



The Impacts of Legalizing Commercial Surrogacy in The Netherlands

Thesis
MSc Health Economics, Policy and Law

A systematic review

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Abstract

Surrogacy is becoming a more popular reproduction tool. Mostly couples who cannot conceive naturally because of infertility or because they are in a same-sex relationship choose this form of reproduction. There are two types of surrogacy: commercial and non-commercial surrogacy. In commercial surrogacy, the surrogate mother is compensated for her services of carrying the child, on top of the reimbursement of her medical expenses. In non-commercial surrogacy it is not allowed to compensate the surrogate mother for more than just her medical expenses. Unfortunately, there are no universal guidelines around surrogacy and many countries do not regulate it at all. The majority of countries around the world have an absolute ban on surrogacy. Some countries only allow non-commercial surrogacy and only a few countries allow commercial and non-commercial surrogacy. Countries fear that women might become victim of exploitation and children might be seen as commodities. The fact that some countries allow and others do not allow surrogacy has caused many unfavorable situations. Intended parents who are desperate to start a family life feel forced to go abroad to fulfil their dream. Some might succeed but some get trapped in a limbo of legal lawsuits, fighting to get legal parentage over their child. In countries where commercial surrogacy is allowed a few main trends have come forward: reproductive tourism, exploitation, discrimination and social surrogacy. The main trends in countries where commercial surrogacy is not allowed are: exploitation and stigma and best interest of the child. Unfortunately, in The Netherlands, many unfavorable situations have occurred as well. The question lays around what the best legislation is. Therefore, the research question is: What could be possible impacts of legalizing commercial surrogacy in The Netherlands? In this paper the moral and legal dilemmas around surrogacy will be discussed, after that the Dutch and International legislation will be explained. The paper will look into the trends of countries where commercial surrogacy is allowed and countries where it is not. After all this, the possible impacts of legalizing commercial surrogacy in The Netherlands will be discussed. Therefore, the Dutch government can decide whether they do or do not want to implement commercial surrogacy.

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Chapter 1 - Introduction

1.1 Problem Analysis

Imagine, falling in love with someone you are destined to be with. The only thing that would make your life complete would be to have children. What would you do if you were not able to do so? Till what lengths will you go to fulfill your dream?

Some would say that humans are designed to reproduce¹. That it is the 'goal' of life to produce offspring. That is why so many feel the urge to start a family. Unfortunately, for some couples it is not so easy. In same sex relationships or when someone is infertile, the dream of conceiving children might shatter. When people are unable to conceive children naturally, they could consider alternative options like adoption, foster care or surrogacy. For decades surrogacy has been very popular, but surrogacy also brings moral and legal complications to the table. There are two types of surrogacy: commercial and non-commercial surrogacy. In commercial surrogacy the surrogate mother's medical expenses get reimbursed but she is also compensated for her services for carrying the child. In non-commercial surrogacy, compensating the surrogate mother, apart from medical expenses, is illegal². In some countries surrogacy as a whole is illegal, but in most countries only non-commercial is allowed³. Within surrogacy we can distinguish two more types: traditional surrogacy, where the surrogate mother uses her own egg and gets fertilized with the intended father's sperm through artificial insemination. Or gestational surrogacy where the surrogate mother carries the genetic child of the intended parents through IVF⁴.

Unfortunately, there have been many conflicting laws. Since commercial surrogacy is illegal in some countries, some intended parents, who are desperate to start a family life, might feel forced to break the law. Many countries are opposed the implementation of commercial surrogacy because it could possibly lead to exploitation of surrogate mothers and it is compared to child trafficking and organ trading⁵. Other countries, that do allow surrogacy, argue that it is unfair to not financially compensate a surrogate mother for her efforts of bringing another life into the world². Another argument would be that forbidding commercial surrogacy is a violation of human rights. One of the most important articles of The Human Right Act is article 8: 'Respect for your private and family life'. Which states that:

‘You have the right to live your life privately without government interference’ and ‘You have the right to enjoy family relationships without interference from government’⁶. By banning commercial surrogacy, it could be stated that the government interferes with couples trying to conceive children through alternative ways. But which argument weighs heavier? Is it possible to allow commercial surrogacy and avoid people and companies taking advantage of surrogate mothers and children by exploiting them, or is it a government’s responsibility to protect all people in its population? What about the intended parents in question, do they have a say in this?

Even though certain things are prohibited, there will always be people who will find themselves in difficult situations and therefore conduct illegal activities. Research has found that even though there are restrictive laws, people will still try to acquire a baby through a surrogacy process⁷. So, prohibiting something in order to avoid a negative outcome does not always work. In reality there have been numerous cases in which the legislation around surrogacy has caused many problems. Eventually leading to unfavorable situations in which the best interests for the child were not met⁸.

In The Netherlands only non-commercial surrogacy is allowed⁹. Recently some Dutch politicians have been debating about lifting some of the legal bans of commercial surrogacy in The Netherlands. They do not want to make commercial surrogacy completely legal, but they want to make it easier for intended parents to conceive a child¹⁰. But this is a long and difficult process in which all aspects and possible outcomes should be taken into account. Apart from the already existing dilemmas around surrogacy, again, there is a discussion about what is morally just to do in this case. Should The Netherlands keep their current legislation around surrogacy and only ban commercial surrogacy or should The Netherlands completely change their legislation and legalize all kinds of surrogacy in order to avoid more (moral and legal) problems around surrogacy?

1.2 Research Question

Therefore, my research question is as follows: *‘What could be possible impacts of legalizing commercial surrogacy in The Netherlands?’*.

1.3 Social and Scientific Relevance

The goal of this research is to get better insight about the laws around commercial and non-commercial surrogacy and the trends in the countries who have implemented the different types of surrogacy.

With this research, the Dutch Government and in particular, The Ministry of Health, Welfare and Sport can better evaluate what trends and impacts could occur if The Netherlands were to implement commercial surrogacy. With this information the government can make a good trade-off whether they would like to implement commercial surrogacy or keep the regulations as it is. Since surrogacy is becoming more and more popular, governments cannot escape reevaluating their current legislation and may be forced to consider making some changes.

By openly allowing commercial surrogacy, the whole surrogacy process can be better regulated by the Dutch government and therefore avoid people getting into complicated situations solely because they would like to start a family life. Eventually this could lead to more favorable outcomes for all parties.

