

**Decriminalizing Payments Made to Surrogates: Lessons for India from
Canada**

By

Anisha Jain

A thesis submitted in partial fulfillment of the requirements for the degree of
Master of Laws

Faculty of Law

University of Alberta

© Anisha Jain, 2024

ABSTRACT

This thesis analyzes surrogacy regulation and practice in Canada and India and examines how both altruistic and commercial surrogacy have the potential to harm and exploit surrogates. I argue that money might not be the sole reason (or even the main reason) for the potential for harm and exploitation in surrogacy to become a reality. The main concern, in my view, is the regulatory approach of both countries, which fails to adequately address the myriad ethical and legal issues involved in surrogacy. I suggest policy recommendations for regulated commercial surrogacy for India, informed by the lessons learned from the Canadian and Indian surrogacy experiences. The objective of the recommendations is to safeguard and promote the interests of surrogates and prioritize their informed consent. In Chapter 1 of this thesis, I provide a brief introduction to the practice of surrogacy and reasons for its popularity in the modern world. With the help of emerging empirical scholarship from the developed world, I challenge the unsubstantiated concerns about surrogacy and lay down the foundation for my argument. In Chapter 2, I discuss how, despite Canada having a heavy-handed law on surrogacy, the law has been ineffective and has inadvertently given rise to the potential for exploitation of surrogates. In Chapter 3, I discuss the development of Indian surrogacy law and unpack the complex realities of Indian commercial surrogacy practice. I argue that India should permit regulated paid surrogacy as it will minimize the potential for harm and exploitation of surrogates. Ultimately, in Chapter 4, I provide policy recommendations for a regulated commercial surrogacy regime in India. My main recommendation is for a robust system of oversight and enforcement aimed at safeguarding surrogates from exploitation.

ACKNOWLEDGMENT

Every significant project is a collective effort, and my LL.M. thesis is no exception. I would like to begin by expressing my profound gratitude to my supervisor, Professor Erin Nelson, for giving me the opportunity to write this thesis under her guidance. Your insightful comments on the various drafts of my chapters have helped me become a better researcher, writer, and thinker. Your clarity of thought and writing continues to inspire me.

I would like to thank the members of my examining committee for providing an excellent defence experience. To Professor Matthew Lewans, thank you for acting as the Chair for my final examination. Your encouragement during our walks to the boardroom on the day of the exam helped calm my nerves immensely. Thank you for clarifying questions during the exam when required and for ensuring that my defence went smoothly. To Professors Cameron Jefferies and Hadley Friedland, a deep thank you for your thoughtful questions. Your questions pushed me to think more deeply about the issues discussed in my thesis.

To Professor Linda Reif, I am forever deeply grateful to you. Thank you for your regular check-ins during COVID, catching up over coffee, and your initial assistance with sorting out my courses. Without your support, this thesis would not have seen the light of day. To Professor Jessica Eisen, thank you for your kindness and encouragement. Your belief in me came at a crucial time. From guiding me on my independent research paper to being an extremely supportive Dean, it has been a pleasure to be your student. I am grateful to the Faculty of Law and University of Alberta for their financial support throughout my program.

To Shauna Rosiechuk, my counsellor, a very special thank you. You have helped me understand myself better through our many fun and insightful sessions. Thank you for staying with me for the final push. You are amazing!

To my parents, my unwavering rocks, words will forever fall short in expressing my gratitude for your constant belief in me. This thesis is dedicated to you both. To my mother, thank you for always being just a call away and for keeping the fire in me alive. To my father, you teach the power of positivity in adversity.

Lastly, but certainly not least, to all my friends - thank you. To my friends back home, I am grateful for your presence in my life. To my friends in Edmonton, you make me miss home a little less. Your love, support, and encouragement have been invaluable.

It is because of all your efforts that I have been able to successfully write and defend my LL.M. thesis.

TABLE OF CONTENTS

ABSTRACT	ii
ACKNOWLEDGMENT	iii
LIST OF FIGURES	vii
CHAPTER 1 SURROGACY: INTRODUCTION AND FOUNDATION	1
1.1. INTRODUCTION TO THE PRACTICE OF SURROGACY	1
1.2. HISTORY OF THE PRACTICE	4
1.3. REASONS FOR THE INCREASED DEMAND FOR SURROGACY	6
1.4. ISSUES RELATED TO COMMERCIAL SURROGACY	7
1.5. CHALLENGING THE UNSUBSTANTIATED CONCERNS ABOUT SURROGACY	12
1.6. CONCLUSION	14
CHAPTER 2 SURROGACY IN CANADA	16
2.1. INTRODUCTION	16
2.2. HISTORY OF SURROGACY REGULATION IN CANADA	17
2.3. REFERENCE CASE	21
2.4. THE AHRA TODAY	23
2.5. CURRENT SURROGACY PRACTICE IN CANADA	25
CHAPTER 3 SURROGACY IN INDIA	39
3.1. INTRODUCTION	39
3.2. HOW INDIA BECAME THE BABY-FACTORY OF THE WORLD	40
3.3. HISTORY OF SURROGACY REGULATION IN INDIA	41
3.4. THE COMPLEX REALITY OF INDIAN SURROGACY INDUSTRY	46
3.5. INDIA’S SURROGACY REGULATION: A CRITICAL ANALYSIS	57
3.6. CONCLUSION	62
CHAPTER 4 POLICY RECOMMENDATIONS FOR REGULATED COMMERCIAL SURROGACY FOR INDIA	64
4.1. INTRODUCTION	64
4.2. POLICY RECOMMENDATIONS	65
4.2.1. A ROBUST SYSTEM OF OVERSIGHT AND ENFORCEMENT	66
4.2.1.1. SURROGACY AGREEMENTS	72
4.2.1.2. SURROGACY AGENCY GOVERNANCE	73
4.2.1.3. BROKERS	78

4.2.1.4. FERTILITY CLINIC GOVERNANCE	78
4.2.1.5. SURROGACY HOSTELS	81
4.2.1.6. PAYMENT STRUCTURE	83
4.2.1.7. CONSULTATION WITH SURROGATES	86
4.2.1.8. DATA COLLECTION	88
4.2.1.9. REVIEW OF SURROGACY LAW	88
4.3. CONCLUSION.....	89
CHAPTER 5 CONCLUSION.....	90
BIBLIOGRAPHY	92

LIST OF FIGURES

Figure 1: Hierarchy of the System of Oversight and Enforcement
for my policy recommendations.....68

CHAPTER 1 SURROGACY: INTRODUCTION AND FOUNDATION

Surrogacy is a controversial topic that is dynamic and complex.¹

To avoid having to explain the biological process of procreation, the early Victorians concocted a legend that the “baby-delivery stork” dropped babies to their parents.² Storks have represented fertility and childbirth for centuries.³ With the advances in reproductive technologies, today the role of the surrogates can be considered similar to the storks.⁴ Surrogates deliver the gift of parenthood to couples and individuals who are unable to have a child on their own.⁵

In this introductory chapter, I begin with a general introduction to the practice of surrogacy and trace its history and evolution in the modern world. Next, I discuss the issue of exploitation and commodification related to surrogacy in general and its more contested form (commercial surrogacy) in particular and argue that both altruistic and commercial surrogacy can harm and exploit surrogates. I then move to challenge some unsubstantiated concerns related to surrogacy with the help of empirical evidence from developed countries, primarily the USA and the UK.

1.1. INTRODUCTION TO THE PRACTICE OF SURROGACY

Surrogacy is defined as – “a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the

¹ John Pascoe, "Sleepwalking through the Minefield: Legal and Ethical Issues in Surrogacy" (2018) 30:Special Issue Singapore Academy of Law Journal 455.

² Shari O'Brien, "Commercial Conceptions: A Breeding Ground for Surrogacy" (1986) 65:1 North Carolina Law Review 127 at 127-128; Taylor E. Brett, "The Modern Day Stork: Validating the Enforceability of Gestational Surrogacy Contracts in Louisiana" (2014) 60:3 Loyola Law Review 587 at 588.

³ E. Brett, *supra* note 2 at 588.

⁴ *Ibid* at 589.

⁵ *Ibid*.

birth”.⁶ It is carried out using one of two reproductive technologies – artificial insemination or in-vitro fertilization.⁷ Artificial insemination “was the first method of noncoital conception (i.e., without sexual intercourse) to be developed”⁸ in which sperm cells are deposited in the reproductive tract of the surrogate.⁹ In in-vitro fertilization (IVF), eggs are removed from the ovaries of a woman and are then combined with sperm in a laboratory.¹⁰ If the egg gets fertilized by the sperm, the embryo so formed is placed in the womb of the surrogate.¹¹

There are two types of surrogacy: traditional surrogacy and gestational surrogacy.¹² In traditional surrogacy, the surrogate conceives the child via artificial insemination using the sperm of the donor or the intended father and her own egg.¹³ The surrogate is genetically connected with the child in traditional surrogacy.¹⁴ She takes the pregnancy to term and surrenders her parental rights to the child to the intended parents (IPs) at birth.¹⁵ Until 1978, when IVF became available, all surrogacy arrangements were traditional.¹⁶

⁶ *The Surrogacy (Regulation) Act, 2021*, No.47 OF 2021, C-1, s 2 (zd) online: <[https://prsindia.org/files/bills_acts/bills_parliament/2019/The%20Surrogacy%20\(Regulation\)%20Act,%202021.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2019/The%20Surrogacy%20(Regulation)%20Act,%202021.pdf)>.

⁷ Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered" (1992) 68:1 *Indiana Law Journal* 205 at 206. In the contemporary world, artificial insemination is also referred to as assisted insemination.

⁸ *Ibid.*

⁹ Anindita Majumdar, *Oxford India Short Introductions Surrogacy*, 1st ed (New Delhi: Oxford University Press, 2019) at 2 [Majumdar, *Oxford India Short Introductions Surrogacy*].

¹⁰ Briana R. Iannacci, "Why New York Should Legalize Surrogacy: A Comparison of Surrogacy Legislation in Other States with Current Proposed Surrogacy Legislation in New York" (2018) 34:4 *Touro Law Review* 1239 at 1247.

¹¹ Lieber, *supra* note 7 at 207.

¹² Sometimes traditional surrogacy is called genetic surrogacy or partial surrogacy. Gestational surrogacy is also called full surrogacy. Abby Brandel, "Legislating Surrogacy: A Partial Answer to Feminist Criticism" (1995) 54:2 *Maryland Law Review* 488 at 491; Austin Caster, "Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime" (2011) 10:2 *Connecticut Public Interest Law Journal* 477 at 480; Caitlin Conklin, "Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation" (2013) 35:1 *Women's Rights Law Reporter* 67 at 68.

¹³ Conklin, *supra* note 12 at 70; Alice Hofheimer, "Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy" (1991) 19:3 *NYU Review of Law and Social Change* 571 at 573.

¹⁴ *Ibid.*

¹⁵ Hofheimer, *supra* note 13 at 573.

¹⁶ Caster, *supra* note 12 at 480; Conklin, *supra* note 12 at 71.

As IVF became increasingly available and affordable, surrogates and IPs started entering gestational surrogacy arrangements. Gestational surrogacy uses IVF and the resulting embryo is implanted in the surrogate's uterus.¹⁷ The surrogate is not genetically connected with the child in gestational surrogacy.¹⁸ In most cases of gestational surrogacy, there is a genetic connection between the surrogate child and one or both IPs, but that may not always be the case.¹⁹ A majority of modern surrogacy agreements are gestational.²⁰

Surrogacy arrangements can be either altruistic or commercial.²¹ Altruistic surrogacy means that the surrogate is not paid a fee.²² The IPs may pay her for expenses directly linked to the pregnancy, such as - medical expenses, maternity clothes, compensation for lost wages, insurance and other pregnancy related expenses.²³ Altruistic surrogacy is essentially a "gift relationship."²⁴ The surrogate in these arrangements is believed to be motivated by "feelings of love", sacrifice, and desire to help a childless couple.²⁵ Since these arrangements are entered into for motivations other

¹⁷ Stephanie F. Schultz, "Surrogacy Arrangements: Who Are the Parents of a Child Born through Artificial Reproductive Techniques" (1995) 22:1 Ohio Northern University Law Review 273 at 274.

¹⁸ *Ibid.*

¹⁹ Victoria R. Guzman, "A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy" (2016) 38:2 Houston Journal of International Law 619 at 623.

²⁰ Charles P. Kindregan Jr. & Maureen McBrien, "Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos" (2004) 49:1 Villanova Law Review 169 at 180; Katherine Voskoboynik, "Clipping the Stork's Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism" (2016) 26:2 Indiana International and Comparative Law Review 336 at 341.

²¹ Guzman, *supra* note 19 at 624.

²² Ailis L. Burpee, "Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy" (2009) 37:2 Georgia Journal of International and Comparative Law 305 at 309.

²³ Gabriella Judith Martin, "Ethical Perspectives on Commercial Surrogacy" (2021) 2:2 Indian Journal of Law and Legal Research 1 at 2; Burpee, *supra* note 22 at 309.

²⁴ Yuri Hibino, "The advantages and disadvantages of altruistic and commercial surrogacy in India" (2023) 18:8 Philosophy, Ethics, and Humanities in Medicine 1 at 3.

²⁵ Rakhi Ruparelia, "Giving Away the Gift of Life: Surrogacy and the Canadian Assisted Human Reproduction Act" (2007) 23:1 Canadian Journal of Family Law 11 at 17; Jenny Gunnarsson Payne, "Autonomy in altruistic surrogacy, conflicting kinship grammars and intentional multilinear kinship" (2018) 7 Reproductive Biomedicine and Society Online 66 at 71.

than money, they are thought not to result in commodification and to be less likely to involve exploitation.²⁶ They are argued to be less ethically concerning and truly reflective of the value of motherhood.²⁷

In commercial surrogacy, the surrogate is paid a fee in addition to payments for pregnancy-related expenses.²⁸ Fundamentally, commercial surrogacy is the same practice as altruistic surrogacy. It involves the same elements as altruistic surrogacy apart from the fact that a fee is paid in commercial surrogacy.

1.2. HISTORY OF THE PRACTICE

Surrogacy is not new; it has been around since ancient times. Descriptions of the practice can be found in the Bible²⁹ and Hindu mythology.³⁰ But in recent decades, with the development and increased use of assisted reproductive technologies, surrogacy arrangements are becoming increasingly common.³¹

In 1980, the first traditional commercial surrogacy contract was entered between William and Elizabeth Stern (IPs) and Mary Beth Whitehead (surrogate) for \$10,000.³² This arrangement led

²⁶ O'Brien, *supra* note 2 at 152.

²⁷ JY Lee, "Surrogacy: beyond the commercial/altruistic distinction" (2023) 49:3 Journal of Medical Ethics 196 at 196; Sharyn Roach Anleu, "Surrogacy: For Love but Not for Money?" (1992) 6:1 Gender and Society 30 at 38; Vida Panitch, "Commodification and Exploitation in Reproductive Markets: Introduction to the Symposium on Reproductive Markets" (2016) 33:2 Journal of Applied Philosophy 117 at 118.

²⁸ Guzman, *supra* note 19 at 624.

²⁹ John W Phillips & Susan D Phillips, "In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience" (1980) 69:4 Kentucky Law Journal 877 at 880.

³⁰ Majumdar, *Oxford India Short Introductions Surrogacy*, *supra* note 9 at 16-17.

³¹ Susan Golombok et al, "Families created through surrogacy: mother-child relationships and children's psychological adjustment at age 7" (2011) 47:6 Developmental Psychology 1579 at 1580 [Golombok et al, "Families created through surrogacy"]; Pikee Saxena, Archana Mishra & Sonia Malik, "Surrogacy: Ethical and Legal Issues" (2012) 37:4 Indian Journal of Community Medicine 211 at 211.

³² *In the Matter of Baby M*, 217 NJ Super 313 (Ch Div 1987), rev'd 109 NJ 396 (1988) [*Matter of Baby M*].

to the famous *Baby M* case, bringing modern surrogacy to the limelight.³³ It was the first time an American court ruled on surrogacy.³⁴ Mary Beth Whitehead entered a traditional surrogacy arrangement with William and Elizabeth Stern in New Jersey. She was inseminated with William Stern's sperm and was genetically related to the baby, Melissa, born in 1986. After Melissa's birth, Whitehead refused to give her up, leading to a custody battle. In 1988, the Supreme Court of New Jersey ruled that the surrogacy contract was invalid because of the involvement of money and coercion, as Whitehead's consent was given before conception.³⁵ However, the court awarded custody of Melissa to the Sterns based on the child's best interests and granted visitation rights to Whitehead.³⁶ This case garnered worldwide attention and incited debates among feminists, lawmakers, ethicists, and the public, on the myriad legal and ethical issues surrogacy entails.³⁷

The first gestational surrogacy was arranged in the year 1985, which paved the way for future surrogacy arrangements without using the surrogate's eggs.³⁸ Since then the practice of surrogacy has flourished. The number of surrogacy agencies and professionals involved in facilitating surrogacy arrangements has also increased.³⁹

³³ Brandel, *supra* note 12 at 488.

³⁴ Karine Bogoraz, "Student Project: Surrogacy Research Guide: In The Matter of Baby M", Pace University, Pace Law Library, Research Guides, online: < <https://libraryguides.law.pace.edu/surrogacy> >.

³⁵ *Matter of Baby M*, *supra* note 32 at 422.

³⁶ *Ibid* at 459, 466-467.

³⁷ Brandel, *supra* note 12 at 489; Carol Sanger, "Developing Markets in Baby-Making: In the Matter of Baby M" (2007) 30:1 Harvard Journal of Law and Gender 67 at 69.

³⁸ Eric A. Gordon, "The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology" (1993) 6:1 St. Thomas Law Review 191 at 194.

³⁹ Conklin, *supra* note 12 at 81; Elizabeth S. Scott, "Surrogacy and the Politics of Commodification" (2009) 72:3 Law and Contemporary Problems 109 at 120.

