding this), plus expenses.

One problem with the emergence of such markets is that when a 'new' destination becomes popular, it can often be overtaken by demand, leading to longer waiting times and pushing costs upwards – meaning it then becomes likely that *another* new destination will emerge. Additionally, without regulation, there is the risk that women who act as surrogates are not properly supported or are exploited (The Economist, 2023). Growing Families, an international surrogacy support organisation based in Australia (but which offers information, support and advice to IPs from other nations including the UK and Ireland) advises that:

> 'There are countries [where IPs should proceed] with extreme caution. These countries include Guatemala, Kenya, and North Cyprus. As these countries offer unregulated programs you may run into issues such as poor medical services, lack of laws, poor surrogate care, and expose yourself to child-trafficking offences' (Growing Families, 2023b).

Reaction to internal pressures or external perceptions

Another trend that might be identified is for jurisdictions to react to internal pressures and external perceptions and seek to close their commercial surrogacy operations to IPs coming from elsewhere, leaving surrogacy available (if at all) for citizens or, in some cases, those from overseas who maintain a familial link to the country. The shutting down of the once massively profitable surrogacy industries in India and Thailand – serving IPs from around the globe and at their peak in the late 2000s – are the clearest examples of this (Cohen, 2015; Rudrappa, 2018; González, 2020; Blaxall, 2023). Such reactions can be said to reflect a reputational move in light of academic and other reports of how women acting as surrogates were treated by clinics and agencies (Pande, 2015; Roache, 2018; Africawala, 2019; Barr, 2019), or how consumerism supposedly drove IPs' decisions on how they regarded surrogates and the children they gave birth to, including, for example, the infamous 'Baby Gammy' case, or the Japanese man who had thirteen surrogate-born children born concurrently in Thailand (Whittaker, 2016; Starza-Allen, 2018). However, and linked to the market fluctuations described above, it is known that closure of IVF surrogacy clinics in India (and presumably Thailand) resulted in many of them being relocated elsewhere, including Nepal (Rudrappa, 2017), Cambodia (Bhowmick, 2016), and Kenya (McCarthy, 2023; The Economist, 2023; Waliaula, 2023), and also to the opening up of new markets in e.g. Ukraine, Russia and the Republic of Georgia (Roache, 2018; Rudrappa, 2018, 2021; Sharma, 2023), often with 'the same fertility doctors and agencies resuming operations across the border' (König, 2023) and therefore replicating many of the same issues. Indeed, despite an initial proliferation of surrogacy in Nepal, it too banned surrogacy for foreign intended parents in 2015 for reputational reasons.

In the context of the Ukraine war, Russia has also closed its borders to international IPs. (Russian Presidential Executive Office, 2022). Also, despite the surrogacy industry in Ukraine continuing to operate in wartime conditions with reportedly more than 1,000 children being born to surrogates in Ukraine since the beginning of the Russian invasion (Marinelli et al, 2022; König, 2023; Tondo and Mazhulin, 2023) and the industry there being worth an estimated $2.5bn in 2021 (Howard, 2023), it has been suggested that Ukraine will do so too, at least temporarily (Beketova, 2023). Meanwhile, Irakli Gharibashvili, the prime minister of Georgia, has announced that foreign IPs will no longer be able to access surrogacy there

from January 2024. Whether this is to deflect reputational damage or because of homophobic reasons (or both) remains unclear (Au, 2023; Howard, 2023). Nevertheless, it is undoubtedly arguable that the closure of unregulated commercial surrogacy destinations, particularly those where there are concerns about the ethical basis on which surrogacy is provided (Bowers, 2022), or how women are both sourced and treated, is a positive outcome. The downside is that it merely shifts the market elsewhere.

