

*'The Absence of the 'Surrogacy Contract'  
from Judicial Constructions of Surrogacy'*

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# Introduction

- The regulation of surrogacy arrangements in the UK is now the subject of potential law reform.
- Prior to that, there were a series of cases which interpreted some of the existing legal provisions governing surrogacy, the resulting interpretation was contradictory and somewhat incoherent.
- My intention is to consider some of these cases using the lens of the consideration of the surrogacy contract, within 'The Sexual Contract'.
- Through this, my intention is to illustrate how the judicial language obscures the contractual nature of surrogacy arrangements.

## The Legal Framework

- S.1A of the Surrogacy Arrangements Act 1985 provides that, ‘No surrogacy arrangement is enforceable by or against any of the persons making it.’
- The 1985 Act also prohibits commercial surrogacy (s.2) and various associated activities (s.3 and s.4).
- This unenforceability of the arrangement is crucial to the construction of surrogacy within judicial decision-making, and has led to the absence of consideration of the ‘surrogacy contract’ itself.

## The Legal Framework

- Subsequent legislation has not been focused on the underlying status of the surrogacy arrangements, but instead on the parental status of those involved in the arrangement.
- S.54 Human Fertilisation and Embryology Act 2008 sets out the conditions for the granting of a 'parental order' - the post birth order that transfers legal parenthood from the surrogate to the intended parents.
- Importantly, the Human Fertilisation and Embryology (Parental Order) Regulations 2010 imported the 'welfare principle' into determinations under s.54.

## The Sexual Contract on Surrogacy

- The political, legal and moral discourses around surrogacy are very different than 30 years ago.
- However, on re-reading Pateman's work I was struck by how much had not changed in spite of this evolution in the discourse.
- First and foremost the contestability around surrogacy comes out in the statement that, '[i]n mid-1987, there is no legal consensus about the legitimacy or status of surrogacy contracts.' (at 210)
- Arguably, there is no more of a consensus in 2018, which will likely come out in the Law Commission's upcoming project.

## The Sexual Contract on Surrogacy

- As well as this, obviously there is the highlighting of the patriarchal nature of surrogacy arrangements.
- ‘The political implications of the surrogacy contract can only be appreciated when surrogacy is seen as another provision in the sexual contract, as a new form of access to and use of women’s bodies by men.’ (at 209)
- The importance of revisiting this argument is that the nature of this access to women’s bodies has been obscured by the ‘prohibition’ on commercial surrogacy, and the emphasis on ‘altruistic’ surrogacy within UK law.

## The Sexual Contract on Surrogacy

- ‘The exchange in the surrogacy contract is between part of the property of a man, namely his sperm or seed, and part of the property of the ‘surrogate’, her uterus. A surrogacy contract differs from a prostitution contract in that a man does not make direct sexual use of a woman’s body; rather, his use is indirect via artificial insemination.’ (at 214)
- The intrinsic relationship between the surrogacy contract and the prostitution contract is another theme that emerges; although, this represents a very different construction of surrogacy arrangements from that which dominates contemporary judicial understanding.

## The Sexual Contract on Surrogacy

- Moreover, Pateman identifies the manner in which the subject of the 'contract' in surrogacy cases is elided.
- 'Ironies never cease in the matter of women and contract. After the long history of exclusion of women from contract, the surrogacy contract is presented as a women's contract; women are now seen as the parties to the contract. The question of men's demand for the service is thus obscured, together with the character of the 'exchange' that takes place.' (at 213)
- My argument is that the 'transaction' at the centre of surrogacy arrangements has been disregarded in contemporary judicial consideration of those arrangements.



## Judicial Consideration of Surrogacy

- The cases have concerned whether the statutory conditions for granting a 'parental order', set out in s.54, are satisfied.
- My focus is on the interpretation of s.54 (8), which concerns 'expenses reasonably incurred' and the authorisation by the court of payments which amount to more than that standard.
- These cases generally concern foreign commercial surrogacies, and therefore the underlying arrangements are opposition to the public policy of the UK legislative regime.
- As these cases concern the payment of money, this is where the courts are having to consider the 'surrogacy contract'.

## Judicial Consideration of Surrogacy

- The first point to note is that payments can be authorised retrospectively by the courts, see e.g. *Re Q (A Minor) (Parental Order)* [1996] 1 FLR 369 and *Re C (Surrogacy: Payments)* [2002] 1 FLR 909.
- In *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733, Hedley J set out the three questions that the court should ask when deciding whether to so authorise:
  - ‘(i) was the sum paid disproportionate to reasonable expenses?
  - (ii) were the applicants acting in good faith and without ‘moral taint’ in their dealings with the surrogate mother?
  - (iii) were the applicants party to any attempt to defraud the authorities?’

## Judicial Consideration of Surrogacy

- Crucially, as a result of the 2010 Regulations, the child's welfare is the court's paramount consideration in any decision relating to a parental order – including the decision to retrospectively authorise payments.
- Indeed, in *Re WT (Foreign Surrogacy)* [2015] 1 FLR 960, Theis J noted that, it is difficult to imagine a set of circumstances in which, by the time an application for a parental order comes to court, the welfare of any child, particularly a foreign child, would not be gravely compromised by a refusal to make the order' (Para 35)

## Judicial Consideration of Surrogacy

- The language and approach of these cases effectively seeks to render a commercial transaction as non-commercial.
- The word ‘contract’ is not used in these cases, with the exception of *Re X (Children) (Parental Order: Retrospective Authorisation of Payments)* [2012] 1 FLR 1347.
- Instead, typically the language used in the judgments is that of ‘surrogacy arrangements’, but for example, in *Re C (Surrogacy: Payments)* there is reference to ‘the Memorandum’ and in *Re D and L (Minors) (Surrogacy)* [2013] 2 FLR 275, to the ‘formal court surrogacy agreement’.

## Judicial Consideration of Surrogacy

- The result of the judicial interpretation is that courts are granting parental orders in circumstances that appear to be excluded by the express terms of the legislation.
- Therefore, the utilisation of the ‘welfare test’, in the context of s.54, allows the court to effectively ignore the public policy considerations, and crucially the contractual nature of the underlying arrangements.
- This problematic approach has resulted in growing calls for law reform from various sources.

## Upcoming Law Reform

- In December 2017, the Law Commission of England and Wales announced the inclusion of surrogacy within its 13<sup>th</sup> Programme of Law Reform; observing that, ‘the law relating to surrogacy is outdated and unclear, and requires comprehensive reform.’ (Para 2.44)
- The law reform project is premised upon the disjuncture in recent cases; therefore, it is unclear whether the unenforceability of surrogacy arrangements, or the prohibition on commercial surrogacy will come under the scope of the reforms.
- Given, what has been set out above, I suggest that it is unlikely that the underlying construction of surrogacy will be shifted, and therefore, examination of the surrogacy contract may continue to be absent from regulation.

## Conclusions

- The regulation of surrogacy within UK law renders the contract unenforceable and prohibits commercial transactions.
- Moreover, in judicial consideration of cases involving surrogacy, the emphasis is upon the welfare of the children, not upon the relationship between the adult parties.
- Returning to Pateman's consideration of the surrogacy contract provides a theoretical framework through which to consider this regulatory approach.
- Ultimately, contemporary judicial discourse (and potentially law reform) is obscuring the contract which underpins surrogacy.