# In the Best Interest of the Child?

on the justification for state restrictions on surrogacy

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## Abstract

Recently, changes to the Dutch Family Law Code for the regulation of surrogacy, have been proposed by an advisory committee. The proposal allegedly focussed on protecting the best interest of the child, in the sense that harmful consequences to the interest of children ought to be prevented. This article questions the consequentialist approach and identifies several deontological arguments in the ethical justification. These deontological arguments protect the rights of children to know the identity of their genetic and gestational parents and be raised by at least one genetic parent. Furthermore, the dignity of the child prohibits commercial surrogacy.

The inclusions of deontological arguments raises questions about the extent and how the State may impose such values. Furthermore, the inclusion of deontological arguments requires a coherent application, which is wanting in the proposal. A possible explanation for this inconsistency are the conflicting underlying models of parental responsibility. A child centred geneticism model, where parental rights follow from the parental obligations, is combined with a pluralistic model. In the latter model, parental rights, not parental obligations are fundamental. Further research is necessary to come a dual interest view, that will allow for a coherent application of the deontological parental obligations in the best interest of the child.

# Table of Contents

## Introduction

What is the harm to children born through surrogacy? New medical technologies have made it possible for a woman to become pregnant with a genetically unrelated child. This may be done for altruistic or commercial reasons. The children born through surrogacy are more than wanted, their happiness is almost certain. Why then would any country restrict surrogacy out of concern for the best interest of the child?

Notwithstanding these observations, commercial surrogacy *is* restricted in the Netherlands. The reasons given by the state are that the practice commodifies women and children and violates the dignity of both (Tweede Kamer, 1987; Tweede Kamer, 1990; Tweede Kamer, 1991; Tweede Kamer, 1996; Tweede Kamer, 2009). Altruistic surrogacy is restricted as well. Commissioning adults who wish to parent a child born to a surrogate mother will face difficulties becoming the legal parents of the child. Despite this legislation, online pregnancy related topics do include advertisements for surrogates and receive positive feedback. Furthermore, a (state funded) television show, *draagmoeder gezocht* ('surrogate mother wanted') in 2013 made both altruistic surrogacy in the Netherlands and commercial surrogacy abroad visible for the larger audience. Lastly, famous Dutch couples who resort to commercial surrogacy arrangements abroad, write about their experiences to 'remove the taboo'(van Ulden, 2016). Their plight, together with other Dutch couples, has given rise to a debate in the Netherlands for new and more lenient regulation, because, what's the harm to children born through surrogacy?

From 2014-2016 the Staatscommissie Herijking Ouderschap (hereafter Staatscie), a state installed advisory body, has studied the subject of commercial surrogacy and advised the Dutch government, to maintain a non-permissive policy towards commercial surrogacy in the Netherlands and restrictions on altruistic surrogacy arrangements.

This new proposal was the result of the consultations of the Staatscie where 'the best interest of the child' (hereafter BIC) was given a central position. This was combined with the important moral values of freedom, equality, and the moral position that individuals should be allowed to make decisions about their own lives, as long as they do not harm the interests

of children and others (Wolfsen, 2016). Moreover, in a pluralistic society ethical objections against certain technical developments may influence personal decisions on whether to use new technologies or not, but are not sufficient arguments for state restrictions. State restrictions should, according to the Staatscie, only be based on the impact of technical developments in the interest of the child. From the perspective of the best interests of the child, developments that may *harm* the welfare of the child could be restricted by the State. This harm would ideally be supported by scientific research. Sufficient research capacities to study the possible risks of new technologies should be made available. The best interest of the child should therefore be understood to represent a consequentialist argument. Only the consequences for the future child, in the sense of harm to its physical and psychological welfare, will justify Staatscie restrictions on the freedom of adults (2016, 387). Deontological arguments, which claim that certain acts are right or wrong in themselves and not necessarily in terms of their consequences, seem to be excluded therefore of the understanding of the best interest of the child by the Staatscie.

However, the best interest of the child is not the most unequivocal moral principle. The best interest of the child has been called a controversial moral principle as it may serve as an argument in favor or against reproductive decisions (Bolt, 2002). The best interest of the child can, for example be used to both allow and bar special commissioning adults from accessing IVF treatment. Others consider the best interest of the child justifications fallacious and 'a smoke screen that prevents us from excavating the true justification for these kinds of interventions' (I. G. Cohen, 2011).' The Staatscie has recognised this controversy as well and has called it a 'magical formula' which may support hidden or unsupported opinions (Wolfsen, 2016).

To overcome this controversy, the Staatscie has explained their understanding of the best interest of the child in great detail. Despite their claim to limit themselves to consequentialist arguments, the use of the term 'best interest of the child' has led to the incorporation of deontological arguments as justification of these restrictions. A focus on the wrongness of the act instead of the harmful consequences, can be found in the discussion of commercial surrogacy by the Staatscie. Where it concerns the prohibition of commercial surrogacy the human dignity of the child is brought forward, as the practice would 'commodify' children.

Further explanation for the prohibition on behalf of the child is not given. But what is the harm to the welfare of the child in this case? How is a child harmed if it is born to a financially compensated surrogate mother into a family with loving parents and happy surrogate mother? These questions remain unanswered by the Staatscie and they seemingly have accepted deontological arguments as justification for state restrictions. This is contrary to their acclaimed restriction to consequentialist harm arguments. The inclusion of deontological arguments can be seen as problematic if these arguments are not acknowledged, and not applied coherently and consistently.

If both deontological and consequentialist arguments are used to restrict the procreational freedom of our citizens, both types of arguments face challenges. For the consequentialist justification, the Staatscie has to prove the actual harm to the future child. Is there evidence to support claims of harm? How should we value this evidence? These questions will be particularly important where the Staatscie introduces the 'high risk to significant harm' standard. How can we predict and prove potential harm to future children?

These difficulties can be overcome by resorting to deontological arguments. However, for the deontological justification, problems apply such as the question whether the State may impose deontological values upon society. This is a pressing questions, especially as deontological norms bring along the difficulty of knowing which acts are right or wrong. (Langdridge, 2000). How can we decide whether a child should have a genetic tie with the commissioning adults or not? Deontological arguments for political decisions may be also in need of a 'translation' into a form 'that is understandable and potentially acceptable for every citizen, regardless of their beliefs and values' (Myskja, 2009). And if we accept a deontological argument to justify a state imposed restriction, these arguments need to be tested for coherence and consistency (Bolt, 2002, p.19). To impose the requirement of a genetic tie between commissioning adult and the child, it must be coherent and consistent with our restrictions in other aspects of reproduction for example.

These potential discrepancies in the ethical justification of the policy proposal will make the governmental justification problematic as well. Policies in a democratic liberal society need to be justified by a transparent and coherent moral reasoning. This justification is necessary to

explain the policy, give vocabulary to the reasoning, establish support and as a result allow for adherence to the policy. Discrepancies in the ethical justification should therefore be examined in order to overcome and solve them. There is a clear urgency to undertake this task as the Dutch government has taken the first steps towards the adoption of the policy proposal by the Staatscie (Tweede Kamer, 2017) and interest groups demand a swift implementation (Beentjes, 2017). In addition, the report has already been used as guidance in Dutch court cases on international surrogacy (Court of Amsterdam, 2018). In this thesis I will examine how the ethical justification based on the best interest of the child is problematic for restricting surrogacy in the Netherlands.

To answer this question, the specific restrictions of both commercial and altruistic surrogacy will be distinguished which are justified with a best interest of the child argument. I will critically analyse the underlying judgments of these justifications. With regards to the consequentialist arguments, the question will be raised whether there is proof of the potential harm to the child. In particular, the proposed check for high risk to significant harm to the future child will be discussed. What welfare standard is implied by the Staatscie and can the state set such a threshold? In other words, can the state restrict the reproductive liberty of citizens when they don't meet a certain level of parenthood? For the deontological arguments, I will discuss the 'translation', coherence and consistency of the given justifications.

The incoherent application of the deontological arguments will lead me to discuss the underlying models of parental responsibility. I will identify two conflicting models of assigning parental responsibility in the Staatscie proposal, a child-centred geneticism theory, and a parent-centred pluralistic account. The co-existence of the two models may explain the incoherent application of the deontological arguments. In cases of surrogacy, a pluralistic account with a parents rights focus is applied. In such an account, deontological arguments based on children's rights, may conflict with the a right to claim parental responsibility over a child by adults. I will conclude that the Staatscie proposal is particularly problematic where it gives priority to the claims of the latter, without accounting for the consequences on the deontological rights of the child.

