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Does the involvement of third parties in surrogacy agreements raise the risk of exploitation of prospective surrogates and prospective parent(s)?

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KEY WORDS

Commercial surrogacy

Reproductive autonomy

Commissioning parent

Surrogate mother

Surrogate motherhood agreement

Assisted reproduction

Reproductive rights

Intermediaries

Third parties

For- profit agencies

Altruistic surrogacy

Fertility specialist

Egg donor clinics



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## Abstract

Surrogacy on many occasions is referred to a million-dollar industry. Just like many countries, South Africa has prohibited commercial surrogacy, thus South Africa only permits altruistic surrogacy. The prohibition has consequences for third parties such as surrogacy agencies and surrogacy facilitators, as their right to occupation freedom which is guaranteed by the Constitution of the Republic of South Africa, is limited. No right is absolute, any right can be limited if it can be proved that it is in the best interest of the public. The prohibition on commercial surrogacy is argued to be in the best interest of the public as it can lead to the exploitation of women and the commodification of children. However, it is argued in this paper that women are not exploited by commercial surrogacy if they have consented to the process voluntarily and they were fully informed about the entirety of the procedure before giving consent. Commodification and the possibility that it may be construed as the sale of children is another big opposition to commercial surrogacy. The author aims to illustrate that the compensation that the surrogate mother received would not be for the child but for service that she has provided. California in the USA does not permit the practice of partial surrogacy. If South Africa takes the same stance - it can thus be concluded that Commercial surrogacy would not be considered the sale of a child, as the child would not be genetically related to the surrogate mother.

In South Africa, the prohibition benefits a specific category of third parties. The parties that are exempted from the prohibition, is lawyers, egg donor clinics as well as fertility clinics. These third parties are undoubtedly a necessity in the surrogacy process. However, there are no mandatory regulations on these egg donor clinics and fertility specialist clinics, they are given guidelines, but there is no consequence for failure to adhere to those guidelines. These clinics can fix their own prices and provides service to commissioning parents and possible donors without fully informing them about the consequences of their decisions. The lack of regulation over these parties creates the risk of self- regulation which could lead to the exploitation of surrogate mothers and commissioning parents.

## CHAPTER ONE: INTRODUCTION

### 1.1. Development of Surrogacy Laws

Surrogacy is defined as a method of assisted reproduction whereby a woman agrees to bear a child for a couple or person, known as the commissioning parent(s), who are unable to bear a child. The term “surrogate” is defined as "substitute"<sup>1</sup> and- therefore it could be understood that the woman bearing the child agrees to act as a substitute mother.<sup>2</sup>

Surrogacy has its origins in biblical times<sup>3</sup> but was recognised by the legislature for the first time with the establishment of the Children’s Act 38 of 2005<sup>4</sup>. The first publicized case of surrogacy was in 1987 where a maternal grandmother gave birth to triplets.<sup>5</sup> The daughter of Karen Ferreira-Jorge was unable to bear children; as a result, her ova were implanted into her mother, who was artificially inseminated by her son in law.<sup>6</sup> At the time that Ferreira-Jorge triplets were born, there was no specific legislation regulating surrogacy.<sup>7</sup> The 1986 Regulations Regarding the Artificial Insemination of Persons and Related Matters (in terms of the Human Tissue Act 65 of 1983)<sup>8</sup> and the Children's Status Act 82 of 1987<sup>9</sup> dealt with artificial fertilization: neither, however, dealt with the situation where a child was born from surrogacy.<sup>10</sup>

Chapter 19 of the Children’s Act was the first South African legislation to specifically acknowledge surrogacy as a form of assisted reproduction. Person(s) unable to reproduce due to infertility, commonly approach egg donation clinics, fertilisation specialists or surrogacy

<sup>1</sup>Merriam-webster, ‘Surrogate’ <https://www.merriam-webster.com/dictionary/surrogate> [27 January 2018]

<sup>2</sup> Pretorius D ‘Surrogate Motherhood: A Worldwide View of the Issues’ (1994) [page](#)

<sup>3</sup> Genesis Chapter 16, the biblical story of Abraham, Sarai and Hagar. Sarai was unable to bear a child for Abraham thus she sent him unto her servant Hagar who bared Abraham’s child. This is similar to what is known as traditional surrogacy.

<sup>4</sup>Children’s Act 38 of 2005. (hereinafter referred to as the Children’s Act)

<sup>5</sup> Battersby J. D, ‘South Africa Woman Gives Birth to 3 Grandchildren, and History’

<http://www.nytimes.com/1987/10/02/world/south-africa-woman-gives-birth-to-3-grandchildren-and-history.html> [-Accessed on the 27 January 2017]

<sup>6</sup> Tracey-Leigh Wessels & Associates website, <http://www.traceyleighwessels.com/surrogacy/> [-Accessed on 08 February 2018]

<sup>7</sup> Tracey-Leigh Wessels & Associates website, <http://www.traceyleighwessels.com/surrogacy/> [-Accessed on 08 February 2018]

<sup>8</sup> The regulations regarding to the artificial insemination of persons and related matters, issued in terms of the Human Tissue Act 65 of 1983.

<sup>9</sup> Children's Status Act 82 of 1987 (hereafter referred to as the Children’s Status Act)

<sup>10</sup> Tracey-Leigh Wessels & Associates website, <http://www.traceyleighwessels.com/surrogacy/> [-Accessed on 08 February 2018]

agents to find what their next steps would be in order to achieve their desire to bear a child.<sup>11</sup> At these agencies person(s) are informed about the option of surrogacy and what it entails. Once the person(s) has decided that surrogacy is the path they are going to pursue, certain requirements must be met for the surrogate motherhood agreement to be valid and confirmed by an order of the court. In the Children's Act section 301 is the requirement that explicitly prohibits commercial surrogacy. This section provides that '... no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind.'<sup>12</sup> However, there are exceptions to section 301 which allows payments to be made in certain circumstances.<sup>13</sup> This means that any surrogacy motherhood agreement entered into has to be done for altruistic and not commercial reasons. This section acts as an obstacle to commissioning parents wanting to use surrogacy as a method of reproduction as finding a fit and capable surrogate mother prepared to provide this service for free is not an easy task.<sup>14</sup> Couples without any willing relative to act as a surrogate approach either egg donation clinics or surrogacy agents to enquire whether they know of a suitable woman willing to be their surrogate. Agencies that introduce a surrogate to prospective commissioning parents publicise that there is 'no waiting period' for a potential surrogate.<sup>15</sup> This publication of no waiting period is questionable as it has been stated above that it is challenging to find a woman who would volunteer to be a surrogate if no fee was offered for her services. It raises the question as to whether these agencies are compensating women for their services and charging the commissioning parents a fee that comprises of the introduction fee to circumvent the compensation prohibition.

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<sup>11</sup> Nicholson C and Bauling A, 'Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?' (2013)28 *De Jure* 510

<sup>12</sup> Section 301 (1) of Children's Act 38 of 2005.

<sup>13</sup> Section 301 (2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for -

- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement
- (b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or
- (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

(3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefor.

<sup>14</sup> Watson J 'Growing a baby for sale or merely renting a womb: Should surrogate mothers be compensated for their services?' (2007) *Whittier Journal of Child and Family Advocacy* 529

<sup>15</sup> 'FAQ for Intending Parents Via Surrogacy'

<http://baby2mom.boltcms.com/Page/11617/SurrogacyProgram#%2FPAGE%2F11838%2FFAQ-for-Intending-Parents-Via-Surrogacy> (accessed 03 March 2018)

Certain jurisdictions forbid surrogacy altogether, viewing it as exploitative and commodifying human reproduction. Other jurisdictions, however, view surrogacy as a means of assisting an infertile person(s) to have children, fuelling economic opportunity, and to give women wishing to be surrogates a degree of autonomy.<sup>16</sup> Chapter 19 does not fully encompass the difficulty of finding a non-relative woman who would bear a child for altruistic reasons. This research will argue that commercial surrogacy does not amount to the commodification of children and women thus for-profit surrogate agencies and intermediaries should be allowed to charge a fee for introducing a surrogate mother to prospective commissioning parents and/or any other service that is relevant but does not fall within the exceptions of section 301. To ensure that commercial surrogacy does not amount to exploitation of the surrogate mother and prospective parents, there must be effective regulation of commercial surrogacy. Finally, this research will further contend that for-profit surrogate agencies and intermediaries in surrogate motherhood agreements should be able to assist prospective commissioning parents with any issues relating to surrogacy with reasonable compensation if there is stringent regulation, transparency, and accountability in place.

### 1.1. Aim of research

Chapter 19 prohibits any form of compensation; aside from the fact that commissioning parents may compensate the surrogate for reasonable expenses. This research will argue that the limitation on commercial surrogacy amounts to an unreasonable and unjustifiable limitation on surrogate mothers and third-party rights. This research will further illustrate what effect the prohibition on commercial surrogacy has on third parties and/or intermediaries. It will further debate whether this prohibition opens the gate for these parties to circumvent the compensation prohibition, which could lead to the exploitation of surrogate and commissioning parents.

Scholars argue that commercial surrogacy should be prohibited on the basis that commercial surrogacy results in exploitation of the surrogate mother and child.<sup>17</sup> However, this research aims to illustrate that commercial surrogacy does not inevitably result in the exploitation of women and children if regulated efficiently. With reference to Israel's law which effectively regulates commercial surrogacy, this research will argue that if South Africa implemented

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<sup>16</sup> Storrow J.F 'New Thinking on Commercial Surrogacy' (2013) 88 *Indiana Law Journal* 1281

<sup>17</sup> Hutton D 'Evaluation of the surrogacy debate between Anderson and Arneson' available at [http://www.academia.edu/1491471/Evaluation\\_of\\_the\\_surrogacy\\_debate\\_between\\_Anderson\\_and\\_Arneson](http://www.academia.edu/1491471/Evaluation_of_the_surrogacy_debate_between_Anderson_and_Arneson) (accessed 04 March 2017)

rigorous regulations and guidelines, commercial surrogacy could be a viable option. This would alleviate any financial burden the surrogate mother might encounter during the pregnancy, which would be beneficial to the South African economy as well as the surrogate mother. The ban on commercial surrogacy was implemented to protect the commissioning parents and the potential surrogate mother. However, the prohibition on commercial surrogacy doesn't consider that parties and agencies can enter into private agreements which could lead to abuse of both commissioning parents and potential surrogates. Therefore, this research aims to show if South Africa implemented stringent regulation of commercial surrogacy, it would allow third parties and/or intermediaries to be able to normalise the procedure, inform the parties regarding the procedures and for all intents and purpose fix prices.<sup>18</sup>

In *Ex Parte WH and Others* [2011], 4 All SA 630 (GNP) (here after referred to as the WH case) the court addressed the issues relating to an egg donation clinic that facilitated the contact between a surrogate and prospective commissioning parent(s).<sup>19</sup> The court held that when an agency is involved there should be additional details regarding the role of the agency, as well as any payments made by the prospective parent(s) to the agency.<sup>20</sup> The secondary aim of this research is to further elaborate on these guidelines provided by the court in the *WH* case thus illustrating that if commercial surrogacy is regulated effectively, it would, in turn, mean that the role of agencies is regulated too. This would significantly reduce the possibility of exploitation of a potential surrogate as well as potential commissioning parent(s).

## 1.2. Significance of the research

Scholars have examined how South African courts interpreted the requirement of a valid surrogacy agreement and have argued that the law regulating surrogacy is in need of a change.<sup>21</sup> According to a study published in 2012, approximately more than 48 million couples worldwide have some form of infertility<sup>22</sup> thus illustrating the significance of this research. This staggering number of infertile couples would mean that many of these couples are pursuing surrogacy<sup>23</sup> as a viable option to fulfil their desire to have a child. As stated above,

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<sup>18</sup> Carbone J. & Madeira J. L., 'The Role of Agency: Compensated Surrogacy and The Institutionalization of Assisted Reproduction Practices' (2015)90:7 *Washington Law Review Online*

<sup>19</sup> Ex parte: WH and Others [2011] 4 All SA 630 (GNP) Para 23

<sup>20</sup> Ex parte: WH and Others [2011] 4 All SA 630 (GNP) Para 66

<sup>21</sup> Nicholson C and Bauling A, 'Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?' (2013) 28 *De Jure*

<sup>22</sup> Mascarenhas MN, Flaxman SR, Boerma T, Vanderpoel S & Stevens GA 'National, Regional, and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys' (2012) *PLoS Med*

<sup>23</sup> Goldfarb J. M, Austin C & Peskin B et al, 'Fifteen Years Experience with an in-vitro Fertilization Surrogate Gestational Pregnancy Programme' (2000) 15:5 *Human Reproduction*

it is extremely difficult to find a non- relative woman willing to act as a surrogate mother. Thus, having third parties or intermediaries being able to assist in connecting potential surrogates with prospective parent(s) alleviates the difficulty in finding a surrogate. This research will indicate detailed insight on the importance of ensuring that these agencies involvement are regulated which, would safeguard the surrogate parents as well as commissioning parents from any abuse or exploitation. Contributing to the development of South Africa's surrogacy laws, this research will add to current literature, providing recommendations which would further supplement the call for legal change.

### 1.3. Research question

Before the High Court can pronounce on the validity of a surrogate motherhood agreement, certain requirements need to be met. However, section 295 (c) (v)<sup>24</sup> and section 301 explicitly prohibits commercial surrogacy, which acts as a hindrance to the prospective parent(s), prospective surrogates and thus affects third party involvement. The Universal Declaration of Human Rights, Article 16 (1) provides that '[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to *found a family*....'<sup>25</sup> However, this limitation restricts the person(s) from fully exercising their ability to start a family. Third party involvement could assist commissioning parents in fulfilling their desire to start a family by providing them with a suitable surrogate. The question which springs to mind is whether the involvement of third parties in surrogacy agreements raises the risk of exploitation of prospective surrogates and prospective parent(s)?

In order to fully answer this research question, other sub-questions to be addressed within this research, namely:

- Would the regulation of third-party agencies, such as surrogacy facilitators involvement limit exploitation of surrogate mothers and intended parents?
- Do third parties who are exempted from s 301 of the Children's Act benefit in surrogate agreements?
- What is the feasibility of regulating commercial surrogacy and third-parties involvement in surrogate agreements?

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<sup>24</sup> The Children's Act 38 of 2005, section 295 (c) (v)

<sup>25</sup> The Universal Declaration of Human Rights, Article 16(1)

This thesis will adopt the desktop research methodology involving the reading and analysing of primary sources such as the Children's Act, international conventions, and case law. Secondary sources such as books, journal articles, and the internet sources will also be relied upon. This research will investigate jurisdictions that allow commercial surrogacy such as California, India, Ukraine, and Israel. The purpose of this international perspective is to determine if they have any regulations in place dealing with third parties.

#### 1.4. Chapter outline

##### Chapter one: Introduction

Chapter one is the introduction to this research; the significance and the aim of the research. Chapter one will also identify the research question and supply an overview of upcoming chapters.

##### Chapter two: Commercial Surrogacy versus Altruistic surrogacy

This chapter will expound on the difference between altruistic and commercial surrogacy. This research shall debate whether commercial surrogate motherhood contracts involve the commodification of children and woman. In addition to this, it will further illustrate how this prohibition of commercial surrogacy affects third party right to freedom of occupation.

##### Chapter three: The role of third parties in surrogacy agreements

The focus of this chapter will be on the role of third parties in a surrogacy agreement. It will further elaborate on the importance and beneficial role that surrogacy agencies would play if the prohibition on commercial surrogacy was lifted. Chapter three will then continue to address the issue of how third parties exempted from the prohibition could take advantage of the prospective parent(s) and surrogates in altruistic surrogacy as well as the commercial surrogate. Additionally, this chapter will also look at whether third party involvement in surrogacy agreements would increase the risk of exploitation and whether commercial surrogacy amounts to the womb for hire.

##### Chapter four: International Perspective

Chapter four will include an investigation into countries allowing commercial surrogacy, such as India, California and, Ukraine This chapter will look at what led to the regulation of

commercial surrogacy and how these regulations affected third party involvement. It will discuss these countries regulations of third-party involvement, where applicable.

#### Chapter five: Recommendations and conclusion

This chapter will include recommendations on how to adapt other countries regulations to fit into a South African legal system that will focus on effectively regulating third party involvement in commercial surrogacy. Having stringent regulations on commercial surrogacy, including the involvement of third parties would allow third parties to continue to provide services to parties under strict supervision. This chapter will then provide a summary of the findings of each chapter. It will additionally determine whether parliament came to the correct decision to prohibit commercial surrogacy and in turn limit the scope of third-party involvement.



## CHAPTER TWO:

### Commercial Surrogacy versus Altruistic Surrogacy

#### 2.1 Introduction

The aim of this chapter is to comprehensively investigate whether commercial surrogacy amounts to exploitation and commodification of women and children. A discussion regarding the relevant terminology will be presented, thereafter the recommendation by the South African Law Reform Commission (hereinafter referred to the SALRC) to ban commercial surrogacy will be examined. Chapter two seeks to examine what the consequences are of the prohibition of commercial surrogacy in South Africa, and the effects it has on third parties and/or intermediaries in surrogacy arrangements. In addition, this chapter will focus on providing reasons why commercial surrogacy should not be banned in South Africa. Chapter two will further debate whether lifting the prohibition on commercial surrogacy would be beneficial to potential surrogate mothers and commissioning parents or whether it would amount to the commodification of women and children.

The topic of commercial surrogacy has been extensively debated worldwide and yet there has not been a unanimous decision on the topic. The debate concerning commercial surrogacy is very intricate and has given rise to zealous arguments regarding the rights of the intended parents, the rights of the surrogate mother and lastly the rights of children conceived through surrogacy. One of the requirements which have to be met in order for a surrogate motherhood agreement to be confirmed in South Africa is that a woman who has decided to act as a surrogate mother would have to enter into the agreement for altruistic reasons and not for commercial purposes.<sup>26</sup> Section 301 of the Children's Act further endorses this requirement by providing that payments can only be approved if the costs provided for are directly linked to the pregnancy of the surrogate mother. These payments are for claims related to the artificial fertilization, pregnancy, and birth of the child; expenses related to the confirmation of the surrogacy agreement itself; loss of earnings suffered by the surrogate in consequence of the surrogacy agreement; insurance for the surrogate mother to cover for death or disability; and bona fide professional medical or legal services. Section 295 (c) (v) and section 301 act as impediments to commercial surrogacy, which essentially means that person(s) who decide that

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<sup>26</sup> The Children's Act Section 295 (c) (v)

he or she is going to require the service of a surrogate mother is reliant on the benevolence of that person(s).

## 2.2 Terminology

### 2.2.1 Commercial surrogacy

Commercial surrogacy refers to those instances where parties to the surrogate motherhood agreement come to an agreement that the surrogate mother will receive compensation, excluding costs incurred for conceiving and bearing the child, for her services.<sup>27</sup> As stated above section 295(c)(v) of the Children's Act<sup>28</sup> provides that a court will not confirm a surrogate motherhood agreement where the surrogate mother enters into the agreement for commercial purposes, it will only confirm the agreement where the surrogate mother enters into the agreement for altruistic purposes.

The Warnock Committee was established in England in July 1982 to review any current and pending development in medicine and science connected to human fertilisation and embryology, to deliberate which policies and safeguards should be applied, including concern for the social, ethical, and legal implications of these developments and to provide recommendations. The Warnock Committee argued that a commercial surrogate motherhood agreement is disgraceful to the child who is to be the product of it, as it would seem that the child had been bought.<sup>29</sup> Many jurisdictions with laws governing surrogacy, such as Australia, the United Kingdom, and South Africa, prohibit commercial surrogacy while explicitly allowing altruistic surrogacy.<sup>30</sup> The reason for the unequivocal prohibition on commercial surrogacy is that commercial surrogacy commonly commodifies children and exploits the surrogate mother as there is allegedly a power imbalance between the surrogate mother and the potential commissioning parents.<sup>31</sup> I believe that there is a power imbalance; however, the power imbalance is between third parties and the commissioning parents, as third parties have

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<sup>27</sup> McLachlan HV, Swales JK 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts' *Law and Contemporary Problems* (2009)

<sup>28</sup> The Children's Act 38 of 2005.