1.4 Research Structure

For this research, I will be conducting a systematic review, in which I will be closely studying the existing literature about the topic. In the first chapter I will focus on surrogacy itself and its definitions. In the second chapter, I will focus on the national and international legislation around surrogacy, comparing the situation in The Netherlands with other countries. In the third chapter, I will focus on the moral dilemmas and legal implications around surrogacy. In the fourth chapter, I will look at the different trends and findings in the particular countries in which commercial surrogacy is allowed and countries in which commercial surrogacy is not allowed. Lastly, in the fifth chapter, I will discuss and conclude my systematic review.

Chapter 2 – Surrogacy

In this chapter I will give a short introduction about the recent trends making surrogacy a more popular form of reproduction. Furthermore, I will explain some of the definitions, types and forms of surrogacy and I will end with a short history of surrogacy.

2.1 Introduction

Worldwide around 15% of the couples get affected by infertility problems. This accounts for almost 48.5 million couples¹¹. Male infertility is mainly caused by the ejection of semen, absence or low numbers of active sperm and motility of the sperm¹². In female infertility, infertility is mainly caused by problems in the ovaries, uterus, fallopian tubes and the endocrine system¹². Sometimes an egg is able to get fertilized with sperm but because of a malfunction in the uterus of the female, the egg is unable to attach to the uterine wall. These types of infertility can either be congenital or achieved. Therefore, within infertility two more types of infertility can be distinguished. Primary infertility, in which a pregnancy has never occurred and secondary infertility, in which the female became unable to get pregnant or carry a baby after previously given birth to another baby¹². Infertility can be very difficult and frustrating for a couple because the reproduction process is now dependent on the interference of a third party.

Infertility is not always the obstacle. Research shows that around 4 to 6% of the adults in The Netherlands is attracted to someone of the same sex¹³. Meaning that every 1 in 20 people is attracted to someone of the same sex and if he or she would like to have genetic children this might become difficult.

Today, many couples, regardless of marital status, sexual preference or infertility are looking into the possibility of surrogacy. Of course, there are many other ways to start a family life but for couples who find it important to have a genetic link with their child, surrogacy comes as the best solution.

2.2 Definitions

In the surrogacy process there are a couple of important actors².

- Surrogate mother: the woman carrying the child, she can be either the biological mother in traditional surrogacy or the 'host' mother in gestational surrogacy.
- Biological father/ donor: the man who contributes his sperm to the surrogacy process.
- Intended parent(s): the individual(s) who intend to become the legal parent(s) of the child.
- Baby

2.3 Types of Surrogacy

Surrogacy is a method of assisted reproduction in which the surrogate mother will carry and care for the baby until birth¹⁴. This arrangement is often supported by a legal agreement but this is not always the case. If people consider surrogacy, they can either go for commercial surrogacy or non-commercial surrogacy, depending on the country's legislation and intended parents' preferences.

In commercial surrogacy, the intended parents work with an agency to find a surrogate mother and pay for the expenses. The surrogate mother's medical expenses get reimbursed and she is also compensated for her services for carrying the child. For that reason, commercial surrogacy is often called 'compensated surrogacy'².

A benefit of commercial surrogacy is that the process of looking for a surrogate mother is mostly shorter and easier compared to non-commercial surrogacy. The surrogate mother and intended parents often do not have a prior relationship. Some couples do not want to pressure family or close friends in doing them a favor or for some anonymity plays a big role. Therefore, they prefer not knowing their surrogate mother and are willing to pay a stranger². Downsides to commercial surrogacy are that it is far more expensive than non-commercial surrogacy, it can possibly exploit vulnerable women and in countries where it is not allowed, commercial surrogacy can unfortunately lead to illegal and unfavorable situations².

In non-commercial surrogacy, compensating the surrogate mother, apart from her medical expenses, is not allowed. It is not allowed to promote or to advertise for surrogacy and use an agency to find a surrogate mother. Surrogate mothers are mostly women who are already acquainted with the intended parents and who agreed to carry the child without a financial incentive. Therefore, this type of surrogacy is often called 'altruistic surrogacy'¹⁵. Of course, finding someone in your close circle to who is willing to do this can be quite difficult and uncomfortable. The benefit of having lower costs with non-commercial surrogacy are in direct conflict with the downside of non-commercial surrogacy. Many intended parents feel like they are less in control of the surrogacy when the surrogate is not compensated. They find it hard to make specific requests because they do not pay the surrogate mother, even though they really wanted to. Another downside to non-commercial surrogacy is that it could potentially have a negative impact on the relationship between intended parents and surrogate mother, mostly because they are family or close friends who might feel pressured to enter a surrogacy arrangement¹⁵.

2.4 Forms of Surrogacy

Within surrogacy, two more types of surrogacy can be distinguished: traditional surrogacy and gestational surrogacy. In traditional surrogacy, the surrogate mother uses her one of her own eggs and gets fertilized with either the intended father's or donor's sperm, mostly through artificial insemination. Because the egg is from the surrogate mother, traditional surrogacy is often also called genetic surrogacy, because of the genetic link between surrogate mother and baby. For that reason, it is very important the surrogate mother is taken up in the birth certificate, because every child has a right to identity¹⁶.

In gestational surrogacy, the surrogate mother does not use her own egg but carries the fertilized egg from the intended parents. For that reason, this type of surrogacy is the least legally complicated form of surrogacy since the surrogate mother is not related to the baby¹⁷. The biggest difference between the two types is that with gestational surrogacy it can be a 100% the genetic child of the intended parents⁴.

2.5 History of Surrogacy

When we think of surrogacy, we might think surrogacy is a fairly new method to conceive children. In fact, surrogacy stems back to the biblical times¹⁸. Back then, the only way to conceive children, if you were not able to do so yourself, was through traditional surrogacy. Unfortunately, during those times, there was a big stigma on infertility and sex outside of the marriage, therefore, over the years the alternatives for conceiving children expanded. The medical world optimized new techniques for reproduction and in 1884 the first successful artificial insemination occurred¹⁸. William Pancoast, the doctor who was informed that one of his patients was having trouble conceiving, found out that it had to do with her husband's infertility. While the woman was under anesthesia, he artificially inseminated her with the sperm of one of his students, without receiving her consent¹⁹. Even though it was an ethical horror, this opened doors for future scientific procedures and artificial inseminations. At the same time this also emphasized the sensitivity and ethical dilemmas around surrogacy and artificial inseminations. Eventually, in 1978, the first ethically approved baby was born through artificial insemination.