The critical analysis method will be uses to evaluate the ethical justification by the Staatscie. This analysis will be aimed at theorising 'from the inside out', Dworkin's preferred method, and described by Norman as 'an attempt to provide a more successful articulation of people's real convictions'(2000). The task I will undertake is to articulate, clarify and assess the kinds of considerations to which the Staatscie appeal. This is only the first step ethics can provide according to Norman. In this thesis I will undertake this first step and not provide solutions to the identified problematic areas. However, in an attempt to do a little bit more than this, I will also take on where possible the role of the ethicist as a cartographer. This descriptive expert is, according to Baggini, able to plot the moral landscape and also possibly suggests routes through it (2010). I will indicate where further research is necessary to come to a more sound ethical justification of State restrictions on reproduction.

My exploration will only focus on the justifications given in the interest of the future child, in other words, 'the best interest of the child' justifications. The interests of women acting as a surrogate will not be discussed. This requires an additional focus and discussion which the scope of this thesis will not allow.

# Chapter 1 Reproductive restrictions

## The policy proposal

What exactly is the regulation for altruistic surrogacy by the Staatscie? By what means does the Staatscie have to restrict surrogacy? Before I introduce the specific restrictions that are justified with a BIC argumentation, it is important to identify the different ways in which a State may influence the practice of surrogacy. A helpful taxonomy is developed by Cohen (Cohen, 2011) which introduces the following three dimensions of reproductive regulations: the *target audience* of a reproductive regulatory arrangement, the *means* through which the reproduction will be influenced and lastly, the *justification* for such regulation by the state. For the discussion on State restrictions, the focus lies on the dimensions of the means. Different means in the taxonomy are: physical alteration, such as state enforced sterilization or forced contraception, criminal prohibition, for example the criminalization of surrogacy and selective funding by the state of certain programs. In addition, informational means, such as sexual education programs to prevent teen pregnancies, can also be distinguished. In the proposal of the Staatscie the main focus with regards to restrictions on surrogacy is on the last two means: the *immutable status determination* of parentage and *default status determination and setting altering rules.*

The immutable status determination can be explained as the States prerogative to give parental status according to immutable or unchangeable rules. These rules are laid down in our Family Law Code. Currently, surrogate mothers in the Netherlands become (at birth) the legal mother of the child as this follows from the principle of *mater certa semper est (*article 1:198 sub 1 and a Dutch Civil Code), one of the foundational principles of Dutch Family Law inherited from Roman law, that prescribes that the birth mother is the legal mother of a child. This is an example of the *immutable status determination* of the mother of a child. In cases of surrogacy these rules are restricting as the surrogate mother will be the birth mother and this will create family ties that are not desired. Not by the commissioning adults, being the adults who initiate a procreational arrangement, or the surrogate mother. This is where the means of *default status determination and setting altering rules* comes in. A state may offer an 'escape route' from the default status determination in its family law and set altering rules. The proposal by the Staatscie has created such an escape route for surrogacy. If the escape

route is followed, the commissioning adults may be able to claim legal parentage of the child and the surrogate birth mother will not become the legal mother of the child. This escape route has numerous conditions for both the surrogate mother and the commission adults that should be met in order to be eligible for the changed status determination of the parents. Some of these conditions are put in place to protect the surrogate mother or the commissioning adults. The focus of this thesis will be on the conditions that are put in place to protect the best interest of the child. There are six conditions or restrictions that are justified in this way. In addition, the criminalization of baby selling is a seventh restriction proposed by the Staatscie with the justification of protecting the best interest of the child.

The Staatscie has expressed the opinion that only harm to the welfare of the child could support governmental restrictions. The possible harmful consequences of new technologies should therefore be researched to support state restrictions (2016, 388). As the *consequence* of harming ought to justify restrictions, the Staatscie wants to limit itself to consequentialist arguments. The question is whether the Staatscie has kept itself to this promise or if also deontological arguments have been given. To answer this first question, I will describe the 'escape route' that needs to be followed in order to create the legal ties as desired by the adults involved and identify the six conditions that need to be met. I will classify which conditions are supported with a deontological argument and which with a consequentialist argument. The proposed criminalization of baby selling will be discussed thereafter. In the next chapter I will test the deontological and consequentialist arguments on their own strength.

## The restrictions

The policy proposal by the Staatscie will create, as stated before, an escape route that will allow for a change from the standard attribution of legal parenthood. In short, instead of the surrogate mother, the commissioning adults will be registered on the birth certificate. As a result, they will become the legal parents of the child. In order to qualify for this special arrangement, several conditions should be met. Note this escape route applies both to gestational surrogacy, where there is no genetic tie between the surrogate mother and the child and which is medically assisted, and to classic surrogacy, where the surrogate mother is impregnated with semen of the commissioning man or a sperm donor, which may take place

without medical intervention or oversight. A similar escape route is created for surrogacy arrangements abroad where the commissioning adults request recognition by the Dutch state of their legal parentage of the resulting child. I will shortly describe the general escape route or procedure and discuss in detail the specific restrictions in this procedure that are introduced to prevent harm to the welfare of the child. The differences between the international escape route and the national escape route will be described next.

To start, the escape route is focussed on the creation of an agreement between eligible commissioning adults and surrogate mothers before the pregnancy will commence. Surrogate mothers and commissioning adults may advertise for each other personally or be assisted by non-profit organisations to find each other. Commercial brokerage between surrogate mothers and commissioning adults will remain criminalized. Eligible surrogate mothers and commissioning adults are those that have habitual residence in the Netherlands and meet medical requirements such as age limitations and health. It is important to note that the incurrence of medical assistance brings with it extensive limitations as laid down in the guidelines for medical professionals by the Dutch Organisation for Obstetrics and Gynaecology (NVOG) (NVOG werkgroep, 2016). These guidelines are binding for medical professionals through their membership of the NVOG and through disciplinary law. All participants should receive information and counselling and should participate voluntarily.

Before conception. the parties involved should come to an agreement on matters of parentage, genetic origins of the future child and compensation for actual costs. The agreement will be submitted to a judge who will check for informed consent on behalf of the surrogate and whether several requirements for children will be realised. On a more practical or objective level, the judge will have to verify if the child has at least one genetic tie with the commissioning adults. Only in exceptional cases, a child with no genetic ties to the surrogate mother may be created within the escape route. The identity of possible egg or semen donors and the identity of the surrogate mother have to be registered in a yet to be created special State register (Register Ontstaansgeschiedenis, ROG) and become accessible for the child. Furthermore, whether the child will obtain a nationality and whether the requested family ties will be recognised in the country of residence needs to be guaranteed. The judge will also be required to check whether there is a high risk to significant harm to the future child.

Commissioning adults who will create a child with a surrogate mother abroad may also be eligible for the escape route. Foreign surrogacy arrangements may be recognized by the Dutch state when foreign authorities perform a judicial check on the voluntariness of the surrogate mother. In addition, the requirements of accessible genetic and gestational information and a genetic link between the child and the parent should be met. The judicial check does not have to include a check of the financial payments to the surrogate mother. Without this requirement commercial surrogacy arrangements abroad will be permitted, as long as there is a judicial check for voluntariness of the surrogate mother. This will include for example California, the world's leading commercial surrogacy destination.

Lastly, to prevent child selling, the monetary compensation for the surrogate mother should be checked strictly. Baby selling and payments beyond what is approved in the agreement will both be criminalized. If the court approves, the pregnancy may commence, and the resulting child will be registered as the child of the commissioning adults as its legal parents, and the surrogate mother will not be legally tied to the child as its  birth mother.
From this short description, I will identify six restrictions. I will describe the specific best interest of the child justification that is given by the Staatscie and classify whether this is a consequential or deontological argument. The first two restrictions on commercial surrogacy will be discussed together.

### 1. Restriction on commercially motivated surrogates.

This is justified with reference to the dignity of the child. The restriction will prevent the child from being reduced to a commodity (2016, p.464). Note this restriction will not apply for foreign surrogacy arrangements.

### 2. Restriction on commercial brokerage.

The dignity of the children involved is presented as the justification. Commercial brokerage may also influence the due diligence or carefulness of the arrangements (2016, p.480).
For both restrictions on the commercial characteristics of surrogacy, the human dignity of the child is the sole argument and is an obvious recognition of a deontological argument. No reference is made to the consequential harm that may occur as a consequence of

commodification of the child. The act in itself seems to be considered wrong and therefore a restriction ought to be justified.

### 3. Requirement of a genetic tie between the future child and at least one commissioning adult.

According to Staatscie, genetic relations can be important for the identity of the future child. With at least one genetic tie between adult and child, the complexity of the child's ancestry may be limited. Placement in the 'natural line of the family' is another argument given by the Staatscie. The importance of genetic ties can be interpreted as a consequential argument, if not having these ties should be understood as harmful to the child's identity or connection with the commissioning adults (2016, p.461). As a result of this reasoning the Staatscie considers it desirable to require at least a genetic tie between the child and one of the commissioning adults. However, there is no scientific evidence that proves this claim, it is rather the opposite. Reference is made to scientific evidence that shows that good parenting can take place irrespective of a genetic tie (2016, p. 147).