1.3. REASONS FOR THE INCREASED DEMAND FOR SURROGACY

Couples and individuals who struggle to conceive naturally, often turn to either adoption or surrogacy.⁴⁰ Earlier people who were unable to conceive naturally resorted to adoption.⁴¹ However, abortion laws, increase in the use of contraceptives, and decreased social stigma attached to children born to unmarried women, seem to have led to a smaller number of adoptable children.⁴² In 1984, two million couples sought to adopt children in the U.S., while only 58,000 children were available for adoption, meaning that the ratio of parents seeking to adopt to available children was 35:1.⁴³ The decrease in the availability of adoptable children has left couples without children with very few options - to accept childlessness, wait long periods for adoption (in both domestic and international adoption), adopt a child with special needs, or buy children from the black market.⁴⁴

Given the decreased availability of adoptable children, surrogacy has emerged as an increasingly viable option for IPs. Unlike adoption, where biological parents give up the custody and care of the child and the law and government authorities establish parentage of that child in the adoptive parents, IPs enter a surrogacy arrangement with the intention to bring the surrogate child into the world.⁴⁵

⁴⁰ Ashley Hope Elder, "Wombs to Rent: Examining the Jurisdiction of International Surrogacy" (2014) 16:2 Oregon Review of International Law 347 at 350-351.

⁴¹ *Ibid* at 350.

⁴² Margaret D. Townsend, "Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion" (1982) 16:2 University of Richmond Law Review 467 at 467; O'Brien, *supra* note 2 at 129; Caster, *supra* note 12 at 482; F. Schultz, *supra* note 17 at 273.

⁴³ O'Brien, *supra* note 2 at 129; F. Schultz, *supra* note 17 at 273; It should be noted that while Shari O'Brien's article notes the number of children available for adoption as 58,000, a later article by Stephanie F. Schultz notes a different figure of 48,000. I was unable to trace the original source both scholars referenced to support their claims.

⁴⁴ O'Brien, *supra* note 2 at 129; Guzman, *supra* note 19 at 622.

⁴⁵ Barbara L. Atwell, "Surrogacy and Adoption: A Case of Incompatibility" (1988) 20:1 Columbia Human Rights Law Review 1 at 4; Marta Casonato & Stéphanie Habersaat, "Parenting without being genetically connected" (2015) 3 *Enfance* 289.

Moreover, today we see a paradigm shift in the concept of family. The conventional family comprised a man, a woman, and their biological children.⁴⁶ The modern family includes singles and same-sex parents within its ambit.⁴⁷ Surrogacy enables infertile heterosexual couples to have a genetically related child.⁴⁸ It also makes it possible for singles and same-sex couples who are married or in civil unions to become parents of a child genetically related to at least one of them.⁴⁹ These are some of the reasons that have contributed to an increased demand for surrogacy as a way to build a family.

1.4. ISSUES RELATED TO COMMERCIAL SURROGACY

In spite of its growth and it being considered as a family-building method, surrogacy remains a controversial practice. This is because surrogacy continues to play a role in the deconstruction of the traditional understanding of family and motherhood.⁵⁰ Surrogacy has also contributed to the creation of a marketplace in the reproductive context.⁵¹

⁴⁶ Cynthia Godsoe, “Adopting the Gay Family” (2015) 90:2 Tulane Law Review 311 at 320; Elizabeth M. Schneider, “Changing Perspectives of the Family” (1994) 5 Drake Law Review 11 at 11.

⁴⁷ Lisa R Zimmer, “Family, Marriage, and the Same-sex Couple” (1990) 12:2 Cardozo Law Review 681 at 684; Schneider, *supra* note 46 at 11.

⁴⁸ M. Simopoulou et al, “Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period” (2018) 2018 BioMed Research International 1 at 1-2; Sasthibrata Panda & Sanskar Jain, “Understanding Commercial Surrogacy: The Pact between Barren and Broke” (2022) 1 Dharmashastra National Law University Student Law Journal 18 at 19; Minsung Kim, “The Regulatory-Permitted Approach for Responsible Uses of Commercial Surrogacy: Who Cares about Surrogates in the Commercial Practice of Gestational Surrogacy?” (2022) 25:1 Quinnipiac Health Law Journal 1 at 3-4.

⁴⁹ Kristiana Brugger, “International Law in the Gestational Surrogacy Debate” (2012) 35:3 Fordham International Law Journal 665 at 667; Doron Dorfman, “Surrogate Parenthood: Between Genetics and Intent” (2016) 3:2 Journal of Law and Biosciences 404 at 405; Kim, *supra* note 48 at 3-4; European Parliament, Directorate-General for Internal Policies, Policy Department Citizen’s Rights and Constitutional Affairs, *A comparative study on the regime of surrogacy in EU Member States* (2013) at 30, online: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf)>.

⁵⁰ Erin Nelson, “Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy” (2013) 41:1 Journal of Law, Medicine and Ethics 240 at 245 [Nelson, “Global Trade”]; Mazarine Lestienne “Applying Mediation to the Complexities of Surrogacy Arrangements” (2020) 13 American Journal of Mediation 183 at 188; Abdul Qadir & T.M. Meghana, “Surrogacy as Modern Form of Emerging Exploitation – A Time to Think” (2017) 2 Supremo Amicus 1 at 2.

⁵¹ Lestienne, *supra* note 50 at 188; Qadir & Meghana, *supra* note 50 at 2.

Traditionally, motherhood referred to giving birth to and raising a child.⁵² The idea that a woman could relinquish her parental rights by surrendering a child in exchange for money through a pre-conception agreement potentially destabilises the traditional understanding of motherhood.⁵³ By separating conception, gestation, and nurturing, the practice of surrogacy fragments the traditional understanding of a mother.⁵⁴ From having just one mother, surrogacy has made it possible to potentially have three mothers – gestational, genetic⁵⁵ and social (intending) mother.⁵⁶

Surrogacy is also argued to be exploitative and commodifying of women, their reproductive capacity, and children.⁵⁷ Gena Corea feared that surrogacy would create a “female breeding caste”.⁵⁸ In 1985, Margaret Atwood in her novel *The Handmaid’s Tale* painted a dystopian image of the practice of surrogacy and the concerns of exploitation related to the practice.⁵⁹ Critics claim that surrogacy is a patriarchal attempt to control the reproductive capacity of women by reducing them to “fetal containers” and taking away their agency for the duration of the contract.⁶⁰ There are concerns that relinquishment of the baby can be emotionally risky for surrogates because of the

⁵² Paige Richardson, “Redefining Motherhood: How Reproductive Technologies Change the Way We Think About Motherhood” (2017) 2 *Revue Your Review* (York Online Undergraduate Research) 79 at 79-80.

⁵³ Elly Teman, “The Social construction of surrogacy research: an anthropological critique of the psychosocial scholarship on surrogate motherhood” (2008) 67:7 *Social Science & Medicine* 1104 at 1105; Richardson, *supra* note 52 at 80.

⁵⁴ Teman, *supra* note 53 at 1105; Scott B.Rae, “Parental Rights and the Definition of Motherhood in Surrogate Motherhood” (1994) 3:2 *Southern California Review of Law and Women’s Studies* 219; Lestienne, *supra* note 50 at 188; John Haskell, “The Parent Trap: Implications of Surrogacy on Motherhood, Fatherhood, and the Family” (2006) 6:1 *Whittier Journal of Child and Family Advocacy* 107 at 112.

⁵⁵ Can also be referred to as the egg donor.

⁵⁶ Teman, *supra* note 70 at 1105; B.Rae, *supra* note 72 at 219.

⁵⁷ Kristy Horsey, “Not Withered on the Vine: The Need for Surrogacy Law Reform” (2016) 4:3 *Journal of Medical Law and Ethics* 181 at 183.

⁵⁸ Gena Corea, “Testimony before the California Judiciary Committee.” April 5, 1988 cited in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Indianapolis: Indiana University Press, 1988) 325.

⁵⁹ Karen Busby & Delaney Vun, “Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers” (2010) 26:1 *Canadian Journal of Family Law* 13 at 14; See also Margaret Atwood, *The Handmaid’s Tale*, (Toronto: Random House, 2019).

⁶⁰ Horsey, *supra* note 57 at 183; Nelson, “Global Trade”, *supra* note 50 at 245; Panitch, *supra* note 27 at 118.

“hypothesized bonding” between the surrogate and fetus during pregnancy.⁶¹ Critics are concerned about the ability of surrogates to give informed consent for relinquishment at the time of entering the agreement because the hormonal, physiological and biological changes during pregnancy and at the time of birth make it impossible for surrogates to foresee their feelings about relinquishment beforehand.⁶² Chances are that surrogates might regret giving up the child.⁶³ Moreover, the fact that a woman knowingly enters an arrangement to relinquish the child upon birth creates a perception that surrogates are different from “normal” women and have abnormal personality characteristics.⁶⁴

Both commercial and altruistic surrogacy have garnered considerable criticism, but commercial surrogacy remains the more contested form of surrogacy.⁶⁵ Feminists, medical ethicists, legal scholars, and human rights advocates argue that paying someone to carry a child commodifies reproduction, reduces women to baby producing machines, and exploits them.⁶⁶ On this view, commercial surrogacy puts a price on the child and on the reproductive capacity of the surrogate and reduces both into goods that can be bought, sold or hired.⁶⁷ Women’s bodies get turned into

⁶¹ Dara E Purvis, "Intended Parents and the Problem of Perspective" (2012) 24:2 Yale Journal of Law and Feminism 211 at 235-236; Anita L. Allen, "The Socio-Economic Struggle for Equality: The Black Surrogate Mother" (1991) Harvard Blackletter Journal 17.

⁶² Brandel, *supra* note 12 at 495; Carmel Shalev, *Birth power: the case for surrogacy* (New Haven: Yale University Press, 1989) at 216; E Purvis, *supra* note 61 at 236; Alan Wertheimer, *Is surrogacy exploitative?* (Toronto, Ontario: Law and Economics Programme, Faculty of Law, University of Toronto, 1992) at 10.

⁶³ Lieber, *supra* note 7 at 215.

⁶⁴ Teman, *supra* note 53 at 1106. It is assumed that “normal” women would never enter an arrangement where they would have to give up the child they bear. Therefore, entering a surrogacy arrangement is considered deviant behaviour.

⁶⁵ Burpee, *supra* note 22 at 322; Anleu, *supra* note 27 at 31.

⁶⁶ Eric A. Feldman, "Baby M Turns 30: The Law and Policy of Surrogate Motherhood" (2018) 44:1 American Journal of Law and Medicine 7 at 14-15; Qadir & Meghana, *supra* note 50 at 1; Panda & Jain, *supra* note 48 at 27; Katy Fulfer, "A Partial Defense of the Non-Commercialization of Surrogacy" (2020) 3:3 Canadian Journal of Bioethics 88 at 88-89; Rui Cascao, "The Challenges of International Commercial Surrogacy: From Paternalism towards Realism" (2016) 35:2 Medicine and Law 151 at 154.

⁶⁷ Qadir & Meghana, *supra* note 50 at 7; Pascoe, *supra* note 1 at 462; Lieber, *supra* note 7 at 213; Panitch, *supra* note 27 at 118.

“childbearing factories”.⁶⁸ Critics also claim that poor women enter commercial surrogacy arrangements out of their desperation for money without having a full understanding of what surrogacy entails.⁶⁹ They ultimately end up regretting their participation because of the exploitation involved.⁷⁰ In fact, most women would not even participate in surrogacy if it was not for their need for money.⁷¹ These concerns become more pressing in the context of developing countries where most women are poor, lack education, and have limited rights and opportunities.⁷²

Most of these concerns are not specific to commercial surrogacy. Since altruistic and commercial surrogacy are essentially the same practice, both carry the same potential for harm and exploitation. Just because altruistic surrogacy arrangements do not involve payment does not mean that they are not exploitative.⁷³ Rather, when entered in the context of close relatives and friends these arrangements may carry a greater risk of exploitation and coercion of the surrogate.⁷⁴ In altruistic surrogacy arrangements that take place in the realm of close family and friends, it becomes difficult to determine whether the surrogate is participating out of her free will or if her decision is made under pressure.⁷⁵ In patriarchal societies where women are dependent on their families financially and otherwise, this risk may be greater.⁷⁶

⁶⁸ Scott, *supra* note 39 at 112.

⁶⁹ Feldman, *supra* note 66 at 13; Panda & Jain, *supra* note 48 at 27; Scott, *supra* note 39 at 109; Deborah Zalesne, "The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art" (2017) 51:2 University of Richmond Law Review 419 at 439; Wertheimer, *supra* note 62 at 10.

⁷⁰ Scott, *supra* note 39 at 112.

⁷¹ Scott, *supra* note 39 at 143; Busby & Vun, *supra* note 59 at 52.

⁷² Michaela Merryfield, "(You're) Having My Baby: Surrogacy Fees as a Cost of Future Care Award in Canadian Tort Law" (2019) 24 Appeal Review of Current Law and Law Reform 135 at 144; Jenny C. Tonsing & Kareen N. Tonsing, "Understanding the Role of Patriarchal Ideology in Intimate Partner Violence among South Asian Women in Hong Kong" (2019) 62:1 International Social Work 161 at 163.

⁷³ Anleu, *supra* note 27 at 36, 37, 44.

⁷⁴ Ruparelia, *supra* note 26 at 36; Anleu, *supra* note 27 at 45.

⁷⁵ M. M. Tieu, "Altruistic surrogacy: the necessary objectification of surrogate mothers" (2009) 35:3 Journal of Medical Ethics 171 at 171; Anleu, *supra* note 27 at 45; Burpee, *supra* note 22 at 326.

⁷⁶ Burpee, *supra* note 22 at 326.

In altruistic arrangements where the surrogate carries the child for a close relative or friend, chances are that the surrogate will see the child grow in front of her. This could have a negative impact on her mental health.⁷⁷ Moreover, altruistic surrogacy does not rule out the possibility of payments being made to surrogates indirectly (as will be discussed in Chapter 2).⁷⁸

Altruistic surrogacy also reinforces the patriarchal notion that reproductive work should be undertaken by women out of love and without pay.⁷⁹ Favouring altruistic surrogacy suggests that societies prefer to regard women as selfless givers and a surrogate is expected to help a childless couple without any expectation of money in return.⁸⁰ In fact, the Parliamentary Standing Committee on Health and Family Welfare (India), in its 102nd Report on The Surrogacy (Regulation) Bill, 2016, was of the view that:

altruistic surrogacy is another extreme and entails high expectations from a woman willing to become a surrogate without any compensation or reward but a decision based on noble intentions and kindness. Pregnancy is not a one-minute job but a labour of nine months with far reaching implications regarding her health, her time and her family. In the altruistic arrangement, the commissioning couple gets a child; and doctors, lawyers and hospitals get paid. However, the surrogate mothers are expected to practice altruism without a single penny.⁸¹

⁷⁷ Tieu, *supra* note 75 at 171; Jyoti Chaudhary, “Consequences of Surrogacy on Surrogates in India” (2019) 49:2 Indian Anthropologist 91 at 104.

⁷⁸ Anne Casparsson, Surrogacy and the best interest of the child (Master in Applied Ethics, Linköping University, 2014) [unpublished] at 19; Leslie P. Francis, “Is Surrogacy Ethically Problematic” (2017) Utah Law Digital Commons, Utah Law Faculty Scholarship 388 at 394, online: <<https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1145&context=scholarship>>.

⁷⁹ Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Bostone: Allen and Unwin, 1987) at 120; Anleu, *supra* note 27 at 32, 37.

⁸⁰ Burpee, *supra* note 22 at 325; Anleu, *supra* note 27 at 32; Jesús Mora, “Parenthood, altruism, and the market: a critique of essentialist constructions of women’s nature in commercial surrogacy” (2021) 17 The Age of Human Rights Journal 276 at 278.

⁸¹ Parliament of India, Rajya Sabha, Department-Related Parliamentary Standing Committee on Health and Family Welfare, *One Hundred Second Report, The Surrogacy (Regulation) Bill, 2016* (August 2017) at 13, online: <https://prsindia.org/files/bills_acts/bills_parliament/2016/SCR-%20Surrogacy%20Bill,%202018.pdf> [*One Hundred Second Report*].

1.5. CHALLENGING THE UNSUBSTANTIATED CONCERNS ABOUT SURROGACY

The practice of surrogacy undoubtedly has the potential to exploit surrogates. However, emerging empirical evidence from developed countries, mainly the UK and the USA, suggests that most concerns of harm and exploitation related to surrogacy are overblown. In this section, I will use this empirical evidence to challenge the unsubstantiated concerns related to surrogacy. It should be noted that the empirical evidence focuses on the practice of surrogacy in general and not necessarily on commercial surrogacy specifically.

Based on empirical evidence, it seems that overall surrogacy is a positive experience for both surrogates and IPs in developed countries.⁸² Surrogates do not feel exploited or “used” by their involvement in surrogacy.⁸³ This view of the surrogates does not seem to change five to ten years after the surrogacy birth.⁸⁴

A majority of surrogates belong to low socioeconomic working-class backgrounds.⁸⁵ IPs are almost always more educated and wealthier than surrogates.⁸⁶ However, money is not the primary reason

⁸² Vasanti Jadva et al, “Surrogacy: the experiences of surrogate mothers” (2003) 18:10 Human Reproduction 2196 at 2203 [Jadva et al, “Surrogacy: the experiences of surrogate mothers”]; Christine Hagan Kleinpeter & Melinda M. Hohman, “Surrogate motherhood: personality traits and satisfaction with service providers” (2000) 87:3 Psychological Reports 957 at 968 [Kleinpeter & Hohman, “Surrogate motherhood”].

⁸³ Melinda M. Hohman & Christine B. Hagan, “Satisfaction with Surrogate Mothering: A Relational Model” (2001) 4:1 Journal of Human Behavior in the Social Environment 61 at 80-81 [Hohman & Hagan, “Satisfaction with Surrogate Mothering”]; Olga van den Akker, “Genetic and gestational surrogate mothers' experience of surrogacy” (2003) 21:2 Journal of Reproductive and Infant Psychology, 145 at 156 [van den Akker, “Genetic and gestational surrogate mothers”].

⁸⁴ Susan Imrie & Vasanti Jadva, “The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements” (2014) 29:4 Reproductive Biomedicine Online 424 at 433 [Imrie & Jadva, “The long-term experiences of surrogates”]; Vasanti Jadva et al, “Surrogate Mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child” (2015) 30:2 Human Reproduction, 373 at 377.