Other laws being made or reviewed

Elsewhere, other jurisdictions are in the process of reviewing surrogacy laws or creating them for the first time (Waliaula, 2023). In some, what is being proposed reflects a move to the political and/or Christian right (Dalwood, 2023). For example, though Italy banned commercial surrogacy in 2004, its parliament has recently approved a bill supported by the current right-wing government which doubles down on the domestic prohibition of surrogacy by also banning IPs from travelling overseas (Giuffrida, 2023). If this becomes law, those who do so will face fines of up to €1 million and prison terms of up to two years. Notably, this proposal emerged at the same time as news that the names of same sex partners – for example non-birth parents within lesbian couples – were being removed from their children's Italian birth certificates (Kilbride, 2023). Taken together, these changes indicate a significant attack on LGBTQ+ rights in Italy (Surrogacy360, 2023; Dalwood, 2023).

A more welcome trend is movement in several jurisdictions towards a recognition that allowing (and regulating) domestic surrogacy in some form is beneficial, including as a disincentive to travel overseas (Fenton-Glynn, 2016; Newson, 2016; Kristinsson, 2017; Horsey, 2018). This includes removal of some of the problems that IPs are known to face on their return home following international arrangements (Kneebone et al, 2022). It is interesting that nearly all the new regulatory models being recommended or proposed, some of which are discussed below, are altruistic. The exception is the recently passed law allowing surrogacy in New York, under tight conditions, but with payment to surrogates allowed and in the context of a commercial framework (Child-Parent Security Act 2021). Currently, altruistic surrogacy models are already regulated in the UK, Canada, Greece, Israel, South Africa, Thailand, Portugal, and some states of Australia and the US (Surrogacy360). Of these, Canada and Greece are the only nations that allow access to surrogacy for IPs from other jurisdictions.

New Zealand has regulated altruistic gestational surrogacy since 2004. Its law renders all surrogacy arrangements unenforceable, and 'traditional' surrogacy is not regulated. At birth the surrogate (and her partner if there is one) is the legal mother, and IPs must adopt the child to obtain legal parenthood. Individual arrangements must be considered and approved on a case-by-case basis by a national ethics committee (ECART) prior to conception. This involves obtaining medical checks and independent legal advice for the IPs and surrogate, and individual and joint implications counselling (including for existing children of any of the parties) for all. ECART also considers the views of any gamete donors and wider family members, as well as ethical and cultural implications. Uniquely, ECART publishes the (anonymised) minutes of its considerations.

While this may be considered a model of good practice (Wilson, forthcoming 2024), it is costly in terms of both money and time and reflects the relative population size of New Zealand. With the growing demand for surrogacy, ECART has found itself stretched and IPs face significant waits for a decision. New Zealand has thus been engaged in a law reform process for some time. A recent New Zealand Law Commission review has led to proposals that are similar in some respects to those of the UK's Law Commissions, though with added considerations in respect of the indigenous Māori population (Te Aka Matua o te Ture | New Zealand Law Commission, 2022). It has recommended a continuation of ECART's role in the surrogacy process as a 'proactive safeguard' for the process but changes to other aspects, including an extension to all clinically performed surrogacy and the creation of a new 'administrative pathway' to parenthood instead of requiring IPs to adopt. As with the UK recommendations, at the time of writing, a government response is awaited.

Draft legislation (the Health (Assisted Human Reproduction) Bill 2022) has been passing through parliament in the Republic of Ireland, which currently has no law in place specifically regulating surrogacy, though has endured a 'long and winding road' towards regulation (Tobin, 2024 forthcoming). Very little surrogacy occurs on Irish soil, with most Irish IPs travelling overseas to access it. For this reason, and the fact that the Bill only considers domestic, altruistic gestational arrangements, international surrogacy was scrutinised by the Oireachtas Joint Committee on International Surrogacy. Its final report was published in July 2022, containing recommendations how international surrogacy arrangements might be dealt with in a revised Bill (Oireachtas Joint Committee, 2022).

Under current Irish law, whether or not the IPs are named on the original birth certificate, there is no automatic recognition of their legal parenthood on return to Ireland. A legal relationship with the child must be established under Irish family law provisions, which only allow the genetic father to obtain a declaration of parentage from the court that states that he is the father, after which he can apply for a guardianship order. However, a second IP (male or female – including intended mothers who provided their own egg) must subsequently wait two years before being allowed to apply for guardianship which, even if granted, terminates when the child reaches the age of 18. The Bill proposes pre-conception and post-birth changes: surrogacy arrangements will be pre-approved by a new state regulatory body (the Assisted Human Reproduction Regulatory Authority (AHRRA)), while after birth legal parenthood will be transferred from the surrogate to the IPs via a parental order. Pre-approval encompasses medical and capacity checks, legal advice and appropriate counselling for the surrogate.