<sup>29</sup> McLachlan HV, Swales JK 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts' *Law and Contemporary Problems* (2009)

<sup>30</sup> Joslin C, 'Uniform Parentage Act Drafting Committee', available at [www.uniformlaws.org/shared/docs/parentage/2016feb8\\_AUPA\\_Memo\\_Revision%20Drafting%20Committee%20Surrogacy.pdf](http://www.uniformlaws.org/shared/docs/parentage/2016feb8_AUPA_Memo_Revision%20Drafting%20Committee%20Surrogacy.pdf). [accessed on the 15 June 2018]

<sup>31</sup> HCCH, 'A preliminary report on the issues arising from international surrogacy arrangements' (2012) Para 18

more of a financial stake in the surrogacy process. This will be discussed more in detail in the next chapter.

### 2.2.2 Altruistic surrogacy

Altruistic surrogacy occurs where the prospective surrogate mother agrees to gestate a child for the prospective commissioning parents without any form of compensation.<sup>32</sup> Section 303 (2) of the Children's Act provides that no person may in any way or with a view to compensation make it known that any person is or might possibly be willing to enter into a surrogate motherhood agreement. This essentially means that a potential commissioning parent will have to secure a surrogate mother by themselves, which has been proven to be time consuming and extremely difficult.<sup>33</sup> There are women who are motivated simply by the enjoyment of assisting infertile couples to fulfil their desire to have a child, however, a strong motivation to be a surrogate is the large fees that accompany commercial surrogacy contracts.<sup>34</sup> Despite it being preferred that commissioning parents secure their own potential surrogate mother,<sup>35</sup> the court in *HPP* held that it was aware of the fact that commissioning parents are in a difficult position when they are looking for a potential surrogate and are unable to find someone willing to act as a surrogate on their own.<sup>36</sup>

There are agencies such as baby2mom that offer the service to assist in introducing a potential surrogate mother to commissioning parents for no fee. However, the difficulty in finding a suitable surrogate creates the opportunity for agencies to charge fees *de facto* for recruiting surrogates and introducing them to commissioning parents.<sup>37</sup> This opens up the door to circumvent the prohibition of compensation paid to third parties for advertising and introducing a potential surrogate mother to commissioning parents. In *WH* the court noted that when future courts are dealing with a surrogate motherhood agreement, they should be aware that there '... may be a danger that generic payments for expenditure without specificity may well run the risk of disguising the payment of compensation.'<sup>38</sup> This is another way in which parties can

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<sup>32</sup> The White Paper on Altruistic Surrogacy: why to oppose empathic gestures? ( ECPM of January 2016).

<sup>33</sup> Medfem Fertility Clinic, Surrogacy, available at <http://medfem.co.za/surrogacy/> [accessed on 15 June 2018]

<sup>34</sup> Patton B A 'Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts' (2010) 79 *UMKC Law Review*

<sup>35</sup> Baby2mom, 'Surrogacy FAQ', available at <http://baby2mom.co.za/page/surrogacy-faq> [accessed on 15 June 2018]

<sup>36</sup> *Ex Parte HPP and Others; Ex Parte DME and Others* (45037/2016) [2017] ZAGPPHC para 39

<sup>37</sup> *Ex Parte HPP and Others; Ex Parte DME and Others* (45037/2016) [2017] ZAGPPHC para 39

<sup>38</sup> *Ex part WH and others* 2011 (6) SA 514 (GNP), par 3929

circumvent the prohibition on compensation and are able to secure a potential surrogate mother, by concealing compensation as nonspecific payment of expenses to the surrogate mother.

The possibility of exploitation occurring in altruistic surrogacy agreements is possible just as it is in commercial surrogacy. Finding a suitable surrogate mother is difficult, which means that potential commissioning parents if unable to find a suitable stranger willing to act as a surrogate would have to turn to a family member, which may add another level of exploitation for the surrogate mother. Sushma Swaraj, India's External Affairs Minister and a committed member of the right-wing Bharatiya Janata Party<sup>39</sup>, headed the group of ministers who recommended that commercial surrogacy in India should be banned.<sup>40</sup> It was held by the ministers that altruistic surrogacy is a revolutionary step forward in protecting women from exploitation as families are the safe haven for women and exploitation only occurs in commercial surrogacy.<sup>41</sup> However, the reality is that a large number of women around the world are exposed to substantial inequalities and domestic violence within their families.<sup>42</sup> Sharmila Rudrappa contends that families are not the safe havens they are expected to be, but rather that they continue to further gender subordination.<sup>43</sup> By continuing to prohibit commercial surrogacy, women are expected to provide reproductive labour for free, which means that there is no legislation that is passed which offers protection measures for women in the surrogacy process.<sup>44</sup> This is illustrated in the case of Diane an Australian woman who offered to act as the surrogate mother for her friend of 20 years, however, the agreement ended up with legal action. The disagreement began over reimbursements of expenses of \$648 which the surrogate mother wanted to recover; she threatened to take back the child should she not be reimbursed. Diane was recovered some of her cost, but \$2500 was still outstanding. Diane was a firm believer that a surrogate mother should not be compensated for her role in the surrogacy

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<sup>39</sup> Ganapathy N, 'Right-wing trolls target senior Indian minister' available at <https://www.straitstimes.com/asia/south-asia/right-wing-trolls-target-senior-indian-minister> (accessed on the 05 July 2018)

<sup>40</sup> Lakshmi R, 'India to Propose A Ban on Commercial Surrogacy, Ending a Lucrative Business' available at [https://www.washingtonpost.com/world/rent-a-womb-industry-in-india-may-beshut-down/2016/08/24/39684d60-79e3-42c9-893d-9ff5998c6179\\_story.html?utmterm=.57680fa74566](https://www.washingtonpost.com/world/rent-a-womb-industry-in-india-may-beshut-down/2016/08/24/39684d60-79e3-42c9-893d-9ff5998c6179_story.html?utmterm=.57680fa74566) [<https://perma.cc/L27CFKZ4>] (accessed on 05 July 2018)

<sup>41</sup> The Times of India, 'Government proposes complete ban on commercial surrogacy' available at <https://timesofindia.indiatimes.com/india/Government-proposes-complete-ban-on-commercial-surrogacy/articleshow/53844035.cms> (accessed on 15 June 2018)

<sup>42</sup> Interview by Theodora Ooms with Michael Johnson, at Building Bridges: Marriage, Fatherhood, and Domestic Violence Conference available at [https://www.clasp.org/sites/default/files/public/resources-andpublications/states/03\\_14.pdf](https://www.clasp.org/sites/default/files/public/resources-andpublications/states/03_14.pdf) (accessed on 15 June 2018)

<sup>43</sup> Rudrappa S 'Why Is India's Ban on Commercial Surrogacy Bad for Women' (2018) 43 *N.C. J. Int'l L.*

<sup>44</sup> Rudrappa S 'Why Is India's Ban on Commercial Surrogacy Bad for Women' (2018) 43 *N.C. J. Int'l L.*

process but changed her perspective on the topic. She held that surrogacy should be treated as a 'business transaction' as altruistic surrogacy provides very little protection for surrogate mothers.<sup>45</sup> Eleni Zervogianni agrees that surrogates are less prone to exploitation if there is a valid contract as opposed to under table agreements.<sup>46</sup> She further contended that legislators should reconsider the altruistic aspect of surrogacy because if parties are entering into clandestine agreements there is little protection for them.<sup>47</sup>

### 2.3 Recommendations of the SALRC to ban commercial surrogacy

The SALRC acknowledged in the Report on Surrogate Motherhood (Project 65:1993) that there are difficulties in implementing a ban on commercial surrogacy.<sup>48</sup> If parties to the agreement contracted in private there could be a fee, it would be exceedingly challenging to establish whether there was any exchange of money between them.<sup>49</sup> The SALRC was hopeful that by enforcing a complete ban on commercial surrogacy it would deter surrogates who might use surrogacy as a source of income.<sup>50</sup> The SALRC viewed compensation in the surrogacy process as being undesirable and held that compensation should be prohibited with the exception of payment for those costs which are directly linked to the 'artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement'.<sup>51</sup> This essentially meant that lawyers, the medical specialist performing the insemination and the doctors delivering the baby were the only persons to be exempted from this prohibition. A surrogate mother could receive compensation, but only in relation to the direct cost of the pregnancy. Surrogacy is a profitable market, but the only parties benefiting from this market would be the doctors, lawyers and fertility specialists who charge large fees for assisting potential commissioning parents and surrogates.<sup>52</sup> The SALRC noted that a commercial agency would play an invaluable service with effective regulation.<sup>53</sup>

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<sup>45</sup> Barless T 'When altruistic surrogacy goes wrong' available at <https://www.smh.com.au/national/when-altruistic-surrogacy-goes-wrong-20140807-101bo5.html> (accessed on the 11 June 2018)

<sup>46</sup> Cambridge Family Law 'Law and Practice of Surrogacy' available at <https://www.era.int/upload/dokumente/20584.pdf> (accessed on 11 June 2018)

<sup>47</sup> Cambridge Family Law 'Law and Practice of Surrogacy' available at <https://www.era.int/upload/dokumente/20584.pdf> (accessed on 11 June 2018)

<sup>48</sup> South African Law Commission (Project 65) *Report on Surrogate Motherhood* (1993)160.

<sup>49</sup> *Id*

<sup>50</sup> *Id*

<sup>51</sup> South African Law Commission (Project 65) *Report on Surrogate Motherhood* (1993) Clause 10(2) Schedule A.

<sup>52</sup> Cattpan A, Cameron A & Gruben V 'When women are surrogate mothers: Is that work?' available at <http://theconversation.com/when-women-are-surrogate-mothers-is-that-work-81381> [accessed on the 15 June 2018]

<sup>53</sup> South African Law Commission (Project 65) *Report on Surrogate Motherhood* (1993) Clause 10(2) Schedule A.

However, the commission failed to further elaborate on what these regulations should entail. If the commission had meticulously detailed what effective regulation involved, it could have aided in illustrating that commercial agencies would be beneficial in the surrogacy, while ensuring that the risk of exploitation is limited.

## 2.4. Arguments for Commercial surrogacy

The purpose of the prohibition was that it would protect women and children from being exploited and eventually be treated as mere commodities in society. The prohibition could be seen to protect vulnerable women from being taken advantage of. Krawiec, however, contends that the only purpose that the ban achieves is limiting the ability of a potential surrogate or egg donors to gain the full financial benefits for their products.<sup>54</sup> An element of exploitation is the lack of free will. Women who freely decide they want to enter into commercial surrogacy agreements should not be viewed as being exploited, as these women are of sound mind and not being coerced to enter into surrogacy agreements. Children being created via the surrogacy process to be sold are a genuine fear; however, children can be created in altruistic surrogacy and sold as well. Commercial surrogacy does not necessarily lead to the commodification of children, as the commissioning parent is not paying for the child, but for the reproductive labour, the surrogate provided. Complementary to the above, women can decide regarding their reproduction without interference. Aside from a person's fundamental right to make their own reproductive decision, the Constitution of South Africa affords every citizen the right to freedom of trade, occupation, and residence.<sup>55</sup> This section will investigate whether commercial surrogacy amounts to exploitation of the surrogate mother and whether it meets the elements of exploitation. It will further determine whether surrogacy process commodifies the child in the surrogacy process.

### 2.4.1 Exploitation

It has been argued that if commercial surrogacy were to be legalised it would amount to the surrogate mother only entering into the surrogate motherhood agreement due to the financial incentive.<sup>56</sup> The argument, therefore, is that the prohibition of commercial surrogacy protects

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<sup>54</sup> Krawiec KD 'Altruism and Intermediation in the Market for Babies' (2009) 66 *Washington and Lee Law Review* 203

<sup>55</sup> The Constitution of the Republic of South Africa, 1996, Section 22

<sup>56</sup> Lewis SV *The Constitutional and Contractual Implications of the Applications of Chapter 19 of the Children's Act 38 of 2005 Surrogacy in South Africa* (unpublished LLM thesis, University of the Western Cape, 2011) 383.

financially challenged women from being exploited by commissioning parent(s) who are more financially stable.

To determine whether a situation would amount to exploitation there are two requirements that have to be met, (1) party A benefits from the transaction, (2) party A is able to induce Party B to agree to the transaction by taking advantage of a feature of Party B or his or her situation and the outcome of the transaction is harmful or at least unfair to party B.<sup>57</sup> It is evident that in commercial surrogacy the commissioning parents benefit from the transaction in commercial surrogacy as they would receive a child at the end of the surrogacy process. Therefore, requirement one would be met. Requirement two is more complex as it is problematic to ascertain whether the transaction is, in fact, harmful or unfair to the surrogate mother and if the commissioning parents have induced or coerced the surrogate mother with the promise of a fee to enter into a commercial surrogacy agreement.

### Coercion/Inducement

Concerning the coercion or inducement element of requirement two, Elizabeth Anderson is one of the many scholars vocal against regulating commercial surrogacy. Anderson believes that if commercial surrogacy were to be regulated it would exploit the surrogate as she would be ‘...forced to give up her child’<sup>58</sup> as she has been compensated for her service. The latter argument seems to assume that in the instance of commercial surrogacy, the surrogate mother is being coerced to commit an act against her will and ignores the fact that some, if not most, surrogates are fully aware of the consequences.<sup>59</sup> Martha A. Field seems to be in agreement with Anderson. Field’s contends that both nationally and internationally there are women, who become surrogates reluctantly.<sup>60</sup> Accounts from an Indian village suggest that young women in the village were expected to improve their standard of living by becoming birthmothers for hire.<sup>61</sup> Despite the occurrence of situations where a surrogate mother is coerced or induced, this does not represent the norm of commercial surrogacy.

Melissa signed up to be a surrogate mother with the agency Building Families Inc. situated in California USA; as a result, she was compensated for her reproductive labour. Melissa signed

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<sup>57</sup> Fabre C ‘Whose Body is it Anyway?: Justice and the Integrity of the Person’ (2006)

<sup>58</sup> Anderson E ‘Is Woman’s Labour a Commodity?’ (1990) 19 (1) *Philosophy and Public Affairs*

<sup>59</sup> Hutton D ‘Evaluation of the surrogacy debate between Anderson and Arneson’ available at [http://www.academia.edu/1491471/Evaluation\\_of\\_the\\_surrogacy\\_debate\\_between\\_Anderson\\_and\\_Arneson](http://www.academia.edu/1491471/Evaluation_of_the_surrogacy_debate_between_Anderson_and_Arneson)

<sup>60</sup> Field MA ‘Compensated Surrogacy’ (2014) 89 *Washington Law Review*

<sup>61</sup> Mohapatra S, ‘Achieving Reproductive Justice in the International Surrogacy Market’ (2012) 21 *Annals of Health Law*

up freely to act as a surrogate mother and assist a couple to fulfil their dream of completing their family.<sup>62</sup> Melissa's surrogacy story is one of many commercial surrogacy success stories and therefore illustrating that commercial surrogacy does not necessarily lead to exploitation.

Claiming that a potential surrogate mother is exploited or coerced by compensation is invalidating a woman's ability to enter into a voluntary transaction.<sup>63</sup> When the surrogate enters into a commercial surrogate motherhood agreement the surrogate is fully aware before the implementation is effected, what the process would entail and what she would have to give up. To assume that a potential surrogate mother is coerced into giving up the child or induced into entering into a commercial surrogacy contract is an insult to a woman's right to autonomy as well as perpetuating the idea of patriarchy, that women are incompetent to make their own choices. In the article *Commodification and Commercial Surrogacy*, Richard Arneson stipulates that when entering into a commercial surrogacy contract, it does not determine how a woman feels, but how she must act.<sup>64</sup> Therefore the author is inclined to agree with Arneson that a commercial surrogate contract is not exploitative unless the woman was deceived in some way or coerced into entering into a surrogacy agreement. The case of *Johnson v Calvert* further illustrates this notion when Judge Parslow emphasized that Anna Johnson knew she had to give the child to the Calvert family upon its birth and that this was in accordance with the expectations of the parties to the agreement.<sup>65</sup>

With regards to the second leg of requirement two, whether the surrogate mother has been induced or coerced by the promise of a fee is not necessarily always met in the instance of commercial surrogacy. The claim that a potential surrogate mother will be paid, and the offer is too good to refuse implies that potential surrogate mother's autonomy is overwhelmed by the price being offered and therefore her decision to act as a surrogate is less than voluntary.<sup>66</sup> The author fails to agree with this reasoning as a surrogate mother who is acting out of her own volition does not mean she is coerced or induced, but rather affording potential commissioning parents with an invaluable service. The compensation received does not contradict the surrogate mother's free will, if this were the case any high paying occupation would be

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<sup>62</sup>Building Families Inc, 'Melissa's Surrogacy Story' available at <https://www.buildingfamiliesinc.com/en/2017/02/melissas-surrogacy-story-2/> (accessed on 15 June 2018)

<sup>63</sup> Glenn Cohen I, 'Regulating the Organ Market: Normative Foundations for Market Regulation' (2014) 77*Law & Contemporary Problems*

<sup>64</sup>Arneson RJ 'Commodification and Commercial Surrogacy' (1992) 21 *Philosophy & Public Affairs*.

<sup>65</sup>Lawrence DE 'Surrogacy in California: Genetic and Gestational Rights' (1991) 21 *Golden Gate University Law Review*

<sup>66</sup> Glenn Cohen L 'Transplant Tourism: The Ethics and Regulation of International Markets for Organs', (2013) 41 *The Journal of Law, Medicine & Ethics*

exploitive.<sup>67</sup> The potential for exploitation created by commercial surrogacy, especially when the commissioning couple is more financially stable and the surrogate mother is living in poverty cannot be repudiated. Nonetheless, this is only a risk, not a certainty, and exploitation can occur in both altruistic surrogacy and commercial surrogacy. The only way to ensure that this risk of exploitation is limited is to ensure that there are regulations in place which would protect both the commissioning parents and the surrogate mother respectively.

Whether a surrogate mother is coerced or induced by the prospect of a fee, does not necessarily invalidate a surrogate's free will to voluntarily enter into a commercial contract. It can be classified as degrading to women by eliminating their autonomy and characterising them as submissive and inadequate individuals who are unable to finalize contractual agreements without being compelled or exploited.<sup>68</sup> The continued prohibition of commercial surrogacy opens an avenue of illegal commercial surrogacy and that in turn affects financially challenged, women.<sup>69</sup>

## Harm

The next leg of requirement two is whether the transaction between the commissioning parent(s) and the surrogate mother is harmful or unfair to the surrogate mother. In order to determine the latter, the author shall be looking at both physical and psychological harm which the surrogate mother may suffer. During pregnancy complications could arise which could be life threatening to the woman carrying the child as well as the child itself.<sup>70</sup> These include pre-eclampsia and thromboembolic conditions. All pregnancies bare risks for the woman carrying the child, whether that is via commercial surrogacy, altruistic surrogacy or via natural methods.<sup>71</sup> The real concern is the possibility of psychological harm which a surrogate mother may be exposed to. The surrogate mother bonds with the child during the nine months of pregnancy and might find it difficult and heart wrenching to hand over the child to the

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<sup>67</sup>Mortazavi S 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *The George Town Law Journal*

<sup>68</sup> Hutton D 'Evaluation of the surrogacy debate between Anderson and Arneson' available at [http://www.academia.edu/1491471/Evaluation\\_of\\_the\\_surrogacy\\_debate\\_between\\_Anderson\\_and\\_Arneson](http://www.academia.edu/1491471/Evaluation_of_the_surrogacy_debate_between_Anderson_and_Arneson) (accessed 24 April 2018).

<sup>69</sup>Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

<sup>70</sup> Office on Women's Health 'Pregnancy Complications' available at <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> (Accessed on 02 December 2019)

<sup>71</sup> Office on Women's Health 'Pregnancy Complications' available at <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> (Accessed on 02 December 2019)

commissioning parents after birth. However, this psychological harm can occur in both altruistic surrogacy and commercial surrogacy. In both instances, the surrogate mother would be required to hand over the child once she has successfully delivered the child. In the case of altruistic surrogacy where the commissioning parents have asked a relative or a family friend to act as a surrogate mother, it could be argued that it would be more psychologically harmful to the surrogate mother who bonded with the child and is unable to be classified as the mother of that child or has decided to keep the child.<sup>72</sup> Being a surrogate mother for a family member could cause additional psychological harm, as the surrogate mother could be a part of the child's life but not in a maternal context as she wishes to be. If commercial surrogacy was to be legalised, it would mean that in most cases the surrogate mother would be a stranger to the commissioning parents, therefore, avoiding the need to ask a relative to act as a surrogate mother.

Financial compensation might become necessary as a means of ensuring that the surrogate fulfills her contractual obligations.<sup>73</sup> If a commercial surrogacy agreement is confirmed by a court the commissioning parents would have an effective remedy in contractual law should the surrogate mother decide to breach the terms of the commercial surrogacy agreement.