⁸⁵ Janice C. Ciccarelli & Linda J. Beckman, “Navigating Rough Waters: An overview of Psychological Aspects of Surrogacy” (2005) 61:1 Journal of Social Issues 21 at 36; Helena Ragone, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Press, 1994) at 54.

⁸⁶ *Ibid.*

for most surrogates to participate in surrogacy.⁸⁷ Helping a childless couple become parents and start their family is the main motivation for the participation of surrogates.⁸⁸

A majority of surrogates are women with normal personalities. Empirical studies have concluded that surrogates are intelligent, stable, and psychologically resilient women.⁸⁹ They are well-prepared for surrogacy.⁹⁰ As regards relinquishment, surrogates do not consider the child as their own and experience less attachment with the child as compared to other pregnant women.⁹¹ Relinquishment is usually a positive experience for surrogates.⁹²

Contrary to the belief that surrogates are forced into surrogacy by their partners or husbands, surrogates choose surrogacy out of their free will and autonomy.⁹³ Surrogates' autonomy does not gets compromised during the pregnancy.⁹⁴ Rather, participating in surrogacy increases their self-esteem and gives them a sense of fulfillment.⁹⁵ Most surrogates' satisfaction with their surrogacy

⁸⁷ Busby & Vun, *supra* note 59 at 44. This claim is based on the review of 40 empirical studies primarily from United States and Britain conducted by Karen Busby and Delaney Vun.

⁸⁸ Jadva et al, "Surrogacy: the experiences of surrogate mothers", *supra* note 82 at 2203; Imrie & Jadva, "The long-term experiences of surrogates", *supra* note 84 at 433; Kleinpeter & Hohman, "Surrogate motherhood", *supra* note 82 at 963; van den Akker, "Genetic and gestational surrogate mothers", *supra* note 83 at 150.

⁸⁹ Teman, *supra* note 53 at 1106; Joan Einwohner, "Who becomes a surrogate: Personality Characteristics" in Joan Offerman- Zuckerberg, ed, *Gender in Transition* (Boston: Springer, 1989) 123 at 131; Imrie & Jadva, "The long-term experiences of surrogates", *supra* note 84 at 433; See also Busby & Vun, *supra* note 59 at 46.

⁹⁰ Todd D. Pizitz, Joseph McCullaugh & Alexa Rabin, "Do women who choose to become surrogate mothers have different psychological profiles compared to a normative female sample?" (2013) 26:1 Women and Birth e15 at e19-20; Hohman & Hagan, "Satisfaction with Surrogate Mothering", *supra* note 83 at 80-81.

⁹¹ Jadva et al, "Surrogacy: the experiences of surrogate mothers", *supra* note 82 at 2203; Ragone, *supra* note 85 at 75.

⁹² van den Akker, "Genetic and gestational surrogate mothers", *supra* note 83 at 153; Hazel Baslington, "The Social Organization of Surrogacy: relinquishing a baby and the role of payment in the psychological detachment process" (2002) 7:1 Journal of Health Psychology 57 at 62; Imrie & Jadva, "The long-term experiences of surrogates", *supra* note 84 at 433.

⁹³ Eric Blyth, "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life:' Interviews with surrogate mothers in Britain" (1994) 12 Journal of Reproductive and Infant Psychology 189 at 192.

⁹⁴ Busby & Vun, *supra* note 59 at 67.

⁹⁵ Jadva et al, "Surrogacy: the experiences of surrogate mothers", *supra* note 82 at 2204; van den Akker, "Genetic and gestational surrogate mothers", *supra* note 83 at 159; Ragone, *supra* note 85 at 53.

experience depends on the quality of their relationship with the IPs both during pregnancy and after birth.⁹⁶ Most studies report that a majority of surrogates share a harmonious relationship with the IPs at the beginning and at the end of the pregnancy.⁹⁷

Moreover, the practice of surrogacy has been around for many years, and thousands of children have been born through it, yet only a small percentage of cases have resulted in litigation or have turned into serious disputes.⁹⁸ This indicates that instances of surrogates refusing to relinquish children or IPs refusing to accept the child are rare. Even the children born from these arrangements seem to be doing well. The absence of genetic or gestational link does not seem to have a negative impact on the functioning of families formed by surrogacy.⁹⁹ To date, there is no conclusive evidence of the long-term implications of surrogacy on families and children.¹⁰⁰

1.6. CONCLUSION

Just because surrogacy is overall a positive experience in the developed world does not mean that it does not carry the potential for exploitation or that surrogates do not get exploited by their

⁹⁶ Hohman & Hagan, "Satisfaction with Surrogate Mothering", *supra* note 83 at 69; Baslington, *supra* note 92 at 69.

⁹⁷ Baslington, *supra* note 92 at 69; van den Akker, "Genetic and gestational surrogate mothers", *supra* note 83 at 154; Jadva et al, "Surrogacy: the experiences of surrogate mothers", *supra* note 82 at 2203.

⁹⁸ Pamela Laufer-Ukeles, "Mothering for Money: Regulating Commercial Intimacy" (2013) 88:4 Indiana Law Journal 1223 at 1245; Busby & Vun, *supra* note 59 at 72-73. In "Revisiting the Handmaid's Tale", Busby and Vun note that in the last 20 years before the article was published, there have been no reported decisions on surrogacy in Canada, the United States, or Britain over disputes between surrogate and IPs.

⁹⁹ Susan Golombok et al, "Families created through surrogacy arrangements: parent-child relationships in the 1st year of life" (2004) 40:3 Developmental Psychology 400-411; Susan Golombok et al, "Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at the age of 2" (2006) 47:2 Journal of Child Psychology and Psychiatry 213-222; Susan Golombok et al, "Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at the age of 3" (2006) 21:7 Human Reproduction 1918-1924; Golombok et al, "Families created through surrogacy" *supra* note 31 at 1579-1588; Katherine H Shelton et al, "Examining differences in psychological adjustment problems among children conceived by assisted reproductive technologies" (2009) 33:5 International Journal of Behavioral Development 385-392.

¹⁰⁰ Erin Nelson, "Surrogacy in Canada: Toward Permissive Regulation" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 185 at 195 [Nelson, "Toward Permissive Regulation"].

participation in surrogacy in developed countries. Further, the reality of the practice is very different in developing countries. In developing countries, money is the main reason for surrogates' participation, and surrogates are more vulnerable to exploitation.¹⁰¹ But the problem, in my opinion, is more nuanced than just the presence of money in a surrogacy arrangement.

In the next two chapters, I take a close look at surrogacy regulation and surrogacy practice in Canada and India and discuss how both altruistic and commercial surrogacy have the potential to harm and exploit the surrogate. Keeping surrogates as the main focus, I argue that money is not the sole reason (or even the main reason) for the potential for harm and exploitation in commercial surrogacy to become a reality. Based on the surrogacy experience of Canada and India, the main concern in my view is the regulatory approach, which fails to adequately address the myriad ethical and legal issues involved in surrogacy. I argue that India should reform its surrogacy law and policy and decriminalize commercial surrogacy. The practice of commercial surrogacy should be carefully regulated so that the potential of exploitation of surrogates is minimized. Ultimately, in Chapter 4, I provide some policy recommendations India can include in its future lawmaking on surrogacy. The recommendations draw from the lessons India could learn from Canada's and its own surrogacy experience.

¹⁰¹ Sophia Shephard, "Regulating International Commercial Surrogacy: A Balance of Harms and Benefits" (2022) 32:2 University of Florida Journal of Law and Public Policy 293 at 303, 313.

CHAPTER 2 SURROGACY IN CANADA

Why am I exploited if I am paid, but not if I am not paid?¹⁰²

2.1. INTRODUCTION

Canada has a restrictive approach to regulating surrogacy.¹⁰³ Canadian law on surrogacy is found in the Assisted Human Reproductive Act (*AHRA*), 2004.¹⁰⁴ The *AHRA* is federal legislation that regulates the general status of surrogacy in the country. The law's objective is to protect the health and well-being of surrogates and prevent them from harm and exploitation by discouraging the emergence of a potential market for surrogacy services.¹⁰⁵ The *AHRA* prohibits commercial surrogacy but permits altruistic surrogacy in Canada.¹⁰⁶

In this chapter, I argue that surrogacy regulation in Canada, as outlined by *AHRA*, though well-intentioned, is ineffective and has inadvertently given rise to the potential for exploitation of surrogates in the country. Despite its objective to safeguard the health and well-being of surrogates and protect them from exploitation, the lack of clarity regarding permissible reimbursements, issues inherent in the "reimbursement of expenditures" model, and the overall failure to enforce the *AHRA*, have given rise to the potential for exploitation of surrogates.

I begin the chapter by tracing the historical development of surrogacy regulation in Canada and discuss Canadian federalism and how the federal government decided to legislate in this area. This is followed by the Supreme Court of Canada's interpretation of the *AHRA* and how the court

¹⁰² Lori Andrews, 1989, *Between Strangers: Surrogate mothers, Expectant fathers, and Brave New Babies* (New York: Harper and Row, 1989) at 259.

¹⁰³ Nelson, "Toward Permissive Regulation", *supra* note 100 at 191.

¹⁰⁴ *Assisted Human Reproduction Act*, SC 2004, c2 [*AHRA*].

¹⁰⁵ *Ibid*, s 2; Nelson, "Toward Permissive Regulation", *supra* note 100 at 193.

¹⁰⁶ *AHRA*, *supra* note 104, s 6(1).

recognized the federal government's jurisdiction to regulate the status of surrogacy in the country. I then briefly discuss the *AHRA* as it stands today. Drawing on the limited empirical and anecdotal evidence that is available, I discuss current surrogacy practice in Canada and highlight the ineffectiveness of the *AHRA*, which has raised concerns about the potential for exploitation of surrogates.

2.2. HISTORY OF SURROGACY REGULATION IN CANADA

The historical evolution of surrogacy regulation in Canada highlights the challenges of regulating surrogacy in Canada. The efforts to regulate surrogacy in Canada began in the early 1980s,¹⁰⁷ but the appointment of the Royal Commission on New Reproductive Technologies (Commission) in 1989 is popularly considered to be the starting point for tracking the history of surrogacy regulation in the country.¹⁰⁸ The Commission was established by the federal government to address concerns raised by feminists and other activists regarding the impact of new reproductive technologies on the bodies of women and Canadian social fabric.¹⁰⁹ The mandate of the Commission was to comprehensively examine the existing reproductive technologies, predict future developments in the field of reproductive technologies, and assess the ethical, legal, social, economic, and health implications of these technologies for Canadian society, women, children, and families.¹¹⁰ The

¹⁰⁷ Alana Cattapan, Vanessa Gruben & Angela Cameron, "Introduction: Regulatory Pasts and Futures" in Vanessa Gruben, Alana Cattapan, & Angela Cameron, eds, *Surrogacy in Canada: critical perspectives in law and policy* (Toronto: Irwin, law, 2018) 1 at 6 [Cattapan, Gruben & Cameron "Introduction"].

¹⁰⁸ *Ibid* at 7.

¹⁰⁹ The Commission was also known as *Baird Commission*. Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Catalogue NO Z1-1989/3E (Ottawa: Minister of Government Services Canada, 1993) Volume 1 at 2 [Royal Commission on New Reproductive Technologies, *Proceed with Care*, Volume 1].

¹¹⁰ *Ibid* at 2.

Commission was tasked with developing recommendations to inform public policy on the use of new reproductive technologies, keeping in mind Canadian values and attitudes towards them.¹¹¹

The Commission came out with its final report - *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, in 1993.¹¹² The recommendations in the report were based on the consultations and research carried out by its commissioners.¹¹³ A total of 40,000 stakeholder groups and individuals from all over the country provided their input.¹¹⁴

Notably, while engaging in consultations with various groups and individuals, the Commission did not consult surrogates about their experiences of surrogacy. It cannot, however, be said with certainty that many surrogates existed or were willing to participate in such discussions at that time. Even the commissioners acknowledged the private nature of the practice, which made it difficult to document details of surrogacy arrangements.¹¹⁵

The federal nature of Canada's constitutional arrangements creates a challenge to regulate assisted reproductive technologies, including surrogacy. Being a federal state, responsibility for making laws in Canada is divided between the federal and provincial/territorial governments.¹¹⁶ Assisted

¹¹¹ *Ibid* at 2, 4.

¹¹² The Report is also known as the Baird Report.

¹¹³ *Ibid* at 8.

¹¹⁴ Jean Haase, "Canada: The Long Road to Regulation" in Eric Blyth & Ruth Landau, eds, *Third Party Assisted Conception Across Cultures: Social, Legal & Ethical Perspectives* (United Kingdom: Jessica Kingsley Publishers Ltd, 2004) 55 at 58.

¹¹⁵ Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Catalogue NO Z1-1989/3E (Ottawa: Minister of Government Services Canada, 1993) Volume 2 at 664 [Royal Commission on New Reproductive Technologies, *Proceed with Care*, Volume 2].

¹¹⁶ Parliament of Canada, Procedural Info, *Canadian Parliamentary System*, online: <https://www.ourcommons.ca/procedure/our-procedure/parliamentaryFramework/c_g_parliamentaryframework-e.html#:~:text=Since%20Canada%20is%20a%20federal,and%20for%20giving%20impartial%20judgments>.

reproductive technologies (including surrogacy) involve the regulation of health. *The Constitution Act, 1867*, does not assign power to regulate health explicitly to either the federal or provincial government,¹¹⁷ but in general, it is thought that jurisdiction over health vests in the provinces.¹¹⁸

The Commission recognized that provincial governments have extensive jurisdiction in the area of health (which includes medical practice) and it would be difficult to establish federal control over ART practice.¹¹⁹ But the commissioners were of the view that the social, ethical, and legal concerns related to the new reproductive technologies were so profound that they required federal regulation.¹²⁰ To address this issue, the commissioners suggested that the federal government could use its powers related to peace, order and good governance, criminal law, regulation of trade and commerce, and spending as possible routes to legislate in this area.¹²¹

To inform their recommendations related to surrogacy, the commissioners relied on anecdotal evidence, a 1988 study by Eichler *et al*,¹²² and views of Canadians received during its public

¹¹⁷ *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

¹¹⁸ Alana Klein, “Jurisdiction in Canadian Health Law” in Joanne N. Erdman, Vanessa Gruben, Erin Nelson, eds, *Canadian Health Law and Policy*, 5th ed (Toronto, Ontario: LexisNexis, 2017) 29 at 31.

¹¹⁹ Royal Commission on New Reproductive Technologies, *Proceed with Care*, Volume 1, *supra* note 109 at 18-22; Nelson, “Toward Permissive Regulations”, *supra* note 100 at 188-189.

¹²⁰ Royal Commission on New Reproductive Technologies, *Proceed with Care*, Volume 1, *supra* note 109 at 11-13, 16.

¹²¹ *Ibid* at 16, 18.

¹²² Alana Cattapan, “Risky Business: Surrogacy, Egg Donation and the Politics of Exploitation” (2014) 29:3 Canadian Journal of Law and Society 361 at 363, 371 [Cattapan, “Risky Business”]; Cattapan, Gruben & Cameron, “Introduction”, *supra* note 107 at 7; Royal Commission on New Reproductive Technologies, *Proceed with Care*, Volume 2, *supra* note 115 at 664. Margrit Eichler & P Poole. *The Incidence of Preconception Contracts for the Production of Children among Canadians: A Report Prepared for the Law Reform Commission of Canada* (Toronto: Law Reform Commission of Canada and Ontario Institute for Studies in Education, 1988). The study analyzed thirty-two surrogacy cases and found that in most cases the IPs were older, more educated, and more affluent than the surrogates. The findings of this study convinced the Royal Commission of the existence of exploitation in surrogacy arrangements. This study was a part of the limited empirical evidence available on Canadian surrogates. It has since been used as evidence to support the argument that surrogacy is exploitative, even though there is no other Canadian research study that suggests so.

hearings, submissions, surveys, and research.¹²³ The Commission recommended prohibition of commercial surrogacy based on the same concerns as discussed in the previous chapter.¹²⁴ The Commission was not even in favor of non-commercial (altruistic) surrogacy arrangements.¹²⁵ In its view, concerns of exploitation and commodification are present in these arrangements as well.¹²⁶ However, the Commission recognised that such arrangements would nevertheless continue to be entered into.¹²⁷ To discourage surrogacy, the Commission recommended criminalizing payments for assisting people to enter these arrangements.¹²⁸ The Commission also recommended legislation to regulate the use of new reproductive technologies and to create a national regulatory body.¹²⁹

Following the report of the Royal Commission, between 1993-1995, the federal government consulted provincial and territorial governments and several stakeholders about these new reproductive technologies.¹³⁰ Finally, the federal government decided to use its criminal law power to regulate reproductive technologies, including surrogacy, in Canada.¹³¹ As a result, the *AHRA* was passed on March 29, 2004.

¹²³ Royal Commission on New Reproductive Technologies, *Proceed with Care*, Volume 2, *supra* note 115 at 669.

¹²⁴ *Ibid* 683-685; See page 7-10.

¹²⁵ *Ibid* at 689.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

¹²⁹ *Reference re Assisted Human Reproduction Act*, 2010, SCC 61 at para 473, 527 [*Reference re Assisted Human Reproduction Act*].

¹³⁰ Cattapan, Gruben & Cameron "Introduction", *supra* note 107 at 9; Cattapan, "Risky Business", *supra* note 122 at 372. In spite of acknowledging that women are more affected by the use of ARTs, when the draft of *AHRA* was presented by the federal government before a parliamentary committee, the committee listened to the testimony of one hundred witnesses out of which only one was a surrogate. The one surrogate who was consulted did not consider her surrogacy experience as exploitative.

¹³¹ Haase, *supra* note 114 at 58-59; Health Canada, *New Reproductive Technologies and Genetic Technologies: Setting Boundaries; Enhancing health*, H21-127/1996 E (Ottawa – Ontario: Health Canada, June 1996); Nelson, "Toward Permissive Regulation", *supra* note 100 at 189; Timothy Caulfield, "Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001) 39:2 Alberta Law Review 335 at 337.