Draft policy and legislative proposals in respect of international surrogacy and the retrospective recognition of past surrogacy arrangements (both domestic and international) were approved by the Irish Government in December 2022. It is intended that this will lead to the Minister for Health introducing relevant amendments to the Bill before it proceeds further. A similar two-step process is proposed to allow for the recognition of parenthood following international surrogacy arrangements, including AHRRA pre-approval and post-birth parental orders to transfer legal parenthood. This will include safeguards for the rights and welfare of all parties, including children's identity rights. Despite the promised legislation, the Bill – and any recommendations of the Oireachtas Committee – have yet to become law, meaning that Ireland still does not regulate surrogacy in any form.

The national Advisory Committee on Bioethics in Belgium, where surrogacy is tolerated, but no legal framework is in place, has also recommended guidelines that would facilitate domestic altruistic surrogacy (CNE, 2023). The Committee's report recommends a ban on commercial surrogacy, including payment to surrogates, and legal parenthood for the IPs, based on the idea that 'is never the intention that the woman carrying the child becomes the mother'. The report maintains that surrogates would always retain bodily autonomy. There is, however, no consensus on whether surrogates should be able to use their own eggs.

The Netherlands has taken a similar approach. There, non-commercial gestational surrogacy is practised without a detailed regulatory scheme in place (Peters et al, 2018). The Minister for Legal Affairs has now proposed a Bill that bans commercial aspects of surrogacy and allows no form of payment to surrogates beyond reasonable expenses (Dutch News, 2023). This was submitted to the House of Representatives in June 2023 (Government of the Netherlands, 2023). Advertisements will, however, be allowed, clarity in parenthood will be generated, including a route to judicial authorisation of legal parenthood for IPs at birth (currently Dutch IPs must adopt) and there will be a strengthening of the right to information about birth history, in the best interests of children and families.

Denmark has also recently begun the process of review, by appointing a parliamentary commission to investigate issues raised by surrogacy (Tanderup 2023). At present surrogacy is allowed in Denmark but only without professional medical assistance, meaning that gestational surrogacy is not available to Danish citizens (the situation is the same in Sweden: Gunnarsson Payne and Handelsman-Nielsen, 2022). The Danish National Center for Ethics has called for this to change, where the surrogacy is altruistic (Danish National Center for Ethics, 2023). The current law means that like many others, Danes tend to travel for surrogacy, but it also engenders further problems, as parents through surrogacy have faced difficulty on return as under Danish law the intended mother, even if genetically related to the child, has been unable to obtain legal motherhood via step-parent adoption (the usual process) if a commercial surrogacy arrangement had been entered into. Fortunately, the European Court of Human Rights has ruled against Denmark on this position, finding that stepchild adoption should be granted as not to do so would have a 'negative impact on the children's right to respect for their private life due to legal uncertainty regarding their identity within society' (KK and others v Denmark, 2022). False registrations of parenthood could be made, relying on foreign birth certificates listing the IPs as parents, but if this was discovered, parenthood could be removed by the authorities. Many parents through surrogacy lived in fear of this happening (Tanderup et al, 2023). There are now calls for 'politicians and authorities [to develop] a sound Danish legal policy on surrogacy addressing the current issues of legal parenthood and missing reproductive opportunities for permanently infertile couples' (Tanderup et al, 2023).

There are even signs of potential liberalisation in France, where surrogacy is currently prohibited. One prominent government minister has marked 'his opposition to Emmanuel Macron by positioning himself in favour of surrogacy' for reasons of both 'love' and 'justice': he acknowledged that French IPs are already using surrogacy, but 'only those who have the means to go abroad' such as to Canada or the US. Because of this, he has said, 'if France

opened up to the question, it could impose its framework, a legal arsenal that is fairer and more protective, particularly for women' (Kerkour, 2023).