There are instances in the surrogacy process where the surrogate mother has agreed to give birth for the commissioning parent, wishes to have no parent-child relationship with the child and wishes to hand over the child to the commissioning parent.<sup>74</sup> This suggests that the surrogate mother experienced no psychological harm. In a study by Ciccarelli, fourteen surrogate mothers were asked to detail their feelings regarding relinquishing the child. One mother reported that she experienced emotional distress over having to surrender the child, two of the surrogates reported strong urges to bond with the child; however, the other eleven mothers felt no bond with the child nor did they have any issue surrendering the child to the commissioning parents.<sup>75</sup> Expert testimony was relied upon which held that 'psychologically it is less likely for the person carrying the child to bond with the child since the original plan is

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<sup>72</sup>Williams S 'N.J Gay Man Wins Custody Battle with Sister' available at <https://www.care2.com/causes/n-j-gay-man-wins-custody-battle-with-sister.html> [accessed on the 16 June 2018]

<sup>73</sup> Lewis SV *The Constitutional and Contractual Implications of the Applications of Chapter 19 of the Children's Act 38 of 2005* (unpublished LLM thesis, University of the Western Cape, 2011) 6

<sup>74</sup> Kriari I, Valongo A, 'International Issues regarding Surrogacy' (2016) 2 *Italian Law Journal*

<sup>75</sup> Ahmari Tehran H, Tashi S, Mehran N *et al*, 'Emotional experiences in surrogate mothers: A qualitative study' (2014) 12(7) *Iranian Journal of Reproductive Medicine*

that the child is the genetic child of another couple and will be raised by them exclusively.<sup>76</sup> It can, therefore, be assumed that whether it is commercial or altruistic surrogacy there is a risk of psychological and physical harm to the surrogate mother. However, as illustrated in the study by Ciccarelli, most women who agreed to act as a surrogate mother have not experienced any emotional distress when relinquishing the child to the commissioning parents.

With any contract, there is a risk that a party could be exploited; however, exploitation is minimalised where there is effective regulation. The exchange of money for the service of surrogacy does not make the practice harmful.<sup>77</sup> In the article titled, *Surrogacy in California: Genetic and Gestational rights*, Lawrence argues that the exploitation of women is actually perpetuated when women are unable to gain monetary recognition for things uniquely achieved by them.<sup>78</sup> The exchange of money for the service that a surrogate mother does not automatically make the practice of commercial surrogacy immoral or harmful. It only becomes unsafe when there are not adequate regulations in place to avoid the exploitation of woman.

#### 2.4.2 Commodification of children

An additional reason for the prohibition of commercial surrogacy is that children would be treated as commodities and eventually the process of commercial surrogacy would lead to the selling of children.<sup>79</sup> Fundamental to every legal system around the world is the principle that certain items are off limits to commercial exchange; babies are one of those sacred objects.<sup>80</sup> The Convention on the Right of the Child gives effect to this by prohibiting the sale of children.<sup>81</sup> Under article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography the sale of a child is defined as ‘... any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’.<sup>82</sup> Article 3 of the Optional Protocol to the Convention on the Right of the Child further states that ‘[e]ach State Party shall

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<sup>76</sup> Lawrence DE ‘Surrogacy in California: Genetic and Gestational Rights’ (1991) 21 *Golden Gate University Law Review*

<sup>77</sup> Hutton D ‘Evaluation of the surrogacy debate between Anderson and Arneson’ available at [http://www.academia.edu/1491471/Evaluation\\_of\\_the\\_surrogacy\\_debate\\_between\\_Anderson\\_and\\_Arneson](http://www.academia.edu/1491471/Evaluation_of_the_surrogacy_debate_between_Anderson_and_Arneson) (accessed 25 April 2018).

<sup>78</sup> Lawrence DE ‘Surrogacy in California: Genetic and Gestational Rights’ (1991) 21 *Golden Gate University Law Review*

<sup>79</sup> Field M. A ‘Compensated Surrogacy’ (2014) 89 *Washington Law Review*

<sup>80</sup> Krawiec KD ‘Altruism and Intermediation in the Market for Babies’ (2009) 66 *Washington and Lee Law Review*

<sup>81</sup> The Convention on the Rights of the Child Article 35

<sup>82</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* Art 2 (a)

ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law...'

- 'a) In the context of sale of children as defined in article 2:
  - (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:
    - a. Sexual exploitation of the child;
    - b. Transfer of organs of the child for profit;
    - c. Engagement of the child in forced labour;'<sup>83</sup>

One of the primary contentions by advocates of commercial surrogacy is that in gestational surrogacy, the woman who bears the child is never the biological mother of the child.<sup>84</sup> Therefore, if the surrogate mother is being compensated for her service it cannot be regarded as payments for relinquishing the child or transferring of custody.<sup>85</sup> Advocates of this kind of methodology argue that no sale of children occurs because a gestational surrogate mother cannot transfer a child that was never hers to start with.<sup>86</sup> This would mean that the surrogate mother is not being compensated for her relinquishing her parental rights to the child, but merely receiving payment for the service of carrying the child. However, opponents of commercial surrogacy argue that even if the gestational mother is not the biological mother, it still amounts to the physical transfer of a child for compensation and therefore still amounts to the selling of children.<sup>87</sup> Regarding Article 2 and 3, it can be assumed that the objective of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography is to protect children from being sold into a situation that could be detrimental to the child physically and psychologically. It cannot be proved that commercial surrogacy has a detrimental effect on a child's wellbeing either physically or psychologically.

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<sup>83</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* Art 3.

<sup>84</sup> Kerian C. L, 'Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?' (1997) 12 *Wisconsin Women's Law Journal*

<sup>85</sup> Ergas Y, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, (2013) 27 *EMORY INT'L L. REV.*

<sup>86</sup> Smolin,DM 'Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children,' (2016) 43 *Pepperdine Law Review*. See: Human Rights Council, 'Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material' (2018)

<sup>87</sup> Human Rights Council, 'Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material' (2018)

It should be noted that in South Africa the surrogate mother could be genetically linked to the child if the commissioning parents prefer to use partial surrogacy rather than gestational surrogacy. However, it is argued by the author that South Africa should disallow partial surrogacy. This would eliminate the notion that the child is being sold, and it also eliminates the possibility of the fact that the surrogate mother decide to keep the child.

The risk of exploitation is evident in commercial surrogacy; however, altruistic surrogacy poses a risk of exploitation as well. Even though altruistic surrogacy is not regarded as a sale on paper, commissioning parents can disguise payment to a surrogate mother as generic payments. Courts must require that all payments be reasonable and itemised to ensure that parties to the agreements are not trying to circumvent the prohibition on commercial surrogacy. However, despite courts being vigilant in scrutinising payments made, parties can enter into clandestine agreements which are not included in the papers, thus too resulting in the sale of children. The fundamental aspect of avoiding exploitation of children being sold is to strictly regulate commercial surrogacy rather than prohibiting the act. Commercial surrogacy is effectively regulated in Israel. Israel creates uniform criteria, medical criteria and a legal structure that aimed at preventing the exploitation of children, surrogates and commissioning parents.<sup>88</sup> Israel's approach in regulating commercial surrogacy will be discussed in more detail in chapter 4.

Sarah Mortazavi argues that commercial surrogacy is no different from fertility treatments or the situation where people donate their sperm or eggs for money.<sup>89</sup> Where the compensation is made to the surrogate mother exclusively for her services and not for the baby then it is no more questionable than payments received as a result of donating one's sperm or eggs.<sup>90</sup> In the case of *Johnson v Calveat*, Judge Parslow held that there is no problem with a surrogate receiving compensation, the payment being for the pain and suffering involved with carrying a child to term and not for the child itself.<sup>91</sup> The compensation that she will be receiving should not be viewed as payment for the transfer or 'sale' of the child, but rather for the complex

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<sup>88</sup> Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

<sup>89</sup>Mortazavi S 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *The George Town Law Journal*

<sup>90</sup>Mortazavi S 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *The George Town Law Journal*

<sup>91</sup>Lawrence DE 'Surrogacy in California: Genetic and Gestational Rights' (1991) 21 *Golden Gate University Law Review*

process that goes with being a surrogate, as well as for the service that the surrogate has rendered.

## 2.5. Freedom of occupation

Section 22 of the Constitution affords every citizen the right to choose their trade, occupation or profession at will. The 1997 case of *S v Lawrence* was decided in terms of the Interim Constitution. The Constitutional Court (CC) held that the provisions of the Liquor Act 27 of 1989 did not interfere with the appellants' right to freely engage in economic activity.<sup>92</sup> The applicants had been charged and convicted in a court *a quo* for contravening the Liquor Act. In its judgment, the CC held that although the Constitution provided that everyone has the right to occupational freedoms, this right is not absolute and comes with limitations which will be permitted if the purpose of the limitation is to improve the quality of life, human development, and economic growth. The next section will debate whether surrogate mothers and third parties right to freedom of occupational trade or profession should be limited by the prohibition on commercial surrogacy or whether the limitation is justified in a democratic society.

### 2.5.1 Surrogate mother

The authors of 'The Bill of Rights Handbook' submit that occupation may be defined 'as an activity through which people seek to provide for their needs, not only in the material sense but also in the more idealistic sense of pursuing their self-development.'<sup>93</sup> From an equality feminist perspective, agreeing to act as a surrogate mother can be regarded as an economic opportunity.<sup>94</sup> Carmel Shalev argues in her book *Birth Power* that the "reproducing woman" should be treated as an autonomous and economic agent<sup>95</sup> and that women who have the desire to act as a surrogate for commercial purposes should be able to enter into commercial contracts voluntarily. Katharine T. Bartlett contends that women have the least control over their employment<sup>96</sup>, thus surrogacy, which is wholly unique to women, should be an economic activity and the choice to participate in commercial surrogacy is a choice that should be

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<sup>92</sup> *S v Lawrence* 1997 (4) SA 1176 (CC).

<sup>93</sup> De Waal J & Currie I *Bill of Rights Handbook* 6ed (2013),

<sup>94</sup> K Sergent 'Feminist Perspective on Surrogacy' available at <http://femlegaltheory.blogspot.com/2012/10/feminist-perspectives-on-surrogacy.html> [accessed on 15 June 2018]

<sup>95</sup> K Sergent 'Feminist Perspective on Surrogacy' available at <http://femlegaltheory.blogspot.com/2012/10/feminist-perspectives-on-surrogacy.html> [accessed on 15 June 2018]

<sup>96</sup> Bartlett K.T 'Feminism and Economic Inequality' (2017) 35 *Law and Inequality*

respected and not prohibited.<sup>97</sup> Feminists are divided on the topic of compensated surrogacy, with some feminists being of the opinion that compensated surrogacy exploits poor women and commodifies woman's bodies, while liberal feminist disagree and argue that states should legalise compensated surrogacy so as to ensure a woman's right to self-determination and to fairly compensate her for what can be classified as risky work.<sup>98</sup>

The school of liberal feminism will be used as it endorses the equality doctrine, their methodology focus on that woman should have the ability to make free choices. Thus this school of feminism strives for women to have independent choice to enter into commercial surrogacy agreements, in that way liberating women from the patriarchal notions that woman should be confined to household chores.<sup>99</sup> Giving women free choice aids women in receiving equal rights as men in terms of their reproductive choices.<sup>100</sup> Men are allowed to be compensated for sperm donation; women should be afforded the same courtesy to be compensated for either egg donation or their service as a surrogate.

The school of liberal feminism advocates for commercial surrogacy because women have individual autonomy, reproductive liberty and the right to make choices.<sup>101</sup> A woman that decides to enter into commercial surrogacy is aware of the circumstance of surrogacy and chooses to do what is best for her family.<sup>102</sup> Allowing commercial surrogacy does not dispute the fact that women who are from disadvantaged backgrounds are swayed by the prospect of being paid, however, simply because money is a deciding factor does not mean that the surrogate's mother's choice should be dismissed.<sup>103</sup> Commercial surrogacy should be viewed

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<sup>97</sup>Ksergent 'Feminist Perspective on Surrogacy' available at <http://femlegaltheory.blogspot.com/2012/10/feminist-perspectives-on-surrogacy.html> [accessed on 15 June 2018]

<sup>98</sup> Ainsworth SL 'Bearing children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States' (2014) 89 *Washington Law Review*

<sup>99</sup> Writings on Surrogacy, 'Commercial Surrogacy & Feminist Perspectives' available at [https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#\\_ftn11](https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#_ftn11) (accessed on 20 June 2018)

<sup>100</sup> Writings on Surrogacy, 'Commercial Surrogacy & Feminist Perspectives' available at [https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#\\_ftn11](https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#_ftn11) (accessed on 20 June 2018)

<sup>101</sup> Writings on Surrogacy, 'Commercial Surrogacy & Feminist Perspectives' available at [https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#\\_ftn11](https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#_ftn11) (accessed on 20 June 2018)

<sup>102</sup> Majumdar A, 'The Rhetoric of Choice: The Feminist Debates on Reproductive Choice in the Commercial Surrogacy Arrangement in Indian' (2014) 18:2 *Gender, Technology & Development*

<sup>103</sup> Deckha M. 'Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding' (2015) 61 *McGill L. J.*

as a new opportunity for women to exercise their freedom to make decisions regarding the use of their body and bodily organs, which further solidifies women's human dignity.

Surrogacy is becoming more prevalent in society, and social attitudes towards commercial surrogacy is changing, thus, The Law Commission of England and Wales noted that the laws that once governed surrogacy may no longer be relevant.<sup>104</sup> In June 2019 The Scottish Law Commission released a report regarding surrogacy, the issue of payment for the surrogate mother has not been finalised. However, the Commission created a questionnaire to receive input from the public, they developed different categories that a surrogate mother could receive payment in the surrogacy process.<sup>105</sup> Sir Nicholas Green, Chair of the Law Commission said: “[m]ore and more people are turning to surrogacy to have a child and start their family... .” ‘... the laws around surrogacy are outdated and no longer fit for purpose. We think our proposals will create a system that works for the surrogates, the parents and, most importantly, the child.”

<sup>106</sup> Allowing commercial surrogacy could be the best possible way to ensure that surrogate mothers are receiving adequate protection during the surrogacy process. Claire Fenton-Glynn in Surrogacy in England and Wales held that it can be seen that courts are more willing to accept payments as being an ‘... ordinary, and inescapable, part of surrogacy arrangements...’<sup>107</sup>

### 2.5.2 Third parties

For the purposes of this thesis, the author will differentiate between third parties by using two categories. The first category relates to third parties who can receive compensation for their services. These are third parties who are exempted from the prohibition of section 301 which includes lawyers, fertility specialists and medical practitioners. The second category refers to third parties, regardless of the beneficial role they play, who are not allowed to receive compensation for their services. These would include surrogacy agencies or surrogacy facilitators. For this section, the author will be focusing on how prohibition affects the third parties in the second category. Commercial surrogacy and the involvement of third parties are

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<sup>104</sup> Scottish Law Commission, ‘Surrogacy’ available at <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/joint-projects/surrogacy/> (accessed on 20 July 2018)

<sup>105</sup> Scottish Law Commission, Building Families Through Surrogacy: A New Law Summary of Consultation Paper, (2019) 9.

<sup>106</sup> Law Commission Reforming the Law, ‘Surrogacy Reforms to Improve the Law for all’ available at <https://www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/> June 2019 (accessed on 1 September 2019)

<sup>107</sup> Claire Fenton-Glynn, Surrogacy in England and Wales in Scherpe, J., Fenton-Glynn, C., & Kaan, T. (Eds.). (2019). *Eastern and Western Perspectives on Surrogacy*. Intersentia. 121

inextricably intertwined. To allow the involvement of third parties in the surrogacy process the prohibition on commercial surrogacy would have to be lifted. The author will illustrate that the prohibition on commercial surrogacy is not reasonable as there are other methods to ensure that women and children are protected from exploitation and thus, the prohibition fails in justifiably limiting third parties' rights.

The prohibition of commercial surrogacy effectively limits third parties' rights to offer surrogacy facilitation services for a fee as it does not fall within the ambit of section 301 of the Children's Act. In *Ex Parte HPP and Others; Ex Parte DME and Others* 2017 (4) SA 528 (GP) the court had to decide whether the right to occupational freedom read with section 301 of the Children's Act would render the service provided by a surrogacy facilitator lawful. The court held that the service rendered by the surrogacy facilitator, regardless of how invaluable the service is, it does not fall within the ambit of section 301 (1) and (2) of the Children's Act.<sup>108</sup>

No rights afforded by the Constitution are absolute and therefore all rights can be limited in terms of section 36 of the Constitution. The limitation to a right must be reasonable and justifiable in an open democratic society. The Constitutional Court held as follows regarding the right to freedom of trade, occupation and profession in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006(3) SA 247 (CC),

[w]hat is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity...<sup>109</sup>

The right to freedom of occupation is a vital right to one's self-determination as it allows an individual not just fulfil their material needs, but their self-development needs as well. The prohibition of commercial surrogacy as stated above serves to prevent the exploitation of poor and vulnerable women and to prevent the commodification of children as well as preventing the sale of children. However, as the author illustrated above, in most cases women who have decided freely to act as a surrogate mother, do so on their own volition and voluntarily without

<sup>108</sup> *Ex Parte HPP and Others; Ex Parte DME and Others* (45037/2016) [2017] ZAGPPHC para 53.

<sup>109</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006(3) SA 247 (CC) [59] - [60].

inducement or coercion. The commodification of children may be minimalised by the removal of partial surrogacy from the Children's Act, which means that the surrogate would have no genetic link to the child and view the compensation that a surrogate receives purely for the service that she has rendered to the commissioning parents and not for the child itself.

The High Court in the case of *Nazo v Free State Gambling & Liquor Authority and Another, In re: Jacobs V Free State Gambling & Liquor Authority and Another* (2389/2015) [2015] ZAFSHC 227 (hereinafter referred to as the *Nazo* case), held the following :

...constitutional right of freedom of trade should not be undermined by restrictions, unless necessary to protect the rights of the public in general.<sup>110</sup>

The author agrees with the court in the *Nazo* case, that limiting third parties right to occupational freedom cannot be done unless there is proof that the limitation is protecting the general public. The author does not agree that section 301 is a justifiable limitation to section 22 of the Constitution as there are less stringent methods that can be used in achieving the same objective while allowing third parties the ability to decide their occupation without any limitations. Sara Ainsworth stated, the practice of commercial surrogacy is happening whether it is regulated or not.<sup>111</sup> The right to determine your occupation is, without doubt, an extremely important decision that individuals make. A person's career choice plays a significant role in one's life, the right to determine one's own occupation is closely linked with one's self-esteem and dignity. It is in the interest of public policy to endorse and respect human dignity.<sup>112</sup> The prohibition on commercial surrogacy should be lifted to allow third parties and surrogate mothers the right to be able to determine their own career. It has been illustrated above that commercial surrogacy does not always amount to commodification, however, having ineffective regulation on a practice that is already happening does amount to exploitation of women and of children.

## 2.6. Conclusion

Numerous commentators view the possibility of commercial surrogacy with apprehension. Adversaries of commercial surrogacy are concerned that if commercial surrogacy were to be

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<sup>110</sup> *Nazo v Free State Gambling & Liquor Authority and Another, In re: Jacobs V Free State Gambling & Liquor Authority and Another* (2389/2015) [2015] ZAFSHC para 227.

<sup>111</sup> Ainsworth SL 'Bearing children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States' (2014) 89 *Washington Law Review*

<sup>112</sup> Mazer D.S. 'Born Breach: The Challenge of Remedies in Surrogacy Contracts' (2017) 28 (1) *Yale Journal of Law & Feminism*

legalised it would contribute to the degradation of women and children, and fear that vulnerable persons would be exploited. Supporters in favour of commercial surrogacy are criticising these arguments as being both moralistic and paternalistic. Meyerson contends that when restricting a person's freedom there is no justification on these grounds.

“We should not interfere with a person's freedom [on paternalistic grounds] for the same reason that we should not interfere on moralistic grounds, namely that judgements as to what is in a person's best interests, like judgements about what is morally admirable and what repugnant, differ, and they differ reasonably’.<sup>113</sup>

This essentially means, that unless there are valid and reasonable reasons for restricting a person's freedom, third parties, and surrogate mothers should be allowed to control their own actions. Interfering with third parties or the surrogate's freedom to make her own choice, whether it is the freedom to choose one's own occupation or make decisions regarding reproduction is unreasonable. The fear that allowing people the freedom to make their own decisions will subject them to exploitation is better dealt with by regulation rather than prohibition.