The *AHRA* can be said to be the product of recommendations of the Royal Commission and feminist opinions at the time.¹³² Originally, when the *AHRA* was passed, it comprised of regulatory provisions and criminal prohibitions. A federal regulatory body called the Assisted Human Reproductive Agency of Canada (AHRC or Agency) was also established under the *AHRA*.¹³³ The Agency was tasked with fully managing and overseeing the clinical and research use of assisted reproductive technologies.¹³⁴ It was responsible for enforcing the provisions of the *AHRA* and advising the Minister of Health on matters related to the *AHRA*.¹³⁵ It was also responsible for collecting, analyzing, and managing health information related to assisted reproduction including surrogacy.¹³⁶

2.3. REFERENCE CASE

After the *AHRA* was enacted, concerns arose about whether by legislating in the area of assisted human reproduction, the federal government exceeded its jurisdiction.¹³⁷ Consequently, less than a year after the *AHRA* was enacted, the Attorney General of Quebec filed a reference before the Quebec Court of Appeal challenging the constitutionality of thirty-two regulatory provisions of the *AHRA*.¹³⁸ The provisions were challenged for being *ultra vires* the legislative authority of

¹³² Busby & Vun, *supra* note 59 at 24.

¹³³ *AHRA supra* note 104, s 21.

¹³⁴ *Ibid.*

¹³⁵ *Ibid*, s 24 (now repealed); Alana Cattapan, "Rhetoric and Reality: Protecting Women in Canadian Public Policy on Assisted Human Reproduction" (2013) 25:2 Canadian Journal of Women and the Law 202 at 217 [Cattapan, "Rhetoric or Reality"].

¹³⁶ *AHRA, supra* note 104 s 24 (1) (e) (now repealed).

¹³⁷ Stefanie Carsley, "Regulating Reimbursements for Surrogate Mothers" (2021) 58:4 Alberta Law Review 811 at 816 [Carsley, "Regulating Reimbursements"]. Starting in Fall 2016, Stefanie Carsley conducted an empirical study in which she interviewed 26 Canadian lawyers from Alberta, British Columbia, Ontario and Quebec. The lawyers interviewed work closely with surrogates and intended parents. They were interviewed on their views on the current law and the proposed changes to the law. This was the first study of its kind in Canada.

¹³⁸ *Reference re: Assisted Human Reproduction Act*, 2008 QCCA 1167. The reference was filed by the Attorney General of Quebec on December 4, 2004.

Parliament.¹³⁹ Quebec argued that “health,” including medical practice and health research, falls within provincial jurisdiction.¹⁴⁰ In this case, the Quebec government also included provincial authority over hospitals and doctors as part of the argument that the regulation of ART practice is a matter within provincial jurisdiction.¹⁴¹ According to the Attorney General of Quebec, the provisions that were not challenged were a valid exercise of the federal criminal law jurisdiction.¹⁴² The Quebec Court of Appeal held all contested provisions to be unconstitutional.¹⁴³

Following this decision, the Attorney General of Canada appealed to the Supreme Court of Canada.¹⁴⁴ The Supreme Court in a split decision of 4:4:1, upheld much of the Quebec Court of Appeal’s decision and struck down most of the *AHRA*.¹⁴⁵ According to Justice Cromwell (who had the deciding vote), the ‘pith and substance’ (i.e. purpose and effect) of most of the impugned provisions instead of serving a criminal law purpose, i.e., “prohibition of negative practices associated with assisted reproduction”,¹⁴⁶ was the regulation of almost all aspects of medical practice and health research in relation to assisted human reproduction.¹⁴⁷ This was *ultra vires* federal jurisdiction.¹⁴⁸ The power to legislate on matters contained in most of the impugned provisions belonged exclusively with the provinces.¹⁴⁹ Section 6 (which prohibits commercial surrogacy and commercial gamete donation) and section 12 (which defines the scope of

¹³⁹ *Reference re Assisted Human Reproduction Act*, *supra* note 129 at 458, 474. The constitutionality of Sections 8 to 19, 40 to 53, 60, 61 to 68 was challenged in the Reference case.

¹⁴⁰ *Ibid* at 474.

¹⁴¹ *Ibid*.

¹⁴² For example, section 6 of the *AHRA*, which prohibits payments to surrogates and intermediaries, was not challenged since it is a prohibition and falls within the criminal jurisdiction of the federal government.

¹⁴³ *Reference re Assisted Human Reproduction Act*, *supra* note 129 at 474.

¹⁴⁴ *Ibid*.

¹⁴⁵ The Supreme Court passed its decision on December 22, 2010.

¹⁴⁶ *Reference re Assisted Human Reproduction Act*, *supra* note 129 at 581.

¹⁴⁷ *Ibid* at 580.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid*.

prohibitions set out in section 6) were held to be valid.¹⁵⁰ The purpose and effect of these provisions is the prohibition of commercialisation of reproductive capacity of men and women and is therefore a valid exercise of the federal government's criminal law power.¹⁵¹

The lack of unanimity (highlighted by the 4-4-1 split) among the Supreme Court judges in this case is suggestive of the complexities and differences of opinions on assisted human reproduction in Canada.¹⁵² Following this decision of the Supreme Court, the majority of the *AHRA* was struck down. Eventually, the AHRC was wound up, and its powers were transferred to Health Canada.¹⁵³

2.4. THE *AHRA* TODAY

With the Supreme Court's decision rendering much of the *AHRA* invalid, today, the *AHRA* comprises only of criminal prohibitions and limited regulatory provisions aimed at enforcing criminal prohibitions and ensuring compliance with the *AHRA*.¹⁵⁴

The *AHRA* permits surrogates to be reimbursed for their out-of-pocket, surrogacy-related expenses provided that reimbursement is done in a manner that is consistent with the regulations.¹⁵⁵ No reimbursement can be provided unless surrogates provide receipts corresponding to the expenditure.¹⁵⁶ Surrogates are also entitled to be reimbursed for any loss of work-related income

¹⁵⁰ *Ibid* at 582.

¹⁵¹ *Ibid* at 582-583.

¹⁵² Vanessa Gruben, "Regulating Reproduction" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy*, 5th edition, (Toronto: Lexis Nexis, 2017) at 422.

¹⁵³ Francoise Baylis & Jocelyn Downie, "The Tale of Assisted Human Reproduction Canada: A Tragedy in Five Acts" (2013) 25:2 *Canadian Journal of Women and the Law* 183 at 197, 199; Cattapan, "Rhetoric or Reality", *supra* note 135 at 219.

¹⁵⁴ Nelson, "Toward Permissive Regulation", *supra* note 100 at 189.

¹⁵⁵ *AHRA*, *supra* note 104, s 12(1) (c).

¹⁵⁶ *Ibid* s 12 (2).

during pregnancy provided a doctor's note certifies that continuing to work is risky for the surrogate's or fetus's health.¹⁵⁷

The *AHRA* prohibits third parties, including surrogacy agencies, from accepting money to arrange, offering to arrange, or advertising to arrange the services of a surrogate in exchange for payment.¹⁵⁸

Any payment, offer to pay or advertisement to pay another person for arranging the services of a surrogate is also prohibited by the *AHRA*.¹⁵⁹ Any person who contravenes these prohibitions is liable for punishment with a fine up to \$500,000 or imprisonment up to ten years, or both.¹⁶⁰ In Canada, surrogates can accept payments without attracting criminal punishment.¹⁶¹

The enforceability of surrogacy agreements and parentage issues are matters of provincial jurisdiction and fall outside the purview of the *AHRA*.¹⁶² Most Canadian provinces lack settled law about the legal status of surrogacy arrangements.¹⁶³ Recently, Quebec passed legislation (though not specific to surrogacy), that will regulate surrogacy arrangements in the province with an aim to protect the rights of surrogates and children.¹⁶⁴

¹⁵⁷ *Ibid* s 12(3).

¹⁵⁸ *Ibid* s 6(2).

¹⁵⁹ *Ibid* s 6(3).

¹⁶⁰ *Ibid* s 60.

¹⁶¹ Nelson, "Global Trade", *supra* note 50 at 242; Alison Motluk, "Anatomy of a Surrogacy" *Hazlitt* (6 November 2017), online: < <https://hazlitt.net/longreads/anatomy-surrogacy> > [Motluk, "Anatomy of a Surrogacy"].

¹⁶² Nelson, "Global Trade", *supra* note 50 at 242.

¹⁶³ *Ibid*. Other than Alberta and British Columbia, the law on validity and enforceability of surrogacy agreements is silent in most provinces. *Family Law Act*, S.A. 2003, c. F-4.5, s.8.2(8) and *Family Law Act*, S.B.C. 2011, c. 25, s.29(6), respectively.

¹⁶⁴ On June 6, 2023, Quebec passed Bill 12, which will regulate surrogacy arrangements in the province. Under the new law, the surrogate will have full autonomy over her body during pregnancy. She will have the authority to terminate the surrogacy agreement at any time on her own. Payment is prohibited, but reimbursement of certain expenses is permitted. IPs are prohibited from abandoning the child once the arrangement is underway. The new law makes it mandatory for both parties to attend an information session before they enter the arrangement. The surrogacy agreement is required to be notarized; Quebec, Québec Parental Insurance Plan, *Surrogacy Project: Royal Assent Given to Bill 12 And Future QPIP Benefits*, (6 June 2023), online: < <https://www.rqap.gouv.qc.ca/en/news/surrogacy-project-royal-assent-given-to-bill-12-and-future-qpip-benefits> >.

2.5. CURRENT SURROGACY PRACTICE IN CANADA

Canada does not have a nationwide data collection system on surrogacy.¹⁶⁵ Because no public health agency has been assigned responsibility to report the number of surrogacy births taking place in Canada, we do not know a lot about the reality of surrogacy practice or surrogates' experiences.¹⁶⁶ A few empirical studies together with limited and mixed evidence from some anecdotal reports, form our understanding of the surrogacy practice and surrogates' experiences in Canada.

Since 2001, the rate of live assisted reproduction births has been published by the Canadian Assisted Reproduction Technology Register Plus (CARTR Plus).¹⁶⁷ Fertility clinics provide information to CARTR Plus on a voluntary basis, which raises concerns about the reliability and accuracy of information provided.¹⁶⁸ For the purposes of this thesis, it is relevant to point out that the CARTR Plus registry contains no information on surrogacy practice and its outcomes in Canada.¹⁶⁹ For its data collection, CARTR Plus considers IPs (not the surrogate) as the patient.¹⁷⁰

Quebec, Surrogacy, (last updated 29 April 2024), online: < <https://www.quebec.ca/en/family-and-support-for-individuals/pregnancy-parenthood/surrogacy> >.

¹⁶⁵ Pamela M White, "Why We Don't Know What We Don't Know" About Canada's Surrogacy Practices and Outcomes" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 51 at 64 [White, "Why We Don't Know What We Don't Know"]; Nelson, "Toward Permissive Regulation", *supra* note 100 at 199.

¹⁶⁶ *Ibid.*

¹⁶⁷ Canadian Fertility and Andrology Society publishes the data collected by CARTR Plus, White, "Why We Don't Know What We Don't Know", *supra* note 165 at 62; A Lanes et al, "CARTR Plus: the creation of an ART registry in Canada" (2020) 3 Human Reproduction Open 1 at 2; Canadian Fertility and Andrology Society, "ART Live Birth Rates- Media Releases" (23 November 2016) online: CFAS < <https://cfas.ca/canadian-art-register.html> > [Canadian Fertility And Andrology Society, "ART Live Birth Rates"].

¹⁶⁸ "Why We Don't Know What We Don't Know", *supra* note 165 at 67-68.

¹⁶⁹ *Ibid* at 71.

¹⁷⁰ *Ibid* at 72. This could be because it is the IPs who are the clients of fertility clinics and require the fertility treatment.

Therefore, the information on CARTR Plus related to gestational surrogacy pertains to IPs, and there is not a lot of information on surrogates.¹⁷¹

While rigorous empirical evidence is not available on the experiences of Canadian surrogates, the findings of the limited empirical studies are similar to the empirical studies conducted in the USA and UK (as discussed in Chapter 1).¹⁷² In 2016, Samantha Yee conducted two empirical studies on the experiences of Canadian gestational surrogates at different stages of their pregnancy.¹⁷³ The purpose of the studies was to contribute to the limited empirical knowledge of the experiences of Canadian surrogates.¹⁷⁴ The studies have some limitations. Only 184 surrogates, mostly from Ontario, were included in the study, and Yee conducted these studies as an employee of a fertility clinic, meaning that there could be concerns about objectivity or conflicts of interest.¹⁷⁵ This, however, in no way disregards the validity of the findings of the studies.

The studies concluded that overall, surrogacy was a highly satisfactory, empowering, and life-transforming experience for the surrogates.¹⁷⁶ Even though many of the participants were in a “very tight” or “tight” family financial situation, their main motivation to participate in surrogacy was their ability to give the gift of a child to individuals suffering from involuntary childlessness and

¹⁷¹ *Ibid* at 72,74.

¹⁷² Chapter 1, section 1.5 at 12-15 of this thesis.

¹⁷³ Samantha Yee, Carly V Goodman & Clifford L Librach, “Determinants of gestational surrogate’s satisfaction in relation to the characteristics of surrogacy cases” (2019) 39:2 Reproductive Biomedicine Online, 249 at 251 [Yee, Goodman & Librach, “Determinants of gestational surrogate’s satisfaction”]; Samantha Yee, Shilini Hemalal, Clifford L Librach, “Not my child to give away”: A qualitative analysis of gestational surrogates’ experiences” (2020) 33:3 Women and Birth: Journal of the Australian College of Midwives e256 at e257 [Yee, Hemalal, Librach, “Not my child to give away”].

¹⁷⁴ *Ibid*.

¹⁷⁵ Yee conducted these studies as a researcher while working for CReATe Fertility Centre in Toronto. CReATe also funded the “not my child” study.

¹⁷⁶ Yee, Goodman & Librach, “Determinants of gestational surrogate’s satisfaction”, *supra* note 173 at 252 and the table on 257; Yee, Hemalal, Librach, “Not my child to give away”, *supra* note 173 at 8.

help them start a family of their own.¹⁷⁷ For them, surrogacy is a profession, an individual calling, a way to contribute to the society, and a way to engage in something significant and impactful.¹⁷⁸ The surrogates felt detached from the fetus.¹⁷⁹ Most of them shared an emotional connection with the IPs instead.¹⁸⁰

Nonetheless, we continue to hear anecdotal reports of instances where Canadian surrogates have been harmed because of their participation in surrogacy.¹⁸¹ There are also concerns about potential health risks for Canadian surrogates. In 2012, Pamela White conducted a study, based on the data published by Canada's voluntary ART registry between 2003 and 2012, which raised concerns that the clinical practice guidelines on the number of embryos to be transferred were not being adhered to in the case of surrogate IVF cycles.¹⁸² According to these guidelines, single embryo transfer should be used in women under 35, who are at the highest risk of multiple births. For women with poor prognosis, transfer of up to two embryos is considered reasonable.¹⁸³ The study found that a

¹⁷⁷ Yee, Hemalal, Librach, "Not my child to give away", *supra* note 173 at 3-4, 8; Yee, Goodman & Librach, "Determinants of gestational surrogate's satisfaction", *supra* note 173 at 252.

¹⁷⁸ Yee, Hemalal, Librach, "Not my child to give away", *supra* note 173 at 8; Shireen Kashmeri, *Unraveling Surrogacy in Ontario, Canada: An Ethnographic Inquiry on the Influence of Canada's Assisted Human Reproduction Act (2004), Surrogacy Contracts, Parentage Laws, and Gay Fatherhood* (MA Thesis, Department of Sociology and Anthropology, Concordia University, 2008) [unpublished] at 58-59. Even the surrogates in Shireen Kashmeri's study did not participate in surrogacy just for money.

¹⁷⁹ Yee, Hemalal, Librach, "Not my child to give away", *supra* note 173 at 8.

¹⁸⁰ Yee, Hemalal, Librach, "Not my child to give away", *supra* note 173 at 8; Yee, Goodman & Librach, "Determinants of gestational surrogate's satisfaction", *supra* note 173 at 252.

¹⁸¹ Motluk, "Anatomy of a Surrogacy", *supra* note 161; Alison Motluk, "Waiting Room" *Hazlitt* (30 August 2023), online: <<https://hazlitt.net/longreads/waiting-room-0>> [Motluk, "Waiting Room"]; Tom Blackwell, "This Ontario surrogate wanted to help another woman have a child, but the decision nearly killed her", *National Post* (15 October, 2015), online: <<https://nationalpost.com/health/this-ontario-surrogate-wanted-to-help-another-mom-have-kids-it-was-a-decision-that-nearly-killed-her>>; Tom Blackwell, "Canadian surrogate eliminated baby from triplet pregnancy at urging of overseas couple", *National Post* (9 September 2015), online: <<https://nationalpost.com/health/canadian-surrogate-pressured-to-eliminate-baby-from-triplet-pregnancy-by-couple>>.

¹⁸² Nelson, "Toward Permissive Regulation", *supra* note 100 at 199; Pamela M White, "Hidden from view: Canadian gestational surrogacy practices and outcomes, 2001-2012" (2016) 24:47 *Reproductive Health Matters* 205 at 210, [White, "Hidden from view"].

¹⁸³ Jason Min & Camille Sylvestre, *Clinical Practice Guidelines: Guidelines on the Number of Embryos Transferred* (Montreal: Canadian Fertility and Andrology Society 2013, online:<https://cfas.ca/_Library/clinical_practice_guidelines/CFAS_CPG_Embryo_Transfer_2013.pdf>.

notably higher rate of embryos per cycle were transferred in surrogate IVF cycles compared to non-surrogate cycles.¹⁸⁴ Between 2003 to 2012, two embryos were transferred in 60% gestational surrogate cycles as compared to 40% for non-surrogate IVF patients.¹⁸⁵

Transferring multiple embryos increases the chances of multiple gestation pregnancy, which involves considerable health risks for both the mother and babies.¹⁸⁶ Some of these risks include maternal hypertension, preeclampsia and anemia, intra-uterine growth retardation, low birth weight, stillbirth, and neonatal death.¹⁸⁷ As noted by Nelson, while it is difficult to determine whether the practice of transferring more embryos to surrogates is actually causing any harm to Canadian surrogates (due to the lack of data), this practice raises concerns that Canadian surrogates are not being treated according to the safety standards recommended by the Clinical Practice Guidelines for IVF treatments in Canada.¹⁸⁸

Limited empirical data is available in relation to the practice of surrogacy and experiences of surrogates in Canada. Arguably, in the absence of robust empirical evidence, we do not know the extent of harm and exploitation surrogates may be experiencing. However, anecdotal evidence suggests that surrogates are being exploited by their participation in surrogacy. This is concerning and cannot be ignored.