The fact that the Staatscie maintains a preference for 'at least' one genetic tie between the child and the commissioning adults without supporting evidence may indicate there is an ambivalent deontological argument to prefer a genetic tie. This may also explain the ambiguity of the requirement. The ambiguity becomes most visible when the Staatscie allows for exceptional situations where the requirement of the genetic tie(s) may be dropped. The reason for this exception is that maintaining a strict adherence to this requirement may be deemed contrary to the best interest of the child. (2016, p.461). Apparently, cases are imaginable where the child would have interest to be born to genetically *un*related parents. In which cases, and for which reasons the interest of a child may be contrary to its interest to have a genetic tie is unfortunately not specified. In conclusion, the requirement of the genetic tie is based on a deontological argument that values a genetic link between adult. However, its importance may vary in different situation.

### 4. Requirement of known genetic and gestational heritage.

Information about the surrogate mother and possible donors should be made accessible for the child. The judicial check should verify whether the child can retrieve its history of origin (2016, 460). This includes at least the agreement between the surrogate mother and the commissioning adults, the identity of the surrogate mother and the genetic origins of the

child. This requirement is justified as it is known that children may have a great interest in obtaining this information. The Staatscie has obtained this knowledge through interviews with interest groups and scientists. Several personal testimonies have made the Staatscie aware of the potential trauma that may be a consequence of finding out about being donor conceived. However, scientific evidence that could further support a claim of the harmful consequences of unknown genetic heritage is not available. The restriction is further justified with a reference to a widely-shared consensus and to article 7 of the International Convention of the Right of the Child which protects the right of children to know their parents. Both indicate this restriction is based on a deontological value. It is a shared value in society and based on a human rights claim which is based on the concept of human dignity.

### 5. Requirement of a nationality upon birth and legal parentage with at least one of the commissioning adults.

The child should be able to obtain upon birth a nationality and have at least one commissioning adult recognized as its legal parent in its future country of residence (2016, p.472). These requirements should prevent the statelessness of the child and uncertainty about the legal parentage of the child. Statelessness or legal orphancy may easily be recognised as harmful for a new-born child. To not have a nationality excludes the child from protection by any state and complicates its access to resources and care by commissioning adults in international surrogacy arrangements. This could be classified as a consequentialist justification for these reasons.

### 6. Check for 'high risk for significant harm' to the child.

A judicial check of 'high risk for significant harm' to the future child is required in the proposal by the Staatscie. If there is such a high risk, governmental assistance for the creation of the child should be withheld' (2016, 471). An example of how this high risk may be assessed is a check of past criminal records of the commissioning adults. There should be no additional check whether the commissioning adults will be suitable parents.

This seemingly straightforward requirement is unfortunately not as clear as it seems as the high risk for significant harm is also understood as a more thorough check of parental capabilities. In the medical ethical literature, three different standards can be identified. The

minimum threshold principle will only deny assistance in cases where children will be given a life not worth living, a life full of suffering due to devastating diseases and syndromes. This approach prioritizes parental autonomy. The maximum welfare standard requires parents to guarantee ideal circumstance is to ensure the future child a happy and fulfilled life. If not, (medical) assistance may be withheld. The reasonable welfare standard falls in the middle between the maximum welfare and the minimum threshold. The reasonable welfare standard was introduced by Pennings and described as follows: 'the provision of medical assistance in procreation is acceptable when the child born as a result of the treatment will have a reasonably happy life (1999, p.1148). Due to the explanations of the standard and the examples given in the report, it could be both regarded as a minimum threshold standard and a reasonable or 'middle ground' standard for the welfare of the child.

An argument can be made that the high risk for significant harm ought to imply a minimum threshold principle. The Staatscie explicitly states that courts should not check the suitability of the parents. Only the 'high risk for serious harm' as an *external border*-criterium is applicable (Wolfsen, 2016). In addition, the reference made to checking the past criminal records of the commissioning adults refers to an example given of the minimum threshold by Langdridge (2000) in his criticism of the reasonable welfare principle. This reading would support an interpretation of the high risk for significant harm as a minimum threshold principle. If this standard is implied, it could be identified as a consequentialist argument. As Langdridge describes the minimum threshold principle, 'these are the cases where we can, with as much certainty as we can predict any future event, state that there is an immediate and future risk to the child's welfare' (2000, p. 503). The consequences for the child will justify the restrictions imposed on the freedom of commissioning adults.

Alternatively, the high risk for significant harm could also be understood as a reasonable welfare principle. This would be in line with the interpretation of the high risk for serious harm criterium in the bioethical discourse where it is seen as a synonym to the reasonable welfare principle and is used interchangeably (Wert, 1999). The Staatscie seems to follow this line of reasoning when they refer to the medical ethical standard of the reasonable welfare of the child. According to the Staatscie this standard could also be applied in another setting where the welfare of a future child needs to be assessed. The reasonable welfare of the child

is further explicated as the bottom line entitlement of 'good enough' parenthood every child is entitled to (2016, p.145). The Staatscie defines the standard 'good enough parenthood' in the following seven core values of parenthood: 1) unconditional personal commitment, 2) continuity in the relation with the child, 3) care for physical well-being, 4) pedagogic task, 5) organizing and monitoring the upbringing of the child, 6) taking care of the child's identity of genetic origin, 7) taking care of the relationships of the child with other important persons, in particular the (other) parent(s). Not all core values should be fully satisfied but the overall realization by the parents should be 'good enough.' The seven core values are the indicators that may help safeguard the bottom line of good enough parenthood. Therefore, safeguards to realise these seven core values should be included in every regulation of descent or custody (2016, p.46). This would also mean the seven core values are applicable to surrogacy cases as this concerns the descent of the child. Following these statements, the high risk for serious harm standard in cases of surrogacy could be understood as a reasonable welfare of the child standard. This would also imply a check of the parental capabilities of the commissioning adults for the seven core values of good enough parenthood.

If the high risk for serious harm is interpreted as a reasonable welfare of the child it can be identified as a consequentialist argument. Again, the possible future harmful consequences for the child will justify the restrictions. However, the reasonable welfare standard as explicated in the seven core values will also contain deontological arguments. Among the seven core values of parenthood, the value of taking care of the child's identity in the sense of its genetic origin should be considered to represent a deontological value. As there is no evidence of future harm and the reference to the human rights of knowing who your parents are, this requirement can (again) be seen as deontological.

In conclusion, this requirement can be explained in two ways: the minimal welfare standard, and the reasonable welfare standard. Clarity about which standard ought to be applied is necessary to better understand the requirements of the escape route. These are pressing questions, a judges will potentially have to decide on the access to medical surrogacy procedures in addition to medical professionals. Remarkably, in the final legal provision that the Staatscie has proposed, a judicial check for of 'high risk for significant harm' can not be found. The court may only withhold its approval if the agreement is considered not to be in

the best interest of the child. Why the Staatscie has decided to resort back to a general BIC argument and what exactly is implied are questions that need to be answered. This uncertainty can be identified as a primary problematic aspect of the ethical justification of the Staatscie. If the reasonable welfare standard is implied deontological arguments are also included in the restriction. The possible problematic aspects of this inclusion will be further discussed in the next chapter.

### 7. Criminalization of child selling.

The Staatscie states that children should not be commodified. Any payment for a child should be criminalized. Payments to the surrogate above the amount stipulated in the agreement should be criminalized as well. This criminalization is a state restriction on commercial surrogacy aside from the requirements for the escape route for different rules of legal parentage. This restriction is justified with a reference to the dignity of the child. This is clearly a deontological argument which is used to justify criminal law prohibitions.

In conclusion, of the above mentioned seven restrictions, five are justified with deontological arguments. One restriction, the requirement of a nationality and legal parent, is justified with a consequentialist argument. The high risk for significant harm can be understood as a minimal threshold standard which is to be justified with a consequentialist argument. If the reasonable welfare of the child standard is implied, explicated in the seven core values of parenthood, deontological arguments may have been introduced here as well.