There have been many ethical and legal dilemmas around surrogacy but the most famous case around surrogacy is the 1984 'Baby M' case. Here, a couple found themselves a surrogate who was willing to carry their baby in the traditional form of surrogacy, therefore making her the biological mother. In return, the surrogate mother would receive \$10,000. When the baby was born, it was time for the surrogate mother to sign over her parental rights, but she refused and decided to keep the baby. Since the surrogate mother is also the biological mother, this complicated things. After a long custody battle, legal parentage was eventually granted to the intended parents, but of course this began the movement of traditional surrogacy to gestational surrogacy¹⁸. Many physicians and intended parents hoped by doing this, it would eventually lead to less conflicts such as in the baby M case. In 1985, the first successful gestational surrogacy occurred, again opening more doors for more types of surrogacy.

Obviously, surrogacy has evolved a lot since the biblical times, but this does not mean that it does not still have to overcome some hurdles. Therefore, it is needed that a universal set of rules and guidelines are set to prevent more unfavorable situations from happening.

Chapter 3 – Legislation

Before answering the research question, it is important to get an insight on what the Dutch and International legislation around surrogacy is. In this chapter I will discuss the current legislation around surrogacy in the Netherlands and in other countries around the world. I will talk about one of the most controversial cases of surrogacy in The Netherlands and lastly, I will discuss some of the most important laws around surrogacy.

3.1 Dutch Legislation

Surrogacy was prohibited in the Netherlands until 1994²⁰. In 1994, the general prohibition of surrogacy moved to a prohibition of only commercial surrogacy. Today, still only non-commercial surrogacy is allowed in the Netherlands⁹. It is illegal to advertise and promote commercial surrogacy. It is also illegal to publicly announce that you are looking for a surrogate mother or want to become a surrogate mother on social media⁹. Setting up a surrogacy agreement, on the other hand, is not illegal but it is mandatory that such agreements of surrogacy get reported to the Child Protection Board. If it is not reported, we speak of illegal inclusion of children²¹. At the moment it is not illegal to pay a surrogate mother more than just her medical expenses, as long as it is not just for profit²². Even though these surrogacy agreements are happening in The Netherlands, there is still no legal regulation for surrogacy. Meaning that the agreements made cannot be enforced in court. If the surrogate mother or intended parents change their mind about the surrogacy process, they cannot be obliged to continue with the process²².

3.2 Baby Donna

A good example why legal regulation of surrogacy is needed, is the case of Baby Donna²³. In early 2004, a couple from Belgium found themselves a Belgian surrogate mother who was willing to carry a baby for them. They drew up a surrogacy contract and agreed on traditional surrogacy, inseminating the surrogate mother with the sperm of the intended father, therefore making him the biological father and the surrogate mother the biological mother. Just before birth, the surrogate mother and the intended parents got into a disagreement, in which the surrogate mother refused to give up the baby. Instead, the surrogate mother

started looking for other intended parents and got into contact with a Dutch couple that had big desire to have children. The surrogate mother and the Dutch intended parents drew up a similar surrogacy contract as the surrogate mother had with the Belgian intended parents. They agreed that the surrogate mother would give up her baby and that the baby would move to The Netherlands. Eventually the Dutch intended parents would adopt the child. However, an application for adoption has never been made²⁴. Instead, the Dutch couple requested to have the Belgian Surrogate parents removed as legal parents and applied for custody of baby Donna, making the foster mother the guardian. This request was denied by the Court. But the Court did come to the conclusion that there was family life between baby Donna and the Dutch intended parents and allowed that baby Donna stayed with them in the Netherlands. In the meantime, the Belgian intended parents were very upset and tried to prove that the man was actually the biological father of baby Donna through a DNA test and they succeeded. The Belgian intended parents requested the Court to remove the guardianship of the Dutch foster mother and applied for guardianship of the biological father. Till this day, Baby Donna remains to live with her Dutch parents²³.

What went wrong? Before going into the surrogacy process, the Dutch intended parents did inform the Board of Child Protection about the surrogacy process but failed to mention the baby would be born in Belgium²³. The Court denied the request of the Dutch intended parents because they did not follow the right legal steps for adoption. The DNA test showed that Belgian man was indeed Donna's father. The question is: what is more important? The best interest of the child or the genetic link between two individuals? At the moment there is no regulation what is to be done in such cases. This is why more regulation around surrogacy is needed. But things are changing.

3.3 Draft Law Surrogacy

In July 2020, The Dutch Government came with new draft law criminalizing commercial surrogacy by seeing paid surrogacy as a criminal offense²⁵. The Dutch minister of Legal Protection, Sander Dekker states that: "Children are not a commodity so we have to set a clear boundary". According to the new draft law, it will be unlawful to give a surrogate mother a financial compensation on top of reimbursing the medical expenses of carrying the child. It will also be unlawful for a surrogate to ask for a significant amount of money for her services of carrying the child. Minister Dekker continues: "Growing up knowing you have

been bought is horrible. Whether it is surrogacy or adoption.” The Dutch government is afraid surrogate mothers will maybe withhold important information about their medical health in order to receive money, therefore stimulating the woman to take risks she otherwise would not have taken. This new draft law has an extraterritorial effect, meaning it is effective even if the surrogacy takes place outside of The Netherlands, in a country where commercial surrogacy is allowed²⁵. Of course, this came as a shock for a lot of intended parents.

In the second part of the new draft law it is stated that a judge determines beforehand if the intended parents and surrogate mother meet all of the requirements of the surrogacy process. After that both parties need to undergo counseling so they can get prepared for the surrogacy process and fully understand what they are getting themselves into.

The Dutch law does not have a special parentage law when it comes down to surrogacy. Therefore, general parentage, custody and child protection laws are applied²⁶. This makes the legal position of the child, but also for the intended parents and surrogate mother very uncertain²⁶. The new draft law comes as a solution to this problem. It states that the intended parents need to be listed on the birth certificate of the child at birth. At the moment, the biological mother is still listed as the legal parent of the child. If the surrogate mother is married, her husband would be the legal father.