¹⁸⁴ White, “Hidden from view”, *supra* note 182 at 206.

¹⁸⁵ *Ibid* at 210.

¹⁸⁶ Nelson, “Toward Permissive Regulation”, *supra* note 100 at 199; White, “Hidden from view”, *supra* note 182 at 212.

¹⁸⁷ *Ibid*.

¹⁸⁸ Nelson, “Toward Permissive Regulation”, *supra* note 100 at 200.

This state of surrogacy practice raises questions about whether the *AHRA* has been effective in achieving its objective of protecting surrogates against harm and exploitation. In the next section, I discuss how the *AHRA*'s lack of clarity regarding permissible reimbursements, "reimbursement of expenditures" model, and the lack of meaningful enforcement of the *AHRA*, have given rise to the potential for exploitation of surrogates in Canada.

Since the *AHRA* came into force, there has been a lack of clarity regarding permissible reimbursements under the Act, which remains unresolved till today. This ambiguity has not only perpetuated illegal reimbursement practices but has also given rise to the potential for exploitation of surrogates.

Section 6 of the *AHRA* prohibits all payments related to surrogacy. Section 12 creates a limited exception to this rule. It permits reimbursement of receipted expenditures and loss of work-related income during pregnancy to surrogates, provided that reimbursement is done in accordance with the regulations. The *Reimbursement Related to Assisted Human Reproduction Regulations (Reimbursement Regulations or Regulations)* required to bring section 12 into force were enacted in 2020.¹⁸⁹ This means that there was a period of 16 years when no clear reimbursement rules were in place.

¹⁸⁹ Dave Snow, Francoise Baylis & Jocelyn Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery" (2015) 9:1 McGill Journal of Law and Health 1 at 3; Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25:2 Canadian Journal of Women and the Law 284 at 302.

In the absence of *Regulations*, there was a lack of clarity about the legal status of reimbursement of expenses to surrogates in Canada.¹⁹⁰ Some scholars argued that in the absence of regulations required to bring section 12 into force, reimbursements could not be permitted in surrogacy arrangements.¹⁹¹ Health Canada issued a clarification on its website that, in the absence of regulations, surrogates could be reimbursed for actual expenses incurred by them for surrogacy.¹⁹² However, this clarification was not very helpful as it did not specify the scope of such reimbursements.¹⁹³

Despite this incoherence, for sixteen years, surrogacy arrangements kept getting entered into without any clarity about what expenses are considered legitimate under the *AHRA*.¹⁹⁴ As a result, IPs and their lawyers interpreted the possibility of reimbursement in a way that served their interests. Surrogates were paid in excess of what could be considered permissible reimbursement.¹⁹⁵ Indirect payments were also being made in surrogacy arrangements, and surrogacy became increasingly expensive in Canada.¹⁹⁶ Even the lawyers working with surrogates

¹⁹⁰ Cattapan, Gruben & Cameron “Introduction”, *supra* note 107 at 15; Carsley, “Regulating Reimbursements”, *supra* note 137 at 812.

¹⁹¹ Jocelyn Downie & Francoise Baylis, “Transnational Trade in Human Eggs: Law, Policy, and (in) Action in Canada” (2013) 41:1 *Journal of Law, Medicine and Ethics* 224 at 229; Francoise Baylis, Jocelyn Downie, & Dave Snow, “Fake it Till You Make it: Policymaking and Assisted Human Reproduction in Canada” (2014) 36:6 *Journal of Obstetrics and Gynaecology Canada* 510 at 511 [Baylis, Downie, & Snow, “Fake it”].

¹⁹² Government of Canada, “Prohibitions Related to Surrogacy”, online: *Government of Canada* < <https://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/%20reprod/surrogacy-substitution-eng.php> > , (text no longer exists), in Baylis, Downie, & Snow, “Fake it”, *supra* note 191 at 511.

¹⁹³ *Ibid.*

¹⁹⁴ Cattapan, Gruben & Cameron, “Introduction”, *supra* note 107 at 15; Nelson, “Permissive Regulation”, *supra* note 100 at 190; Baylis, Downie, & Snow, “Fake it”, *supra* note 191 at 511.

¹⁹⁵ Carsley, “Regulating Reimbursements”, *supra* note 137 at 826-827; Yee, Hemalal, Librach, “Not my child to give away”, *supra* note 173 at 5, 9.

¹⁹⁶ For specific examples of such instances see Carsley, “Regulating Reimbursements”, *supra* note 137 at 826; Angel Petropanagos, Vanessa Gruben, & Angela Cameron, “Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements? Legal and Ethical Recommendations for a Revised Approach to Reimbursement” in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 155 at 170-171.

and IPs found it difficult to interpret the law and advise their clients on permissible reimbursements under the *AHRA*.¹⁹⁷

This lack of clarity around permissible reimbursements contributed to surrogates' uncertainty about their rights in a surrogacy arrangement. Canadian surrogacy law does not provide for mandatory legal advice for surrogates, so unless the IPs cover this expense, many surrogates remain unsure of their rights within the surrogacy arrangement.¹⁹⁸ Because surrogates were receiving payments in excess of what could be considered permissible reimbursements, they were hesitant to seek clarification on any aspect of their surrogacy arrangement, fearing legal repercussions.¹⁹⁹ This uncertainty made surrogates susceptible to exploitation.²⁰⁰

In the fall of 2016, Health Canada announced its intention to develop regulations related to the *AHRA*.²⁰¹ The regulations were looked forward to as they were expected to bring clarity regarding permissible reimbursements and deter indirect payments being made under the *AHRA*.²⁰² On June 9, 2020, the *Reimbursement Regulations* along with section 12 of the *AHRA* came into force.²⁰³

¹⁹⁷ Carsley, "Regulating Reimbursements", *supra* note 137 at 825.

¹⁹⁸ Busby & Vun, *supra* note 59 at 65-66. Surrogates rely on online surrogate communities for information about their rights.

¹⁹⁹ Kashmeri, *supra* note 178 at 12. Shireen Kashmeri noted a similar finding in her thesis, Canadian surrogates are hesitant to talk about their surrogacy arrangements because they are getting paid. They are afraid that the information they share would be taken on record and be used against the IPs who are paying them; Nelson, "Toward Permissive Regulation", *supra* note 100 at 192.

²⁰⁰ Motluk, "Anatomy of a Surrogacy", *supra* note 161. Motluk has explained in detail just how vulnerable surrogates can become in Canada.

²⁰¹ Government of Canada, Notice (Department of Health), (2016) C Gaz I, 2818 (Assisted Human Reproduction Act), online: < <https://gazette.gc.ca/rp-pr/p1/2016/2016-10-01/html/notice-avis-eng.html>>.

²⁰² Carsley, "Regulating Reimbursements", *supra* note 137 at 825.

²⁰³ Government of Canada, *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193, online: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-193/page-1.html#h-1141415>; Health Canada, *Compliance Approach for the Reimbursement Related to Assisted Human Reproduction Regulations*, Catalogue No H14-346/2020E-PDF (Ottawa: Health Canada, June 2020), online: < <https://www.canada.ca/en/health-canada/services/drugs-health-products/compliance-enforcement/information-health-product/compliance-approach-reimbursement-assisted-human-reproduction.html>>.

For this thesis, it is important to note that feedback from surrogates was not expressly sought even while drafting the *Reimbursement Regulations*.²⁰⁴

The *Reimbursement Regulations* provide clarity around the types of expenses that can be legally reimbursed.²⁰⁵ However, it seems that the *Regulations* could end up creating new confusion related to permissible reimbursements.²⁰⁶ There are inconsistencies in the language of the *AHRA*, the *Regulations*, and the Guidance Document (an administrative instrument released with the *Regulations*), at some places.²⁰⁷ While the *AHRA* and *Regulations* provide that the surrogate may be reimbursed for any loss of work-related income only “during her pregnancy”, the Guidance Document provides that for any loss of work-related income, the surrogate may be reimbursed before pregnancy and after delivery.²⁰⁸ Additionally, for reimbursement of loss of work-related income, the Guidance Document provides that surrogates may be reimbursed for extended (for example, bed rest certified by a qualified medical practitioner) and short absences (for example, attending routine doctor’s appointment) from work.²⁰⁹ Whereas, reimbursements as provided under the *AHRA* and *Regulations* are limited to bed rest certified by a qualified medical practitioner.²¹⁰

²⁰⁴ Among the names of stakeholders who were consulted, the word “surrogates” is missing. It should be noted that it is possible that some surrogates participated but did not identify themselves as “surrogates”. Health Canada, *What We Heard Report: A Summary of Feedback from the Consultation: Toward a Strengthened Assisted Human Reproduction Act*, Catalogue No H164-228/2018E-PDF (Ottawa: Health Canada, 2018), online: <<https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/feedback-toward-strengthening-assisted-human-reproduction-act.html>>.

²⁰⁵ Health Canada, *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations*, Catalogue No H164-288/2019E-PDF (Ottawa: Health Canada, 2019) [*Guidance Document*]; Carsley, “Regulating Reimbursements”, *supra* note 137 at 831-833.

²⁰⁶ *Ibid* at 832, 835.

²⁰⁷ *Ibid* at 835.

²⁰⁸ *Guidance Document*, *supra* note 205.

²⁰⁹ *Ibid*.

²¹⁰ Carsley, “Regulating Reimbursements”, *supra* note 137 at 835.

These inconsistencies suggest that the authorities in charge of making the *Regulations* were not able to come to a coherent conclusion. While the Guidance Document attempts to address the practical aspects of surrogacy practice and clarify the *AHRA* and *Regulations*, it inadvertently ends up contradicting them. It is important to note that the Guidance Document does not carry the force of law. In case of any inconsistency between the Guidance Document and the *AHRA* and *Regulations*, the *AHRA* and *Regulations* will prevail.²¹¹ Despite recent clarification attempts through *Regulations* and Guidance Document, it is unlikely that much will change as regards surrogacy practice. As a result, the ambiguity around permissible reimbursements and with it the potential for exploitation of surrogates will likely remain unchanged.²¹²

Even if the *Regulations* for section 12 had clarified the confusion pertaining to permissible reimbursements, there are problems inherent in the “reimbursement of expenditures” model under section 12 which may leave surrogates in a precarious financial position.

One of the objectives of the *AHRA* is to prevent surrogates from experiencing financial hardship as a result of their participation in surrogacy.²¹³ The reimbursement model requires the surrogate to pay for any surrogacy-related expenses herself, save the receipts corresponding to those expenses, and then submit those receipts to the IPs for reimbursement.²¹⁴ The Royal Commission’s report acknowledged the social and economic disparity between surrogates and IPs.²¹⁵ Available empirical evidence on surrogacy suggests that, in most cases, surrogates do not enjoy the same

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid* at 834; *AHRA*, *supra* note 104, s 2.

²¹⁴ *AHRA*, *supra* note 104, s 12.

²¹⁵ Royal Commission on New reproductive Technologies, *Proceed with Care*, Volume 2, *supra* note 115 at 670-672.

socio-economic status as IPs.²¹⁶ In such a scenario, the law requires surrogates to pay for surrogacy-related expenses upfront and then wait to get reimbursed, thereby placing financial burden on surrogates and creating the risk that surrogates will not receive reimbursement.²¹⁷ This is not simply a hypothetical risk - there have been instances where surrogates have even been left out-of-pocket by IPs who reneged on their promise to reimburse the surrogate following a birth or miscarriage.²¹⁸

The reimbursement system for loss of work-related income has its own challenges. To qualify for such reimbursements, surrogates must provide a medical note certifying that working would endanger their or the fetus's health.²¹⁹ According to section 12(3), without a doctor's certification, any leave taken will result in a loss of wages without reimbursement.²²⁰ Therefore, if a surrogate is vomiting and she has to take the day off, she cannot be reimbursed for the loss of income without a note from the doctor certifying that working would be dangerous for her or the fetus.²²¹

Arguably, the *AHRA* was intended to discourage surrogacy in Canada. But, twenty years since the enactment of the *AHRA*, it has not been successful in impeding the growth of the practice in Canada. Even though the exact number of surrogacy arrangements in Canada is unknown, anecdotal evidence suggests that the demand for surrogacy has increased in the country.²²² Given that the

²¹⁶ See page 12.

²¹⁷ Petropanagos, Gruben & Cameron, *supra* note 196 at 167-168; Carsley, "Regulating Reimbursements", *supra* note 137 at 829, 834.

²¹⁸ Stefanie Carsley, *Surrogacy in Canada: Lawyers' Experiences, Practices and Perspectives* (Doctor of Civil Law Dissertation: McGill University, 2020) [unpublished] at 194-196.

²¹⁹ *AHRA*, *supra* note 104, s 12(3).

²²⁰ Carsley, "Regulating Reimbursements", *supra* note 137 at 829; Motluk, "Anatomy of a Surrogacy", *supra* note 161.

²²¹ Carsley, "Regulating Reimbursements", *supra* note 137 at 829.

²²² Canadian Fertility and Andrology Society, "ART Live Birth Rates", *supra* note 167. Between the years 2014 and 2015, gestational surrogacy in Canada increased by 23% i.e. from 413 to 533 cycles; Chris Glover, Chelsea Gomez & Laura Clementson, "Why a lack of oversight of surrogacy in Canada leaves some parents feeling taken advantage of", *CBC* (2 March 2022), online: <<https://www.cbc.ca/news/health/surrogacy-agencies-expenses-costs-oversight->

demand for surrogacy has increased and surrogates come from an inferior economic background compared to the IPs, the current reimbursement model is likely to put surrogates at risk of financial hardship because of their participation in surrogacy, which is antithetical to the objectives of the *AHRA*.²²³

Having discussed the lack of clarity around permissible reimbursements, the shortcomings of the reimbursement model and their potential implications for the surrogates, I now turn to the issue of the overall lack of enforcement of the *AHRA*. Since the *Reference Case*, it is now settled that the jurisdiction to prohibit commercial surrogacy in Canada rests in the federal government.²²⁴ Despite this, Health Canada has failed to enforce the *AHRA* in a meaningful way.²²⁵

The *AHRA* has been in force for 20 years, but *R v. Picard* remains the only prosecution under the Act to date.²²⁶ In 2011, the AHRC received complaints that Leia Picard and her fertility agency, Canadian Fertility Consulting Ltd., (CFC), were carrying out their operations in contravention of the *AHRA*. The AHRC referred the matter to the Royal Canadian Mounted Police (RCMP) for investigation. The RCMP found that Picard and her consultancy were making payments to surrogates and accepting money for arranging surrogacy services in contravention of sections 6(1) and 6(2) of the *AHRA*. According to the "Agreed Statement of Facts," Picard and her agency were

canada-1.5476965> In a recent investigative report by CBC News, based on the data from CARTR, 816 surrogate births have taken place between 2013-2017. There is no other data to draw on.

²²³ Carsley, "Regulating Reimbursements", *supra* note 137 at 834.

²²⁴ *Ibid* at 817.

²²⁵ *Ibid*.

²²⁶ *R v. Picard*. The case is unreported. But see *R v. Picard and Canadian Fertility Consulting Ltd* (2013), Agreed Statement of Facts, online: Novel Tech Ethics

<https://cdn.dal.ca/content/dam/dalhousie/pdf/sites/noveltechethics/AHRA_Facts.pdf> (accessed: 29 July 2024) [Agreed Statement of Facts]; Alison Motluk, "First Prosecution under Assisted Human Reproduction Act Ends In Conviction" (2014) 186:2 Canadian Medical Association Journal E75-E76 [Motluk, "First Prosecution"].

paying surrogates irrespective of whether the surrogates provided receipts or not.²²⁷ In many cases, where receipts were provided, they were not for a surrogacy-related expense. They were related to rent, entertainment expenses, car insurance, internet, utility, and phone bills. Such payments cannot be considered permissible reimbursements under the *AHRA*, as they are not directly related to pregnancy. Picard was also found guilty of accepting money from Hilary Neiman, (a fertility lawyer in Maryland who was sent to jail for her involvement in a “baby-selling” case)²²⁸ for helping arrange surrogacies and accepting payments for them in contravention of Section 6(2). Picard and her agency pleaded guilty and were fined \$60,000.²²⁹

When Picard was charged for the offences under the *AHRA*, the case was expected to bring clarity to the Canadian public about what was allowed under the *AHRA*.²³⁰ But Picard and her company were only fined \$60,000. Scholars argued this to be too little in comparison to the contravention.²³¹ In addition, none of the charges related to the consulting services in which they matched IPs with

²²⁷ Agreed Statement of Facts, *supra* note 226 at 3; See Tom Blackwell, “Canadian fertility consultant received \$31K for unwittingly referring parents to U.S. ‘baby-selling’ ring”, *National Post*, (December 15, 2013), online: <<https://nationalpost.com/news/canada/canadian-fertility-consultant-received-about-30000-for-unwittingly-referring-parents-to-u-s-baby-selling-ring>>.

²²⁸ Neiman, along with a California lawyer and a Nevada surrogacy agent, sent surrogates from Canada and the U.S. to other countries for fertility treatments without matching them with intended parents first. The surrogates underwent IVF with donated embryos, and once pregnant, they were matched with intended parents. Neiman falsely claimed these surrogates had originally agreed to help other couples who had backed out. She charged intended parents, including several Canadians, up to \$149,000 to be legally recognized as the children's parents. To avoid the adoption process, Neiman and her associates filed fake pre-birth orders in California. Neiman, who was jailed for her actions, paid Ms. Picard about \$10,000 on three occasions for referring would-be parents. See Carsley, “Regulating Reimbursements”, *supra* note 137 at 819; U.S. Attorney Office, San Diego Division, “Prominent Surrogacy Attorney Sentenced to Prison for Her Role in Baby-Selling Case” (24 February 2012), online: <<https://archives.fbi.gov/archives/sandiego/press-releases/2012/prominent-surrogacy-attorney-sentenced-to-prison-for-her-role-in-baby-selling-case>>.