It has been submitted that a woman is not only motivated by the prospect of compensation in becoming a potential surrogate mother. However, it would be ill advised to ignore that not many women would agree to be a surrogate mother without receiving any form of compensation. This would mean that commissioning parents would be unable to secure a potential surrogate mother, thus having to resort to a clandestine contract, which would inevitably be leaving both parties exposed to the possibility of exploitation. As stated above commercial surrogacy and the involvement of third parties in surrogacy agreements are inextricably intertwined. Having a third party such as a surrogacy agency involved would minimise the possibility of exploitation occurring where a commissioning parent is unable to secure a surrogate. The possibility of a mere risk, which can be curtailed by necessary regulation is not a justifiable limitation on a right that is seen as central to our human dignity. There are methods to ensure that third parties are held accountable for their actions. If surrogacy agencies could operate in the surrogacy process, they would be able to assist commissioning parents every step of the way, explaining what the process entails, finding suitable surrogates and performing all necessary screenings. June Carbone and Jody Lynee Madeira contend that

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<sup>113</sup> Meyerson D 'Surrogacy Agreements' In Christina Murray *Gender and the New South African Order (1994)*

having a surrogacy agency could promote human dignity as well as ensuring that commissioning parents and surrogates do not enter into clandestine altruistic surrogate arrangements, which could be harmful to all parties, including the child.<sup>114</sup>

Storrow J.F in *New Thinking on Commercial Surrogacy* held that some jurisdictions prohibit commercial surrogacy on the basis that its important in ensuring that persons in vulnerable groups in society are protected at all cost.<sup>115</sup> However, with commercial surrogacy there would be strict regulations and accountability to ensure that this is prevented. This was reiterated by Lady Paton, Chair of the Scottish Law Commission who held that: “Surrogacy has become a significant issue in today’s society. The interests of all the parties involved must be properly regulated and protected.”<sup>116</sup> As stated by the South African Law Reform Commission parties are able to enter into secret agreements and these agreements are not regulated or protected by law at all, which opens up the door for exploitation to occur as surrogate mothers would not have any recourse if the commissioning parents decide to breach the clandestine agreement and vice versa.<sup>117</sup> Kelly Weisberg agrees that abstaining from regulating commercial surrogacy due to moral and paternalistic debates will only serve to aggravate the assumption that commercial surrogacy allows for exploitation.<sup>118</sup> It is the view of the Author that the prohibition on commercial surrogacy does not just unjustifiably limit third parties and surrogate mother’s freedoms; it is hardly conducive as it exacerbates the situation of exploitation. Section 12 (2) of the Constitution of the Republic of South Africa (The Constitution) provides that ‘[e]veryone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction;’<sup>119</sup> Parties should have the freedom be able to make decisions regarding their reproductive choices freely. Additionally, women and third parties alike should be able to choose whichever occupation they feel is suited for them without any unjustifiable limitation. This is protected by section 22 of the Constitution and ensures that ‘[e]very citizen has the right to choose their trade, occupation or profession freely...’<sup>120</sup>

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<sup>114</sup> Carbone J and Madeira JL ‘The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction’ (2015) 90 (7) *Washington Law Review Online*.

<sup>115</sup> Storrow J.F ‘New Thinking on Commercial Surrogacy’ (2013) 88 *Indiana Law Journal* 1281

<sup>116</sup> Law Commission Reforming the Law, ‘Surrogacy Reforms to Improve the Law for all’ available at <https://www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/> June 2019 (accessed on 1 September 2019)

<sup>117</sup> South African Law Commission (Project 65) *Report on Surrogate Motherhood*

<sup>118</sup> Weisberg D. K The birth of surrogacy in Israel ed (2005) 14.

<sup>119</sup> The Constitution of the Republic of South Africa, s 12(2)

<sup>120</sup> The Constitution of the Republic of South Africa, S 22

Commercial surrogacy as an occupation would not only provide material satisfaction but would provide the surrogate mother as well as any third party with a sense of self-satisfaction.

## CHAPTER THREE: THE ROLE OF THIRD PARTIES IN SURROGACY AGREEMENTS

### 3.1 Introduction

Couples seeking to conceive, but are unable to do so, may consider surrogacy as a viable option. Potential commissioning parents would approach an egg donor clinic and/or a fertility specialist for assistance.<sup>121</sup> These commissioning parents would be put in contact with social workers as well as a psychologist who would perform all the required assessments on all parties involved.<sup>122</sup> Third parties often inform the prospective commissioning parents of the legal requirements that accompany surrogacy.

Aside from suggesting the use of egg and sperm donation, egg donor clinics have encouraged that a small gift to the egg donor would be appreciative to express gratitude.<sup>123</sup> Although the practice of compensating the donor for their contribution might be construed as admirable, it can also be viewed as an incentive, seriously bringing into question the ethics of these third parties. Another failure on the part of egg donor clinics is that they do not adequately inform donors of the risk associated with donating. Young women who consider donating their eggs are informed that there are no known long-term effects of donating eggs; however, this does not mean that there are no long-term risks of donating their eggs.<sup>124</sup> The Blog, *We are Egg Donors* interviewed a potential egg donor who backed out of the donation process after having done in-depth research regarding the long term effects of the donation.<sup>125</sup> She was shocked at what she had found, mainly because she was not informed of these side effects by the egg

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<sup>121</sup> Nicholson C and Bauling A ‘Surrogate Motherhood Agreements and their Confirmation: A New Challenge for Practitioners?’ (2013) 28 *De Jure*

<sup>122</sup> Nicholson C and Bauling A ‘Surrogate Motherhood Agreements and their Confirmation: A New Challenge for Practitioners?’ (2013) 28 *De Jure*

<sup>123</sup> ‘Baby2mom Egg Donation Agency’ available at <http://baby2mom.boltcms.com/Page/11588/Recipients#%2FNews%2F188%2FEgg-Donor-Gift> (accessed 14 June 2018).

<sup>124</sup>The Center for Bioethics and Culture ‘The Fertility Industry Has a Dirty Little Secret. Eggsploration’ available at <http://www.eggsploration.com/resources.htm> (accessed on 20 July 2018)

<sup>125</sup> We are egg donors ‘Interview: My Egg Donor Agency Billed Me \$3,400 for Backing Out. I Fought Back’ available at <http://www.weareeggdonors.com/blog/fighting-back> (accessed on 20 July 2018)

donation clinics. Once the donor terminated the contract, the clinic tried to recover the cost of the screenings, even though she was not legally liable for them.<sup>126</sup> It is evident that these egg donation clinics fail to inform the donors and mislead them, and if the donor does not ask the correct questions they do not voluntarily offer information, which leads to donors not giving informed consent.<sup>127</sup> Additionally, to the abovementioned, clinics do not do long term follow-up appointments with egg donors to determine whether these donors were exposed to any long-term risks.<sup>128</sup>

Chapter three will focus on who the main third parties in the surrogacy process are. Additional to the above, this chapter will aim to illustrate that lawyers, fertility clinics and egg donation clinics are the only parties that can benefit from the prohibition on commercial surrogacy. The author will conclude that the presence of these third parties, can increase the likelihood of exploitation if the ban on commercial surrogacy continues to stand, as surrogate mothers are not receiving adequate compensation for their efforts, and commissioning parent(s) who are desperate to have a child will have to pay handsomely for the service of finding a suitable egg donor or sperm donor, as well as the cost of fertility specialists.

### 3.2 Third parties in the surrogacy process

As stated above, to have a child through the surrogacy process the commissioning parents would have to contact an egg donor clinic, fertility specialist, and a lawyer. These third parties are of vital importance to the surrogacy process as without them, commissioning parents would be unable to have a child that has a genetic link to them. The forthcoming paragraphs will briefly clarify who these parties are and examine the involvement of each third party in the surrogacy process.

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<sup>126</sup> We are egg donors 'Interview: My Egg Donor Agency Billed Me \$3,400 for Backing Out. I Fought Back' available at <http://www.weareegdonors.com/blog/fighting-back> (accessed on 20 July 2018)

<sup>127</sup> Emily Woodruff, 'We simply don't know': Egg donors face uncertain long-term risks' available at <https://www.statnews.com/2017/01/28/egg-donors-risks/> (accessed on 05 March 2020)

<sup>128</sup> Edwards B. 'The High Cost of Giving up your eggs' available at [https://journalism.nyu.edu/publishing/archives/livewire/archived/high\\_cost\\_eggs/](https://journalism.nyu.edu/publishing/archives/livewire/archived/high_cost_eggs/) (accessed 20 July 2018)

### 3.2.1 Egg donor clinics

Egg donation has been used to treat infertility for nearly 30 years.<sup>129</sup> As mentioned previously there are two forms of surrogacy, one where the surrogate mother provides her genetic material, and another is where the commissioning parents decide to use a donor egg for the surrogacy process. Gestational surrogacy is preferred to avoid a biological link between surrogate and baby.<sup>130</sup>

Egg donation clinics, therefore, play a vital role in the surrogacy process when potential commissioning parents elect to have the surrogate mother act just as a gestational surrogate. Egg donation clinics have been defined as brokers who recruits egg donors and matches them to intended parents.<sup>131</sup> Essentially these clinics are regarded as the middlemen between the egg donors and the intended parents.<sup>132</sup> Egg donation clinics and fertility specialists often work in unison to identify and recruit egg donors.<sup>133</sup> Egg donation clinics recruit possible egg donors either via the internet or pamphlets at clinics, with the purpose to assist individuals who are unable to conceive children.<sup>134</sup> Some clinics go as far as advertising in the restrooms at universities to recruit possible egg donors.<sup>135</sup>

Due to the increase in infertility, operating an egg donation clinic has become a very profitable business.<sup>136</sup> Egg donation clinics can charge up to R17 000 (seventeen thousand rands) for local clients, and R18 000 (eighteen thousand rands) for international clients for the service of finding a suitable egg donor.<sup>137</sup> This fee is inclusive of finding a suitable egg donor, the administration of the donor contract, the handover of the egg donors' files to the fertility clinic,

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<sup>129</sup> Keehn J, Holwell E, Sauer M.V & Klitzman R, 'How Agencies Market Egg Donation on the Internet: A Qualitative Study' (2015) 43 (3) *Journal of Law, Medicine & Ethics*

<sup>130</sup> Southern Surrogacy, 'Understanding the Differences of Gestational vs. Traditional Surrogacy' available at <https://southernsurrogacy.com/surrogacy-information/gestational-vs-traditional-surrogacy/> (accessed on the 01 July 2018)

<sup>131</sup> Holster K. 'Making connections: Egg donation, the internet, and the new reproductive technology marketplace' (2008) 10 *Adv Med Social*.

<sup>132</sup> Holwell E, Keehn J, Sauer M.V & Leu C & Klitzman R, 'Egg Donation Brokers: An Analysis of Agency Versus in Vitro Fertilization Clinic Websites' (2014) 59 (0) *The Journal of Reproductive Medicine*

<sup>133</sup> Kenny NJ, McGowan ML. 'Looking back: Egg donors' Retrospective Evaluations of their Motivations, Expectations, and Experiences during their First Donation Cycle' (2010) 93 (2) *Fertil Steril*.

<sup>134</sup> Morrissey J.F. 'Surrogacy: The Process, the Law, and the Contracts' (2015) 51 *Willamette Law Review*

<sup>135</sup> This is has been a personal experience of the author who has seen these advertisements in the restroom at her university.

<sup>136</sup> The Center for Bioethics and Culture 'The Fertility Industry Has a Dirty Little Secret. Eggsploration' available at <http://www.eggsploitation.com/about.htm> (01 July 2018)

<sup>137</sup> ababySA Fertility Agency (Pty) Ltd 'Our Rates' available at <https://www.ababysa.com/recipients/our-rates/> (01 July 2018)

medical and psychological assessments as well as support for the donor during the donation cycle.<sup>138</sup>

Despite the egg donation business becoming extremely profitable, the donors are not necessarily benefiting financially from their donation. According to the National Health Act 61 of 2003, when donating gametes an individual is not allowed to be paid for their donation.<sup>139</sup> However, agencies encourage commissioning parent(s) to ‘gift’ donors for their time and effort at a going rate of R7000 per cycle.<sup>140</sup> Agencies have continuously held that the payment of R7000 (seven thousand rands) is purely to compensate donors for their time, but money is still a motivating factor for most women in donating their eggs.<sup>141</sup> The R7000 that donors are ‘gifted’ with is not inclusive of the fee that commissioning parent(s) pay to the egg donation clinic, as a result commissioning parent(s) will pay a total of about R24 000 (twenty-four thousand rands) for a suitable egg donor.

### 3.2.2 Fertility Clinics

In 2010 the World Health Organisation (WHO) estimated that approximately 48.5 million couples worldwide suffered from some form of infertility.<sup>142</sup> The WHO concluded that 1.9 percent of women between the ages 22 and 40 wanted children but were unable to conceive and 10.5 percent of women have had a child before were unable to have another baby after trying for five years.<sup>143</sup> If an individual or couple has struggled to conceive naturally, fertility testing has to be done to establish the cause of the problem.<sup>144</sup> An infertility clinic provides the fertility testing service as well as advising clients on the best fertility treatments.<sup>145</sup> Infertility clinics provide various services including harvesting eggs or sperm as well as using gametes in a variety of ways such as IVF, intrauterine sperm injection, intracytoplasmic sperm injection,

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<sup>138</sup> ababySA Fertility Agency (Pty) Ltd ‘Our Rates’ available at <https://www.ababysa.com/recipients/our-rates/> (01 July 2018)

<sup>139</sup> National Health Act 61 of 2003 section 60(4)(a)(b)

<sup>140</sup> Kovarsky T ‘All about Egg Donation’ available at <https://www.parent24.com/FertilityTreatment/All-about-egg-donation-20150826> (01 July 2018)

<sup>141</sup> Kovarsky T ‘All about Egg Donation’ available at <https://www.parent24.com/FertilityTreatment/All-about-egg-donation-20150826> (01 July 2018)

<sup>142</sup> [https://www.bionews.org.uk/page\\_93930](https://www.bionews.org.uk/page_93930)

<sup>143</sup> Warren-Gash C, ‘Worldwide infertility rates unchanged in 20 years says World Health Organisation’ BioNews 7 January 2013 available at [https://www.bionews.org.uk/page\\_93930](https://www.bionews.org.uk/page_93930) ( 25 June 2018)

<sup>144</sup> Warren-Gash C, ‘Worldwide infertility rates unchanged in 20 years says World Health Organisation’ BioNews 7 January 2013 available at [https://www.bionews.org.uk/page\\_93930](https://www.bionews.org.uk/page_93930) ( 25 June 2018)

<sup>145</sup> Warren-Gash C, ‘Worldwide infertility rates unchanged in 20 years says World Health Organisation’ BioNews 7 January 2013 available at [https://www.bionews.org.uk/page\\_93930](https://www.bionews.org.uk/page_93930) ( 25 June 2018)

and many other advanced fertility techniques.<sup>146</sup> As stated above, infertility clinics and egg donation clinics work in tandem to assist couples who want to pursue the option of surrogacy with donor eggs.

Fertility clinics are a necessity for the use of surrogacy as a viable option and therefore play a crucial role in the surrogacy process. The average cost for the procedure of artificial insemination ranges from R 10 000 ( ten thousand rand) and R20 000 ( twenty thousand rand) per treatment cycle.<sup>147</sup> The procedure of IVF cost begin at R40 000 (forty thousand rand) and R50 000 (fifty thousand rand) with their own egg, and between R 60 000 and R90 000 if you are using an egg donor.<sup>148</sup> Infertility treatments are not covered by health insurance, leaving intended parents unsure of how to cover the cost themselves.<sup>149</sup> However, the public health system does provide IVF treatment to commissioning parent(s) costing anything between R150 (hundred and fifty rand) and R6, 600 (six thousand six hundred rand) on the condition that the commissioning parent(s) provides a recent payslip to prove that they cannot afford private fertility treatments.<sup>150</sup> Pricing of infertility treatment differs from clinic to clinic, as there are no set guidelines on how much each procedure will cost allowing each clinic to be able to determine their own pricing.<sup>151</sup>

### 3.2.3 Lawyers

Before the surrogacy process may commence, the parties must enter into a surrogate motherhood agreement which must be confirmed by the High Court.<sup>152</sup> This agreement contains information regarding the rights of the commissioning parent and the rights of the

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<sup>146</sup> Life Healthcare, 'Fertility' <https://www.lifehealthcare.co.za/patient-information/patient-services/hospital-services/fertility/> (Accessed on 02 December 2019)

<sup>147</sup> BioArt, 'IVF Treatment Costs: What You Need To Know' available at <https://bioartfertility.co.za/ivf-treatment-costs-what-you-need-to-know/> (accessed on 5 March 2020)

<sup>148</sup> Zongile Nhlapo, 'Thinking About IVF? Here's 5 Cold, Hard Facts About Doing It In South Africa' Available at [https://www.huffingtonpost.co.uk/2017/09/11/thinking-about-ivf-heres-5-cold-hard-facts-about-doing-it-in-south-africa\\_a\\_23204086/?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAANIKaFzW3UduOwzXWqO4DwkpqnFZyllOvXjN0Np5nBNDgmdAdajbtZl1fpxb5DRY3Ei7q949PrQnjWLkzlh6qVioP1giIk5EetuHkF0db5WeZ278RZWMoaaVW-uRYyI91xNPHZuU9WyiDwHqbHpte1lf9qAACv7vyaLrIm-NwE6b](https://www.huffingtonpost.co.uk/2017/09/11/thinking-about-ivf-heres-5-cold-hard-facts-about-doing-it-in-south-africa_a_23204086/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAANIKaFzW3UduOwzXWqO4DwkpqnFZyllOvXjN0Np5nBNDgmdAdajbtZl1fpxb5DRY3Ei7q949PrQnjWLkzlh6qVioP1giIk5EetuHkF0db5WeZ278RZWMoaaVW-uRYyI91xNPHZuU9WyiDwHqbHpte1lf9qAACv7vyaLrIm-NwE6b)

<sup>149</sup> MedFem Fertility Clinic 'The cost of in vitro Fertilisation (IVF) in South Africa' available at <https://medfem.co.za/the-cost-of-in-vitro-fertilisation-ivf-in-south-africa/> (accessed on 5 March 2020)

<sup>150</sup> Western Cape Government, ' Infertility Programme' available at <https://www.westerncape.gov.za/service/infertility-programme> (accessed on 10 July 2018)

<sup>151</sup> MedFem Fertility Clinic 'The cost of in vitro Fertilisation (IVF) in South Africa' available at (accessed on 5 March 2020)

<sup>152</sup> Slabbert MN,' Legal issues relating to the use of surrogate mothers in the practice of assisted conception' (2012) (1) *South African Journal of Bioethics and Law*

surrogate mother. A surrogate motherhood agreement is a complex document and it is therefore of paramount importance that it is drafted by someone in the legal profession.