Every child has the right to identity. Meaning that the child has the right to know who the biological mother or father is. This information must always be accessible to the child. Therefore, the new draft law introduced a counter where information about identity and origin can be found²⁷. In cases when intended parents do not comply with the law of their own country and go abroad to find themselves a surrogate through traditional surrogacy, the main problem is that the surrogate mother does not get listed on the birth certificate and therefore the child is deprived of its own right to identity. With this new draft law, the Dutch government tries to tackle this problem.

Important to know that this draft new law is not effective yet.

3.4 International Legislation

The lack of internationally recognized laws makes surrogacy a very difficult topic. Each country can have its own policy and restrictions. Each country can choose if they allow commercial or non-commercial surrogacy. In some countries surrogacy in general is illegal. In most countries only non-commercial surrogacy is allowed. There is an ongoing debate between the two sides. On one side, people argue that surrogacy should be allowed to be practiced under certain regulations and on the other side, people argue that it should be prohibited. I will zoom in on a couple important countries in the world with different legislations and address their reasons for choosing their legislation around surrogacy.

France

Unlike The Netherlands, in many European neighboring countries, both commercial and non-commercial surrogacy is illegal. In France surrogacy arrangements are illegal. The French Government believes that allowing surrogacy would commercialize women's bodies²⁸. They believe that allowing women to get paid for surrogacy would bring a big risk of exploitation and might force poorer women into conceiving children against their own will.

However, French legislators want to recognize children born through surrogacy abroad as the children of the French intended parents²⁸. They state that punishing innocent children for the way they have been brought into this world is not fair. This is a huge difference compared to The Netherlands, whereas children born through surrogacy abroad, in which the intended parents are recognized as 'biological parents', do not receive citizenship²⁹.

Germany

In Germany, all surrogacy arrangements, both commercial as non-commercial, are illegal³⁰. The German Embryo Protection Act criminalizes both surrogacies with and without egg donations. This has a great impact on intended parents who consider the gestational form of surrogacy. The main argument against egg donation and surrogacy is that it will cause 'split motherhood', as that is not in the best interest of the child. Therefore, when German intended parents go abroad to conceive a child through surrogacy, the German Court will rule that the woman that bore the child must be registered as the mother of the child³¹. This makes it very difficult for intended parents to get legal parentage of their child after their return to Germany.

Belgium

Similar to the Netherlands, in Belgium surrogacy is not regulated by law. Therefore, neither intended parents nor surrogate mother are protected by the law when either one of them changes their mind. Like the Netherlands, in Belgium only commercial surrogacy is prohibited as it commercializes human beings³².

Eastern Europe

Although surrogacy is still heavily restricted in most parts of Europe, there are a few countries that have legalized surrogacy. For instance, in Russia and Ukraine both commercial and non-commercial surrogacy are allowed³³. Therefore, these countries attract a lot of intended parents and other 'surrogacy tourists'.

Rest of The World

Outside of Europe, there are also a few countries that have legalized both types of surrogacy. In some states of the United States, commercial surrogacy is legal³⁴. Especially in California, the surrogacy industry is very well regulated by law. In most countries in which commercial surrogacy is legal, the main opinion is that everybody should be able to enjoy their own freedom of reproduction and everybody should be able to start a family life.

But some countries have also changed their legislation recently.

India legalized commercial surrogacy in 2002. In the years after that, India became better known as the 'baby farm', because it was one of the cheapest places for surrogacy, attracting many intended parents from all over the world. But over the years India started making some adjustments. From 2012 on, single and same-sex couples were banned from receiving surrogacy assistance³⁴. In 2016, India banned all international intended parents. Today, surrogacy in India is only allowed for heterosexual Indian citizen couples and commercial surrogacy is completely banned³⁵.

All over the world, different legislation of surrogacy applies. The main question is what the best type of surrogacy actually is. Therefore, the up and downsides of certain regulations have to be taken into account. What will make a country decide to lift the ban of commercial surrogacy, or the other way around? Which important factors play a role and do they ever come in conflict with each other?

Chapter 4 – Dilemmas

Because surrogacy is not regulated in every country and it involves human beings, a lot of unfavorable situations can occur. In this chapter I will discuss some of the moral and legal dilemmas around surrogacy. I will give a definition of a moral dilemma and discuss a case in which such a dilemma is laid out. Lastly, I will discuss the conflicting principles and laws in such dilemmas.

4.1 Moral Dilemma

We speak of a moral dilemma when two types of ‘good’ (or ‘bad’) are faced with each other³⁶. This often leads to difficult choices that have to be made between moral obligations. Because surrogacy involves human beings, healthcare professionals and healthcare managers, such as governments, we will discuss the biomedical principles.

4.2 Biomedical Principles

There are four pivotal biomedical principles: Respect for Autonomy, Non-Maleficence, Beneficence and Justice³⁶.

Respect for Autonomy

The principle Respect for Autonomy stands for having the freedom of choice. People should be able to make their own choices and these choices should be respected³⁶. An example is intended parents choosing surrogacy as a reproductive tool and a government having a respectful attitude towards this choice. Or a surrogate mother choosing to carry someone’s baby.

Non-Maleficence

With the principle Non-Maleficence, people are meant to harm or injure others³⁶. Especially in the medical world this is a very important principle. All healthcare workers need to swear to the Hippocratic Oath, ensuring that they will never harm or injure others and use their medical knowledge to help others. An example of Non-Maleficence is a government granting

a baby citizenship instead of sending it back to a surrogate mother abroad, in order not to 'harm' the child.

Beneficence

The principle Beneficence has some similarities with the principle Non-Maleficence. Beneficence is the moral obligation to act to the benefit of others by promoting good or preventing harm from happening³⁶. Governments are often ought to be acting in a beneficence way, to promote good for the entire population. An example of Beneficence is a government banning commercial surrogacy, in order to protect and prevent women from being subject to exploitation.

Justice

The principle Justice stand for fair, equitable and appropriate treatment between people³⁶. Equals should be treated equally and unequals should be treated unequally. The main question lays around when people are considered equal and unequal. An example of Justice is allowing heterosexual intended parents and same-sex intended parents to use surrogacy as a reproductive tool. Or a government giving everybody in their population, regardless of the reproductive tool, the same possibilities of starting family life.