²²⁹ Motluk, “First Prosecution”, *supra* note 226.

²³⁰ Alison Motluk, “The Baby-Making Business: on the front lines of Toronto’s booming, semi-legal surrogacy market”, *Toronto Life*, (3 February 2014), online: <<https://torontolife.com/city/baby-making-business-surrogacy-market-toronto/>> [Motluk, “The Baby-Making Business”]; Motluk, “First Prosecution”, *supra* note 226.

²³¹ Francoise Baylis and Jocelyn Downie, “Wishing Doesn’t make it so” (17 December 2013), online: *Impact Ethics*, <<https://impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>>; See also Cattapan, Gruben & Cameron, “Introduction”, *supra* note 109 at 14.

surrogates and accepted payments as a regular part of their business.²³² Therefore, to the disappointment of many, not much clarity came out of the case. Rather, Picard's case raised questions related to the meaning and scope of *AHRA*'s prohibition on arranging the services of a surrogate and the reluctance to enforce the *AHRA*.²³³

Today, for-profit surrogacy agencies can be easily found in Canada, and their business is thriving.²³⁴ Following her conviction, Lea Picard's business increased significantly.²³⁵ Surrogacy agencies in Canada are charging thousands of dollars for their services, which include consultation, arranging appointments with lawyers, psychologists, and fertility specialists, and paying surrogates more than what can be considered permissible under the *AHRA*.²³⁶ They camouflage their illegal operations by stating that the IPs and surrogates match on their own using the agency's resources or that the agency matches them for free.²³⁷ The high fee they charge goes towards providing services like referrals, arranging appointments, and managing surrogates' financial expenses.²³⁸ Lawyers, doctors, IPs, and even Health Canada are having a hard time accepting that these agencies are operating in compliance with the law.²³⁹

²³² Motluk, "First Prosecution", *supra* note 226.

²³³ Motluk, "First Prosecution", *supra* note 226; Carsley, "Regulating Reimbursements", *supra* note 137 at 819.

²³⁴ *AHRA*, *supra* note 104, s 6; Nelson, "Toward Permissive Regulation", *supra* note 100 at 195; Busby & Vun, *supra* not 59 at 20; Glover et al, *supra* note 222.

²³⁵ Alison Motluk, "After pleading guilty for paying surrogates, business is booming for this fertility matchmaker", *The Globe and Mail*, (28 February 2016), online: <<https://www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article28930242/>>. Some scholars have argued that the only reason the Canadian government took cognizance of the case despite having years of evidence of contraventions of the law taking place was its connection to Neiman. Not taking any action would have brought a bad name to the Canadian government. See Motluk, "First Prosecution", *supra* note 226; Carsley, "Regulating Reimbursements", *supra* note 137 at 819.

²³⁶ Nelson, "Toward Permissive Regulation", *supra* note 100 at 195-196; Carsley, "Regulating Reimbursements", *supra* note 137 at 826-827; Motluk, "Waiting room", *supra* note 181.

²³⁷ Carsley, "Regulating Reimbursements", *supra* note 137 at 819, Motluk, "The Baby-Making Business", *supra* note 230.

²³⁸ Motluk, "The Baby-Making Business", *supra* note 230.

²³⁹ *Ibid*.

Arguably, had the *AHRA* been enforced, the contraventions discussed in this chapter would be less likely to occur, and the law would be taken more seriously. But, the regulatory system for surrogacy in Canada as it stands today seems to have become unmanageable. The reimbursements permissible under the *AHRA* are not clear, and the reimbursement model seems to be impractical. Additionally, irrespective of the lack of clarity about legal reimbursements and practical difficulties in the reimbursement model, the *AHRA*, which was framed in a way to reduce the likelihood of exploitation and harm of surrogates, has not been enforced. This lack of enforcement is likely to contribute to the risk of exploitation of surrogates in Canada.

2.6 CONCLUSION

The discussion in this chapter suggests that the *AHRA* has been ineffective in achieving its objectives. The lack of clarity about what is considered a reimbursable expense, problems in the reimbursement model, and failure to oversee or enforce the law have given rise to a situation where, although Canada has a heavy-handed law on surrogacy, IPs, surrogacy agencies, and surrogates are acting in a way that suggests that they are not worried about enforcement of the *Act*. They are taking risks that they might not have taken if they thought that the law would be enforced. As a result, Canadian surrogates are left to navigate the murky waters of surrogacy regulation and potentially face exploitation due to its regulatory gaps. In the next chapter, I discuss surrogacy regulation in India and argue that India should legalize regulated commercial surrogacy.

CHAPTER 3 SURROGACY IN INDIA

The majority of surrogates emphasized that surrogacy was a preferable option to their previous job. They declared that this activity was better paid and had better working conditions.²⁴⁰

3.1. INTRODUCTION

I begin this chapter by sharing a glimpse from an Indian surrogacy hostel. I then look into the reasons that contributed to India becoming the baby factory of the world. Next, I trace the history and development of Indian law on surrogacy and unpack the complex realities of Indian commercial surrogacy practice. I then discuss the current surrogacy law i.e. The Surrogacy (Regulation) Act, 2021²⁴¹ (*Act*), and how it violates some basic fundamental rights of Indian citizens and disregards the interests of surrogates. I argue that undoubtedly surrogacy harmed and exploited Indian surrogates, but the Indian surrogacy experience (as discussed in this chapter) brings to fore the fact that money alone might not be the sole reason (or the primary reason) for this exploitation. The Indian surrogacy industry was operating in complete absence of any kind of legal regulation, which contributed to the problem. In my opinion, permitting regulated paid surrogacy will minimize the potential for harm and exploitation of surrogates.

Long before any comprehensive empirical study on commercial surrogacy in the Indian context was carried out, western scholars prophesied the possibility of baby farms with embryos belonging to foreigners growing in the wombs of young third world women.²⁴² Several years later, a

²⁴⁰ Virginie Rozee *et al*, “The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018” (2020) 20:234 BMC Women’s Health 1 at 7.

²⁴¹ *The Surrogacy (Regulation) Act*, *supra* note 6.

²⁴² Barbara Katz Rothman, “Reproductive Technology and the Commodification of Life” (1988) 13:1-2 Women and Health 95 at 100; Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy In India*, (Delhi: Primus Books, 2018) at 4 [Pande, *Wombs in Labor*]; Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, (New York: Harper & Row, 1985).

description from the field notes of Amrita Pande's²⁴³ empirical study on commercial surrogacy reveals the following scene from an Indian surrogacy hostel:

The room is lined with eight beds, one next to the other with barely enough space to walk in between. A ceiling fan groans above. Some of the beds are raised on one side with a block so that the women can have their legs elevated after the embryo transfer or any gynecological checkups. There is nothing else in the room.....the women are still in their nightclothes, and it's nearly evening. The day has been planned for them, the morning visit from the doctor, 8 am breakfast, 9 am medicines, 10 am rest hour, 12 pm injections, followed by an afternoon nap. The evening is nothing different. Except perhaps the broker will bring in a new member. A bed will be added to the room. Another pregnant woman will join the ranks.²⁴⁴

At first glance, these lines suggest that the fears of western scholars about surrogacy came very close to reality in India.²⁴⁵ However, the reality of Indian commercial surrogacy was not limited to the country turning into a "baby farm."²⁴⁶ These predictions failed to fully encapsulate the lived realities of the lives of Indian surrogates and the complexities of the Indian commercial surrogacy industry.²⁴⁷

3.2. HOW INDIA BECAME THE BABY-FACTORY OF THE WORLD

The Indian government legalized commercial surrogacy in 2002, and soon the country became the "world's top destination for commercial surrogacy."²⁴⁸ Several reasons contributed to India's rise in rank, such as unregulated surrogacy practice, affordable costs, one of the best healthcare infrastructures in the world, qualified English-speaking doctors, a readily available pool of

²⁴³ In 2006 Amrita Pande conducted one of the first detailed ethnographic studies on commercial surrogacy in India.

²⁴⁴ Pande, *Wombs in Labor*, *supra* note 242 at 2.

²⁴⁵ *Ibid* at 1, 4.

²⁴⁶ *Ibid* at 4.

²⁴⁷ Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker" (2010) 35:4 *Signs: Journal of Women in Culture and Society* 969 at 971 [Pande, "Commercial Surrogacy in India"].

²⁴⁸ Sayantani DasGupta & Shamita DasGupta, "Motherhood jeopardized: reproductive technologies in Indian communities" in Wendy Chavkin & JaneMaree Maher, eds, *The Globalisation of Motherhood: Deconstructions and reconstructions of biology and care* (London: Routledge, 2010) 131 at 137; Sharmila Rudrappa, "Why Is India's Ban on Commercial Surrogacy Bad for Women" (2018) 43:4 *North Carolina Journal of International Law* 70 at 76 [Rudrappa, "Why is India's Ban"].

working-class women willing to become surrogates, and no treatment waiting period.²⁴⁹ The Indian government encouraged medical and infertility travel by providing financial incentives to private hospitals, reducing import duty on medical equipment, and speedily issuing medical visas.²⁵⁰ While there is no official data on the magnitude of India's commercial surrogacy industry, according to a 2012 UN backed study, the estimated worth of the Indian surrogacy industry was at more than \$400 million USD a year.²⁵¹

3.3. HISTORY OF SURROGACY REGULATION IN INDIA

Between 2002, when India first legalized commercial surrogacy, until 2022, when it finally closed its doors to it, the government made several failed attempts to regulate the practice. The regulatory efforts started with the publication of the National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics²⁵² drafted jointly by The Ministry of Health and Family Welfare (MHFW) and the Indian Council of Medical Research (ICMR) in 2005.²⁵³ The guidelines were not binding in nature and, as a result, were not adhered to.

²⁴⁹ Surrogacy in India cost one-third of what it cost in the US. Cost of surrogacy in the United States was approximately \$80,000 to \$100,000 whereas, in India, it was between \$35,000 to \$45,000. See Pande, *Wombs in Labor*, *supra* note 242 at 5, 13; Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, (New York: New York University Press, 2015) at 5, 76 [Rudrappa, *Discounted Life*]; Diksha Munjal-Shankar, "Medical Tourism, Surrogacy & The Legal Overtones- The Indian Tale" (2014) 56:1 Journal of the Indian Law Institute 62 at 65; Usha Rengachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" (2008) 39:1 Cumberland Law Review 15 at 84; Ritika Mukherjee & T.V. Shekher, "Women at Risk in the Unregulated Surrogacy 'Industry': Evidence from a Study of Commercial Surrogates in Kolkata" (2015) 50:26/27 Economic and Political Weekly 83 at 84; Izabela Jargilo, "Regulating the Trade of Commercial Surrogacy In India" (2016) 15:2 Journal of International Business and Law 337 at 338; Kalindi Vora, "Experimental Sociality and Gestational Surrogacy in the Indian ART Clinic" (2014) 79:1 Ethnos 63 at 77 [Vora, "Experimental Sociality"].

²⁵⁰ See Pande, *Wombs in Labor*, *supra* note 242 at 13; See also Rudrappa, "Why is India's Ban", *supra* note 248 at 76.

²⁵¹ Nita Bhalla & Mansi Thapliyal, "India seeks to regulate its booming 'rent-a-womb' industry", *Reuters* (30 September 2013), online: <<https://www.reuters.com/article/us-india-surrogates-idUSBRE98T07F20130930/>>.

²⁵² Government of India: Ministry of Health and Family Welfare, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (2005), online: <https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf>.

²⁵³ *Ibid.*

Two cases²⁵⁴ brought the Indian surrogacy industry to the international stage and highlighted the need to develop surrogacy legislation for India.²⁵⁵ In both cases, foreign IPs traveled to India for surrogacy. India and the home countries of the IPs lacked legal certainty pertaining to the citizenship status of children born from these arrangements. As a result, the babies born were left stateless and homeless.²⁵⁶ Government intervention was needed to permit the IPs to take their children back to their home countries.

These cases were followed by some unsuccessful attempts at regulating surrogacy practice.²⁵⁷ In 2013, the Ministry of Home Affairs prohibited single foreigners and homosexual couples from coming to India for surrogacy.²⁵⁸ This change in visa rules for gay couples was a major blow for the Indian surrogacy industry.²⁵⁹ It was condemned for being discriminatory and violative of equality and reproductive rights.²⁶⁰ However, Indian surrogacy businesses quickly adjusted to the new rules by shifting some of their surrogacy operations to Nepal and Thailand.²⁶¹ Indian

²⁵⁴ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518; *Jan Balaz v. Anand Municipality and Ors. High Court of Gujarat (India)*, LPA 2151/2009 (Gujarat H.C. 2009).

²⁵⁵ “Commercial Surrogacy and Fertility Tourism in India”, online: *The Kenan Institute For Ethics at Duke University* <https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji_Case2015.pdf>.

²⁵⁶ Chaudhary, *supra* note 77 at 94.

²⁵⁷ Government of India, Law Commission of India, *Need for Legislation To Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties To A Surrogacy*, Report No. 228 (2009), online: <https://prsindia.org/files/bills_acts/bills_parliament/2016/Law%20Commission%20Report-Surrogacy%20Bill.pdf>; Government of India, Ministry of Health & Family Welfare, Indian Council of Medical Research, *The Assisted Reproductive Technologies (Regulation) Bill– 2010* (Draft), online: <<https://main.icmr.nic.in/sites/default/files/guidelines/ART%20REGULATION%20Draft%20Bill1.pdf>>.

²⁵⁸ Government of India, Ministry of Home Affairs, F.No.25022/74/2011-F.I (9 July 2012).

²⁵⁹ Rudrappa, “Why is India’s Ban”, *supra* note 248 at 80-81. By 2012, nearly 10,000 foreign couples had already visited Indian for reproductive service out of which 30% were singles and queer.

²⁶⁰ *Ibid.*

²⁶¹ Rudrappa, “Why is India’s Ban”, *supra* note 248 at 80-81; Amrita Pande, “Gestational Surrogacy in India: New Dynamics of Reproductive Labour” in Noronha, E., D’Cruz, P, eds, *Critical Perspectives on Work and Employment in Globalizing India* (Singapore: Springer, 2017) 267 at 276[Pande, “Gestational Surrogacy in India”]. For some context, Thailand banned transnational surrogacy in 2014 following scandals related to international surrogacy arrangements and Nepal opened its doors to surrogacy for foreigners in 2014.

surrogates were flown to Nepal and implanted with the embryo there.²⁶² The IPs then picked up their babies from Nepal.²⁶³

Significant changes started in 2015 when a public interest litigation (PIL) was filed before the Supreme Court of India over concerns that India was becoming a baby factory for foreigners.²⁶⁴ It was argued that surrogacy was exploiting India's illiterate and impoverished women, violating their constitutional and human rights.²⁶⁵ As a result, the MHFW issued a letter stating that until legislation was enacted, commercial surrogacy for foreign nationals would be prohibited.²⁶⁶ Surrogacy for Indian citizens remained unaffected and continued to flourish.²⁶⁷

In 2016, the government considered a draft bill that proposed to prohibit commercial surrogacy.²⁶⁸ The Bill permitted only altruistic surrogacy.²⁶⁹ One of the main objectives of the Bill was the prohibition of exploitation of working-class women and protecting the rights of the children born through surrogacy.²⁷⁰ According to the government, people were misusing surrogacy by taking advantage of the wombs of poor women.²⁷¹ Several problematic practices had increased with the

²⁶² Rudrappa, "Why is India's Ban", *supra* note 248 at 81.

²⁶³ *Ibid.*

²⁶⁴ *Ibid* at 79.

²⁶⁵ *Ibid.*

²⁶⁶ Government of India, Ministry of Home Affairs, No. 25022/74/2011-F.I (Vol.III) (3 November 2015).

²⁶⁷ Chaudhary, *supra* note 77 at 94.

²⁶⁸ *The Surrogacy (Regulation) Bill, 2016*, No.37/LN/Ref./July/2018; See also Majumdar, *Oxford India Short Introductions Surrogacy*, *supra* note 9 at 97.

²⁶⁹ Rudrappa, "Why is India's Ban", *supra* note 248 at 79; Rama Lakshmi, "India to propose a ban on commercial surrogacy, ending a lucrative business", *The Washington Post* (24 August 2016), online: <https://www.washingtonpost.com/world/rent-a-womb-industry-in-india-may-be-shut-down/2016/08/24/39684d60-79e3-42c9-893d-9ff5998ce179_story.html>.

²⁷⁰ DD News, "Indian Cabinet debriefing of the Surrogacy (Regulation) Bill 2016" (24 August 2016), online (video) <<https://www.youtube.com/watch?v=wtI4Mskjpnk>>.

²⁷¹ *Ibid.*

boom in surrogacy, including abandoning surrogate-born children with disabilities, leaving behind female children, and, in cases of twin birth – a girl and boy – abandoning the female twin.²⁷²

The ban on commercial surrogacy was met with significant criticism.²⁷³ Some critics were concerned that the ban was likely to push the surrogacy industry underground and ultimately increase the exploitation of surrogates.²⁷⁴ The Bill was subsequently referred to the Parliamentary Standing Committee on Health and Family Welfare for further discussions with various stakeholders, including surrogate mothers and the general public.²⁷⁵ During the discussions, it was recognised that it was poor women who were mostly engaged in surrogacy because of their need for money and there was no doubt that surrogacy as it existed at the time, without any regulatory oversight, had the potential to exploit surrogates.²⁷⁶ This potential for exploitation could be reduced through regulation, and for this reason, the committee argued for a compensated surrogacy model.²⁷⁷ However, no heed was paid to these recommendations, and the government introduced another bill, similar to the 2016 Bill, before the cabinet.²⁷⁸ That Bill was referred to the Select Committee of the Rajya Sabha,²⁷⁹ which in its report favored altruistic surrogacy.²⁸⁰

²⁷² *Ibid.*

²⁷³ Lakshmi, *supra* note 269.