Potential commissioning parent(s) and surrogates have to work with an attorney to ensure that the surrogate motherhood arrangement is legally binding and effectively echoes the expectations of both the commissioning parent(s) and the surrogate mother.<sup>153</sup> A High Court has to confirm a surrogate motherhood agreement and it cannot be confirmed unless it stipulates the following:

‘(a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible; (b) the commissioning parent or parents— (i) are in terms of this Act competent to enter into the agreement; (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof; (c) the surrogate mother— (i) is in terms of this Act competent to enter into the agreement; (ii) is in all respects a suitable person to act as surrogate mother; (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof; (iv) is not using surrogacy as a source of income; (v) has entered into the agreement for altruistic reasons and not for commercial purposes; (vi) has a documented history of at least one pregnancy and viable delivery; and (vii) has a living child of her own; (d) the agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child’s position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child; and (e) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.’<sup>154</sup>

The issues that South African courts have encountered when confirming a surrogate motherhood agreement (SMA) is whether a surrogacy agency should be able to be compensated, whether funds have been paid to an agency for the recruitment of a surrogate mother as well as cautioning against generic payments made to the surrogate mother. This is evident from the case of *WH* in which the court had to determine whether an egg donation clinic was compensated for the introduction provided between a surrogate mother and

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<sup>153</sup> Morrissey J.F. ‘Surrogacy: The Process, the Law, and the Contracts’ (2015) 51 *Willamette Law Review*

<sup>154</sup> The Children’s Act 38 of 2005, S295

commissioning parent(s).<sup>155</sup> The court held that if an agency is involved they should provide a detailed supplementary affidavit of their involvement in facilitating surrogacy.<sup>156</sup> The court further held that the SMA should motivate the surrogate mother's expenses, as generic payments may run the risk of being disguised as possible compensation.<sup>157</sup> The issue of generic payments was also dealt with in *Ex Parte KAF*, the court held that a surrogate mother receiving R6000 (six thousand rands) a month for expenses that are not detailed in the SMA lacks sufficient proof that the surrogate mother is not being compensated.<sup>158</sup>

Lawyers play a curial role as courts rely on them to provide the court with all necessary material detailing all expenses by commissioning parents as well as the surrogate mother.<sup>159</sup> Without an attorney to assist the parties in the legal aspects of the surrogacy process, many questions might go unanswered in the beginning discussions which might have ramifications that could negatively affect the surrogacy process as it proceeds. Despite attorneys playing an important role in the surrogacy process, there is still the possibility that surrogate's attorney may take advantage of the system which may result in potential commissioning parent(s) being exploited as well as potential surrogate mothers. This is illustrated in the case of two prominent surrogate attorneys in California who were convicted for their participation in a baby-selling ring.<sup>160</sup> One of the attorneys admitted that 'she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over \$100,000 each'.<sup>161</sup> The convicted attorney confessed that she was just the 'tip of the iceberg' of a 'corrupt' 'billion-dollar industry'.<sup>162</sup> This case provides evidence that despite commercial surrogacy regulations, there has to be effective policing of all parties involved in the surrogacy process to ensure that no parties are being exploited. Attorneys are governed by ethical rules and standards; these rules ensure that lawyers are always acting in the best interest of their client and that they are fit and

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<sup>155</sup> *Ex part WH and others* 2011 (6) SA 514 (GNP), par 12

<sup>156</sup> *Ex part WH and others* 2011 (6) SA 514 (GNP), par 12

<sup>157</sup> *Ex part WH and others* 2011 (6) SA 514 (GNP), par 29

<sup>158</sup> *Ex parte KAF and Others*[2017] ZAGPJHC 227 para 17- 18

<sup>159</sup> *Ex Parte HPP and Others; Ex Parte DME and Others* (45037/2016) [2017] ZAGPPHC para 39 para 9

<sup>160</sup> Smolin DM, 'Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children' (2016) 43 Pepperdine Law Review

<sup>161</sup> Federal Bureau of Investigation, 'Baby-selling ring busted' Available at <https://archives.fbi.gov/archives/sandiego/press-releases/2011/baby-selling-ring-busted> (29 June 2018)

<sup>162</sup> Devine R, Stickney R, 'Convicted surrogacy attorney' Available at [www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html](http://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html) (29 June 2018)

proper to practice. However, if the client does not report the infraction to the governing body, there would not be any consequences.

### 3.3 The Beneficial Role a Surrogacy Agency or Surrogacy Facilitator would play

As previously stated, surrogacy agencies or surrogacy facilitators are not allowed to operate for profit, regardless of how invaluable their service is. Chapter two details that the fear of exploitation is the driving force for the prohibition of agencies in the surrogacy process, however, legislatures in South Africa fail to acknowledge the significant role that a surrogate agency could provide for commissioning parents who are considering surrogacy as a valid option. The court in *WH* held that even though the service of an agency may be instrumental in the surrogacy process as they provide an invaluable introduction service, the fear of abuse outweighs the advantages.<sup>163</sup> However, the author argues that the beneficial service that agencies offer to commissioning parents and surrogate mothers alike outweighs the mere possibility of abuse taking place. Every couple or individual has the right to create their surrogacy journey which best suits their needs. When first time commissioning parents decide to pursue surrogacy as an option it is advised that these first time commissioning parents consult the services of a surrogacy agency.<sup>164</sup> Surrogacy is a complex process and a huge commitment for commissioning parents and prospective surrogate mothers who do not have the assistance of a surrogacy agency.

Countries that allow surrogacy agencies to operate for profit provide a host of services that could considerably reduce the already stressful procedure for potential surrogates as well as potential commissioning parents.<sup>165</sup> These services may include providing medical and psychological screening to any potential surrogate mother. Before a woman can be chosen to be a surrogate mother, she must meet certain criteria. The first requirement is that she must fall

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<sup>163</sup> *Ex parte: WH and Others* [2011] 4 All SA 630 (GNP) para 64

<sup>164</sup> Surrogate.com 'About surrogacy, the pros and cons of surrogacy without an agency' available at <https://surrogate.com/about-surrogacy/surrogacy-professionals/the-pros-and-cons-of-surrogacy-without-an-agency/> (04 July 2018)

<sup>165</sup> Carbone J, Maderia JL, 'The Role of Agency: Compensated Surrogacy and the Institutionalized of assisted Reproduction Practices' (2015) 90 *Washington Law Review Online* .25

within a certain age group and have a body mass index of 33 and under<sup>166</sup> this can be referred to as a biological requirement. Additionally, commissioning parents have a preference regarding the surrogate mother they decide to use. It is not a requirement per se, but rather a preferred lifestyle choice: the potential surrogate mother should not smoke and should be financially stable. Surrogacy agencies can screen out the most vulnerable participants to ensure that potential surrogates meet the criteria and avoid any future conflicts that could arise. Having a surrogacy agency that specialises in providing these matching services adds another safeguard for commissioning parents. Commissioning parents are provided with an unlimited rematch of a surrogate, which enables a commissioning parent the option of being matched to a complete new surrogate mother if a physician is not satisfied with a particular surrogate.<sup>167</sup> This safeguard provided by a surrogacy agency is vitally important as it protects commissioning parents from the added stress of having to secure another surrogate as well as paying the additional cost to find another suitable surrogate mother at short notice.<sup>168</sup> Even though a surrogacy agency would be an additional cost for commissioning parent(s) it adds further protections for the surrogate mother as well as assisting first time commissioning parents with finding the best-suited surrogate for their needs.<sup>169</sup>

Positive results in the surrogacy process are credited to the contribution of surrogacy agencies who carefully select and match parties who, through inexperience as well as personal involvement, would be less prepared to understand the complexities of the surrogacy agreement.<sup>170</sup> Lawyer Natalie Gamble contends that commissioning parent(s) undertaking the surrogacy process in countries which do not have surrogacy agencies tend to go to countries that do provide these service to ensure that they receive 'speedy, professional, and 'looked after' services'.<sup>171</sup> Krawiec advises that in most cases potential commissioning parents, surrogates and egg donors need agencies and intermediaries since these parties are not 'repeat players', and commissioning parents and surrogates tend to begin the surrogacy the process

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<sup>166</sup> Circle Surrogacy & egg donation, 'Surrogate and Egg Donor Body Mass Index (BMI)' available at <https://www.circlesurrogacy.com/blog/circle-surrogacy/the-importance-of-body-mass-index/> (accessed 20 July 2018)

<sup>167</sup> Golden Surrogacy ' Agency Fee comparison' available at <https://goldensurrogacy.com/agency-fee-comparison/> (05 July 2018)

<sup>168</sup> Carol Sanger, 'Developing Markets in Baby-Making: In the Matter of Baby M' (2014) 30 *Harvard Law Journal & Gender*

<sup>169</sup> Carol Sanger, 'Developing Markets in Baby-Making: In the Matter of Baby M', (2014) 30 *Harvard Law Journal & Gender*

<sup>170</sup> Millbank, J 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry*

<sup>171</sup> Gamble N 'Made in the U.S.A.: Representing U.K. parents conceiving through surrogacy and ART in the United States' (2012) 46(1) *Family Law Quarterly*

with 'severe information disparities'.<sup>172</sup> Surrogacy agencies would be able to expect any possible problems that could arise and therefore able to strategise accordingly to minimize any foreseeable risk drastically. Jenni Millbank agrees that potential commissioning parents and surrogates may simply be ill-equipped to find a suitable match with the correct person in such a complex endeavour as surrogacy.<sup>173</sup> Surrogacy agencies providing high-quality service by ensuring that screening procedures are done proficiently and providing counseling service to parties involved, putting their reputational capital at stake to ensure that the risk to parties is reduced significantly.<sup>174</sup> The presence of a surrogacy agency does not mean that they will act against self-interest, instead, it simply means that the existence of these agencies and intermediaries in the surrogacy process will change the surrogacy process more predictably.<sup>175</sup>

Another beneficial feature of having for-profit surrogacy agencies would be that they can fix prices for compensation for all surrogates, thus avoiding pay discrepancies between different races and nationalities. Pamela Laufer-Ukeles notes that 'capping the price reflects the desire to ensure that surrogacy is not fully marketized but rather appreciated for its dual function of creating intimate and monetary relationships.'<sup>176</sup> Fixed pricing coupled with staggering payments made by the agency to a potential surrogate mother is an additional advantage of having a surrogate agency, as staggering payments could resemble compensation for a service rather than a lump sum which could imply payment for the baby.<sup>177</sup> Caborne contends that having initial payment from the beginning asserts the surrogate's sense of responsibility to the commissioning parents from the beginning and mutual involvement in the pregnancy.<sup>178</sup>

The incorporation of surrogacy agencies, as repeat players in the surrogacy process, would result in surrogacy arrangements being executed more efficiently and effectively and in return aids in the development of socially acceptable commercial surrogacy agreements.<sup>179</sup>

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<sup>172</sup> Krawiec, K., 'Altruism and intermediaries in the market for babies' (2009) 66 (1) *Washington and Lee Law Review*.

<sup>173</sup> Millbank, J 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry*

<sup>174</sup> Millbank, J 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry*

<sup>175</sup> Carbone J, Maderia JL, 'The Role of Agency: Compensated Surrogacy and the Institutionalized of assisted Reproduction Practices' (2015) 90 *Washington Law Review Online* .

<sup>176</sup> Laufer-Ukeles P, 'Mothering for Money: Regulating Commercial Intimacy' (2013) 88 *Indiana Law Journal*.

<sup>177</sup> Carbone J, Maderia JL, 'The Role of Agency: Compensated Surrogacy and the Institutionalized of assisted Reproduction Practices' (2015) 90 *Washington Law Review Online*

<sup>178</sup> Carbone J, Maderia JL, 'The Role of Agency: Compensated Surrogacy and the Institutionalized of assisted Reproduction Practices' (2015) 90 *Washington Law Review Online* 29

<sup>179</sup> Carbone J, Maderia JL, 'The Role of Agency: Compensated Surrogacy and the Institutionalized of assisted Reproduction Practices' (2015) 90 *Washington Law Review Online*

Surrogacy agencies would have an important role as they would have to ensure that a potential surrogate mother enters into a surrogate agreement freely and that she fully understands the procedure. There will always be the risk of surrogacy agencies taking advantage of commissioning parents and surrogates alike. However, these for-profit agencies are more likely to ensure that they take extra precautions to guarantee their actions are ethical and above board. Therefore, if these agencies actions are found to be in any way corrupt or dishonourable, they could be held accountable to the full extent of the law.

### 3.4 Ways in which third parties benefit from the surrogacy process

The involvement of third parties in the surrogacy process does not imply that they are inherently bad; however, third parties benefit financially from the prohibition on commercial surrogacy which allows third parties to influence the system to their benefit. For this section, third parties will refer to those third parties exempted from the prohibition in s 301 of the Children's Act. The surrogacy industry, whether it is commercial surrogacy or altruistic surrogacy, is quite similar to many common markets in various ways, including price differentiation, the presence of powerful third parties and the significant industry profits.<sup>180</sup> The surrogacy industry and adoption market for one have similarities, such as having third parties involved in the process, as well as the transfer of money. Thus, third parties involved in the surrogacy process should be subject to extensive state regulation to minimize the risk of exploitation. The lack of supervision over third parties creates a gap for them to build an industry which financially benefits them. This next section will deal with ways in which third parties can benefit from the system by lack of regulation.

#### 3.4.1 Fixing prices

Professors Landes and Posner stated more than thirty years ago that legal restrictions allowed adoption agencies a free hand in setting prices that were charged to adoptive parents, but limitations were placed on the compensation received by those individuals supplying gametes or acting as a surrogate.<sup>181</sup> Even though the sentiment was expressed years ago, it is still a

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<sup>180</sup> Krawiec, K., 'Altruism and intermediaries in the market for babies' (2009) 66 (1) *Washington and Lee Law Review*

<sup>181</sup> Landes EM & Richard A. Posner RA, 'The Economics of the Baby Shortage', 7 (1978) *J. LEGAL. Stud.* 328

relevant contention in today's surrogacy industry. Third parties can determine prices depending on the service they are providing.<sup>182</sup> One of the characteristics of the surrogacy process is that suppliers of gametes and surrogate mothers are legally excluded from receiving full profits for their exchange; as a result, their monetary compensation may be well below the market value. At the same time, third parties such as the egg donor clinics and the fertility specialists legally profit generously from the surrogate market, without any legal restrictions on their profit-making activities. This occurrence is not just prevalent in countries like South Africa, but in an international context too.<sup>183</sup> The prohibition of commercial surrogacy prevents surrogates from receiving payment for their service and limits the compensation that egg donors may receive. However, there are no restrictions on the prices that third parties set for service,<sup>184</sup> which leads to their percentage of the profits continuing to grow substantially,<sup>185</sup> arguably as a result of the prohibition. Third parties, namely egg donation clinics, and fertility clinics control the surrogacy market as they continue to advocate for the prohibition on commercial surrogacy to stand and therefore allowing them to fix prices and avoid the competition of surrogate mothers and egg donors pursuing commissioning parents and negotiating prices directly.<sup>186</sup>

Surrogate mothers and gamete donors are not the only person(s) being exploited by third parties, commissioning parents are being taken advantage of as well. Persons who desire a child are willing to pay or give up any resource for the chance to raise a child.<sup>187</sup> As surrogate mothers are unable to receive compensation, and gamete donor's compensation is limited considerably, this leads to the considerably low supply of gamete donors and surrogate mothers.<sup>188</sup> On account of the low supply of surrogate mothers and gamete donors, third parties can charge commissioning parents absurdly high prices since there is a scarcity of potential surrogate mothers and gamete donors.<sup>189</sup> This essentially means that these third parties namely,

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<sup>182</sup> Huggies 'IVF Cost' available at <https://www.huggies.co.za/conception/ivf/ivf-cost/> (accessed 10 July 2018)

<sup>183</sup> Everingham, S. 'Australians' use of and attitudes to altruistic and commercial surrogacy: Results of a national survey in Hayes, A., & Higgins, D.' (Eds.) *Families, policy and the law: Selected essays on contemporary issues for Australia*. Melbourne: Australian Institute of Family Studies (2014). In the United States, a surrogate mother will only receive twenty percent of a surrogate agreement costing \$150 000

<sup>184</sup> Trimmings, K., and P. Beaumont. 'International surrogacy arrangements: An urgent need for legal regulation at the international level' (2011) 7(3) *Journal of Private International Law*

<sup>185</sup> Nicolas P, 'Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy' (2014) 89 *WASH. L. REV.*

<sup>186</sup> Krawiec, K., 'Altruism and intermediaries in the market for babies' (2009) 66 (1) *Washington and Lee Law Review*

<sup>187</sup> Davis JS, 'Regulating Surrogacy Agencies through Value-Based Compliance' (2018)43 *J. Corp. L.*

<sup>188</sup> Krawiec, K., 'Altruism and intermediaries in the market for babies' (2009) 66 (1) *Washington and Lee Law Review*

<sup>189</sup> Krawiec, K., 'Altruism and intermediaries in the market for babies' (2009) 66 (1) *Washington and Lee Law Review*

egg donors, lawyers and fertility clinics could be seen as controlling the market in the surrogacy process as they receive the majority of the profits.<sup>190</sup> Fertility clinics and egg donor clinics are only regulated to a certain degree.<sup>191</sup> The Society for Assisted Reproductive Technology (SART) and the American Society for Reproductive Medicine (ASRM), are the closest thing the field has to regulators. Thus, third parties are self-regulated with regards to pricing and therefore do not have a limit on the amount they charge commissioning parents for their services. These gaps in regulation permits clinics to set a price that desperate commissioning parent(s) are willing to pay to conceive a child. Carol Sanger reiterates this view by stating that a '[c]hildless couples with means (and sometimes couples without) are often willing to pay anything'<sup>192</sup> to have a child.

### 3.4.2 Fertility financing

Doctors take an oath to do no harm, however, this oath does not extend to one's finances.<sup>193</sup> As stated above, the cost of medical procedures by fertility clinics are exceedingly expensive and many couples or individuals are unable to afford fertility treatments. Patients unable to afford fertility treatments are left seeking alternative methods to have a child. Fertility financing companies realised that there is a gap in the market in which they can fill. Fertility finance companies loan women money for their fertility procedures, and their financing industry is thriving.<sup>194</sup> Jim Hawkins concluded interviews with prominent lenders which revealed that financial lenders and clinics are teaming up to pitch credit to patients.<sup>195</sup> This is true in a South African context as well; First Health Finance is one of the financing companies that fertility clinics and egg donation clinics have teamed up with to provide fertility financing to desperate patients.<sup>196</sup> Fertility clinics and egg donation clinics provide fertility financing options on their websites so that potential clients can sign up immediately by filling out an '...

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<sup>190</sup> Nicolas P, 'Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy' 89 (2014) *WASH. L. REV.*

<sup>191</sup> Anita M. Ventrelli et al., 'Report to the House of Delegates on the Model Act Governing Assisted Reproductive Technology Agencies' (2016) *A.B.A. SEC. FAM. L. REP.*

<sup>192</sup> Carol Sanger, 'Developing Markets in Baby-Making: In the Matter of Baby M', 30 (2014) *HARV. J.L. & GENDER* This view is also shared by Davis Jordana, who believes that potential commissioning parents would give up any resource to have a child. Davis JS, 'Regulating Surrogacy Agencies through Value-Based Compliance' (2018) 43 *J. Corp. L.*

<sup>193</sup> Hall MA & Schneider CE, 'Patients as Consumers: Courts, Contacts, and the New Medical Marketplace' (2008) 106 *MICH. L. RE.*

<sup>194</sup> Baker K. 'Are Fertility Finance Companies as Shady as They Seem?' available at <https://jezebel.com/5888249/are-fertility-finance-companies-as-shady-as-they-seem/> (accessed on 20 July 2018)

<sup>195</sup> Hawkins J, 'Doctors as Bankers: Evidence from Fertility Markets' (2010) 84 *TuL. L. REV.* 843

<sup>196</sup> Medfem 'IVF Funding' available at <https://medfem.co.za/ivf-funding/> (accessed on 20 July 2018)

easy online application'.<sup>197</sup> Medifin is another financial service with whom nurture egg donor program has teamed up, which advertises on their website that they can '... approve an application within 1 hour and disburse funds within 48 hours.'<sup>198</sup> The fact that these applications can be approved within the hour raises the question about whether these patients are informed fully regarding these fertility loans they are applying for. A physician and patients' relationship is based on trust and respect and when patients who approach fertility specialists are usually doing so in desperation and confusion, they are vulnerable and susceptible to influence from others. Therefore, studies have shown that when a doctor provides a recommendation, patients tend to accept it without doing additional research.<sup>199</sup>

As stated, fertility clinics often partner with these financing companies, and it appears that many do for the financial benefit that they will receive. Fertility financing companies have pitched fertility financing as a 'gold mine' as it will increase business for clinics as patients are now able to afford expensive treatments that they once could not.<sup>200</sup> Fertility clinics benefit from advertising fertility financing on their websites, which draws commissioning parent(s) who are desperate to conceive. Patients have not regretted using financing companies to have a child. However, once the child is born, they suffer great financial fallout.<sup>201</sup> Fertility financing could be beneficial to those individuals that would do anything to conceive a child. Nonetheless, doctors have a duty towards their patients to provide them with all the information, regarding different financing options, not just the option which is ideal to their needs but rather that of the patient. Doctors should not be misleading their patients by not fully presenting them with a variety of lenders who can assist commissioning parents financially and not leave them bankrupt once the procedure is complete.