The best interest of the child is therefore explained by the Staatscie as consisting of both consequentialist and deontological arguments. This is contrary to their acclaimed restriction to consequentialist harm arguments. Only harm to the welfare of the future child, which ideally would be scientifically proven, would justify restrictions according to the Staatscie. The inclusion of deontological arguments can be seen as problematic, as it goes beyond the initial intentions of the Staatscie. The inclusion of deontological arguments also implied that the Staatscie will impose their vision on the good life upon the citizens of the Netherlands. This seems to be contrary to what was intended, as the Staatscie explicitly states that ‘ethical considerations could be of importance to personally want or not to want something, but these considerations should therefore not be imposed on everyone (2016, p. 387). The

inclusion of the deontological arguments to justify restrictions is therefore in need of a defense. In the next chapter I will give three arguments why deontological arguments should be given aside from consequentialist arguments. The inclusion of deontological arguments will raise questions about the legitimacy of state imposed deontological norms. I will identify these questions and provide a tentative solution.

And if we accept both deontological and consequentialist arguments to restrict the procreational freedom of our citizens, both arguments face challenges. The proposed deontological arguments will be tested for consistency and coherence. I will also question whether they are sufficiently 'translated' into arguments that make them accessible to others, who may not share the same values. This is necessary as this enables others to evaluate the arguments from within a framework they do understand and accept (Myskja, 2009). This is very important for the adherence to the proposed policy in the future.

# Chapter 2 Critical Analysis

Can the state impose deontological norms upon society through their restrictions on reproduction? By criminalizing baby selling and restricting surrogacy, the Staatscie proposal would have the Dutch State adopt a deontological anti-commodification argument. In addition, deontological norms about the importance of genetic ties between parent and child and accessible knowledge of genetic heritage are also enforced. The initial position of the Staatscie was to limit itself to consequentialist arguments, but we can conclude that the state has interpreted the best interest of the child to include deontological norms with regards to surrogacy. In the next paragraph I will three arguments and one real life example to support why deontological arguments are called for to overcome some of the short comings of a solely consequentialist approach.

## In defense of deontological arguments.

A good example of the necessity of including deontological arguments can be found in defining the welfare of the child standard. The welfare of the child standard is an explanation of what interest children may have. Are these interests solely physical, psychological or focused on options in life, or is there more to life than just being happy and well? Pennings, who has introduced the reasonable welfare of the child standard, has argued for a clear separation of deontological and consequentialist arguments in this standard for medical professionals (1999). The welfare of the child is supposed to be a standard to measure whether there is deficiency in the fulfilment of the needs of the child. This deficiency can, to a large extent be measured objectively, as an emotional, relational behavioural or other problem of the child. If these problems do not occur within certain families or through certain medical procedures, there is no reason to restrict these families or modes of procreation. Pennings is aware these arguments may not convince everybody. Some medical professionals may relate to a moral background theory of the ideal family. Such convictions cannot be overruled by consequentialist arguments, nor find welfare the ultimate justification of said ideal. According to Pennings ‘it is precisely the independence of the ideal family from the happiness of the people involved which explains why scientific information about the welfare of the children cannot decide the issue’(1999, p. 1149). This reflex may also be seen in the proposal by the Staatscie. The scientific evidence about the welfare of children who are raised

by parents without a genetic tie showed no deficiencies in their welfare. These outcomes were however not convincing for the Staatscie to let go of the requirement of at least one genetic tie between the commissioning adults and the future child in surrogacy arrangements. Furthermore, the Staatscie has referred to the human rights claim of children to know their parents. According to Pennings this is a clear deontologist move which cannot be said to protect a person's interest. We have to know what interests a person has before we can create a right. Without the preceding proof of this link, rights may be introduced, which are nothing more than expressions of the ideal of the family. The right to know your genetic parent is, without proof of an interest which can be harmed, unacceptably moralistic according to Pennings.

This brings me to my first argument. The requirement of 'proven' harm to the child's interest is very problematic, with novel procreational arrangements such as commercial surrogacy. We cannot provide evidence of the impact of commercial surrogacy on the welfare of the child without first allowing commercial surrogacy to take place. And if the practice is studied abroad, research about the possible long term impacts will take years before we can know which interests children may have with regards to commercial surrogacy. In addition, how should we use and value the research outcomes? What should be the consequence, for example, when research shows that 10% of all children born through commercial surrogacy have strained relationships with their legal parents? Or 40% express feelings of 'unease' about their mode of conception. Would this be a reason to restrict commercial surrogacy? In other words, research is not going to give us the answers when we need them and may neither be able to provide definitive answers. Consequential arguments may therefore be insufficient when the government has to regulate new reproductive techniques.

A second argument would be related to the question of what to do with the research findings. Can we define the welfare of the child solely with consequential arguments? The consequentialist 'reasonable welfare of the child standard' by Pennings is criticized for including too little. Bolt (2002) has argued it includes too little. She would claim that the exclusion of deontological arguments from the reasonable welfare of the child standard is counterproductive. Deontological opinions will be unavoidable if we want to give an

interpretation of the criterium 'welfare of the child.' To pose the question 'what is welfare?' is to open up the discourse of deontological values as well, and this cannot be ignored. Deontological arguments may also be used to articulate a certain baseline of welfare above the minimum threshold and below a maximum welfare standard. Discussions about moral norms for procreation may also bring along questions about enhancement. Why stop at diminishment for example, and not promote procreational beneficence, as Savulescu would suggest(2001). Cohen rightly identifies this as a baseline problem, as soon as we start setting a baseline of the 'normal child' or 'reasonable welfare', we have to be able to explain why it is normatively significant. Therefore, deontological arguments would be necessary to support a certain baseline, just as Bolt has argued (2002).

To strengthen the point, I will introduce an intuition pump to underline the importance of deontological arguments. In 2018, the Japanese family court has granted a 28 year old Japanese millionaire sole custody over 16 children he created through commercial surrogacy arrangements in Thailand. As he is of considerable wealth, he is able to provide the children with excellent care and a trust fund to optimize their future options in life. He is also the genetic father of the children. He does not have a conviction for child abuse or any other criminal record. Each child will receive care by a nanny and a plan for their upbringing was presented to the court. The court argued that the children may expect happiness and many opportunities from their biological father. Reportedly he wants to have a very large family and plans to continue to have annually twenty more children each year through surrogate mothers (BBC, 2018). His goals is to father up to a 1000 children (Horton, 2018).

If you have any inclination to stop this man from having more children, like I do, it will be difficult to find a consequentialist argument to do so. The happiness and welfare of the children seems to be guaranteed and they are provided with many opportunities. Additional children may expect a similar 'package' in life. Neither the consequentialist harm principle, nor the reasonable welfare standard, will be able to restrict the aspirations of the Japanese businessman, if only 'proven' harm to the children's welfare may be measured. Perhaps we could argue that after about thirty children, the group of (half) siblings would grow too large to create a sense of a family life, or allow the Japanese father to spend time with each child. But aren't these deontological values about what a family should look like and how much

quality time a child should receive from its father? When each child is provided with a personal nanny, as the Japanese businessman does employ, and sufficient resources for a bright future, the individual welfare of the child may be ensured. It will be very difficult to argue that the welfare of the children is at stake if only physical, psychological or emotional deficiencies may count.

It is not the consequences of the reproductive ambition of the Japanese businessman that harm the child. It is the instrumental approach to the creation of children, the fractured family relations of the child with its birth mother, father and nanny, and the objectification and commodificiation of the children that give rise to the moral intuition that this is not in the best interest of the child. The best interest of the child is here to be understood as a deontological argument. Only such an argument could ground restrictions, if for example a Dutch millionaire would develop similar aspirations. This example may function as an intuition pump to support the claim by Bolt that deontological arguments are inevitable when discussing the welfare of the child in medical settings. The example could also function as an intuition pump to analyze which deontological norms may be applicable to the best interest of the child in cases of reproduction.

The last argument in favor of including deontological arguments is targeted at the criticism that consequentialist arguments may prove too much. Langdridge (2000) argues that the consequentialist interpretation of the reasonable welfare of the child is problematic in two ways. First, consequentialist arguments are not able to determine what constitutes the welfare of the child. The principle is simply too indeterminate. Langdridge asks (2000, p.503), 'how can we make a judgement at the very beginning of a child's life, about what level of satisfaction, happiness and so on that they will achieve as they develop into an adult?' Second, the prevention of any harmful consequence may be determined and predicted is problematic too. To prevent a future child from an unavoidable harmful consequence, for example being born to a certain parent or into a certain harmful situation, will in a procreational setting lead to the non-existence of said child. Langdridge therefore proposes to limit ourselves to the minimum threshold principle, only preventing children from lives that are not worth living. If we recall the example of the Japanese Business man, this principle

would not be able to criticise this 'baby factory project.' Deontological arguments may be the way forward to overcome these problems with the consequentialist welfare standard.