At a European level, the picture is somewhat more complicated. A European Parliament-commissioned comparative study of surrogacy across EU Member States in 2012 found it impossible to identify any particular legal trends, despite all Member States appearing to agree that children born from surrogacy should have clearly defined legal parents and civil status (Brunet et al, 2013). In 2016, the Parliamentary Assembly of the Council of Europe voted for a second time to reject a proposal to introduce Europe-wide guidelines on surrogacy and children's rights (Starza-Allen, 2016). This included proposals to ban 'for-profit' surrogacy and a recommendation to work with the Hague Conference on Private International Law on legal issues concerning children born by surrogacy, including legal parenthood.

The European Court of Human Rights has interpreted Article 8 of the European Convention on Human Rights (ECHR) as requiring all states within its jurisdiction to recognise the legal parent-child relationship established abroad between a child born through surrogacy and the biological intended parent/father (Mennesson v France, 2014). Additionally, states must provide a mechanism (though not necessarily legal parenthood) for recognition of the parent-child relationship with the non-biological intended parent (for example through adoption, fostering or stepparent adoption) (e.g., Advisory Opinion, 2019; Valdis Fjölnisdóttir and others v Iceland 2021; KK v Denmark, 2022). States that fail to recognise parent-child relationships for a non-genetic IP, where the genetic IP has already had their legal parenthood recognised, have breached their obligations to respect the child's right to family life under Article 8.

Though this is clearly thought to be in the best interests of the children concerned, some argue this principle does not go far enough and contend 'that the identity of surrogate-born children necessitates recognition of the relationship between child and intended parent(s), irrespective of a genetic link' (Park-Morton, 2023). It could be argued further still that requiring the use of adoption procedures for a non-genetic parent – which then provide an artificial record of the circumstances of birth – is both discriminatory and contrary to children's bests interests as it neither accurately reflects the intention of the parties involved nor the identity of the child. Perhaps there needs to be a gradual narrowing of the margin of appreciation granted to states in relation to the legal relational status of children born through surrogacy in other countries, to guarantee children's best interests (including their identity rights) and achieve harmonisation of these principles across state signatories to the ECHR (Mulligan, 2018; Piersanti et al, 2021). There is a 'growing recognition of how non-genetic intended parents are still formative to the child's identity and resultantly the continued distinction on the basis of genetics can be questioned' (Park-Morton, 2023).

Meanwhile, the European Parliament has recently allowed an amendment to its draft position paper on human trafficking (European Parliament, 2023a), which would extend its remit to include 'surrogacy for the purpose of reproductive exploitation'. The amendment was tabled by French MEP François-Xavier Bellamy of the centre-right European People's Party Group (EPP) and passed with a strong majority, so it remains hard to tell what the direction of travel is in Europe. Initially, there was no definition of 'surrogacy for the

purposes of reproductive exploitation', though seemingly this would exclude 'altruistic' forms of surrogacy. Nevertheless, some groups considered that it meant the European Parliament was proposing a Europe-wide ban on surrogacy. Given the ambiguity, a press release has since clarified the position is not to entail a general ban, but merely to address 'surrogacy for reproductive exploitation in the context of trafficking' (European Parliament, 2023b).

Normative notions of what a family should be or should look like do not necessarily represent the best interests of children. At some point in Europe and elsewhere there must be some move from an ideological position in the interests of children and families created by surrogacy. It is to be hoped that the margin of appreciation granted to Member States will decrease over time as has done for other contentious issues such as recognition of gay partnerships and gender transition.

6. Conclusions

The practice of surrogacy is not going to stop. Nor should it, when it is known that models of good practice exist in which surrogacy can be demonstrated to be a legitimate form of family building. There are some who will never sway from the belief that surrogacy is inconsistent with human dignity and exemplifies commodification of reproductive capacities, women and children (ICASM, 2023; Declaration of Casablanca, 2023). However, this is an ideological position and is not borne out by empirical studies conducted in regulated surrogacy environments, either altruistic (Jadva et al, 2014; Teman and Behrend, 2018; Golombok, 2020; Yee et al, 2020; Horsey, 2015, 2018, 2022, 2023) or some commercial ones (Teman and Behrend, 2018; Mahmoud, 2023).