### 4.3.3 Fertility refund

The use of fertility treatments does not guarantee that a cycle of IVF will be successful. Fertility clinics and financing companies abroad have begun to offer patients a refund program which

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<sup>197</sup> Medfem 'IVF Funding' available at <https://medfem.co.za/ivf-funding/> (accessed on 20 July 2018)

<sup>198</sup> Nurture 'Financing options' available at <https://www.nurture.co.za/financing-options/> (accessed on 20 July 2018)

<sup>199</sup> Hall MA & Schneider CE, 'Patients as Consumers: Courts, Contacts, and the New Medical Marketplace' (2008) 106 *MICH. L. RE.* 654-55

<sup>200</sup> Baker K. 'Are Fertility Finance Companies as Shady as They Seem?' available at <https://jezebel.com/5888249/are-fertility-finance-companies-as-shady-as-they-seem/> (accessed on 20 July 2018)

<sup>201</sup> Fin24 'Breaking the Budget on Baby Making' available at <https://www.fin24.com/Money/Money-Clinic/Breaking-the-budget-on-baby-making-20100915> (accessed on 20 July 2018)

allows couples to pay a premium upfront to the fertility clinics for treatments. The ART Fertility Program of Alabama offers patients the option of a ‘Three Cycle Options’. This program involves patients paying \$17 500 for up to three fresh cycles over twelve months. If a live birth is a result of one of the three fresh cycles, the fertility clinic retains the entire fee. However, if the three fresh cycles and any frozen embryos are unsuccessful the fertility clinic will refund the patient with \$ 10 500 of the \$17 500 of the initial fee. Even though the refund program is a ground-breaking tool for financing fertility<sup>202</sup> there is not any regulation of these programs which allows fertility clinics and doctors to mislead and exploit vulnerable patients.

Patients that decide they are going to purchase the refund package rely on several misrepresentations about the cost of the refund program compared to the cost they would pay for every single cycle individually.<sup>203</sup> Refund providers imply that refund patients who undergo one cycle would be worse off than those refund patients who undergo more than two cycles.<sup>204</sup> However, this reasoning is flawed because refund program participants will still end up paying more for the service as there is the possibility that they could have a successful cycle the first time around.<sup>205</sup> Refund providers possess medical knowledge and statistical data, which enables them to make an informed decision whether or not a patient will require the refund program or will have a successful pregnancy on their cycle.<sup>206</sup>

Additionally, clinics often present information about refund programs deceptively or in a manner that exploits poor patient decision-making.<sup>207</sup> Fertility clinics misinform patients about the cost of the refund program and fail to inform patients about the additional cost for fertility treatment such as medication costs.<sup>208</sup> Patients believe that the cost of the refund program is their only cost and is comforted by the fact that they are not taking any risk at all, because they are receiving a child or full money-back guarantee.<sup>209</sup> However, patients have a lot to lose because even under the refund program patients are not refunded the entire amount spent because the additional costs are not refunded.

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<sup>202</sup> Hawkins J, ‘Financing Fertility’, (2010) 47 *Harvard Journal on Legislation*.

<sup>203</sup> *Id*

<sup>204</sup> *Id*

<sup>205</sup> *Id*.

<sup>206</sup> *Id*.

<sup>207</sup> *Id*.

<sup>208</sup> *Id*

<sup>209</sup> Gordon D, ‘Fertility Clinic in Los Angeles Offers a Baby or Your Money Back’ available at <http://www.encyclopedia.com/doc/IG1-20433572.html> ( accessed 11 July 2018)

### 3.5 Conclusion

In today's society, surrogacy is a billion-dollar industry<sup>210</sup> that is largely unregulated.<sup>211</sup> Many states fall short of treating surrogacy as the market that it is instead, they are more concerned with the possibility of exploitation and commodification that has, in fact, already occurred.<sup>212</sup> Susan Markens held that there has been legislative inactivity with regards to the debate between those individuals that see surrogacy as the commodification of reproduction and those who see it as reproductive freedom.<sup>213</sup>

Removing the prohibition on commercial surrogacy will not necessarily instigate bad outcomes. Self-regulation by third parties is likely to increase the probability of exploitation in the surrogacy process, in commercial surrogacy and altruistic surrogacy. The introduction of for-profit surrogacy agencies creates an element of protection for commissioning parents and potential surrogates. Agencies can provide various services that will help ensure that the surrogacy process is operated in the least stressful manner while ensuring that each party is well informed of their rights and responsibilities throughout the procedure. Just as third parties increase the risk of exploitation in the surrogacy process, unregulated surrogacy agencies would too lead to exploitation.

The author does not support unregulated for-profit agencies. These agencies must be effectively regulated with constant policing and supervising by an authorised governing body to avoid self-regulation. Permitting for-profit agencies and allowing for commercial surrogacy will develop a more accessible model of surrogacy which is the most viable option to minimise exploitation and provide protection for both the surrogate and commissioning parents.<sup>214</sup>

Lawyers, egg donor clinics, and fertility clinics control the surrogacy industry, legislators can ensure that the needs of commissioning parents and surrogates are protected by realizing that

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<sup>210</sup> Spar DL, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (2006).

<sup>211</sup> Ventrelli AM et al., 'Report to the House of Delegates on the Model Act Governing Assisted Reproductive Technology Agencies', 2016 A.B.A. SEC. FAM. L. REP. 112A.

<sup>212</sup> Krawiec KD, *Price and Pretense in the Baby Market*, in BABY MARKETS ed (2010) Money and the New Politics of Creating Families FAMILIES 52

<sup>213</sup> Markets S, 'Third Party Reproductive Practices: Legislative Inertia and the Need for Nuanced Empirical Data' (2016)3 *J. L. & BIOSCIENCES*

<sup>214</sup> Stuhmcke, A. 'Extraterritoriality, and surrogacy: The problem of State and Territory moral sovereignty' (ed) In *Law in context* (2015)

surrogacy is indeed a market and should be regulated as one. Surrogacy would not exist without third parties. Third parties are essential role players in the surrogacy process and have taken advantage of this opportunity which has arisen. However, the fact that there is a lack of regulation for these third parties has allowed them to benefit financially at the expense of the other parties involved in the surrogacy process.

A fertility specialist must inform patients of all information regarding treatments or financing provided to patients. Doctors, especially fertility specialists, become intricately integrated into their patient's financial decision. Fertility clinics that provide financing in the form of advocating for a fertility financing company or refund programs offer a ground-breaking tool to assist desperate commissioning parents to conceive a child. Even though doctors do not receive any benefit from the financing company, it increases the number of patients they are able to assist, which increase their profits.<sup>215</sup> Patients are most vulnerable when approaching a fertility clinic and therefore are more susceptible to accepting the doctor's advice without doing additional research.

The author agrees with Angela Campbell that, "too often, law's efforts at protecting vulnerable women have yielded impacts that have harmed rather than helped them"<sup>216</sup> The main aim in prohibiting commercial surrogacy was to prevent exploitation of commissioning parents and surrogates. However, the prohibition limits surrogates from receiving adequate compensation for their labor and the significant risks that are accompanied by pregnancy. Restricting their ability to receive compensation but allowing third parties to legally profit from the surrogacy market is not the only way to protect surrogate mothers or commissioning parents. Third parties can benefit exponentially from the surrogacy process and are not subject to the same call for benevolence and gifts as surrogate mothers are, which places them in a more powerful position than both commissioning parents and surrogate mothers.

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<sup>215</sup> 'Overdose of Debt: Lenders Push Risky Credit for Everything from Cancer Care to Botox', (2008) 73(7) *CONSUMER REPORTS*,

<sup>216</sup> Campbell, A. 'Law's suppositions about surrogacy against the backdrop of social science' (2012) 43(1) *Ottawa Law Review*



## CHAPTER FOUR: INTERNATIONAL PERSPECTIVE

### 4.1 Introduction

There is no convention at an international level that regulates surrogacy, every countries law relating to surrogacy varies considerably. For example, surrogacy is completely prohibited in

countries such as France, Italy, Germany, and Spain.<sup>217</sup> The prohibition on all forms of surrogacy by these countries is credited to religious and moral concerns.<sup>218</sup> Even though there are countries that prohibit surrogacy completely, many countries allow altruistic surrogacy. As previously explained, surrogacy can be divided into altruistic surrogacy and commercial surrogacy. Countries that do regulate altruistic surrogacy have their own statutory provisions regarding surrogacy. Countries that prohibit surrogacy in its entirety meant that infertile couples who were considering surrogacy as an option had to contemplate leaving the country to pursue surrogacy in countries that allowed it. Another reason for couples considering surrogacy in other countries is the high cost of surrogacy in their country. Thus, fertility tourism was created. If a couple wants to pursue surrogacy in another country, they can simply travel to a country that allows surrogacy and begin the procedure.<sup>219</sup> This, however, poses quite a few legal problems, not just for the child, but for the commissioning parents and the surrogate mother. For example, certain countries do not recognize the commissioning parents as the legal parent of a child that is born via surrogacy, but rather the surrogate mother and her spouse.<sup>220</sup> This results in a lengthy court procedure which means the baby is caught in 'legal limbo' due to surrogacy laws differing from country to country.<sup>221</sup> Another problematic aspect that exists in fertility tourism is that the surrogate mother may decide that she wants to keep the baby<sup>222</sup> or the situation may be reversed and the commissioning parents may decide they do not want the baby and leave the surrogate mother to care for the baby.<sup>223</sup>

Chapter four will be a consideration of the international perspective of commercial surrogacy. This Chapter will be restricted to countries that have legalized commercial surrogacy, namely The United States of America, specifically focusing on California, Ukraine, and Israel. Chapter four will look at how these countries regulate commercial surrogacy, and how these regulations affect third-party involvement in the surrogacy process. It will further examine India that had once regulated commercial surrogacy but has prohibited it again due to exploitation that has

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<sup>217</sup> Cheung H, 'Surrogate babies: 'Where can you have them, and is it legal?'' available at <https://www.bbc.com/news/world-28679020>. ( accessed on 26 July 2018)

<sup>218</sup> Cornell Law Faculty Publications, 'Should Compensated Surrogacy Be Permitted or Prohibited?' (2017) 9 *Cornell Law: A Digital Repository*

<sup>219</sup> Mare L, 'The Feasibility of Compensated Surrogacy in South Africa: A Comparative Legal Study' (unpublished LLM thesis, University of South Africa, 2016)

<sup>220</sup> Trisha A. 'Wolf, Why Japan Should Legalize Surrogacy' (2014) 23 *PAC. RIM L. & POL'Y J* 486

<sup>221</sup> Mohapatra S, 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *BERKELEY J. INT'L LAW*

<sup>222</sup> *Johnson v Calvert* 851 P. 2d 776 Cal Supreme Court 1993

<sup>223</sup> Howard S. 'Taming the international commercial surrogacy industry' (2014) *The BMJ*.

occurred. As stated above each country has different statutory regulation, which means different results and outcomes. This chapter aims at identifying whether these countries effectively regulate commercial surrogacy and whether their regulatory guidelines can be adopted into South Africa's legal system. South Africa could learn from the mistakes of countries like India that became a reproductive hub with respect to surrogacy. If commercial surrogacy was ever to be legalized in South Africa, India's downfalls in regulating commercial surrogacy could be used as a guide of how to best address those flaws and loopholes to ensure that South Africa does not follow suit in becoming a tourism reproductive hub.

## 4.2 India

Between the year 2002 when commercial surrogacy was first legalised until its prohibition in 2016, India was regarded as the main reproductive tourism hub for commercial surrogacy.<sup>224</sup> Surrogacy in India had flourished to a £300 million industry since 2002.<sup>225</sup> It is no mystery why India became the main reproductive hub, it is affordable, has high-quality private healthcare, English-speaking clinics, and a significant number of women willing to participate in surrogacy.<sup>226</sup> The fertility market in India had over 200, 000 ( two hundred thousand) private fertility clinics that offer assisted reproductive technology (ART) services to clients without any state regulation or interference.<sup>227</sup> Infertility clinics, healthcare providers, medical tourism companies, the Indian government, and the women who provide surrogacy services all profited from the surrogacy industry.<sup>228</sup> A surrogate mother was paid a fee of £5000 for a single birth and more if they carry twins and surrogate mothers are housed at the fertility clinics during the pregnancy.<sup>229</sup>

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<sup>224</sup> Witzleb N, Chawla A, 'Surrogacy in India: Strong Demand, Weak Laws' in Gerber & O'Byrne (eds) *Surrogacy, Law and Human Rights* (2016)

<sup>225</sup> Sarangi A. 'Commercial Surrogacy in India' available at <http://eprints.lse.ac.uk/78483/1/Engenderings%20%E2%80%93%20Commercial%20Surrogacy%20in%20India.pdf> (accessed on 30 July 2018)

<sup>226</sup> Rimm J. 'Booming baby business: Regulating commercial surrogacy in India' (2009) *University of Pennsylvania Journal of International Law*

<sup>227</sup> Sarangi A. 'Commercial Surrogacy in India' available at <http://eprints.lse.ac.uk/78483/1/Engenderings%20%E2%80%93%20Commercial%20Surrogacy%20in%20India.pdf> (accessed on 30 July 2018)

<sup>228</sup> Points K. 'Commercial Surrogacy and Fertility Tourism in India: The case of Baby Manji' Kenan Institute for Ethics, Duke University, (2009) 3. Available at <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf>

<sup>229</sup> Sarangi A. 'Commercial Surrogacy in India' available at <http://eprints.lse.ac.uk/78483/1/Engenderings%20%E2%80%93%20Commercial%20Surrogacy%20in%20India.pdf> (accessed on 30 July 2018)

India had an absence of adequate regulation for surrogacy apart from the guidelines for regulation, accreditation, and supervision of surrogacy clinics established in 2005 by the Ministry of Health and Family Welfare.<sup>230</sup> These guidelines used for surrogacy were drafted by a committee formed by the National Academy of Medical Sciences and Indian Council of Medical Research (ICMR). Bailey held that these guidelines are non-binding and purely directed towards ensuring that these new technologies are being promoted, rather than adequately regulating these new technologies.<sup>231</sup> In the absence of the law governing such a fast-growing market, commercial surrogacy in India became chaotic.<sup>232</sup>

The debate on commercial surrogacy in India became prevalent with the case of baby Manji<sup>233</sup>. In November 2007, Dr. Patel at the Akanksha infertility clinic facilitated a surrogacy contract between Japanese couple Ilufumi and Yuki Yamada and a surrogate mother, Pritiben Mehta.<sup>234</sup> The Japanese couple agreed that if they were to divorce, then the husband would care for the child; this was the first hint of a problem. The surrogate mother was implanted with an embryo, using a donor egg and the husband's sperm. Once the implantation was done, the Yamada's went back to Japan. During the duration of the pregnancy, the Yamada's divorced and thus Mr. Yamada flew to India alone to collect baby Manji. Yamada found himself in a delicate situation as India requires that a child be legally adopted before they are able to leave the country, but the law restricts single men from adopting. Yamada was thus denied travel documents for baby Manji. He was caught between two legal systems that could not adequately deal with the situation of three mothers that had no legal responsibility towards the child. Eventually, baby Manji was issued a birth certificate which just had her father's details which meant travel documents could be issued.

This issues surrounding baby Manji further sparked the debate of whether commercial surrogacy was, in fact, a good idea at all and whether there should be better oversight and

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<sup>230</sup> Points K. 'Commercial Surrogacy and Fertility Tourism in India: The case of Baby Manji' Kenan Institute for Ethics, Duke University, (2009) 3. Available at <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf>

<sup>231</sup> Bailey A 'Reconceiving surrogacy: Toward a reproductive justice account of Indian surrogacy' *Hypatia* (2011)

<sup>232</sup> Anjora Sarangi, 'Commercial Surrogacy in India' available at <https://blogs.lse.ac.uk/gender/2016/12/21/commercial-surrogacy-in-india/> (accessed on 05 March 2020)

<sup>233</sup> *Baby Manji Yamada v Union of India & ANR*. [2008] INSC 1656 (29 September 2008).

<sup>234</sup> Mohapatra S, 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy', (2012) 30 *BERKELEY J. INT'L LAW*

regulation for commercial surrogacy.<sup>235</sup> Dr. Patel of Akanksha infertility clinic held that commercial surrogacy is beneficial for all parties involved, but there is a possibility of exploitation due to lack of oversight and government regulation.<sup>236</sup> These non-binding guidelines that infertility clinics may choose to follow does not provide any protection for surrogate mothers, the commissioning parents or the children born via surrogacy. At a national consultation in India, activists, academics, researchers, healthcare professionals and attorneys criticized the voluntary nature of the guidelines, they proclaimed that the sections relating to clinic accreditation and key medical procedures were vastly inadequate.<sup>237</sup> They further condemned the lack of explicit human rights framework. Dr. Aniruddha Malpani, an advocate for stricter regulation on commercial surrogacy, held that regulation would counter the problem of the ‘international black market’ of commercial surrogacy.<sup>238</sup> He further argued that ‘[t]he surrogacy laws will give confidence to those who come to India for fertility treatment that they are well within the laws of the country and at the same time protect the rights of the surrogate mother and the baby.’<sup>239</sup> No enforceable regulation and an abundance of surrogates mothers living in poverty create a system that is likely to be abused.

#### 4.2.1 Introduction of the new Bill

Commercial surrogacy was largely unregulated in India, however, in 2014 the Indian government introduced into parliament the Assisted Reproductive Technologies Regulation (ART) Bill. The Bill addresses most of the issues that are currently unregulated, such as the age and background of the surrogate mother, the limits to how many babies a surrogate mother can have as well as the procedure that commissioning parents have to adhere to.<sup>240</sup> Finally in 2016 Parliament passed the Bill and commercial surrogacy came to a halt. The ban on

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<sup>235</sup> Darnovsky M. ‘Complications of Surrogacy: The case of Baby Manji’ available at <https://www.geneticsandsociety.org/biopolitical-times/complications-surrogacy-case-baby-manji> (accessed on 27 July 2018)

<sup>236</sup> Dunbar P. ‘Wombs to rent: Childless British couples pay Indian women to carry their babies’ available at <http://www.dailymail.co.uk/news/article-500601/Wombs-rent-Childless-British-couples-pay-Indian-women-carry-babies.html> (accessed on the 28 July 2018)

<sup>237</sup> Kari Points, ‘COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA The case of baby Manji’ *The Kenan Institute for Ethics at Duke University* available at <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf> (accessed on 5 March 2020)

<sup>238</sup> Kari Points, ‘COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA The case of baby Manji’ *The Kenan Institute for Ethics at Duke University* available at <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf> (accessed on 5 March 2020)

<sup>239</sup> Points K. ‘Commercial Surrogacy and Fertility Tourism in India: The case of Baby Manji’ *Kenan Institute for Ethics, Duke University*, (2009) 3. Available at <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf>

<sup>240</sup> Howard S. ‘Taming the international commercial surrogacy industry’ *The BMJ* (2014)

commercial surrogacy was aimed to protect women of poorer backgrounds being exploited, and not for the protection of children.<sup>241</sup>

Sharmila Rudrappa held that the Indian Surrogacy (Regulation) Bill, 2016 was grounded on arguments that commercial surrogacy contracts, exploited India's working class.<sup>242</sup>

Under the Regulation Bill, only altruistic surrogacy is allowed in India, which would only occur between an infertile heterosexual couple. Additionally, the surrogate mother has to be an extended female family member between the age of 25 and 35 years<sup>243</sup> The Bill further restricts that a female family member was only allowed to be a surrogate once in her lifetime.<sup>244</sup> An additional deterrent to agreements between international clients and Indian surrogacy agencies is that any agency caught selling or importing embryos are punishable to imprisonment for a term of not less than ten years and a fine up to \$15, 400 (fifteen thousand four hundred dollars).<sup>245</sup>

Academics have commended the Indian government for regulating surrogacy, however, believe that the government might have come to the wrong conclusion in banning commercial surrogacy entirely. Rudrappa believes that though the ban is aimed at protecting surrogate mothers from exploitation, it might do the complete opposite. She further argues that commercial surrogacy in India needed to be regulated by 'robust laws that strengthen surrogate mothers' rights'.<sup>246</sup> The ban on commercial surrogacy removes the financial characteristic, which might mean that women that are living in rural areas will be forced to either enter into sex work or sell their organs to be able to financially support their families.<sup>247</sup>

Even though India has outlawed commercial surrogacy, infertility clinics are discovering loopholes in the legislation. Infertility clinics have taken to move surrogate mothers across

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<sup>241</sup> Rudrappa S 'Why Is India's Ban on Commercial Surrogacy Bad for Women' 43 *N.C. J. Int'l L.* (2018)

<sup>242</sup> Rudrappa S, *Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002-2015* (2017) *CRITICAL SOC.*

<sup>243</sup> Rudrappa S, *Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002-2015* (2017) *CRITICAL SOC.*

<sup>244</sup> Rudrappa S, *Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002-2015* (2017) *CRITICAL SOC.*

<sup>245</sup> PRS Legislative Research, 'The Surrogacy (Regulation) Bill', available at <http://www.prsindia.org/billtrack/the-surrogacyregulation-bill-2016-4470/> [<https://perma.cc/3NV4-KPUT>] (accessed on 20 July 2018)

<sup>246</sup> Rudrappa S 'Why Is India's Ban on Commercial Surrogacy Bad for Women' (2018) 43 *N.C. J. Int'l L.*

<sup>247</sup> Lamba N, 'Why Ban Commercial Surrogacy' available at <https://www.thehindubusinessline.com/opinion/why-ban-commercial-surrogacy/article8124254.ece> (accessed on 21 July 2018)

borders, however, moving a surrogate mother across borders exposes her to even higher risk of exploitation.<sup>248</sup> An example of how infertility clinics find loopholes to benefit themselves is when India first banned surrogacy for gay couples in 2012; however, infertility clinics continued to sign on gay clients.<sup>249</sup> Clients would ship their frozen sperm to Delhi, which would then be fertilized with donor eggs.<sup>250</sup> This would result in embryos which legally belongs to the gay men being implanted in an Indian surrogate mother. To avoid the ban, they would move the surrogate mother across international borders to give birth to the child and clients would arrive to pick up their children.<sup>251</sup> A fertility specialist who will remain anonymous held that he would recruit surrogate mothers from Kenya to come to Mumbai.<sup>252</sup> He would implant the Kenyan women with embryos belonging to gay men, these women would then be flown back to Kenya after 24 weeks in India. The Mumbai fertility doctor believes that he did not break the law because technically he did not interact with these gay men.<sup>253</sup> As previously discussed in chapter three, infertility clinics are more concerned about how lucrative these services of surrogacy are to them rather than ensuring that the surrogate mother, the commissioning parents or the child are adequately protected.