In conclusion, the adoption of deontological arguments by the Staatscie may be supported by pointing to shortcomings in the consequentialist approach. However, the adoption of such arguments should be done openly by the Staatscie. It would open a discussion about which deontological argument society values with regard to reproduction and the best interest of the child. It would also raise two questions. One, whether and how deontological arguments may be adopted by the State and used to impose restrictions on citizens. Special attention ought to be given to the criminalization of baby selling. Criminal law is one of the most intrusive instruments of the State which requires a more stringent justification. And second, how these deontological values should be balanced against the freedom of the citizens. These two questions need to be addressed. Providing a full answer to these questions is not the objective of this thesis nor does the scope of this thesis allow for a satisfying answer to both questions. My objective has been to uncover the 'real convictions' of the Staatscie behind their acclaimed consequentialist interpretation of the best interest of the child, and indicate the subsequent problematic aspect of the ethical justification of the Staatscie. As I would also take on the role of the ethicist as a cartographer, I will also give a tentative answer to the first question on how to justify legislation based on a human dignity argument. However, further research is necessary to come to a more conclusive and structured answer.

Can the state use deontological arguments to justify restrictive legislation? The discussion on the (reasonable) welfare of the child standard is mostly focussed on its application by medical professionals individually or on a clinical policy level, not how the State ought to implement such a standard. With the exception of Bolt, who questions whether the State may adopt such a standard, and argues it may not. Only a minimum threshold principle would be appropriate for the State. Langdridge and Pennings may be expected to hold a similar position. They didn't like morality or unproven human rights claims of children to trump procreational freedom of adults by medical professionals, so it is unlikely they would be in favor of State limitations of this kind. We can conclude that the Staatscie has included deontological norms in their policy proposal with regards to surrogacy. By bringing medical ethical issues to the level of State legislation, in family and criminal law, the field of biomedical ethics overlaps with legal theory

which questions the limits of the law. Can the state base its legislation on a principle of violating human dignity? Can it do so with regards to family law and criminal law?

In defense of a prohibition in law of commercial surrogacy on behalf of the child, the Staatscie could refer to a perfectionist harm principle as suggested by Raz(1986) or Dan-Cohen (2002). Without doing sufficient justice to both of their theories, I will give a short outline of how they might argue for the prohibition of commercial surrogacy for children. In short, Raz would replace the question of harm with independence or autonomy and Dan Cohen would replace harm for the dignity principle. How their theories would work can be explained with the 'happy slave' thought experiment. Imagine two persons who enjoy the same level of welfare and have the same degree of choice, but one of them is a slave while the other is not. How could you condemn slavery if you only resort to a harm principle that should be understood as welfare or choice? According to Raz independence, the option to choose, is part and parcel of autonomy and therefore a reference to autonomy might solve this problem. The happy slave is no longer independent and therefore no longer autonomous. Dan-Cohen would argue this is why the harm should be replaced with dignity, as otherwise there is no principle to argue against slavery.

I think this example is particularly appropriate as prohibition of commercial surrogacy will be concerned with a new-born who may be in a somewhat comparable situation as the happy slave, a case of (harmless) indignity. Coveted new-borns may in a sense be comparable to a happy slave as they are at the mercy of their caregivers, but often well taken care of. They are not independent as a consequence of their very limited capacities. This may create difficulties in following the suggestion by Raz, to replace harm for restricted choice or autonomy. What autonomy does a new-born have and in what sense is it impacted through its birth via a commercial surrogate? Perhaps its future life choices are limited as their parents may impose expectations upon the child such as, they have paid 'good money' for the child, they may have higher expectation or expect something in return! It is very questionable whether this will be a convincing way to argue for state restrictions on commercial surrogacy. The proposal by Dan-Cohen to replace harm with human dignity may be the most convincing option. Only this principle may cover the intuition of what is wrong with commercial surrogacy for children sufficiently. Obviously more research is necessary.

The second question concerns the balancing of the deontological values against the right to procreate. The deontological value to have a genetic tie with the commissioning adults, may for example partly be waived according to the Staatscie to allow for same sex couples or infertile heterosexual couples to exercise their right to procreate. An important question that needs to be discussed in this regard is, *when exactly* do adults exercise their procreational rights? When do you as a couple procreate? If a married heterosexual couple needs to use donor semen due to male infertility, do they as a couple exercise their right to procreation, or rather the woman together with the donor? Can you exercise your right to procreate independently or (for now) due to facts of nature always as a couple? When procreational rights need to be balanced against the interests of the child, it is important to know in which cases an adult is actually exercising its right to procreate. For example, when Michael Jackson asked his wife to become pregnant of an embryo made from an anonymously donated egg and sperm, was he exercising his right to procreation? Or perhaps he was exercising his right to found a family, but not necessarily procreate. More clarity about who is exercising his or her right to procreate is necessary. It is also necessary to define who makes the moral choice of bringing a child into this world (Mutcherson, 2012). This moral choice brings along responsibilities towards the resulting children. When assessing the moral claims children may entertain, a common understanding of the moral choices of adults would be helpful. This may for example clarify what moral choice sperm and egg donors are making and whether they may be excused from being responsible for the welfare and upbringing of the child and if so, for what reason. In Chapter three, I will identify two models of parental responsibility in the Staatscie proposal that attempt to answer who may be held morally responsible. The need to have a clear and coherent account of how procreational rights may correspond with parental responsibilities, will further be discussed in this chapter.

Again, further research is necessary to define the deontological arguments that may support restrictions on behalf of the best interest of the child. My aim so far has been to demonstrate the inclusion of deontological arguments in the Staatscie proposal and to demonstrate as a cartographer the necessity and validity of investigating such a route. These deontological arguments however need to be balanced against the procreational rights of adults. I have argued that a more precise definition of who exercises this right and in which situation, would

be helpful. How the state may implement deontological arguments in its restrictive policies is another question that needs further research.

In the next paragraph, I will test the deontological norms as presented by the Staatscie. The values that underlie these deontological arguments may be valid but they need to be 'translated' and introduced in the general debate. Translations are successful when the arguments can be understood and accepted as valid and meaningful by other citizens with a different worldview, irrespective of their agreement with the arguments (Myskja, 2009). This brings me to the question of the 'translation' or clarity of the deontological arguments. In addition, the deontological norms ought to be coherent and consistent (Bolt, 2002). In the next chapter I will test the deontological norms for these three criteria. If deontological norms are brought to the table, which I will support as demonstrated above, this needs to happen in a coherent, consistent and translated manner. Otherwise, it will be difficult for society to accept these norms and adhere to them. I will again not be able to give solutions to the problems, but will be limited to proposing routes to solutions that need to be further researched.

## Deontological Arguments further tested for coherence and clarity.

Deontological arguments have been given for the following moral positions. Non-commodification, which will include the criminalization of commercial surrogacy, surplus payments and genetic relations between child and commissioning adult and accessible information of gestational and genetic origins for the child. The high risk for significant harm requirement will not be discussed.to standard will not be discussed as a deontological argument. If I will discuss each with regards to translative arguments, coherence and consistency and inclusiveness.

### *Anti-Commodification*

The translation of the non-commodification argument is missing in my opinion in the policy proposal. More work needs to be done to give a vocabulary to the society of why the commodification of children is undesirable. A statement that commercial surrogacy violates the dignity of children and will commodify them is not enough. Adherence to the norm will become doubtful without an understandable argument that answers questions about why,

how and when commercial surrogacy commodifies children. If the payment to the surrogate is presented as aimed at the labour of the woman, instead of the transfer of the child, the commodification of the child is not clear. Even if the child was bought, if it is raised in a loving family and not harmed in any way, a violation of the dignity of the child may be too abstract. There is a considerable body of philosophical theory discussing what is wrong with commodification that could be of help. For example, a differentiation between the coercive and corrupting elements of commodification could explain the different features of the argument. Women may be protected from commercial surrogacy because they may be exploited. The reason we may argue against the commodification of children is because it would corrupt their moral worth. This differentiation is important, as it helps to understand why commercial surrogacy will remain to be problematic even when there is a solution to the coercive elements of a surrogacy market (Sandel, 2013). Even if all commercial surrogate mothers would do so voluntarily, there would still remain the moral objection against treating the baby like an object with a price tag. Exchanging children for money corrupts the value of children because money and children belong in different spheres of valuation. This difference in valuation can be based on prevailing societal norms, also called conventionalism. Another reason to value babies different from money is because of the essence of the baby. This is called essentialism (G. Cohen, 2003). The latter may sound like the most promising and most in line with deontological arguments, but if the Staatscie adopts an essentialist anti-commodification position, it becomes problematic to ban commercial surrogacy but to allow altruistic surrogacy. If a child has a unique value that may not be traded for money, why then would you be allowed to give it away? The conventionalist option may allow for a differentiation between commercial and altruistic surrogacy by claiming that commercial surrogacy violates the prevailing social norms that surround childbirth, motherhood and new-borns which altruistic surrogacy may not. Anleu (1990) has criticised this distinction for being based on gender norms that women should only be motivated to have children out of love and affection and not  self-interestedness or financial gain.