We speak of a moral dilemma in the (biomedical) world if any of these principles is in conflict with each other.

4.3 Case

This case is fictional but based on true events.

Kate and Jim are a Dutch couple from Amsterdam. They are high-school sweethearts and have been together ever since. They both have a good career with well-paying jobs. After moving in together, they are finally ready for the next big step: children.

After years of trying, Kate never managed to get pregnant. Kate and Jim started fearing the worst and visited a clinic so both of them could get their fertility checked. Unfortunately, they found out that Kate is infertile and cannot conceive children on her own. This left them heartbroken. Kate and Jim have a big desire to have children. Adoption is a long and very difficult process and apart from that, Kate and Jim find the genetic link between their

children very important. Only one option remains: surrogacy. After carefully considering the idea of having a surrogate mother carrying their child, Kate and Jim became very enthusiastic. They do not have to give up their dream to start a family life just yet. In the Netherlands, only non-commercial surrogacy, in other words altruistic surrogacy, is allowed. Kate and Jim do not want to pressure any of their family members or close friends into becoming their surrogate mother. Therefore, they must need to find a surrogate who is willing to carry a baby for complete strangers. Of course, this is also a very difficult task since it is prohibited in The Netherlands to advertise for surrogacy. Kate and Jim feel desperate and start looking for options elsewhere. Googling more information about surrogacy, Jim landed on Russian site about surrogacy. Even though advertising for surrogacy is illegal in The Netherlands, it is not in Russia. On the contrary, in Russia paying a surrogate mother more than her medical expenses is also legal.

Kate and Jim's wish to become parents and start a family life weighs heavier than the potential risk they take by ignoring the Dutch law around commercial surrogacy. They decide to go to Russia and start their surrogacy process. With luck! A small year later, Kate and Jim can pick up their baby son and fly back to The Netherlands. The young couple is overjoyed with their baby and can't wait to show him to everyone, but first they need to register him in the city hall. The employees of the city hall notice that the surrogate mother is not listed on the birth certificate of the baby, but that the intended parents are. Since the surrogate mother is the woman who gave birth to the baby, the current Dutch law states that the surrogate mother is the biological mother and should be listed on the birth certificate. Meaning the surrogate mother still has legal parentage over him. Kate and Jim's son is not granted citizenship and faces the consequence of being send back to Russia. At the moment the baby is stateless and therefore does not have the right to healthcare, leaving him in a very vulnerable position.

Kate and Jim are heartbroken and do not know what to do. Since surrogacy is not legally regulated in The Netherlands yet they feel helpless. They are going to find a lawyer who can help them and will surrender themselves to a custody battle that can take up to years.

4.4 Conflicting Principles

In this case, the principles Non-Maleficence and Beneficence are in conflict with each other. In the principle Non-Maleficence, one is ought not to inflict evil or harm on others³⁶. If the Dutch government and the Dutch law have ruled that commercial surrogacy is illegal and retrieving a child in such way does not permit it to have citizenship, many unfavorable situations occur. If a human being does not have a legal birth certificate nor a citizenship, that person gets referred to as 'stateless' and therefore Kate and Jim's son is neither Dutch nor Russian³⁷.

At the same time, the Dutch government is also expected to fulfill a fatherly role to protect its citizens and promote good for the entire population. Allowing commercial surrogacy would come with the consequence of possibly exposing women and children to danger. The surrogate mother's risk being exploited by surrogacy companies and children risk being sold or seen as a commodity³⁸. For that reason, commercial surrogacy is often compared to human trafficking³⁹.

Non-Maleficence

When someone is stateless, it is meant that the person is not considered as a national by any state under the operation of its law³⁷. Officially, a stateless person 'does not exist' in the law and therefore cannot be granted any rights. This also included the access to medical care and so on⁴⁰. It is commonly known that newborn babies need to be taken care of and need to have check-ups frequently. If intended parents and their newborn baby are refrained to do so, one could speak of maleficence to the child. Why is the child punished for the actions of the intended parents? It does not seem to be fair.

The law states that the surrogate mother is the genetic mother and that a child has right to identity⁴¹. Therefore, the Dutch government can demand the baby to return to the country of origin because the surrogate mother has legal parentage of the child and the child has the right to know where he or she is from and who their biological parent is.

In some cases, it is impossible to find the surrogate mother because the intended parents have not even met her. Surrogacy companies mediate the entire process and some of these companies do not fully adhere to the laws and pay little attention to the surrogate mother³⁸. Sometimes the intended parents would rather not come in contact with the surrogate

mother and keep the surrogacy as anonymous as possible, fearing that at an older age their child might start looking for their biological parents.

If the baby has to return to the country of origin, chances are high the newborn baby will end up in an orphanage⁴⁰. Again, violating the principle of non-maleficence by not granting the baby citizenship and possibly sending it back to their country of origin would harm the newborn baby who did not have a say in all of this.

Beneficence

What is the Dutch government ought to do in such a case? Do they need to stick to the Dutch law and enforce the laws around commercial surrogacy? Or should they excuse the situation and therefore accept the illegal act the intended parents have committed?

In the principle beneficence, one is ought to prevent/remove evil or harm on others and one is ought to promote good³⁶. In this case a government is ought to act as a 'father' to the population and has the moral obligation to promote good to others. Commercial surrogacy is prohibited in The Netherlands because it could potentially exploit surrogate mothers and therefore harm them⁵. In some cases, surrogate mothers can be forced to give up their child or are very desperately in need of money, forcing them to do the impossible. In countries where commercial surrogacy is allowed, surrogacy companies make huge profits³⁸. When offering a baby to intended parents is commercialized, the risk of human trafficking is very high³⁹. Surrogacy companies could use surrogate mothers as money machines and only keep their own profit in mind. As a government, you are obliged to refrain these things from happening in your own population. A government strives for the beneficence of all people in their population, therefore protecting the vulnerable from exploitation. By allowing commercial surrogacy, a government allows possible exploitation of surrogate mothers and a form of human trafficking. This would then violate the principle of beneficence.

4.5 Conflicting Laws

In The Netherlands, surrogacy does not have a specific legislation, but since it involves human beings there are Human Right laws. In this case a couple laws are in conflict with each other.