²⁷⁴ Bronwyn Parry & Rakhi Ghoshal, “Surrogacy Regulation Bill: Cause For Congratulation or Concern?”, *BQ Prime* (26 December 2018), online: < <https://www.bqprime.com/opinion/surrogacy-regulation-bill-cause-for-congratulation-or-concern#gs.YzKiS1Sk> > [Parry & Ghoshal, “Surrogacy Regulation Bill”]; Amrita Pande, “Surrogacy Bill’s missteps: Is the prohibitory approach, adopted by the Surrogacy (Regulation) Bill 2016, really the best way to protect the rights of surrogates and their children in India?”, *Himal Southasian* (12 October 2016), online: < <https://www.himalmag.com/surrogacy-bill-india-women-rights-labour/> >.

²⁷⁵ *One Hundred Second Report*, *supra* note 81 at 4-5.

²⁷⁶ *Ibid* at 13.

²⁷⁷ *Ibid* at 13-14.

²⁷⁸ *The Surrogacy (Regulation) Bill, 2019*, Bill No. 156-C of 2019.

²⁷⁹ Rajya Sabha is the upper house of the bicameral Parliament of India.

²⁸⁰ Parliament of India, Rajya Sabha, *Report of the Select Committee on The Surrogacy (Regulation) Bill, 2019* (5 February 2020), online: < https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf > at 23.

Finally, The Surrogacy (Regulation) Bill, 2020 was introduced in the Parliament, and The Surrogacy (Regulation) Act, 2021 (*Act*) came into force on January 25, 2022.²⁸¹ The *Act* permits only gestational altruistic surrogacy and allows payments for medical and “other prescribed expenses”.²⁸² A woman between the age of 25 to 35 years, married with at least one child of her own, can act as a surrogate.²⁸³ She can participate in surrogacy just once in her lifetime and has to obtain a certificate of being medically and psychologically fit for surrogacy.²⁸⁴ The *Act* permits only heterosexual married couples of Indian origin, or an “intending woman” who is a widow or divorcee, to proceed with surrogacy arrangements.²⁸⁵ The surrogate child must be genetically related to at least one of the IPs or the intending woman.²⁸⁶

A couple who violates the *Act* by opting for commercial surrogacy is liable for a fine of up to 5 lakh rupees (currently, approximately \$6000 USD) and imprisonment of up to five years, with a maximum fine of up to 10 lakh rupees (currently, approximately \$12,000 USD) and imprisonment of up to 10 years.²⁸⁷ Anyone found facilitating commercial surrogacy or exploiting surrogates or children born via surrogacy is liable for imprisonment of up to ten years and a fine of up to 10 lakh rupees.²⁸⁸

²⁸¹ Harleen Kaur, *Laws and Policies on Surrogacy: Comparative Insights from India*, 1st ed (Singapore: Springer, 2021) at 108.

²⁸² *The Surrogacy (Regulation) Act*, *supra* note 6 at ss 2(b), 2(r), 4(ii)(b).

²⁸³ *Ibid* at s 2(zg), s 4, s 6.

²⁸⁴ *Ibid* s 4, s 6.

²⁸⁵ *Ibid* s2 (s), s 3. The ‘intending woman’ must be aged between 35-45 years, s 4. See also Government of India, Ministry of Health and Family Welfare (Department of Health Research), *Surrogacy (Regulation) Amendment Rules, 2023*, G.S.R. 415 (E). According to this amendment, couple of Indian origin means that both husband and wife are Overseas Citizens of India (OCI) cardholders. (8 June 2023).

²⁸⁶ *Ibid*.

²⁸⁷ *Ibid* s 40.

²⁸⁸ *Ibid* s 38.

The Surrogacy (Regulation) Act, 2021, provides for the establishment of one or more Appropriate Authorities for every state or union territory,²⁸⁹ a State Assisted Reproductive Technology and Surrogacy Board (State Board) for every state,²⁹⁰ and an overarching National Assisted Reproductive Technology and Surrogacy Board (National Board)²⁹¹ for the regulation of surrogacy in the country. Together, these bodies are constituted for the regulation of the practice of surrogacy in the country.

3.4. THE COMPLEX REALITY OF INDIAN SURROGACY INDUSTRY

Having traced the history of surrogacy legislation in India, and before analyzing the effects the current law will have on the surrogacy practice in general and on the surrogates in particular, it is pertinent to discuss how commercial surrogacy was practised in India before the Indian government prohibited it.

A surface view of commercial surrogacy in India portrayed Indian surrogates as illiterate women, married to drunkards, living in grave poverty, and in desperate need of money.²⁹² Indian surrogates were shown as grateful recipients of the chance to earn the kind of money involved in surrogacy, which was equivalent to the amount it would take them eight to ten years to earn doing their usual jobs.²⁹³ This superficial perspective misses out on significant details and complexities about the realities of the Indian surrogacy industry. This section will take a deep dive and reveal those

²⁸⁹ *Ibid*, s 35.

²⁹⁰ *Ibid* s 26.

²⁹¹ *Ibid* s 17.

²⁹² Pande, *Wombs in Labor*, *supra* note 242 at 5.

²⁹³ Vora, “Experimental Sociality”, *supra* note 249 at 68; Jargilo, *supra* note 249 at 353; Pande, *Wombs in Labor*, *supra* note 242 at 5; SAMA, “Birthing A Market: A Study on Commercial Surrogacy” (2012) Sama- Resource Group for Women and Health at 51-52.

complex realities. The objective of this discussion is to provide a foundation for my argument about the regulatory model that India should adopt.

During the boom of commercial surrogacy in India, Indian surrogates faced significant exploitation. Surrogates belonged to the poor and less educated section of society.²⁹⁴ They were married or separated and had at least one child of their own.²⁹⁵ Their husbands were also uneducated, unemployed, addicted to alcohol, or employed in factories, agriculture, or as rickshaw pullers, earning paltry sums, and in need of money.²⁹⁶

At the time of entering surrogacy contracts, surrogates were not given adequate information by agents and doctors about the medical and psychological implications of surrogacy.²⁹⁷ A majority of surrogates did not fully understand the terms of the contract because the contract was in English.²⁹⁸ Surrogacy contracts did not provide health insurance, psychological support, or post-birth counseling.²⁹⁹ No legal advice was given to surrogates at the time of signing the contract, and

²⁹⁴ Kaur, *supra* note 281 at 125; Mukherjee & Shekher, *supra* note 249 at 84; Jargilo, *supra* note 249 at 347; Daisy Deomampo, “Transnational Surrogacy in India: Interrogating Power and Women’s Agency” (2013) 34:3 *Frontiers: A Journal of Women Studies* 167 at 177 [Deomampo, “Transnational Surrogacy”].

²⁹⁵ Kaur, *supra* note 281 at 126; Mukherjee & Shekher, *supra* note 249 at 84; See also Smerdon, *supra* note 249 at 47.

²⁹⁶ Kaur, *supra* note 281 at 126; Rudrappa, *Discounted Life*, *supra* note 249 at 44-53; Mukherjee & Shekher, *supra* note 249 at 84; Deomampo, “Transnational Surrogacy”, *supra* note 294 at 167.

²⁹⁷ Malene Tanderup et al, “Reproductive Ethics in Commercial Surrogacy: Decision-Making in IVF Clinics in New Delhi, India” (2015) 12:3 *Journal of Bioethical Inquiry* 491 at 494 [Tanderup, “Reproductive Ethics”]; Jargilo, *supra* note 249 at 349; Deomampo, “Transnational Surrogacy”, *supra* note 294 at 176; Anu Gupta & Sheela Prasad, “‘Outsourced Pregnancy’: Surrogate narratives from Hyderabad” (2019) 53:2 *Contributions to Indian Sociology* 299 at 313, 323-324.

²⁹⁸ Gupta & Prasad, *supra* note 297 at 311; Varada Madge, “Gestational Surrogacy in India: The Problem of Technology and Poverty”, in Sayantani DasGupta & Shamita Das Dasgupta, authors, *Globalisation and transnational surrogacy in India: outsourcing life* (Lanham: Lexington Book, 2014) 45 at 61; Maya Unnithan, “Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women” (2013) 1:3 *Journal of Legal Anthropology* 287 at 293.

²⁹⁹ Lakshmi, *supra* note 269; Elder, *supra* note 40 at 370; Sheela Saravanan, “Surrogacy in India, A Globalized Bazaar Built on Women’s Exploitation – Interview with Sheela Saravanan” (3 September 2018) online: *CIAMS* <<http://abolition-ms.org/en/ressources-en/opinions-en/surrogacy-in-india-a-globalized-bazaar-built-on-womens-exploitation-interview-with-sheela-saravanan/>>.

they could not afford such advice on their own.³⁰⁰ Surrogates received a very small portion of the total money paid by the IPs for surrogacy, as a majority of that money went to clinics and doctors.³⁰¹

Due to the absence of regulations, surrogacy clinics did not adhere to minimum medical and ethical standards in the treatment of surrogates.³⁰² Indian surrogacy clinics advertised high success rates at low prices to attract international clientele.³⁰³ These clinics routinely transferred multiple embryos to the surrogates.³⁰⁴ Multiple embryos increase the chances of a successful outcome.³⁰⁵ Multiple embryo transfer is also linked with the risk of multiple pregnancies, which can lead to more complications.³⁰⁶ Surrogates were seldom aware of the number of embryos transferred or the complications associated with multiple pregnancies and fetal reduction.³⁰⁷ In an empirical study carried out in fertility clinics in Delhi, out of fourteen surrogates that were interviewed, not even a single surrogate knew the number of embryos that had been transferred.³⁰⁸ In many cases of multiple pregnancies, clinics administered abortion pills without the surrogate's knowledge or

³⁰⁰ Majumdar, *Oxford India Short Introductions Surrogacy*, *supra* note 9 at 60; Madge, *supra* note 298 at 61.

³⁰¹ Pande, *Wombs in Labor*, *supra* note 242 at 71. According to this study, the surrogates at Armaan Maternity Clinic at Garv (India) received a payment approximately in the range of \$4000- \$8000 for surrogacy; Jargilo, *supra* note 249 at 347.

³⁰² Scott Carney, "Inside India's Rent-a-Womb Business", *Mother Jones* (April 2010), online: <<https://www.motherjones.com/politics/2010/04/surrogacy-tourism-india-nayna-patel/>>.

³⁰³ Tanderup, "Reproductive Ethics", *supra* note 297 at 493, 499.

³⁰⁴ Tanderup, "Reproductive Ethics", *supra* note 297 at 493-496; Vora, "Experimental Sociality", *supra* note 249 at 76; Pande, *Wombs in Labor*, *supra* note 242 at 12; Daisy Deomampo, *Transnational Reproduction: race, kinship, and commercial surrogacy in India*, (New York: New York University Press, 2016) at 176 [Deomampo, *Transnational Reproduction*].

³⁰⁵ *Ibid.*

³⁰⁶ Tanderup, "Reproductive Ethics", *supra* note 297 at 493.

³⁰⁷ Tanderup, "Reproductive Ethics", *supra* note 297 at 493; Malene Tanderup et al, "Informed consent in medical decision-making in commercial gestational surrogacy: a mixed methods study in New Delhi, India" (2015) 94:5 *Acta Obstetrica et Gynecologica Scandinavica* 465 at 468 [Tanderup, "Informed consent"]; Vora, "Experimental Sociality", *supra* note 249 at 76.

³⁰⁸ Tanderup, "Informed consent", *supra* note 307 at 468.

consent.³⁰⁹ Surrogates had no say in the number of embryos that were transferred, in embryo reduction, or the decision to abort in case the child was diagnosed with any disease.³¹⁰

Because a lot of money and effort went into the success of these pregnancies, the doctors at these clinics did not want to take any risks and routinely carried out caesarean section (c-section) deliveries.³¹¹ Financial gain and the reputation of the clinic (which boasted high success rates) were prioritized over surrogate's health in deciding the mode of delivery.³¹² Surrogates were given no choice in the matter, and complete disregard was given to the fact that c- section deliveries increase the risk of infection and elongate post-delivery recovery.³¹³ Clinics scheduled these deliveries based on their own and IPs' convenience, so that IPs could travel to India and be present at the time of the delivery.³¹⁴ After the c-section delivery, no postnatal care was provided to the surrogate unless she paid for it.³¹⁵ These unethical practices and the lack of regulation reduced surrogates to

³⁰⁹ Centre for Social Research (CSR), *Report of the National Conference on: "A Policy Dialogue on Issues around Surrogacy in India"* (2014), online: < https://drive.google.com/file/d/0B-f1XIdglJC_ZmlsZXQwY3VvcW8/view?resourcekey=0-4GR8Raz4KPPIc4XiAqn4dQ > [CSR, *Report of the National Conference*].

³¹⁰ Gupta & Prasad, *supra* note 297 at 325; Swati Gola, "One step forward or one step back? Autonomy, agency and surrogates in the Indian Surrogacy (Regulation) Bill 2019" (2021) 17:1 International Journal of Law in Context 58 at 61; Vora, "Experimental Sociality", *supra* note 249 at 77; Mukherjee & Shekher, *supra* note 249 at 87; Tanderup, "Reproductive Ethics", *supra* note 297 at 493-494, 497; CSR, *Report of the National Conference*, *supra* note 309 at 7.

³¹¹ Tanderup, "Reproductive Ethics", *supra* note 297 at 494; Gupta & Prasad, *supra* note 297 at 313.

³¹² Deomampo, *Transnational Reproduction*, *supra* note 304 at 180-183; Tanderup, "Reproductive Ethics", *supra* note 297 at 498.

³¹³ Deomampo, *Transnational Reproduction*, *supra* note 304 at 183; Tanderup, "Reproductive Ethics", *supra* note 297 at 494; Gupta & Prasad, *supra* note 297 at 325; Vora, "Experimental Sociality", *supra* note 249 at 76-77.

³¹⁴ Deomampo, *Transnational Reproduction*, *supra* note 304 at 181; Rudrappa, *Discounted Life*, *supra* note 249 at 115.

³¹⁵ Rudrappa, *Discounted Life*, *supra* note 249 at 71. Only Dr. Patel, owner of Akanksha Hospital made surrogates stay at the surrogacy hostel to regain their health free of cost. See Carney, *supra* note 302.

birthing machines who “rented” their womb to IPs for the duration of pregnancy.³¹⁶ In a few instances, surrogates even lost their life.³¹⁷

Given that the surrogates belonged to an inferior economic and educational background, there existed a power imbalance between them and the IPs and doctors.³¹⁸ Surrogates were not used to the level of medical care and technology involved in surrogacy.³¹⁹ Consequently, they hesitated to ask for clarifications from doctors in case of doubts or concerns about a medical procedure or its implications for their health.³²⁰ In a way, this access to good medical care came at the cost of surrogates’ reproductive rights.³²¹

For Indian surrogates, money was without a doubt the main attraction for their participation in surrogacy arrangements.³²² Most surrogates belonged to the working class and needed the money to improve the living conditions of their family, provide education to their children, support other family members in need, repay debts, marry their daughters, and increase their own self-worth.³²³

³¹⁶ Tanderup, “Reproductive Ethics”, *supra* note 297 at 497; See also Daisy Deomampo, “Gendered geographies of reproductive tourism” (2013) 27:4 Gender and Society 514 at 528 [Deomampo, “Gendered geographies”].

³¹⁷ TNN, “Surrogate mother dies of complications”, *The Times of India* (17 May 2012), online: <

<https://timesofindia.indiatimes.com/city/ahmedabad/surrogate-mother-dies-of-complications/articleshow/13181592.cms>>.

³¹⁸ Deomampo, *Transnational Reproduction*, *supra* note 304 at 182, 184; Rudrappa, *Discounted Life*, *supra* note 249 at 168; Vora, “Experimental Sociality”, *supra* note 249 at 70; Tanderup, “Reproductive Ethics”, *supra* note 297 at 494; Gupta & Prasad, *supra* note 297 at 313, 323-324.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ Gupta & Prasad, *supra* note 297 at 325.

³²² Jargilo, *supra* note 249 at 348; Kaur, *supra* note 281 at 126; Anindita Majumdar, “Conceptualizing Surrogacy as Work-Labour: Domestic Labour in Commercial Gestational Surrogacy in India” (2018) 13:2 Journal of South Asian Development 210 at 215 [Majumdar, “Conceptualizing Surrogacy”].

³²³ Rudrappa, *Discounted Life*, *supra* note 249 at 78, 152, 161; Anindita Majumdar, *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*, 1st ed (New Delhi: Oxford University Press, 2017) at 48-53 [Majumdar, *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*]; Mukherjee & Shekher, *supra* note 249 at 84; Pande, *Wombs in Labor*, *supra* note 242 at 93; Smerdon, *supra* note 249 at 54; Gupta & Prasad, *supra* note 297 at 324; Vora, “Experimental Sociality”, *supra* note 249 at 69.

For this reason, even though they received only a small portion of the total amount paid by the IPs, it still meant a lot to them.³²⁴

Surrogates weighed the other employment options available to them before entering a surrogacy arrangement and consulted their family, doctors, agents, and even other surrogates.³²⁵ Prior to participating in surrogacy, surrogates held various jobs, such as nannies, cooks, industrial laborers (even in toxic industries), daily wage workers, live-in servants, domestic workers, garment industry employees, and seasonal laborers.³²⁶ These other employment options were often equally, if not more, exploitative than surrogacy, as they offered less pay, no social security benefits, long hours of strenuous labor, and no legal protection.³²⁷ Surrogacy on the other hand, offered better working conditions along with more money.³²⁸ An ART clinician described the working conditions at one of these other employment options as “the factories are windowless, and they are making all kinds of stuff... their children are loitering around for 10,12,14 hours. You think she would not prefer surrogacy to that?”³²⁹

³²⁴ Pande, “Commercial Surrogacy in India”, *supra* note 247 at 975-976, 988; Mukherjee & Shekher, *supra* note 249 at 84, 87; Jargilo, *supra* note 249 at 347.

³²⁵ SAMA, *supra* note 293 at 56.

³²⁶ SAMA, *supra* note 293 at 50; Rudrappa, *Discounted Life*, *supra* note 249 at 92-93.