It is apparent that India's downfall in commercial surrogacy was a lack of regulation. It is my opinion that if properly regulated with mandated guidelines for commercial agencies and fertility clinics it would make the surrogacy process safer for all parties involved, However, regulation is not where it ends, these regulations need be insistently enforced to ensure the effectiveness of these regulations.

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<sup>248</sup>Rudrappa S, 'India outlawed commercial surrogacy – clinics are finding loopholes' available at <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> (accessed on 21 July 2018)

<sup>249</sup> Rudrappa S, 'India outlawed commercial surrogacy – clinics are finding loopholes' available at <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> (accessed on 21 July 2018)

<sup>250</sup> Rudrappa S, 'India outlawed commercial surrogacy – clinics are finding loopholes' available at <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> (accessed on 21 July 2018)

<sup>251</sup>Rudrappa S, 'India outlawed commercial surrogacy – clinics are finding loopholes' available at <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> (accessed on 21 July 2018)

<sup>252</sup> Rudrappa S, 'India outlawed commercial surrogacy – clinics are finding loopholes' available at <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> (accessed on 21 July 2018)

<sup>253</sup> Rudrappa S, 'India outlawed commercial surrogacy – clinics are finding loopholes' available at <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> (accessed on 21 July 2018)

### 4.3 Ukraine

Ukraine had its first successful case of surrogacy in 1995, and since then developed enormously with regards to the surrogacy process.<sup>254</sup> Ukraine is quickly gaining attention as an international surrogacy destination due to its surrogacy laws<sup>255</sup> and the fact that commercial surrogacy is legalized. There are many surrogacy clinics that operate in Ukraine to advertise that they have slack surrogacy regulations and favourable policies toward the commissioning parent(s).<sup>256</sup> Statistics for the exact number of surrogacy agreements that are concluded in Ukraine are difficult to obtain, as there is no regulatory body that monitors surrogacy<sup>257</sup> and agencies are not obligated to report statistics to a governing body.<sup>258</sup> However, surrogacy in Ukraine has seen rapid growth, due to other countries that have clamped down on commercial surrogacy, such as India.<sup>259</sup>

Ukraine is argued to have very 'liberal' surrogacy laws, however, these surrogacy laws only allow married heterosexual couples access to surrogacy, which excludes single persons and gay couples. Ukraine surrogacy laws are documented in the Family Code of Ukraine 10 January 2002. The Family Code, states that the commissioning parents are the legal parents of the child<sup>260</sup>, the reason for this provision is aimed at preventing a lengthy court battle to determine parentage.<sup>261</sup> Even though Ukraine has progressive laws to protect the commissioning parent's rights, it has no rights that are protecting the rights and interest of the surrogate mother.<sup>262</sup>

Olha Zhyla argues that Ukraine's surrogacy laws focus on 'protect[ing] the family and the child, but not the surrogate mother.'<sup>263</sup> This statement made by Zhyla is accurate and is evident by

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<sup>254</sup> Gennadiy, Druzenko, 'Ukraine', in *International Surrogacy Agreements Legal Regulations at International Level* (2013)

<sup>255</sup> Noy Kirshner S, 'Selling a Miracle? Surrogacy Through International Borders: Exploration of Ukrainian Surrogacy' (2015) 14 *1 Journal of International Business and Law*

<sup>256</sup> Mohapatra S 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *Berkeley J. Int'l Law*

<sup>257</sup> *Id*

<sup>258</sup> *Id*

<sup>259</sup> Sensible Surrogacy, 'Surrogacy in Ukraine Sees Rapid Growth, Lower Prices' available at <https://www.sensible-surrogacy.com/surrogacy-in-ukraine-sees-rapid-growth/> (accessed on 01 August 2018)

<sup>260</sup> Family Code of Ukraine, available at [http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family\\_kideks-engl.pdf](http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family_kideks-engl.pdf) (accessed on 01 August 2018)

<sup>261</sup> Family Code of Ukraine, available at [http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family\\_kideks-engl.pdf](http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family_kideks-engl.pdf) (accessed on 05 March 2020)

<sup>262</sup> Order # 771 issued by the Ministry of Health of Ukraine 'About approval of instruction of the order to apply assisted reproductive technologies' available at <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Ukraine/Embryoresearch/page.aspx/578> (accessed on the 01 August 2018)

<sup>263</sup> Zhyla O, 'More Women in Ukraine Want To Be Surrogate Mothers', available at <http://www.day.kiev.ua/289226>. (accessed on 02 August 2018)

the lack of mention of surrogate mothers rights in the Family Code of Ukraine. Lawyers are required to inform commissioning parents of the process of surrogacy in Ukraine, but surrogate mothers aren't afforded the same right. Surrogate mothers can request a surrogacy contract so that her interest is protected, however, the enforceability of these agreements in Ukraine remains unclear.<sup>264</sup> If a surrogate mother requests that a contract should be drafted, she would have to contact an attorney and that may not be financially feasible for most surrogates.<sup>265</sup> Kydalov & Partners, a Ukraine law firm, held that if there are surrogacy contracts involved, in most instances the fertility clinics or specialized agency prepares the contract themselves or use standardized contracts.<sup>266</sup> They contend that to save costs, some agencies and clinics do not even offer the surrogate mother or the commissioning parents legal or professional assistance.<sup>267</sup> Kydalov & Partners held that the worst of these unscrupulous practices, is that if a lawyer is 'present during the signing of the contract, as a rule, he plays along with the clinic or agency as he is interested in commission from the transaction and because of that many of the questions are ignored or false answers are given.'<sup>268</sup>

The Ministry of Health has declared that any healthcare establishment must be accredited in order to perform assisted reproduction. However, it failed to specify the exact type of accreditation that is required.<sup>269</sup> The lack of clarification by the Minister of Health essentially permits many surrogacy providers to enter into the surrogacy market. Surrogacy agencies and fertility clinics do not have a set of guidelines that they are mandated to follow and ensure they uphold. Families Through Surrogacy is a consumer-based non-profit organization, who in consultation with other stakeholders has provided a list of best practice guidelines that surrogacy agencies, lawyers, and fertility clinics should follow.<sup>270</sup> However, these guidelines

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<sup>264</sup> Mohapatra S 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *BERKELEY J. INT'L LAW*

<sup>265</sup> Mohapatra S 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *BERKELEY J. INT'L LAW*

<sup>266</sup> Kydalov & Partners, 'Surrogacy in Ukraine: Positive and Negative Aspects' available at <http://kydalov-partners.com/surrogacy-in-ukraine-positive-and-negative-aspects/> (accessed on 02 August 2018)

<sup>267</sup> Kydalov & Partners, 'Surrogacy in Ukraine: Positive and Negative Aspects' available at <http://kydalov-partners.com/surrogacy-in-ukraine-positive-and-negative-aspects/> (accessed on 02 August 2018)

<sup>268</sup> Kydalov & Partners, 'Surrogacy in Ukraine: Positive and Negative Aspects' available at <http://kydalov-partners.com/surrogacy-in-ukraine-positive-and-negative-aspects/> (accessed on 02 August 2018)

<sup>269</sup> Order # 771 issued by the Ministry of Health of Ukraine 'About approval of instruction of the order to apply assisted reproductive technologies' available at <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Ukraine/Embryoresearch/page.aspx/578> (accessed on the 01 August 2018)

<sup>270</sup> Families through surrogacy, 'What is Best Practice' available at <http://www.familiesthrusurrogacy.com/best-practice-guidelines/> (accessed on 03 August 2018)

are not mandatory, but voluntary, which means that there is no real effective regulation on these third parties in the surrogacy process. One of the best practice guidelines that a surrogacy agency should adhere to is that they should not 'facilitate surrogacy for intended parents whose country of origin will not process the necessary citizenship for infants born via surrogacy.'<sup>271</sup> Even though these companies are advised against the above-mentioned practice, surrogacy agency continues to facilitate these surrogacy agreements knowing fully the commissioning parents will encounter legal trouble. An example of this is the case of a French family being arrested for trying to smuggle their two-month-old twins out of Ukraine to bypass the laws of their country.<sup>272</sup> Fertility clinics and agencies are promising protentional commissioning parent(s) that they 'guarantee that the legal department of our center will prepare all essential documents for your baby in the proper manner prescribed by our active laws, as we normally do for our clients from France. We guarantee that you will be able to take your child home without any legal problems.'<sup>273</sup> However, this is untrue and complete deception by these agencies and clinics, a spokeswoman Mira from the French Consulate held that these clinics 'have no power over the decisions of the French government to issue visa or passport.'<sup>274</sup> The owner of Biotex, a fertility clinic in Ukraine that assisted the French couple, insisted that the couple will eventually be able to go as the French Embassy will give the surrogate children documents.<sup>275</sup> These fertility clinics are not concerned with the commissioning parents once the child has been born since they fulfilled their end of the bargain.<sup>276</sup> However, they fail to acknowledge the legal repercussions these families face due to their actions in assisting commissioning parents who are unable to secure travel documents for their children.

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<sup>271</sup> Families through surrogacy, 'What is Best Practice' available at <http://www.familiesthrusurrogacy.com/best-practice-guidelines/> (accessed on 03 August 2018)

<sup>272</sup> Mail Online 'The baby smugglers: French family arrested trying to sneak two-month-old surrogate twins out of Ukraine in a chest' available at <https://www.dailymail.co.uk/news/article-1369561/French-family-arrested-trying-smuggle-month-old-surrogate-twins-Ukraine.html> (accessed on 05 March 2020)

<sup>273</sup> Grushenko K 'French couple's desire for a child brings trouble' available at <https://www.kyivpost.com/article/content/ukraine-politics/french-couples-desire-for-child-brings-trouble-102433.html> (accessed 03 August 2018)

<sup>274</sup> Grushenko K 'French couple's desire for a child brings trouble' available at <https://www.kyivpost.com/article/content/ukraine-politics/french-couples-desire-for-child-brings-trouble-102433.html> (accessed 03 August 2018)

<sup>275</sup> Grushenko K 'French couple's desire for a child brings trouble' available at <https://www.kyivpost.com/article/content/ukraine-politics/french-couples-desire-for-child-brings-trouble-102433.html> (accessed 03 August 2018)

<sup>276</sup> *Id*

Ukraine's so-called liberal surrogacy laws may have attracted many foreigners to their country, but the lack of clear national guidelines and regulations has left some children in legal limbo, as the case regarding the French couple indicates. Aside from agencies and clinics providing false security to foreign commissioning parents, a more pressing concern is the lack of rights and protection a surrogate mother is offered in the surrogacy process. Without any laws governing these agencies and clinics, they allow the exploitation of women who are considering surrogacy.

#### 4.4 California

The laws regarding surrogacy are not equal across the United States (US), however, there are several states that are more accepting of surrogacy than others. California is perhaps the most liberal state regarding surrogacy, especially with regards to gestational surrogacy and commercial surrogacy. California is one of the few places that permit commercial surrogacy in the US.<sup>277</sup> The surrogacy process in California relies very much on case law, but as of January 1, 2013, California codified legal best practices. California law (AB1217) added to the Family Code the Uniform Parentage Act, cited as Family Code section 7962, which codified the acceptance of surrogacy contracts.<sup>278</sup>

Even though surrogacy law has been extensively governed by case law, this new legislation provides additional control in the manner in which these surrogacy agreements have to be executed, when any medical procedures can be commenced, and where parental establishment cases may be filed.<sup>279</sup> Although some of the procedures that section 7962 of the family code addresses were already being applied by experienced fertility clinics, they were not required by law.<sup>280</sup> So, in other words, this new law aims to create legal certainty and codify some of the best practices used to ensure that all parties are protected.<sup>281</sup>

The new law in relation to gestational surrogacy requires the following: that commissioning parents and potential surrogate mothers both be represented by legal counsel. The surrogate

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<sup>277</sup> Mare L, 'The Feasibility of Compensated Surrogacy in South Africa: A Comparative Legal Study' (unpublished LLM thesis, University of South Africa, 2016) 30

<sup>278</sup> Kinley M. 'The Requirements for a Valid Surrogacy Parentage Contract in California' available at <http://californiahealthcarelaw.com/?p=526> (accessed on 03 August 2018)

<sup>279</sup> International Fertility Law Group '26 NOV California Surrogacy Law takes Effect Jan 1.' Available at <https://www.iflg.net/california-surrogacy-law-to-take-effect-jan-1/> (accessed on 03 August 2018)

<sup>280</sup> International Fertility Law Group '26 NOV California Surrogacy Law takes Effect Jan 1.' Available at <https://www.iflg.net/california-surrogacy-law-to-take-effect-jan-1/> (accessed on 03 August 2018)

<sup>281</sup> International Fertility Law Group '26 NOV California Surrogacy Law takes Effect Jan 1.' Available at <https://www.iflg.net/california-surrogacy-law-to-take-effect-jan-1/> (accessed on 03 August 2018)

agreement must be executed and notarised before the medication has been administered to the surrogate mother.<sup>282</sup> To ensure that commissioning parents and surrogate mothers are being truthful in the surrogacy process they must attest under penalty of perjury as to their compliance with these provisions.<sup>283</sup> In addition to these protections, what makes surrogacy ideal to pursue in California is that the new law permits commissioning parents the ability to establish parentage before the child's birth<sup>284</sup>. This eliminates the lengthy court battle that other countries that legalise commercial surrogacy encounter.

These laws are a welcomed addition to case law to ensure that there is both protection for commissioning parents and surrogate mothers. However, there is still little to no legislation regulating the practice of fertility clinics or surrogacy agencies to ensure that exploitation can be eliminated or at best, minimised. Surrogacy agencies in California have their own requirements for potential surrogate mothers. The requirements that should be regarded as the most important are the following: a surrogate mother '[d]oes not participate in the following government aid programs: cash assistance, welfare, public housing and section 8. All other forms of government assistance will be considered on a case-by-case basis' and that she '[i]s financially secure'.<sup>285</sup> Another significant requirement that surrogacy agencies have in place is that the compensation that a surrogate mother receives is not paid in a lump sum to the surrogate mother, but rather instalments that are paid over the course of the pregnancy.<sup>286</sup> These requirements are crucial to the surrogacy process because they eliminate the arguments that women are being coerced into surrogacy agreements because of the money. If a surrogate mother is financially secure or not dependent on governmental grants, it would eliminate the argument that women are being exploited by fertility clinics because they are less privileged than the commissioning parents.

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<sup>282</sup> R & SLaw Group, APC, 'Surrogacy Laws in California' available at <https://www.randslawgroup.com/surrogacy-laws-california/> (accessed on 05 March 2020)

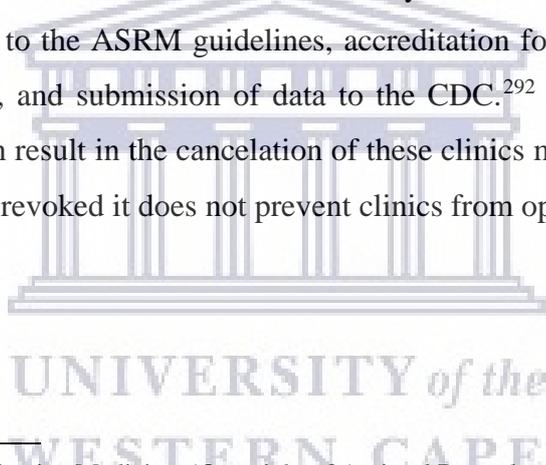
<sup>283</sup> OHCHR, 'To the UN Special Rapporteur on the sale and sexual exploitation of children' available at <https://www.ohchr.org/Documents/Issues/Children/SR/Surrogacy/CivilSociety/SSN.pdf> (accessed on 05 March 2020)

<sup>284</sup> Henaghan, Mark; Ballantyne, Ruth; Helm, Devon --- "Genes versus gestation: protecting the interests of surrogate mothers" [2016] OtaLawFS 32; Law, ethics, and medicine

<sup>285</sup> Circle Surrogacy & Egg donation, 'Become a Surrogate Mother' available at <https://www.circlesurrogacy.com/surrogates/overview> (accessed on 03 August 2018)

<sup>286</sup> Circle Surrogacy & Egg donation, 'Become a Surrogate Mother' available at <https://www.circlesurrogacy.com/surrogates/overview> (accessed on 03 August 2018)

In the US at a federal level, there are three agencies that regulate assisted reproductive technologies. The first agency is the Centers for Disease Control and Prevention (CDC) which collects data and then publishes the data on ART procedures.<sup>287</sup> The next agency is the Food and Drug Administration (FDA) which controls the use of drugs, biological products, and medical devices and has jurisdiction over screening and testing of reproductive tissues, such as donor eggs and sperm.<sup>288</sup> The final agency is the Center for Medicare and Medicaid Services (CMS) who are responsible for the implementation of the Clinical Laboratory Improvement Act to ensure the quality of laboratory testing.<sup>289</sup> Aside from these three agencies, professional associations like the American Society for Reproductive Medicine (ASRM) attempt to regulate ART. The ASRM is an organization devoted to the development and the improvement of science and the practice of reproductive medicine.<sup>290</sup> ASRM produces ethics and practices guidelines relating to sound clinical and ethical practices.<sup>291</sup> Society for Assisted Reproductive Technology (SART) which is an affiliate of ASRM, strictly monitors clinics that are members to ensure that they adhere to the ASRM guidelines, accreditation for their embryology labs, qualification of their staff, and submission of data to the CDC.<sup>292</sup> Failure to adhere to the requirements by SART can result in the cancellation of these clinics membership.<sup>293</sup> Although if clinics memberships are revoked it does not prevent clinics from operating.<sup>294</sup>



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<sup>287</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 1

<sup>288</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 1

<sup>289</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 1

<sup>290</sup> American Society for Reproductive Medicine available at <https://www.asrm.org/topics/topics-index/assisted-reproductive-technologies/> (accessed on 10 August 2018)

<sup>291</sup> 'Navigating the Federal Regulatory Structure of Assisted Reproduction Technology Clinics' available at [https://www.americanbar.org/groups/health\\_law/publications/aba\\_health\\_esource/2016-2017/november2017/reproduction.html](https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2016-2017/november2017/reproduction.html) (accessed on 10 August 2018)

<sup>292</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 1

<sup>293</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 9

<sup>294</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 9

The standards set by the ASRM and SART are generally followed and successful, however, there are the instances where clinics do not adhere to standards or guidelines.<sup>295</sup> A study was conducted to see which clinics adhere to ASRM and SART guidelines and standards that they are required to adhere to. The first issue of the study was whether clinics abided by the guidelines provided by ASRM for compensation for oocyte donation. The guideline stipulates that compensation should only be given for time inconvenience and discomfort and should not differ based on the personal traits of the individual.<sup>296</sup> The study concluded that 49% of the websites of clinics violate ASRM's guidelines which outlines avoiding selecting oocyte donors based on a particularly human trait.<sup>297</sup> Specifically, 34% of the websites of clinics offer to pay an oocyte donor a higher compensation fee for certain traits, which is a clear violation of the ASRM principle of ensuring that compensations are based on time, inconvenience and the discomfort that is accompanied with egg retrieval.<sup>298</sup> Another issue that the study addressed is whether clinics abide by the ASRM guidelines to provide meaningful and accurate information to donors with regards to the risks associated with donating their oocytes. The conclusion drawn from the data was that websites that indicated that donors would be compensated for their donation were not adequately informed of the present risks, either long term, short term or even psychological risks.<sup>299</sup> It is presumed that these clinics inform donors of the risk prior to initiating the donation procedure, however, research has indicated that individuals make 'risk/benefit decision based on their first impressions',<sup>300</sup> which is usually done when looking at the websites clinics.