That said, demand for international commercial surrogacy will not cease, particularly where the (global) market can take advantage of demand generated not only by rising levels of infertility and declining availability of adoption (Trimmings and Beaumont, 2011), but also a variety of other factors, including recognition of new and diverse family forms or, paradoxically, the failure to recognise them. Where surrogacy is prohibited or limited to certain groups of people (usually heterosexual married couples, sometimes requiring a demonstrable medical need for surrogacy) it is inevitable that those unable to access it in their home countries or states will seek it elsewhere, particularly in a world where IPs, surrogates, embryos, gametes and money can move easily across borders. Crucially, cost is also a factor, as are enforceable contracts, the availability of surrogates and of ART techniques not available in domestic clinical contexts, such as sex selection, genetic testing, anonymous gamete donation and, unfortunately in some settings, transfer of multiple embryos.

Some will also enter illegal arrangements where legal ones are not available, either in their own country (as experiences in Vietnam show (Thu, 2023)) or internationally, as we already know from the numbers of IPs travelling to surrogacy destinations from countries where it is prohibited domestically. Not only does this increase the risk of women being exploited or even trafficked, it can also make surrogates and IPs vulnerable to exploitation from criminal activities (Makinde et al, 2015; Lynam, 2018; Neofytou, 2023), including by unscrupulous

agencies and brokers (Barr, 2019; Bowers et al, 2022). IPs are also vulnerable to excessive costs where commercial surrogacy is done well, as in some states in the US. And, as we already know, when surrogacy is banned in one marketplace, it may promptly appear elsewhere, potentially giving rise to unregulated and underground activities which carry more risks of exploitation and do not operate in the best interests of children or families. The UN agrees that 'banning surrogacy is not the solution', believing instead that 'the UN should develop guidance on surrogacy that fully respects all the rights at stake' (Barr, 2019) and create safeguards in the context of commercial surrogacy (Howard, 2023). Work commissioned by the European Parliament concluded that EU-level regulation would likely be unsuccessful and recommended work at international level towards an international instrument which could be ratified by states (Brunet et al, 2013). Work continues at UN level, and via the Hague Conference on Private International Law (Hague Conference, 2023), and by other interested groups as discussed above, to find international consensus on minimum ethical standards.

However, these may not be enough in isolation (Hodson et al, 2019). A collective response to the commonly agreed negative aspects of surrogacy would be welcome, even if this is initially only to agree minimum standards of treatment for all parties involved, for example as proposed by Surrogacy360.org or in the Verona Principles (International Social Service, 2021). Alternatively, or in addition, as a first step, matters of parenthood could be recognised extra-territorially, as a means of adhering to obligations under the United Nations Convention of the Rights of the Child (UNCRC). This is the objective of the Council Regulation proposed by the European Commission (European Commission, 2022) which would mean that 'If you are a parent in one country, you are a parent in every country' under a 'European Certificate of Parenthood'. Given that there is no international consensus on whether surrogacy should be allowed or, where it is allowed, whether it should be altruistic or commercial (or at least allow payments to the women involved), this may merely mean that minimum agreed levels of non-exploitation, dignity and autonomy of women are agreed, or preventative measures against exploitation are put in place, as well as ensuring that the rights of children born through surrogacy, wherever and however this occurs, are upheld, including rights to identity and citizenship (Mulligan, 2018; Park-Morton, 2023).

Meanwhile, in the absence of any internationally agreed standards, improvements in national laws, such as those currently being considered in the UK, Republic of Ireland, New Zealand, Denmark and elsewhere, are clearly desirable – and even arguably necessary (Jefford, 2023). A major motivation for (re)regulating is to encourage IPs to enter domestic surrogacy arrangements instead of commercial arrangements in other countries, especially those 'where there is a particular risk of the exploitation of women' (Law Commissions, 2023). A good national regime, in which the rights of children are foregrounded, surrogates are protected, and IPs can access ethical surrogacy, ought to mean that fewer people travel for it.

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