In other words, more work needs to be done to come to a coherent position on why commercial surrogacy violates the dignity of the child whereas altruistic surrogacy under certain conditions does not. Luckily the philosophical discourse has already done a lot of work in showing the different routes that may be taken by the Staatscie. It is important that a route

is indicated and explained by the Staatscie on why children are commodified through commercial surrogacy and why this is a problem. This clarification or translation is necessary to at least understand the position in its full extent. It is a missed opportunity that the criminal provision for baby selling has not been drafted. This could have given more substance to the concept of baby selling as a form of commodification and where to draw the line.

The absence of the criminal provision stands also in stark contrast with the extremely detailed reformulation of the family code. A more elaborate standpoint may also have made visible the internal inconsistencies of the policy proposal and its restrictions. The question remains why a child may be given away but not sold. In addition, two more inconsistencies in the anti-commodification argument can be identified.

One, as explained above, the proposal will restrict commercial surrogacy in the Netherlands but condone Dutch citizens accessing this service abroad. Foreign surrogacy arrangements may be recognized by the Dutch state when the foreign authorities perform a judicial check of the voluntariness of the surrogate mother and the requirements of accessible genetic and gestational information and a genetic link between the child and the parent are realised. The judicial check will not cover the financial payments to the surrogate mother and thereby allowing the access to commercial surrogacy arrangements.

Second, the proposal will restrict commercial surrogacy but allow for payment of actual expenses and financial compensation for the pain and labour of the surrogate mother to 500,- EUR a month. This raises several questions. If a transaction of money takes place per month, is it therefore no longer the payment for the child? Why is a monthly compensation of 500 euro not a payment for labor and thus paid surrogacy or commercial surrogacy? Especially as the payment will most likely be taxed according to the Staatscie. More explanation is necessary.

On a last somewhat related point, the justification for the prohibition of commercial brokerage for surrogacy was also explained as preventative for regarding surrogacy as a 'normal service.' In this regard it should be noted that the policy will allow for the personal brokerage of surrogate mothers and commissioning adults, which may also change the public opinion of surrogacy. In addition, in cases where Dutch hospitals and thereby the NVOG guidelines may be evaded, surrogacy for reasons of convenience will become accessible as

there is no judicial check on the medical necessity of surrogacy. Both consequences of the regulation may have an impact on the normalisation of surrogacy, which may have been unforeseen or is otherwise unaccounted for in the proposal.

### *Genetic link*

The ambiguity about the necessity of a genetic link between the child and the commissioning adults is in need of more explanation. How can a genetic link between parent and child be valued and at the same time limited to *at least one* commissioning parent? Which values have been balanced against each other? In which particular situation could it be in the best interest of the child to be brought into an existence with no genetic tie with its parents?

The reference to article 7 of the International Convention on the Rights of the Child (ICRC) brings us to the question of consistency and the meaning of this deontological argument. Article 7 of the ICRC prescribes a right of a child to 'be registered immediately after birth,' 'a name,' 'the right to acquire a nationality' and, 'as far as possible, the right to know and be cared for by his or her parents'. It is unclear why the Staatscie has chosen to introduce all elements as restrictions that should be met for the future child, save for the right 'to be cared for by his or her parents'. The care by the genetic parent has been transposed in an ambivalent requirement of at least 'one genetic tie.' The importance of care by the birth mother, who has been the 'sole caregiver' for the first nine months, is dismissed in the proposal in the case of surrogacy. Why is there no explanation why the gestational mother, or birth mother, is excused of her moral duties towards the child. Especially as a deontological norm can be distinguished in our family law which places great importance on the genetic ties between parents and children and the importance of the birth mother. This brings us back to the earlier question about why exchanging a child for money is wrong, but exchanging the child for gratefulness or out of benevolence is not wrong.

In the policy proposal the moral norm enclosed in the principle of *mater certa semper est*, the birth mother is always the legal and thereby responsible mother, will be given up in cases of altruistic surrogacy. The moral responsibility that comes with gestational motherhood becomes inconsistent as a consequence. Two examples may show how. First, the relinquishment of a child by its birth mother in cases other than surrogacy is a trying and long

procedure. It culminates in a court hearing where the judge will assess whether the birth mother is incapable to care for the child and its upbringing (Article 1:247 paragraph 2 sub a, Dutch Civil Code). It is not possible to refuse responsibilities for the child by claiming there was no intention to become a mother. It is neither a ground for relinquishment if the mother expresses a wish to give the child away. Even though an adoptive family will be ready to take the child, this will not release the birth mother of her responsibilities. This stands in stark contrast with the position of the birth mother in surrogacy cases, who may give her responsibility away to the commissioning adults as a 'gift' and receive compensation for her labour and actual costs. What could justify the difference between the surrogate mother and the relinquishing mother? In both cases they are pregnant of a child they have no intention of raising? The genetic link between the birth mother in a case of relinquishment may be an argument why this is different from cases of altruistic surrogacy where the birth mother is not the genetic mother. Do note that also cases where the surrogate mother is genetically related, she may give away the child in the Staatscie proposal. A possible reason could be that an intentional pregnancy of a non-genetic related child may be considered to create less responsibilities and allow for a transfer of parental responsibilities. Whether intentions may alter deontological obligations towards children is a question which will be further discussed in chapter three.

A second example may problematize this counter argument. In cases of egg donation, the birth mother is not genetically related to the child. She will however be given full responsibility of the child, which in most cases will also be desired, based on the gestational relation of the mother with the child. The genetic mother of the child will not be able to break into this legal tie between mother and child, nor can she be held responsible for the child as she has a protected status as a donor. The gestational relationship trumps in this case the genetic link. One exception to this rule is provided in the Lesbian Motherhood Act (2014). In cases of lesbian egg sharing construction, the genetic mother, married or in a relationship with the gestational mother, may request a legal tie with the child in court if necessary in cases of a conflict with the birthmother. However, this will allow the genetic mother to also become the mother of the child, the birth mother will remain the mother also.

These examples may show a reflex of the law to uphold the moral duty of the birth mother towards her child but make adjustments when desired by adults and in their interest. However, if the best interest of the child includes a deontological argument that places a certain value on the relationship between the child and its gestational mother, we need to apply this deontological value consistently from the perspective of children. How will the difference in the agreements of adults change the moral claims the child may have towards the persons that bring it into existence, in this case the birth mother? There is a need to come to a consistent understanding of these values to prevent different sub classes of children to emerge with every new reproductive technique or arrangement.

### *Right to know*

The last requirement is the access to information on genetic and gestational origins. The Staatscie has contemplated to suggest the adoption of the right to know your origins in the Dutch Constitution but decided against it because it is already binding via international law. The support for the moral right to know your origins for children born through surrogacy is coherent with the Dutch approach to donor conceived children. The existing state registration of genetic heritage for donor conceived children will be expanded to include also children born through surrogacy. Explanation is given of the importance of this knowledge for the narrative identity of the child. Evidence that may support this claim is however lacking.

Two more points should be made with regards to the right to know. The right to know your origins in article 7 of the ICRC is tied to the right to be cared for. Both are made conditional to the element 'as far as possible.' Remarkably, the right to know has become almost an unconditional fundamental right to know your genetic parent, whereas the right to be cared for by your genetic parents has been left out of the picture. This also begs the question whether the registration of a genetic parent is a true reflection of what the right was meant to preserve and protect. How can this be justified? To what extent is the interest of the child replaced with the interest of adults who wish to procreate and raise children according to their wishes? Second, the right to claim a genetic parent as a legal parent and thereby demand (financial) assistance, a general right for naturally conceived children, has been excluded for donor conceived children. The same exclusion will apply to surrogacy children whose birth mother will also be exempt from a claim by the child. Again, how this may be in

the best interest of the child begs an explanation that still needs to be given. It rather creates an inequality between different groups of children.

### *Conclusion*

In conclusion, all deontological arguments are in need of more 'translation' and a more coherent and consistent application. The deontological values of non-commodification alongside the option of altruistic surrogacy, where the gestational mother may give away her child, raises questions about the parental responsibility of gestational mothers. It cannot be sold, but may be given away? This is further contrasted with the current legislation on the relinquishment of a child which prohibits gestational mothers to give away their parental responsibility. Similar differentiations can be distinguished in the approach to genetic parentage. A genetic tie between parent and child is in many cases of reproduction a reason to impose parental responsibility upon the parent. In surrogacy cases this is also set as a requirement but a half-hearted one. It is either limited or reduced to an parental responsibility to be known.