Even though the ASRM and SART guidelines are beneficial and influence members, the question arises whether these guidelines are effective in regulating the behavior of clinics and whether there is a need for stronger regulations. Membership of these agencies is voluntary and not mandatory for clinics and are not even an option for agencies since they are not medical service providers. The study concluded that there should be more regulation for agencies as

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<sup>295</sup> American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' available at <https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/> (accessed on 03 August 2018) 11

<sup>296</sup> Keehn J, *et al* 'Recruiting egg donors online: an analysis of IVF clinic and agency websites' adherence to ASRM guidelines' (2012) 98 (4) *Fertil Steril*.

<sup>297</sup> Keehn J, Holwell E, Sauer M.V & Klitzman R, 'Recruiting egg donors online: an analysis of IVF clinic and agency websites' adherence to ASRM guidelines' (2012) 98 (4) *Fertil Steril*.

<sup>298</sup> *Id*

<sup>299</sup> *Id*

<sup>300</sup> *Id*

they are less compliant with guidelines.<sup>301</sup> California's approach is aimed at ensuring that there are best practices which are codified into law in order to safeguard all parties to the surrogate process. However, there is more that can be done with regards to fertility clinics and agencies that provide surrogacy services to ensure that the risk of potential exploitation is minimized.

#### 4.5 Israel

Israel as early as 1992 formed the Aloni Commission to address the potentially intricate issues that are accompanied by advancements in reproductive technology.<sup>302</sup> The Aloni Commission's goal was to ensure that policy is drafted that will maintain the balance between the State's interest in ensuring that there are effective regulations for human reproduction while respecting individuals' privacy and autonomy.<sup>303</sup> Commercial surrogacy was not the goal of the Aloni Commission. However, Israel's government disqualified a relative serving as gestational surrogacy, which therefore resulted in other women being able to act as a gestational surrogate while being compensated for time and suffering.<sup>304</sup> The disqualification of relatives acting as a surrogate mother indirectly resulted in the regulation of commercial surrogacy. Israel's law regarding commercial surrogacy is strictly organised. When commissioning parent(s) decide they want to pursue surrogacy an option, the decision on whether the parties may proceed rests entirely with the Approvals Committee.<sup>305</sup> The Approvals Committee is responsible for the legal review and formal approval of surrogacy contracts, as well as ensuring that all parties interests are protected.<sup>306</sup>

Another way Israel ensures that surrogate mothers are protected from exploitation is guaranteeing that potential surrogate mothers are subjected to comprehensive screening, which

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<sup>301</sup> Keehn J, Holwell E, Sauer M.V & Klitzman R, 'Recruiting egg donors online: an analysis of IVF clinic and agency websites' adherence to ASRM guidelines' (2012) 98 (4) *Fertil Steril*.

<sup>302</sup> Schuz R, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate Motherhood: International Perspective* ed. (2003)

<sup>303</sup> Schuz R, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate Motherhood: International Perspective* ed. (2003)

<sup>304</sup> Schuz R, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate Motherhood: International Perspective* ed. (2003)

<sup>305</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

<sup>306</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

determines the suitability of the parties involved, whether there is voluntary and informed consent, physical and mental precaution, as well as determining financial safeguards.<sup>307</sup>

The screening process of a potential surrogate mother is provided by the public health care system in Israel and couple who have to undergo IVF may obtain treatment at approximately \$500 ( five hundred dollars) through the IVF Centre at Rambam Hospital.<sup>308</sup> The Centre at the Rambam Hospital is able to perform the screening of potential surrogate mothers as well as provide social workers who are able to accompany the parties involved throughout the surrogacy process. The final stage before the surrogacy process can continue is that the Approval Committee must perform a review to ensure that all the necessary aspects of the surrogacy agreement are considered in the contract.<sup>309</sup> The Approval Committee has to ensure that each party rights are protected by the surrogacy agreement. The Committee will examine aspects regarding at the fairness to both parties, whether each party has separate legal counsel, restrictions, and requirements regarding the medical facility.<sup>310</sup> The Approval Committee will also examine the type of treatment the surrogate agreed to, the surrogates ability to refuse medical procedures throughout the process, whether the contract contains a provision for psychological counselling for the surrogate for at least six months after she delivers the child.<sup>311</sup> As discussed above, fertility clinics are regulated by voluntary self- regulation of the community like the ASRM, whereas Israel's healthcare system is regulated and receives guidelines by the Approvals Committee and provides adequate protection to the gestational surrogates to ensure that exploitation is limited.

Ruby L. Lee argues that as a result of Israel's comprehensive regulation, the risk of exploitation is substantially reduced.<sup>312</sup> Israel has created a regulatory system of clarity, certainty, and effectiveness. The law in Israel only allows for paid surrogacy and the Approvals Committee does not interfere with the negotiations of parties involved.<sup>313</sup> However, there are

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<sup>307</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

<sup>308</sup> Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

<sup>309</sup> *Id*

<sup>310</sup> Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

<sup>311</sup> Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

<sup>312</sup> Schuz R, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate Motherhood: International Perspective* ed. (2003)

<sup>313</sup> Schuz R, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate Motherhood: International Perspective* ed. (2003)

recommendations on what surrogate mothers should be compensated for.<sup>314</sup> Lee contends that the extensive review process by the Approvals Committee to ensure fairness between the parties and the binding effect of the contract make it difficult to financially exploit gestational surrogates.<sup>315</sup> Nevertheless, there are scholars that disagree with the recommendations of what a surrogate mother should receive, they argue that there should be additional compensation besides the mere recommendations that are listed.<sup>316</sup> They further contend that a surrogate mother only receives compensation once there is a heartbeat, which means that she isn't paid for the psychological and medical testing she has to undergo.<sup>317</sup> Furthermore, in cases where treatment or the pregnancy is unsuccessful, the surrogate mother receives little to no compensation, which is unsatisfactory given the emotional and psychological pain that may occur.<sup>318</sup>

Israel has a well-organized system to drastically reduce exploitation from occurring in the surrogacy process. The Approval Committee serves as a regulatory system, which aims to safeguard that potential surrogate mothers and ensure that they are adequately protected, as well as ensuring that any surrogate mother has adhered to and passed the comprehensive screening without any red flags. The only issue that Israel's surrogacy laws failed to regulate is how much a surrogate mother should receive for her role in the surrogacy process. Even though surrogacy is strictly regulated in Israel, regulation on compensation would be an added safeguard to protect surrogate mothers from exploitation that could occur.

#### 4.6 Conclusion

It is clear from the above that there is no clear, comprehensive and accurate set of regulations in existence for the regulation of the role of third parties in the surrogacy process. Third parties are in most instances self-regulated by voluntary guidelines from the communities in the profession. There is no exact law that is regulating their involvement and ensuring there are satisfactory penalties in places if they breach regulations or guidelines. The guidelines that these communities in the profession recommend are guidelines that are aimed at ensuring that

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<sup>314</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

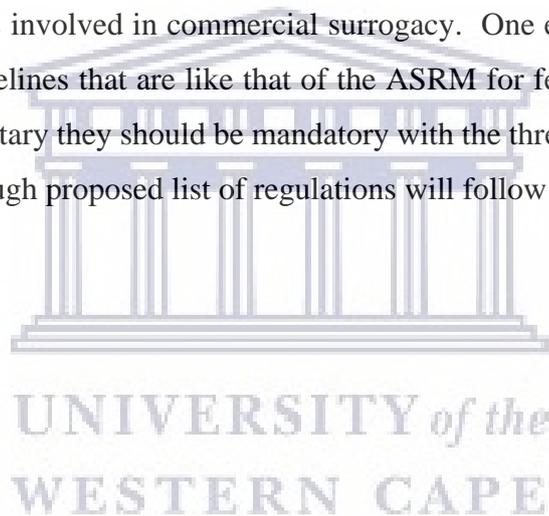
<sup>315</sup> Schuz R, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate Motherhood: International Perspective* ed. (2003)

<sup>316</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

<sup>317</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

<sup>318</sup> Alisa Von Hagel A & Daniela Mansbach D, 'The Regulation of Exploitation: A Comparative Analysis of Surrogacy Agreements in Israel and the United States' (2016) 18 (2) *International Feminist Journal of Politics*

surrogate mothers and commissioning parents are not being exploited by fertility clinics. Even though these guidelines are beneficial, the fact that they are not legally binding on third parties means they are ineffective at achieving their purpose. As discussed above, there are fertility clinics who are members of the ASRM who fail to adhere to the guidelines that are recommended by the ASRM. Commercial surrogacy could be extremely beneficial to a country as well as to those women who voluntarily decide to act as a surrogate mother. South Africa could learn from the mistakes that have occurred in other countries and could adjust their law to safeguard against these instances of exploitation. One way in which South Africa can create a regulation system for commercial surrogacy that does not only protect the commissioning parents but the surrogate mother as well is by looking at all these international countries. If the best parts of the above-mentioned countries legal systems are combined into one, an effective regulation system could be created to ensure that there are safeguards and monitoring of third parties involved in commercial surrogacy. One example would be South Africa implementing guidelines that are like that of the ASRM for fertility clinics, but rather than having them be voluntary they should be mandatory with the threat of losing their license and a fine. A more thorough proposed list of regulations will follow in the final chapter.



## CHAPTER FIVE: Conclusion and recommendations

### 5.1. Conclusion

The purpose of this is to answer the overarching question of whether third parties increase the risk of exploitation for commissioning parents and surrogate mothers.

As mentioned in chapter two altruistic surrogacy is where a woman becomes a surrogate mother for not any form of compensation, besides medical expenses, commercial surrogacy, on the other hand, is where a woman becomes a surrogate mother for commercial purposes. However, commercial surrogacy is strictly prohibited not only in South Africa but in many parts of the world. There are many scholars that oppose commercial surrogacy on the basis that it constitutes the exploitation of women, as well as the commodification of children. This thesis aimed to discredit the notion that commercial surrogacy is necessarily exploitative of financially disadvantaged women. It thus looks at a two requirements, the first requirement is whether party A would benefit from the transaction, and second requirement is broken into two legs, the first leg looks at whether party A is able to induce party B to agree to the transaction by taking advantage of a feature of party B or his or her situation and the second leg is whether the outcome of the transaction is harmful or at least unfair to party B. Requirement two is the requirement that has caused much debate regarding commercial surrogacy. Arguing that women are coerced or exploited into a surrogacy agreement because of their circumstance to is invalidating women's freedom over their own bodies. When the surrogate enters into a commercial surrogate motherhood agreement, the surrogate is fully aware before the implementation is affected, what the process would entail and what she would have to give up. To assume that a potential surrogate mother is coerced into giving up the child or induced into entering into a commercial surrogacy contract is an insult to a woman's right to autonomy as well as perpetuating the idea of patriarchy, i.e. that women are incompetent to make their own choices.

Another debate opposing commercial surrogacy is that the surrogate mother would sustain psychological harm as she is being paid to hand over a child; however, a surrogate mother would have to hand over the child in altruistic surrogacy as well. The surrogate mother in both instances would suffer psychological harm, that is why it is so vital that the surrogate mother receives counselling prior to and after the surrogacy process. One of the benefits of commercial surrogacy is that the surrogate mother would not be related in most instance to the

commissioning parents, but in altruistic surrogacy, it may be a family relative that agrees to act as a surrogate mother on behalf of the commissioning parents.

As provide for in Chapter 2, it has been argued that commercial surrogacy amounts to the sale of children as the surrogate mother is receiving compensation for the transfer of the sale of the child. One of the primary contentions by advocates of commercial surrogacy is that in gestational surrogacy, the woman who bares the child is never the biological mother of the child.<sup>319</sup> Therefore, if the surrogate mother is being compensated for her reproductive labour it should not be regarded as payments for relinquishing the child or transferring of custody. This is reiterated by the story of Melissa from California who signed up to be a surrogate mother and believed that the compensation she received was not for relinquishing her parental rights but rather that she was being compensated for her reproductive labour.

The objective of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is to ensure that a child is never placed in a situation that could be detrimental to their development and survival.<sup>320</sup> International commercial surrogacy may have real implications for the child, especial birth registration of the child and determining who is the legal parent of the child. The Special Rapporteur 2019 report on Sale and sexual exploitation of children, including child prostitution, child pornography, and other child sexual abuse material provides States with recommendations to ensure that the best interest of the child is given primary consideration.<sup>321</sup> The Special Rapporteur further held that ‘real threat of exploitation and commodification of children, and potentially of surrogates, is often related to the role of intermediaries’<sup>322</sup> This implies that limitation on surrogate mothers receiving compensation is not warranted, rather that intermediaries needs to be regulated more effectively to ensure that surrogate mothers, as well as children born from surrogacy as fully protected.

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<sup>319</sup> Kerian C. L, ‘Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?’ (1997) 12 *Wisconsin Women's Law Journal* 154-55

<sup>320</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

<sup>321</sup> United Nations, Special Rapporteur 2019 report on Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material’ (2019) 6.

<sup>322</sup> United Nations, Special Rapporteur 2019 report on Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material’ (2019) 12.

The category of third parties that are exempted from section 301 of the Children's Act are the parties that benefit the most in the surrogacy process. These third parties are an irrefutable necessity to the surrogacy process, and without these parties, the surrogacy process would not be possible. It is this demand for these parties' interventions that gives them the power to control the market. As illustrated, these parties are not regulated by law with regards to pricing, they can determine their own pricing and amount of treatments provided to commissioning parents. Reproductive clinics are regulated to a degree but not fully thus allowing third parties to self-regulate. Self-regulation by third parties is likely to increase the probability of exploitation in the surrogacy process, in commercial surrogacy and altruistic surrogacy. In my opinion, the prohibition on commercial surrogacy does not achieve its goal in ensuring that the parties to the SMA are protected from exploitation. The only effective way to ensure that exploitation is drastically minimised is to implement stringent regulation. However, regulation is just the first step, there must be constant policing of implementation of these regulations as well as the parties. If it becomes apparent after regular monitoring that fertility clinics, lawyers, and egg donor clinics are failing to adhere to these regulations, there should be an appropriate punishment, such as suspension of license to operate as well as a fine.

There are countries that allow commercial surrogacy; however, no system is perfect as there is never complete regulation of these systems, and even if there are, clinics find loopholes in order to continue making profits. These fertility clinics are more concerned with the revenue that they will be receiving than ensuring the surrogate mother, the child or even the commissioning parents are protected. Rudrappa argues that commercial surrogacy in India needed to be regulated by 'robust laws that strengthen surrogate mothers' rights'.<sup>323</sup> The ban on commercial surrogacy removes the financial characteristic, which many women that are living in rural areas will be forced to either enter into sex work or sell their organs to be able to financially support their families. In chapter four relating to international perspective India, California, Ukraine and Israel were looked at, and the common element that was missing in these systems was adequate regulation by law. These countries have non-binding regulations for infertility clinics, California has the ASRM and SART which regulates ART; however, these bodies are voluntary, and they provide guidelines which are non-binding, thus nonconformity or not adhering to the guidelines have no consequences for these clinics. Commercial surrogacy is possible if certain protective measures are implemented into law to ensure that the parties

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<sup>323</sup> Rudrappa S 'Why Is India's Ban on Commercial Surrogacy Bad for Women' (2018) 43 *N.C. J. Int'l L.*

involved are held liable if they contravene the laws regulating surrogacy. These are recommendations which could assist in regulating commercial surrogacy:

## 5.2 Recommendations

### For commercial surrogacy:

For commercial surrogacy there are 5 categories in which the recommendations can be placed under, they are as follows:

#### Matching

1. All potential surrogate mothers should be placed on a national database potential commissioning parent(s) who are seeking the services of a surrogate mother are therefore able to visit the agency's database and decide on an appropriate surrogate.
  - a. This is a similar system that Ukraine has implemented. Potential surrogates are put on a list with all relevant details, this will allow the commissioning parents to be able to match with a potential surrogate mother.<sup>324</sup>

#### Screening for suitability

2. The surrogate mothers and the commissioning parent(s) must be obligated to attend counselling by a professional psychologist. 'A surrogate also should be informed, orally and in writing, of her rights and responsibilities as a surrogate, and should consent in writing to evidence her intent.'<sup>325</sup> This will ensure that the parties understand the nature of the agreement and the process, in the medical as well as the emotional sense.
3. Surrogate mothers would be protected from exploitation by there being a comprehensive screening process of potential candidates in order to guarantee the appropriateness of the match of a surrogate mother and commissioning parents.<sup>326</sup> Israel adopts a similar system to ensure that commercial surrogacy is not exploited within the country. In order to protect surrogate mothers Israel requires all-inclusive

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<sup>324</sup> Magdassi D 'Surrogacy in Ukraine'

<http://www.familiesthrusurrogacy.com/wpcontent/uploads/2016/08/Surrogacy-in-Ukraine.pdf> ( accessed 13May 2017)

<sup>325</sup>Lawrence DE ' Surrogacy in California: Genetic and Gestational Rights' (1991) 21 *Golden Gate University Law Review*

<sup>326</sup>Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

screening of potential candidates to ensure: 'suitability of the parties, voluntary and informed consent, physical and mental health precautions, as well as financial safeguards.'<sup>327</sup>

#### Compensation for surrogate mothers

4. The legislation should provide a fixed amount that should be paid to the surrogate mother as compensation; this will be in addition to the amount the commissioning parent(s) will pay for any expenses relating to the pregnancy and the surrogacy process.<sup>328</sup> Furthermore, the legislation must provide a fixed amount that the commissioning parent(s) pay to the agency for their services. In order to accommodate persons of all income levels to be able to access surrogate agencies, the agency should allow for a payment plan in which the commissioning parent(s) can pay the agency in instalments. This ensures that the commissioning parent(s) have access to the agencies and that the agency receives payment.

#### Payments to Agency

5. All and any communications between the commissioning parent(s) and the surrogate mother are to be supervised by the agency as well as all payments by the commissioning parent(s) must be paid to the agency. This practice would eliminate backdoor deals between the surrogate mother and the commissioning parent, as well as ensuring that neither party is taking advantage of the other. It also The commissioning parent(s) may not make any payments directly to the surrogate mother. The agency will compensate the surrogate mother for all expenses incurred as a result of the pregnancy and the procedures related to it.

#### Prevention of exploitation

6. The purpose of having legislation provide for the fixed amount that must be paid to the surrogate mother is to prevent any exploitation by any of the parties involved, including the agency. It would further prevent the payment resulting in a transaction where the commissioning parent(s) are "buying" the child. In order to curtail the use of surrogacy

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<sup>327</sup> Lee RL 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) *Hastings Women's Law Journal*

<sup>328</sup> Mortazavi S 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *The George Town Law Journal*

as a source of income, the legislation should provide that a woman can only be a surrogate mother once in every two years. This will mean that once the surrogate mother has given birth to the child, she will not appear on the database again until the expiration of the two-year period. Having the restriction of a two year period, is to ensure that surrogate mothers aren't being taken advantage of, in the case of women being told by their partners to be a surrogate for the income. It will also allow the woman's body time to rejuvenate after giving birth which could be taxing in her body.

### Third parties

1. The main concern with fertility clinics is the lack of regulation, therefore South Africa should create a regulatory body that regulates fertility clinics and, egg donor clinics. This regulatory system should not just be comprised of medical practitioners, but persons from the legal profession as well, as to ensure that the regulations are all in compliance with the law and the appropriate sanctions are imposed as well.
2. Membership to the regulatory body should be mandatory, and clinics who wish to operate need to be issued a certificate of compliance every 1 year.
3. Laws should be implemented which are obligatory to follow and not mere guidelines. Clinics that do not adhere to the regulations should be faced with a fine, and depending the severity of the violation it should be compelled with the lose of their accreditation and certificates. If a fine is just imposed on a fertility clinic, there should be placed on a probationary period. Owners of these clinics will be blacklisted on a database which results in them being unable to apply for accreditation for a time period of 2 years.
4. There should be fixed pricing for fertility treatments across all fertility clinics, which the regulatory body will analyse to determine if they are fair
5. Fertility clinics who offer fertility financing should vet the commissioning parents to determine if they are able to pay back their instalments without bankrupting them completely.
6. The regulatory body should ensure that laws are effectively implemented into the business and this will be done with a monitoring inspection of these clinics every 6 months.

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