Respect for Your Private and Family Life

Article 8 of the Human Right Act states that: “One has the right to live life privately and enjoy family relationships without the interference of the government⁶”. ‘Right to Private Life’ refers to everybody having the right to determine his or her sexual orientation, lifestyle and physical appearance. With ‘Right to Family Life’ is meant that everybody has the right to start a family life and live with family. Family life includes relationships between (un)married couples, children, adopted children and foster children.

Right to Identity

In The Convention on the Rights of the Child, the ‘Right to Identity’ is taken up. Article 8 states that: “State Parties must respect the right of the child to preserve his or her identity including name, nationality and family relations”. The second part of article 8 states that: “When a child is deprived of any of the above, State Parties must provide appropriate assistance and protection to the child, in order to re-establish his or her identity⁴²”.

In this case, the laws ‘Respect for Private and Family Life’ and ‘Right to Identity’ are in conflict with each other. The Dutch government has the duty to protect the child and re-establish his identity. According to the Dutch law, not the intended mother but the surrogate mother is the biological mother of the baby and therefore holds legal parentage. If Kate and Jim’s child were to grow up without knowing his heritage and therefore not knowing his identity, the Dutch government can be held accountable. If a biological mother is not listed on the birth certificate of the baby, this might cause problems in the future. Research has shown that 80% of children conceived out of surrogacy are likely to pursue their identity and would like to come in contact with their donors but if they are not able to find information about them it can cause problems⁴³. Therefore, it is very important that the ‘Right to Identity’ is treasured. ‘Right to Identity’ also makes sure that children get taken up into society. When a child is not recognized by the State and considered stateless, this deprives

them from their right to healthcare and school. By enforcing children's 'Right to Identity' this will automatically grant them with judicial protection from their legal parents and the State, protecting them from forms of maltreatment and exploitation⁴⁴.

On the other hand, all individuals have the 'Right to Private and Family life' without interference of the government. One could say that when a government decides to ban commercial surrogacy there is too much of an interference in the intended parents' life. Therefore, the government did not give everyone in their population the chance to start their own family life. Infertile citizens and citizens with different sexual preferences are victims of the government's decision. Next to that, if a government decides to send the baby back to the country of origin to stay with the surrogate mother, one could also say this a violation of the law since there was already family life build between intended parents and baby. Altogether, a difficult situation in need of improvement.

Surrogacy, whether it is traditional or gestational, can bring much joy and happiness to people's life but unfortunately does come with many conflicting principles and laws. It is difficult to decide which argument weighs heavier and every situation can be different. The evaluation of these dilemmas is often influenced by the culture and norms of that specific country. Therefore, it can be hard to set universal guidelines. In such cases it might be best to look into countries in general. What do most countries that allow commercial surrogacy have in common and what are the recurring phenomena? What do the countries who do not allow commercial surrogacy have in common and how can this be explained? In the next chapter I will zoom in on these trends.

Chapter 5 – Trends

Due to lack of regulation in many countries, surrogacy is becoming a more frequent and popular form of human reproduction⁷. In this chapter I will discuss the trends in countries with different legislations around surrogacy. What do we see in countries where surrogacy is allowed, who are the people applying for this reproductive tool and what are the obstacles? I will compare them with findings in The Netherlands, a country that does not allow commercial surrogacy. I will end with the possible advantages and disadvantages of commercial surrogacy, if it would be allowed in The Netherlands.

5.1 Trends Commercial Surrogacy

In some states of the United States, commercial surrogacy is allowed but comes with an expensive price tag. Average costs of surrogacy vary between \$70.000 and \$150.000⁴⁵. Only a limited amount of people is able and willing to pay so much money to conceive a child through surrogacy. Intended parents who do not have the financial means are forced to either look for a surrogate mother abroad or rely on family members and close friends who would carry the baby voluntarily. Because of these high prices, one could say that surrogacy is only available to the rich and elite members of society, excluding the less fortunate once again⁴⁶. Therefore, many intended parents start looking for possibilities elsewhere.

Reproductive Tourism

In India, intended parents were able to find a surrogate mother for only a fraction of the costs compared to in the United States⁴⁵. The total costs of surrogacy in India were about \$12.000⁴⁵. Looking at the difference in costs, it is easy to understand why intended parents were increasingly flying out to India. India quickly became a 'baby destination'³⁴.

Characteristics of these so called 'reproductive tourists' are price sensitive, middle income individuals with a big desire for children⁴⁷. The financial benefits of this trend were huge for India. Annually, around \$400 million was generated through surrogacy clinics⁴⁷. This money had a positive impact on India's economy. Nevertheless, there was a lot of criticism on these reproductive tourists. The main argument was that only the Indian tax payer should be able to enjoy the medical expertise and benefits of India's reproductive clinics, since the doctor's education and infrastructural support are tax-subsidized⁴⁶.

The other way around, this new trend was also disadvantageous for the countries of origin of these reproductive tourists. These countries experience a potential loss of income that could have had an effect on that country's economy. The surrogacy tourists spend their money on medical treatments and surrogacy services in a foreign country, rather than in their home country⁴⁷.

Exploitation

Even though there are many surrogate mothers who are willing to carry a baby for someone else, there are also surrogate mothers who feel cornered. For some, surrogacy might be a 'last resort' to their financial situation. Surrogate mothers in India receive between \$2800 to \$5600 for their services. This is equivalent to 10 years of salary for a rural Indian woman⁴⁵.

A surrogate mother is often poorer than the intended parents and therefore could be easily persuaded. Sometimes, surrogate mothers prefer not to donate an egg but in order to provide themselves and their families they might be forced to cross their own boundaries. Therefore, these women are exposed to possible exploitation of surrogacy companies who usually also take a large amount of their profit.

Currently, commercial surrogacy is completely banned in India and non-commercial surrogacy is allowed for Indian natives only.

Discrimination

In a country where commercial surrogacy is legal, intended parents have many options to choose from. Surrogate mothers can actively promote themselves or register themselves at a surrogacy company. Because the intended parents pay for a service, they might feel less burdened to make certain demands. In many cases some forms of discrimination occur.