This analysis brings me to the discussion of the underlying models of parental responsibility. Conflicts between the models that either support surrogacy or 'traditional' procreation may explain why the deontological arguments are applied incoherent and inconsistently, which will be discussed in the next chapter.

# Chapter 3 Missing coherent theory on parental responsibility

In this chapter I will introduce two models of parental responsibility, a geneticism model and a pluralistic model, that can be distinguished in the proposal by the Staatscie. I will explain how these models have either a child-centred or a parent-centred focus. Both models with their respective focus are already applied in our current Family Law Code and lead to inconsistencies. By introducing an incomplete pluralistic model for surrogacy and other new family forms, the Staatscie further problematizes the coherent application of parental responsibility. I will describe the pluralistic account and indicate the problems inherent with the pluralistic model in general and specifically the account proposed by the Staatscie. I will demonstrate how the (incomplete) parent centred pluralistic account makes it impossible to coherently apply deontological norms regarding children's rights to parental care and the corresponding parental obligation.

## Introducing the models of Parental Responsibility

Parental responsibility can be explained as the responsibility for raising and nurturing a child. General explanations of what nurturing would entail guidance toward adulthood and attending to the child's needs. The seven core values of parenthood can also be a description of what parental responsibility ought to include.

But, whose duty is it to take on this responsibility? This question may arise in unwanted pregnancies. Alternatively, in cases of surrogacy the question is rather who is allowed, or who has the right, to take on this responsibility? Several models may be used to answer these questions. Models can be child-centred, where parental rights follow from parental responsibilities to children (Blustein, 1982). In parent-centred models, parental rights, not parental obligations, are fundamental, because the parents' interests are the basis for the rights (Brighouse & Swift, 2006; Brighouse & Swift, 2014)

Two models can be identified in our current Family Law Code and the proposal by the Staatscie, the geneticism model and the pluralistic model. A geneticism model can be explained as a model that assigns parental responsibility upon the person whose genetic material is transferred to create another being in the new being's parent. According to Weinstein it has been argued that our social and legal practices implicitly endorse the genetic

criterion of parental responsibility (Weinberg, 2008). The geneticism model of parental responsibility in the Dutch Family Law Code is focused on assigning the duty, or obligation, to parent based on the objective criterion of a genetic tie. Parental rights follow from an obligation towards a child. This can be identified as a child-centred approach where children may claim a right to a certain parent.

An example of how the geneticism model is represented in the current Dutch Family Law Code is the option of assigning parental responsibility to the genetic father. If the father is not willing to accept this parental responsibility, the court may make him responsible, provided a DNA test is given to prove his genetic tie with the child (Article 1:207 Dutch Civil Code (Family Law)). Alternatively, a non-genetic father may deny his paternity of the child and be released of his parental responsibility (Article 1:200 Dutch Civil Code). The mother and the child itself may also deny paternity or enforce paternal responsibility based on DNA evidence of a genetic tie. However, a genetic or gestational parent may never deny nor be denied parental responsibilities.

It is important to note that the geneticism model focuses on the *initial* attribution of parental responsibility. The intention and dedication to care and love for a child are welcome and positive reasons to assign parental responsibility to an adult, if the child is in need of an additional or different parent. However, love and intentions can be a shaky foundation for a general model of initial parental responsibility if many children have no one willing or able to take care of them when they arrive into this world. Therefore, a geneticism model may give a solid foundation to build initial claims on.

In a pluralistic account, a different approach is followed. Initial claims to a child may be based on the various causal elements that contribute to the creation of a child. Neither intentions, gestation or genetic ties are necessary for parental responsibility but each is sufficient because each can often be 'causally linked in the right sort of way to the creation of children' (Bayne & Kolers, 2003). This can be an advantage for adults desiring to assign parental responsibility to adults other than the genetic parents. It can also be used to facilitate a *right* for certain adults to claim parental responsibility. The pluralistic model allows for a parent-centred focus, where parental rights create parental obligations.

The parent-centred focus can also create problems. In a pluralistic account, parental responsibility is spread too broadly according to Weinberg (2008, p. 170). The pluralistic account is particularly problematic as they do not prioritize one criterion for parental rights over another. If intentional, gestational and genetic parents all may apply for parental responsibility, some children may end up with no-one, while others will be fought over. Compare, for example, the case of baby Desire, where the surrogate mother, the egg donor and the intended adults want to take the baby home. In the case of baby Unwanted, nobody is willing to take on its care for the next eighteen years. Without a prioritization of who gets to take baby Desire and who must take on baby unwanted, the pluralistic account may create problems.

A parent rights approach can also reshape our concept of procreational rights. Recall in this regard the question on procreational rights, and which moral obligations may follow from the exercise of such rights. A focus on parental rights will necessarily also question which obligations may be claimed because of procreational acts. The genetic parent of a child born through surrogacy may claim a right to parental responsibility as he or she has exercised his or her procreational rights by contributing essential for the child. If we remember the case of Michael Jackson, the question may be asked whether he has exercised his procreational rights and therefore may claim parental responsibilities. Is having the intention of having a child being created, the same as exercising the right to procreate? As a pluralist account also holds a space for parental rights for the (solely) intentional parent who may claim parental obligations, our understanding of procreational rights may change. Alternatively, parental rights may be disconnected from procreational rights and replaced with for example intellectual property rights. Roosevelt (1998) argues for such a change to prevent 'chaos to the law.' Whether procreational rights may rightly be replaced with intellectual property is a question I will leave for another time. However, I recognise the need for a coherent concept of what may ground parental rights, for the benefit of the coherence of the law and both adults and children. A pluralistic model would benefit from such an explanation as well to be able to prioritize among parental rights.

## Current law

The current Dutch Family Law code ‘solves’ the problem of baby Unwanted and baby Desired by combining a general geneticism model of parental obligations with a pluralistic model for parental responsibility in cases of assisted reproduction and new family formations. Recall the arrangement to tie genetic fathers to naturally conceived and possibly unwanted children. For desired children born through donor conception, a pluralist account shifts the focus from children’s rights to parental rights. In this setting, the genetic parent is excused from his or her parental obligations and the birth mother is given sole parental responsibility, or joint parental responsibility with another intentional parent. If the conception was realized through artificial insemination as opposed to ‘natural’ conception, the child could no longer claim parental care of its genetic parent (1:207 sub 1 Dutch Civil Code). Parental rights overrule children rights in this situation.

The co-existence of both the child-centred geneticism model and the parent-focused pluralist account has led to two problems. First, the coherent application of children’s rights and the mirroring obligation of parental care is compromised. Parental rights limit parental obligations in this problem and children may end up with less, or no parents. Children may object to this. For example, the prohibiting of donor conceived children to claim a genetic parent. Whether this prohibition is justified will be brought to court end of 2018 (Hotse Smit, 2017). A group of donor conceived persons will ask the Dutch court to adjudicate whether the legal protection of a donor overrules their right to claim parental responsibility. In the future similar procedures by children conceived through surrogacy may be possible.
And second, as a consequence of a pluralist account without a clear prioritisation conflict over parental responsibility have already materialised. Cases about adults trying to claim baby Desire, or refuse parental responsibility for baby Unwanted, have both been brought to the Dutch courts (Rechtbank 's-gravenhage, 2011; Rechtbank den haag, 2015). The focus on parental rights has led to conflicts.

## Staatscie proposal for future law

As the Staatscie proposal envisages to regulate other ‘new’ family formations such as surrogacy and multiple parentage, they also resort to the pluralistic account. The Dutch

Family Code is pushed further towards a pluralist parents' rights account with far fetching reorganization of the law.

One of the main recommendations by the Staatscie reads as follows 'intentional and genetic parenthood should be on equal footing to assign parental responsibility to a person'. This account is further explained to include several grounds for parental responsibility, such as being the birth mother, the married partner of the birth mother, intentional adults, the consenting partner of a woman who undergoes donor insemination, and the adult who is responsible for the conception of the child through physical intercourse (2016, p.400). The Staatscie has not been able to give a clear prioritization among the different grounds aside from two distinctions. One, an intentional genetic parent ought to take precedence over solely a genetic parent. And second, a genetic (I assume non-intentional) and an intentional parent ought to be on equal footing.
Without a clear further prioritization between the various grounds, Weinberg's criticism of pluralistic accounts for either pointing to many or too few adults, will apply. The two problems resulting from the focus on parental rights instead of parental obligations, have materialised here as well.

Parental rights will be used to deny parental obligations. As a result, children may end up with less parents. For surrogate mothers who do not have the intention to parent the child a relief from parental responsibility will become available in the escape route. In addition, a genetic father may now be excused from parental responsibility. If the father repeatedly declares to not have had the intention to impregnate the mother, and does not have the intention to become the legal parent of the child he may be excused from parental responsibility. His parental obligation may be reduced to a registration in the State register (ROG). This is a change from the former legislation, based on the geneticism model, where the genetic parent had to accept parental responsibility. Baby Unwanted may now potentially have one parent less.

Conflicts may arise from this approach as the Staatscie keeps the geneticism model at hand for all other cases of procreation. Two norms regarding birth mothers will co-exist. The birth mother will either be the initially responsible parent, or solely the carrier of a child she has no

responsibility towards after birth. This may create conflicts in cases where procreational arrangements go wrong and parties have different understandings of the agreement or have a change of heart. The Staatscie proposal will regulate these procedures to the extent that these problems will eventually be brought to a court hearing. However, how the judge should value the relationship of the gestational mother versus the intentional parent(s) remains unanswered. What will be in the best interest of the child?

This example brings us back to the discussion on the interpretation of the best interest of the child by the Staatscie. I will argue that the combination of both models with their respective focus on parental and children's rights has led to the ambivalent understanding of the deontological obligation of parental care. Let me unpack that last statement.
I have identified several deontological arguments in the Staatscie proposal to influence and restrict reproduction in the best interest of the child. Thereby, the Staatscie has given their understanding of the deontological value of parental care which children are entitled to, further supported by the Staatscie 's references to their human rights. Additional deontological values can be found in our Family Law Code which the Staatscie has left untouched.

If we look at the total package of parental responsibility, we can deduce the following parental obligation. Genetic parents either have a full parental responsibility (based on the rights of a child to be raised by its genetic parent) or the deontological obligation to parent may be reduced to an obligation to be known through a registration. For birth mothers, parental responsibility follows automatically from giving birth to the child. This embodied act creates an obligation as well to not sell the resulting child. However, under the single exception of surrogate motherhood, the parental obligation may be transferred to another adult. A deontological duty to be known to the resulting child applies to all birth mothers.

This analysis makes visible how the Staatscie tries to accommodate both a child-centred focus and a parent-centred focus of parental responsibility. Therefore, the deontological duty of parental care has become incoherent. Whereas under a child-centred focus, parental obligation is attributed in full to a person and can't be sold, the parent-focused pluralistic model allows for the transfer or the reduction of the parental obligation. For uncertain

reasons foreign birth mothers may sell their initial parental responsibility. If we understand parental responsibility as a deontological obligation to care, it is questionable whether these duties may be transferred or reduced. And if so, for which reasons?

According to Weinberg, parental responsibilities are a relational obligation, and entails standing in an emotional relation towards one another (2008, p.174). The child requires the love and care of the parent with the (initial) parental responsibility. To replace it with the parental care and love of another adult is not to fulfill the parental duty. Surrogate mothers may justify their actions by explaining their wish to help another couple become parents. It is questionable whether a wish to make somebody else happy is a justification for not fulfilling an obligation. The fact that the transfer gave the surrogate mother a feeling of fulfillment and happiness can not be seen as valid justification for a transfer of parental obligations. The reduction of the parental obligation to 'being known' is questionable in a similar way. If parental care is a deontological obligation to love and care for a child, reducing it to 'being known' to the child, may be a sorry excuse for an much greater obligation.

A comprehensive ethical justification for the changes in the deontological obligations of genetic and gestational parents is missing in the proposal. This is particularly intriguing as the Staatscie originally claimed a best interest of the child focus which makes it even more problematic when parental rights overrule children's rights. A possible solution would be a more explicit recognition that the proposal is based on a dual-interest view, grounding rights in the interest of both parents and children. If interests, in this dual interest view, are understood to include deontological interests, an explanation must be given where and why children's interest are subservient to parent's interest. Whether this is possible without compromising the coherence of any deontological obligation of parental care is uncertain. Alternatively, the government adopts a truly harm based approach and abstains from using deontological argument to support state restrictions. Only scientifically proven harm may limit reproductive interests of parents when in conflict with children's interest. Lastly, the interest of children may be recognised as a primary consideration and a proposal will be built that places the child's interests over the interests of parents. As 'it takes a village to raise a child', additional parents could be welcomed in such a model, however, adults may not be excused from parental responsibility. The multiple parent proposal by the Staatscie could

provide fruitful ground for such a model. Unfortunately, this model is only proposed for voluntary three to four parent arrangements where the genetic couple and their partner(s) are willing to come to such an arrangement. Further research on how this model could be used to organise donor conception and surrogacy arrangements would be required.

## Conclusion

In this thesis I have analyzed the policy proposal for surrogacy in the Netherlands by the Staatscie. My goals was to theorize 'from the inside out' and understand how they explained the moral principle of 'the best interest of the child.' This moral principle was presented by the Staatscie as their primary consideration in and the sole justification for the restrictions proposed. The Staatscie has explained the best interest of the child as a consequential harm principle. Only harm to the future child ought to justify restrictions.

I have identified seven restrictions that have been formulated with a best interest of the child justification. Five of these restrictions have been found to be supported by deontological instead of consequentialist arguments. The right to know your genetic parent, the right to be cared for by a genetic parent, the right not to be sold as a child and a prohibition of both commercial surrogacy and commercial brokerage for surrogacy are all justified with a deontological argument. The restriction to prohibit reproduction where there might be a 'high risk for significant harm' was identified as unclear. Either a welfare of the child check, which may include deontological arguments, or a minimum welfare threshold can be implied. A first problematic aspect of the ethical justification of the Staatscie is therefore the undecided judicial check for surrogacy agreements. Only one requirement, the check for a nationality and legal parentage for the future child may be called consequential as it is justified with reference to the harm and uncertainty the child may face without a nationality or a legal tie with the commissioning adult.

The investigation of the restrictions has revealed the best interest of the child to include both deontological and consequentialist arguments. I have argued that deontological arguments should be included as they are inevitable part of our moral conception of reproduction, the welfare of the future child and the parental obligations. We cannot do without deontological arguments, also shown in the policy proposal by the Staatscie.
The inclusion of the deontological arguments raises the question whether the State may impose these values upon the Dutch citizens. A justification for the inclusion of deontological arguments, need to be developed, for example by adopting a perfectionist harm theory.

However, if deontological arguments are included, they should be included coherent, consistent and 'translated'. The justifications and their restrictions have been critically analysed. Multiple inconsistencies have been identified in the application of the deontological norms. The prohibition of commercial surrogacy is limited to surrogacy arrangements in the Netherlands but allowed abroad. Uncertainty remains also about the difference between commercial and altruistic surrogacy if monthly payments are allowed aside from monetary compensation for actual costs.

The requirement of a genetic tie between the future child and commissioning adult varies from 'at least one' to none in exceptional circumstances. Furthermore, the right to a genetic tie is alternatively reduced to a right to know the genetic parent through a registration in a state register (ROG). Article 7 of the ICRC prescribes a right of a child to 'be registered immediately after birth,' 'a name,' 'the right to acquire a nationality' and, 'as far as possible, the right to know and be cared for by his or her parents'. It is unclear why the Staatscie has chosen to focus only on the first part of this right and make the right to know your genetic parent almost unconditional, and the right to be cared for conditional. The parental obligations for birth mothers are upheld for all women except for surrogate mothers. More explanation is necessary to justify the differentiation between the expectations a child may harbour towards its birth mother in cases of surrogacy and all other cases.

Lastly, an explanation for the incoherent application of the deontological argument is sought in the underlying models of parental responsibility. A child-centred geneticism model is identified alongside a parent-centred pluralist account. Whereas the child centred geneticism model is necessary to ensure parental care for unwanted babies, the pluralist model may allow for flexibility in cases of desired babies. If only a pluralist account would be applied, unwanted babies may remain unparented. In a geneticism account, adults may not be able to claim their desired babies.

As the Staatscie tries to accommodate both a child-centred focus and a parent-centred focus to have the best of both worlds, the deontological duty of parental care has become incoherent. The unprioritized pluralist model will shift the focus to parent's interest and can overrule the child's interests for parental care, as laid down in the Convention on the Rights of the Child. This may explain why despite an acclaimed 'best interest of the child' focus, the

child interest not to be sold and be cared for by a genetic parent, have been applied inconsistently where parent's rights have been given priority by the Staatscie. It is questionable whether deontological values can be transferred, reduced or ignored.

A possible solution for the ethical justification of the Staatscie proposal would be a more explicit recognition that the proposal is based on a dual-interest model, when both the best interest of the child and the parent are included. Clear indications of how both potentially competing interests are weighted, would contribute to a more coherent justification. Another solution would be for the Staatscie to let go of deontological arguments and limit itself to restrictions that prevent scientifically proven harm to future children. Alternatively, the deontological arguments could be given center stage and the proposal ought to be brought in line to coherently respect the rights of children to secure the parental care of specific parents and welcome the care other adults want to provide.

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