Every surrogate mother has to go through a medical screening and is preferred to have carried children before, but on top of that, intended parents can choose their surrogate mothers based on other factors. Research in India has shown that surrogate donors are "chosen based on religion, caste, skin color and attractiveness in which a lighter skinned, middle class woman will earn much more than a poor dark-skinned woman"⁴⁸. Whenever this happens, it is needless to say that women and their children risk becoming commodities.

Social Surrogacy

The freedom to use surrogacy as a reproductive tool can also be abused.

In countries where surrogacy is legal, the upcoming trend is that people who are not infertile and have the ability to conceive naturally also use it. There are different reasons why more and more people are attracted to surrogacy. Many celebrities have admitted to using a surrogate mother. 'Social Surrogacy' is the term Dr. Vicken Sahakian refers to⁴⁹.

Dr. Sahakian sees a growing number of women that want to have a baby but do not want to be pregnant. Most of these them are models, actresses or other women with full-time jobs. They simply do not have the time or possibility to become pregnant since it might have an influence on their career. There is one thing all of his patients have in common: they all have the ability to afford surrogacy services⁴⁹.

Another trend is older intended parents. Some people have always put their career first and never thought about kids. Now they might regret not having kids at an earlier age. Since adoption agencies have a strict requirement on age, many older intended parents are pushed towards surrogacy⁵⁰.

5.2 Trends Non-Commercial Surrogacy

Main arguments for banning commercial surrogacy are human trafficking and exploitation of women⁵. Therefore, many countries, The Netherlands included, do not allow commercial-surrogacy. In The Netherlands, lack of regulation for surrogacy can cause intended parents to look elsewhere. One could opt that situations like these might create a foundation for other women abroad to offer and provide surrogacy⁷. So, while countries are desperately trying to avoid the negative outcomes of surrogacy in their own country, they might facilitate the exact opposite in another.

Exploitation and stigma

The fear of exploitation of surrogate mothers is often the biggest reason to ban commercial surrogacy in countries. While doing this, countries protect the vulnerable women who might be exploited but harm other women. We must not forget that some women actively choose to be a surrogate, because they want to share the joy of having children with others.

Recently, more attention has been paid to this group of women in these countries.

Researcher Lisa Ling has found that Indian surrogate mothers used their money to purchase

family homes and provide their children with good education⁴⁵. Becoming a surrogate mother has made them financially independent. Therefore, she rejects the argument of exploitation and states that no one speaks of middle-class American women being exploited, even though commercial surrogacy is allowed there as well. Dr. Ling speaks of a stigma of exploitation put on poorer women, who share the same joy as these American women by becoming a surrogate mother⁴⁵.

Best Interest of the Child

Many intended parents found themselves in unfavorable situations in which their country did not allow them to have legal parentage over their baby. Over the years, more and more courts are slowly accepting solutions in which the well-being of the child is also taken into account⁵¹. The reason for this trend is the increasing popularity of surrogacy and therefore the increasing amount of legal cases. In the recent years, there has been a shift of focus from the crime of the intended parents, to the best interest of the child⁵². At first, many countries would only follow the strict rules and laws around surrogacy but bumped into many legal and ethical dilemmas. Because of this shift, more countries are forced to reevaluate their current legislation.

5.3 Possible Impact in The Netherlands

What were to happen if The Netherlands were to accept commercial surrogacy as well?

Would the same trends be observed here?

Commercial surrogacy can lead to the same reproductive tourism in The Netherlands.

A benefit of reproductive tourism is the effect it can have on the economy⁴⁷. These tourists will be spending a lot of their money on medical expenses and other expenses related to travel. The immediate consequence can be that the Dutch medical world is not prepared for a rapid growth of the surrogacy practices⁴⁷. Therefore, hospitals and clinics might become overcrowded, ultimately resulting long waiting lists for medical procedures. Another consequence is criticism of the Dutch population. Just like in India, Dutch tax-payers could feel offended that tourists might reap the rewards of their tax-money and might get access to care more easily or earlier than the inhabitant population⁴⁷.

Allowing women in The Netherlands to choose whether they want to become a surrogate mother or not can have a positive effect on their financial stability. They can decide to carry a baby for someone else because they genuinely want to and at the same time invest the money they would earn. This sounds like a win-win situation for most. Just like Dr. Ling has stated in her research, not all surrogate mothers have the risk of getting exploited and assuming they will can be a misconception. In order to protect the women who do carry the risk of getting exploited by surrogacy companies or intended parents, the Dutch government must come with strict guidelines around commercial surrogacy. An example can a maximum amount of money that can be paid to compensate the surrogate mother. In the new draft law regarding surrogacy, The Dutch Government already took some of these risks in account. They stated that beforehand, a judge must rule if both the surrogate mother and intended parents meet all the requirements and establish that there are no signs of forced surrogacy. By doing this, The Netherlands would come closer to keeping the best interest of the mother and child in mind and avoid possible exploitation.

Next to exploitation, surrogate mothers could also experience discrimination in which intended parents can choose which surrogate mother they want based on genes and physical appearance. If commercial surrogacy would be legalized in The Netherlands, it is important that every form of discrimination in the surrogacy process is avoided.

Surrogacy discrimination can also occur on the surrogate's side. If surrogate mothers have the choice to receive money for their efforts they might be tempted to 'sell to the highest bidder' without them feeling exploited. This could lead to surrogacy discrimination in which less wealthy intended parents can be overlooked and might leave them even more desperate. In both cases, either the surrogate mother or child could risk becoming a commodity.

The implementation of commercial-surrogacy could also ignite the rise of social surrogacy. Women who are perfectly capable of conceiving on their own might be influenced by the new trend and therefore choose not to become pregnant themselves. This might feel unfair for intended parents who would desperately like to have a child but are unable to. Today, there is still a big taboo on women who openly talk about not wanting to carry children themselves. Arguments are that women connect better with their child after carrying themselves⁴⁹. It might cause a division between the population based on personal beliefs on what is in the best interest of the child.

On the positive note, legalizing commercial surrogacy would drastically decline the illegal act of retrieving a child abroad. Many Dutch intended parents will not be forced to break the law and find themselves in dangerous situations, solely to start a family life. By going through the correct surrogacy process, they lay a good foundation for their child and provide him or her with enough information about their identity.

Eventually, if The Netherlands would legalize commercial surrogacy, the Dutch government can have a better insight into the number of intended parents going abroad and in order to find a surrogate mother. Only with data, governments can find fair and equitable solutions to challenging problems⁵³.

Chapter 6 – Discussion and Conclusion

As surrogacy is becoming more popular over the years, problems around the subject receive more attention. By looking at all of the trends and findings in countries in which commercial surrogacy is and is not allowed, we can conclude that it is difficult to prefer one over the other. Both forms of surrogacy come with advantages and disadvantages in which many laws and morals come in conflict with each other.

Allowing commercial surrogacy can lead to more financial stability for surrogate mothers⁴⁵. Some surrogate mothers just want to contribute to happiness in someone else's life and find it a truly altruistic task¹⁵. Even at a national level it can have a positive influence.

Host countries for commercial surrogacy could experience a positive influence on their economy because of the reproductive tourists. But the immediate downside can be the health care overload the country can experience, alongside with the criticism of the host country's population⁴⁶.

The risk of exploitation, and women and children becoming commodities is the biggest drive for countries to ban (commercial) surrogacy. But assuming every woman will be exploited when going into the surrogacy process can be far-fetched and can lead to false pre-assumptions and stigma⁴⁵.

For countries in which commercial surrogacy is legal, the biggest drive is the right to have freedom of reproduction. Resulting in trends in which intended parents who can conceive naturally, actively choose not to, simply because the surrogacy process is easier, or it can lead to surrogacy discrimination and exploitation as we have seen in researches done in India. Some also state that commercial surrogacy can lead to surrogacy becoming a luxury good in which the rich could be the only ones to afford it⁴⁶.

But how far should we go? Breaking laws and possibly violating human rights cannot be the solution to the problem of infertility or inability to reproduce. Some people are born with disfunctions or acquire a disease at a later age and some are more fortunate. Unfortunately, there is not much to do against this inequality in life. When someone is infertile or unable to reproduce naturally, many more options other than surrogacy are possible. Think about adoption or foster care. Of course, this is very different than having a (semi-)genetic child.

But one could also state that it is cruel to not provide these people with a reproductive tool when a solution to their problem is so near.

We can conclude that every case of surrogacy is unique and can be very different to another. That is why every surrogacy case has to be carefully looked into before making a decision about the child's and intended parent's future. A new trend shows us that the best interests of the child are more taken into account recently. For example, in the baby Donna case, in which 'family life' weighed more than the fact that the intended parents did not handle the surrogacy process in the right way.

The fact that every case is unique makes it even more difficult to come with universal guidelines. At the moment there are no universal guidelines in how surrogacy should be regulated as many countries can decide for themselves whether they allow surrogacy or not. Some countries have an absolute ban on surrogacy, while others only ban commercial surrogacy. This led to many complicated and ambiguous situations. Often, the country's decision to allow or not allow surrogacy was based on cultural norms and beliefs.

The new draft law about surrogacy presented by the Dutch government in 2020, took some of these risks in account by setting strict rules to the surrogacy process. They did not propose lifting the ban on commercial surrogacy but they did try to improve and regulate the current legislation more by making some aspects of the surrogacy process stricter. Because commercial surrogacy is illegal, it does not automatically mean that people refrain from doing it. It is hard to get an insight of how many people conduct these illegal activities and therefore hard to fight against it. Like many illegal activities, you can only regulate it when it becomes partly legal. An example would be the legalization of certain drugs. By legalizing the drug, a government is not condoning it, but can now regulate it. The drug market becomes eliminated and the government now has better insight into drug abuse⁵³. At the moment The Netherlands does not regulate surrogacy by law. By legalizing commercial surrogacy, The Netherlands can create a regulated health framework in which dangerous medical and legal situations abroad can be avoided. Legalizing commercial surrogacy does come with a risk. The Dutch government can risk potentially harming its population. Children could risk becoming a commodity and women could be exploited. Therefore, careful consideration is needed. Legalizing commercial surrogacy can also have a

positive outcome such as financial stability for surrogate mothers, more attention to the best interest of the child and more insight into the problem.

The advantages of the trends of legalizing commercial surrogacy in The Netherlands, should be weighed out against the disadvantages before the Dutch government can make decision. The Dutch government should also look into the conflicting biomedical principles and laws such as Respect for Private and Family Life and Right to Identity, in order to consider changing their current legislation.

Limitations

Because of the ambiguity of the topic, a limitation of the literature review is that not all cases of surrogacy are known to the government. Therefore, it was hard to give a full estimation and get accurate numbers of commercial surrogacy cases in The Netherlands and around the world. A direct consequence was the lack of scientific research that is done about the specific topic. Some research about the trends of surrogacy in countries has been conducted, but these researches have been conducted a while ago. Especially since surrogacy is rapidly becoming more popular, it is wise to have more research done. Not everybody reports that they have had help from a surrogate mother if commercial surrogacy is illegal in their country. Finding companies that offer such illegal services where impossible to find, even more for research about these companies. For that reason, data about women who were being exploited by surrogacy companies was hard to find. Most data were retrieved through interviews in researches in which women shared their personal experience.

Another limitation of the literature review is that surrogacy in general gets underreported. If one chooses traditional surrogacy, where the surrogate mother uses her own egg, one does not need the intervention of a clinic. Therefore, it can be done without the government knowing. Therefore, again, finding specific and accurate numbers was hard.

Even though these numbers and data were hard retrieve, the validity of the paper did not suffer. There was a big amount of data to be found about surrogacy and Dutch and International guidelines and legislature. The biggest trends of commercial and non-commercial surrogacy were found. Based on that data it was possible to predict a possible scenario of what trends and impacts could occur if The Netherlands were to implement commercial surrogacy.

Recommendation

A recommendation for further research is to combine a literature review with interviews with surrogate mothers and intended parents in both countries where commercial surrogacy is and is not allowed. With these in-depth interviews, researchers can find other trends and reasons why these people opted for surrogacy and what made them choose that form of surrogacy. Interviews can be held anonymously, so everybody feels safe to speak the truth. Especially regarding to the fact that some of these surrogate mothers or intended parents acted against the law. With this additional information, The Dutch government, and possibly even more governments, have more insight into surrogacy and the reasons why some inhabitants of their population made certain decisions. On these grounds the governments can decide whether to adapt certain measures, or change their legislation completely.

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