³²⁷ SAMA, *supra* note 293 at 50, 55-56; Majumdar, *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*, *supra* note 323 at 49-50; Elder, *supra* note 40 at 371; Jargilo, *supra* note 249 at 347; Abigail Haworth, “Surrogate Mothers: Womb for Rent” (28 July 2007), online: *marieclaire* <<https://www.marieclaire.com/politics/news/a638/surrogate-mothers-india/>>. See especially Rudrappa, *Discounted Life*, *supra* note 248 at 89-93, 96. In her empirical study of Bangalore garment workers who turned into surrogates, Sharmila Rudrappa found that in the garment industry these women worked sixteen hours a day at the factory and at home. They were expected to meet unfairly high targets at work and if they were not able to meet them, they were verbally abused. Their supervisors who were mostly men behaved inappropriately with them. They worked these long hours without even taking bathroom breaks which made them prone to urinary tract infections. No overtime wages were paid to them. All this took a toll on their health and their productivity as a result of which they would often get fired. They would return to the industry after having regained their health because of their need for money. For these reasons these women preferred surrogacy. Surrogacy was more respectable as it was free from sexual harassment and humiliation.

³²⁸ Parry & Ghoshal, “Surrogacy Regulation Bill”, *supra* note 274.

³²⁹ Parry & Ghoshal, “Surrogacy Regulation Bill”, *supra* note 274; Bronwyn Parry & Rakhi Ghoshal, “Regulation of surrogacy in India: whenceforth now?” (2018) 3:5 *BMJ Global Health*, online: <<http://dx.doi.org/10.1136/bmjgh-2018-000986>>.

Contrary to Western media portrayals and surrogates' expectations, the money earned from surrogacy provided only a temporary relief.³³⁰ Surrogates believed this money would significantly improve their status and end their precarious financial situation, but that was not the case.³³¹ While it provided some security, the money often got used to meet some of the above-mentioned expenses and unforeseen emergencies.³³² As a result, the money earned had little impact on the day-to-day life of the surrogates.³³³ To make the most of their reproductive capacity while they still could and to secure their family's future, these women chose to become surrogates again.³³⁴

Throughout their pregnancies, the majority of surrogates were required to stay in surrogacy hostels, financed by surrogacy clinics.³³⁵ These hostels closely monitored and controlled the daily routines, movements, and diets of surrogates.³³⁶ Visits from family members were regulated.³³⁷ High levels of stress and anxiety were experienced by surrogates due to isolation and being constantly under surveillance.³³⁸ The hostels provided little privacy, and poor-quality food.³³⁹ Indian doctors advertised this living arrangement, highlighting the benefits of greater control over surrogates and reduced risk of drugs, alcohol, or smoking during pregnancy, in contrast to the U.S.³⁴⁰

³³⁰ Rudrappa, *Discounted Life*, *supra* note 249 at 88; Gupta & Prasad, *supra* note 297 at 324; Vora, "Experimental Sociality", *supra* note 249 at 69; Smerdon, *supra* note 249 at 54.

³³¹ Rudrappa, *Discounted Life*, *supra* note 249 at 65, 150.

³³² Gupta & Prasad, *supra* note 297 at 324; Pande, *Wombs in Labor*, *supra* note 242 at 190-191.

³³³ *Ibid.*

³³⁴ Rudrappa, *Discounted Life*, *supra* note 249 at 152; Pande, *Wombs in Labor*, *supra* note 242 at 190-191.

³³⁵ Deomampo, "Gendered geographies", *supra* note 316 at 526; Pande, "Commercial Surrogacy in India", *supra* note 247 at 981; Majumdar, "Conceptualizing Surrogacy", *supra* note 322 at 214. Unlike surrogacy clinics in Anand, Mumbai, and other states surrogates in Delhi were not required to stay in surrogacy hostels during their pregnancy, they lived with their family.

³³⁶ Deomampo, "Gendered geographies", *supra* note 316 at 526.

³³⁷ Margot Cohen, "A Search for a Surrogate Leads to India", *The Wall Street Journal* (9 October 2009), online: <<https://www.wsj.com/articles/SB10001424052748704252004574459003279407832>>; Pande, *Wombs in Labor*, *supra* note 241 at 75.

³³⁸ Deomampo, "Gendered geographies", *supra* note 316 at 524-526; Rudrappa, *Discounted Life*, *supra* note 249 at 94-95.

³³⁹ Rudrappa, *Discounted Life*, *supra* note 249 at 94-95; Pande, *Wombs in Labor*, *supra* note 242 at 2; Priya Shetty, "India's unregulated surrogacy industry" (2012) 380:9854 *Lancet* 1633 at 1634.

³⁴⁰ Madge, *supra* note 298 at 76; Pande, *Wombs in Labor*, *supra* note 242 at 100-101.

A superficial understanding of Indian surrogacy hostels suggests that they were places of control and confinement, which they arguably were, and consequently garnered considerable criticism.³⁴¹ However, a deeper understanding reveals they also served as safe spaces and were preferred by most surrogates. During the peak of surrogacy in India, society largely misunderstood the practice, equating it with prostitution or sale of a child, which led to significant stigma attached to surrogacy.³⁴² As a result, many surrogates preferred to stay in these hostels as it enabled them to hide their pregnancy from friends and relatives, escape the stigma, and return to their normal lives post-delivery.³⁴³

For surrogacy clinics, IPs, and surrogates, these hostels were mutually beneficial. Clinics could easily monitor the health of surrogates and ensure proper nutrition, while IPs were reassured that their surrogates lived in hygienic conditions.³⁴⁴ For surrogates, surrogacy hostels offered better living conditions and a break from employment and household duties.³⁴⁵

Surrogacy hostels also fostered bonds and long-term friendships among surrogates.³⁴⁶ Many hoped that relationships built during their stay with IPs, doctors, and clinic staff would lead to future employment opportunities.³⁴⁷ In some cases, hostels offered English language and computer skills

³⁴¹ Diksha Munjal-Shankar, “Commercial Surrogacy in India: Vulnerability Contextualised” (2016)

58:3 *Journal of the Indian Law Institute* 350 at 357; Deomampo, “Gendered geographies”, *supra* note 316 at 524.

³⁴² SAMA, *supra* note 293 at 120; Alison Bailey, “Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy” (2011) 26 *Hypatia* 715 at 725; Pande, “Commercial Surrogacy in India”, *supra* note 247 at 975.

³⁴³ Carney, *supra* note 302; Vora, “Experimental Sociality”, *supra* note 249 at 72; Rudrappa, *Discounted Life*, *supra* note 249 at 93-95; Pande, *Wombs in Labor*, *supra* note 242 at 16; Pande, “Commercial Surrogacy in India”, *supra* note 247 at 975; Majumdar, *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*, *supra* note 323 at 5.

³⁴⁴ Cohen, *supra* note 337; Carney, *supra* note 302; Vora, “Experimental Sociality”, *supra* note 249 at 73; Rudrappa, *Discounted Life*, *supra* note 249 at 93-94; Chaudhary, *supra* note 77 at 103.

³⁴⁵ Deomampo, “Gendered geographies”, *supra* note 316 at 524; Vora, “Experimental Sociality”, *supra* note 249 at 73; Rudrappa, *Discounted Life*, *supra* note 249 at 94-95.

³⁴⁶ Rudrappa, *Discounted Life*, *supra* note 249 at 95; Vora, “Experimental Sociality”, *supra* note 249 at 73.

³⁴⁷ Pande, “Commercial Surrogacy in India”, *supra* note 247 at 989.

training to enhance surrogates' future job prospects.³⁴⁸ Surrogates with similar backgrounds and experiences found comfort in each other's company and received guidance from more experienced surrogates on pregnancy-related concerns.³⁴⁹ In one instance, surrogates at a hostel came together as a collective and got the fertility doctor to add a special clause in the contract according to which it would be the responsibility of the IPs to pay the brokerage fee. Prior to this change, this fee was paid by the surrogates.³⁵⁰ Thus, while surrogacy hostels served as spaces of confinement and control, they also provided comfort and support.³⁵¹

Surrogacy clinics and agents counseled Indian surrogates to view their wombs as a spare room rented out to IPs for their baby to grow, in exchange for money and gifts.³⁵² Like a "mother-worker", surrogate was expected to provide motherly care to the baby, yet consider surrogacy as contractual labor, with their role ending at the child's birth.³⁵³ Surrogates tried to resist their disposability by emphasizing the special bond with the IPs, especially the intended mother.³⁵⁴ They hoped that post-delivery, IPs would keep in touch with them as they wanted to feel respected for their sacrifice.³⁵⁵ However, IPs typically felt no connection with the surrogate, as all

³⁴⁸ *Ibid* at 983.

³⁴⁹ Gupta & Prasad, *supra* note 297 at 322.

³⁵⁰ Pande, "Commercial Surrogacy in India", *supra* note 247 at 989-990.

³⁵¹ Gupta & Prasad, *supra* note 297 at 322.

³⁵² Kalindi Vora, "Medicine, Markets and the Pregnant Body: Indian Commercial Surrogacy and Reproductive Labor in a Transnational Frame" in Kalindi Vora, *Reimagining Reproduction, Essays on Surrogacy, Labor, and Technologies of Human Reproduction* (London: Routledge India, 2022) 10 at 14 [Vora, "Medicine, Markets and the Pregnant Body"]; Majumdar, *Oxford India Short Introductions Surrogacy*, *supra* note 9 at 59; Malene Tanderup et al, "Breastfeeding and Bonding: Issues and Dilemmas in Surrogacy" in Tanya Cassidy & Abdullahi El Tom, eds, *Ethnographies of Breastfeeding* (London: Routledge, 2020) 157 at 164,169, 170 [Tanderup, "Breastfeeding and Bonding"].

³⁵³ Pande, "Commercial Surrogacy in India", *supra* note 247 at 978; Gupta & Prasad, *supra* note 297 at 321.

³⁵⁴ SAMA, *supra* note 293 at 101; Majumdar, "Conceptualizing Surrogacy", *supra* note 322 at 215; Pande, *Wombs in Labor*, *supra* note 242 at 140; Amrita Pande, "Transnational Commercial Surrogacy in India: Gifts for global sisters?" (2011) 23:5 *Reproductive Biomedicine Online* 618 at 622 [Pande, "Gifts for global sisters"]; Deomampo, *Transnational Reproduction*, *supra* note 304 at 63.

³⁵⁵ SAMA, *supra* note 293 at 101; Rudrappa, *Discounted Life*, *supra* note 249 at 160.

communication was controlled by clinics and agents due to language barriers.³⁵⁶ Surrogates were often portrayed as untrustworthy and greedy by surrogacy agents and clinics, fostering distance between them and the IPs.³⁵⁷

Despite the complexities of Indian commercial surrogacy practice, there have been no reported cases of surrogates refusing to relinquish the baby.³⁵⁸ Indian surrogates did not feel attached to the baby.³⁵⁹ They were counseled not to view the baby as their own, as it would not even look like them.³⁶⁰ Most surrogates missed the child post-delivery but received no counseling to deal with this distress.³⁶¹ However, the pain of separation did not last long upon seeing the happiness of the IPs at the birth of their baby and the thought of betterment of surrogates' own families' lives from the money earned from surrogacy.³⁶²

In contrast to Western surrogates, who view themselves as angelic gift-givers and missionaries, Indian surrogates were counseled to see themselves as “needy gift-receiver” by the clinics and hostels.³⁶³ Surrogacy doctors, brokers, and intended mothers assumed the role of divine

³⁵⁶ SAMA, *supra* note 293 at 101; Rudrappa, *Discounted Life*, *supra* note 249 at 146, 160; Vora, “Experimental Sociality”, *supra* note 249 at 74; Vasanti Jadvla et al, “Parents' relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111:3 Fertility and Sterility 562 at 568; Deomampo, “Transnational Surrogacy”, *supra* note 294 at 182.

³⁵⁷ Majumdar, “Conceptualizing Surrogacy”, *supra* note 322 at 221.

³⁵⁸ The basis of this claim is that a search on Indian Kanoon points to no source where an Indian surrogate refused to relinquish the surrogate baby. Indian Kanoon is an Indian law search engine which provides access to legislations and judgements from highest courts and tribunals in India.

³⁵⁹ Smerdon, *supra* note 249 at 52; Vora, “Experimental Sociality”, *supra* note 249 at 72; Vora, “Medicine, Markets and the Pregnant Body” *supra* note 352 at 14.

³⁶⁰ *Ibid.*

³⁶¹ Madge, *supra* note 298 at 62-63.

³⁶² Mukherjee & Shekher, *supra* note 249 at 86; Rudrappa, *Discounted Life*, *supra* note 249 at 119-121.

³⁶³ Pande, *Wombs in Labor*, *supra* note 242 at 91, 93; Pande, “Gifts for global sisters”, *supra* note 354 at 619; Majumdar, *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*, *supra* note 323 at 53.

missionaries, offering surrogates this opportunity to transform their lives.³⁶⁴ Surrogates were encouraged to see surrogacy as a gift from God to improve their financial situation.³⁶⁵ They were trained to be a “virtuous mother” and not be greedy and negotiate payments with the IPs.³⁶⁶ This “missionaries” narrative had a detrimental impact on the bargaining power of surrogates, making them appear needy and desperate for money, thus preventing wage negotiations for their labor.³⁶⁷ As a result, Indian surrogacy fees were the lowest globally.³⁶⁸

Despite control from doctors, agents and IPs, surrogacy overall was empowering for Indian surrogates.³⁶⁹ It made surrogates feel as if they were contributing to something meaningful and added to their moral worth.³⁷⁰ It allowed them to exercise agency and resistance within existing power structures, providing a sense of self-worth and empowerment probably for the first time in their lives.³⁷¹ Unlike in the West, Indian women typically lack individual autonomy.³⁷² Their reproductive decisions are usually influenced by their husband and his family.³⁷³ Surrogacy enabled women to challenge this and exercise their agency by choosing surrogacy despite resistance from their family.³⁷⁴ Contrary to the popular belief, most Indian women were not forced into surrogacy; they often had to convince their husbands to allow them to participate in surrogacy

³⁶⁴ Pande, *Wombs in Labor*, *supra* note 242 at 93, 95-96, 100-101; Deomampo, *Transnational Reproduction*, *supra* note 304 at 62-63; Rudrappa, *Discounted Life*, *supra* note 249 at 146-147.

³⁶⁵ Pande, “Commercial Surrogacy in India”, *supra* note 247 at 978-979; Pande, *Wombs in Labor*, *supra* note 242 at 92-93; Majumdar, *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*, *supra* note 323 at 53; Rudrappa, *Discounted Life*, *supra* note 249 at 71.

³⁶⁶ *Ibid.*

³⁶⁷ Pande, *Wombs in Labor*, *supra* note 242 at 102-103.

³⁶⁸ *Ibid.*

³⁶⁹ Rudrappa, *Discounted Life*, *supra* note 249 at 97; Pande, “Commercial Surrogacy in India”, *supra* note 247 at 980.

³⁷⁰ Rudrappa, *Discounted Life*, *supra* note 249 at 96.

³⁷¹ Deomampo, “Transnational Surrogacy”, *supra* note 294 at 172, 176; Gupta & Prasad, *supra* note 297 at 315.

³⁷² Unnithan, *supra* note 298 at 300.

³⁷³ *Ibid.* at 296, 299.

³⁷⁴ Deomampo, *Transnational Reproduction*, *supra* note 304 at 200.

and sometimes even went against the wishes of their families.³⁷⁵ For many underprivileged women, surrogacy was not only a temporary occupation but also a survival strategy.³⁷⁶ It had become a way to earn a respectable life and “equal status in the society”.³⁷⁷

3.5. INDIA’S SURROGACY REGULATION: A CRITICAL ANALYSIS

The Surrogacy (Regulation) Act, 2021, is intended to protect the rights of surrogates and children; however, the law in its present form seems restrictive and is likely to be counterproductive.³⁷⁸ The *Act* imposes a blanket ban on commercial surrogacy. Several provisions of the *Act* contravene some important decisions of the Supreme Court of India (SC) and violate fundamental rights guaranteed to every Indian citizen by the Constitution of India. At present, the SC has a whole range of petitions challenging various aspects of The Surrogacy (Regulation) Act, 2021, and the rules made thereunder, pending before it.³⁷⁹ The *Act* and the rules have been challenged on several grounds for not being able to regulate surrogacy effectively.³⁸⁰

Article 21 of The Constitution of India, 1950, guarantees the “right to reproductive autonomy” to every Indian citizen.³⁸¹ The SC has recognised that live-in relationships are at par with marriage

³⁷⁵ Deomampo, “Transnational Surrogacy”, *supra* note 294 at 177; Rudrappa, *Discounted Life*, *supra* note 249 at 167; Gupta & Prasad, *supra* note 297 at 311.

³⁷⁶ Pande, “Commercial Surrogacy in India”, *supra* note 247 at 971; Jargilo, *supra* note 249 at 353.

³⁷⁷ SAMA, *supra* note 293 at 128; Deomampo, *Transnational Reproduction*, *supra* note 304 at 200; Rudrappa, *Discounted Life*, *supra* note 249 at 53, 69.

³⁷⁸ Dr. Sangeeta Chatterjee, “Surrogacy (Regulation) Act 2021 in India: Problems and Prospects” (2022) 2 *Aequitas Victoria* 52 at 64.

³⁷⁹ In the Supreme Court of India, Public Interest Litigation (PIL), *Arun Muthuvel v. Union of India & Ors*, (2022) [*Arun Muthuvel*].

³⁸⁰ India News, “Centre Clarifies On Surrogacy Law In Supreme Court”, *NDTV* (8 February 2023), online: < <https://www.ndtv.com/india-news/centre-clarifies-on-surrogacy-law-in-supreme-court-3764667>>.

³⁸¹ In *Suchita Srivastava v. Chandigarh Administration* (2009) 14 SCR 989,(2009) 9 SCC 1 [*Suchita Srivastava*], the SC held that right to make reproductive choices falls within the ambit of ‘personal liberty’ guaranteed under Article 21 of the Constitution of India and this includes both the choice to procreate and refrain from it.

and prohibits any discrimination based on marital status.³⁸² The Supreme Court has also officially recognised a third gender and decriminalized homosexual sex.³⁸³ Therefore, by excluding members of 2SLGBTQIA+ community, unmarried couples and single men and women from participating in surrogacy, the *Act* disregards the rulings of the Supreme Court, violates equality (Article 14)³⁸⁴ and reproductive autonomy rights guaranteed under the Constitution and “reinforces social stigmas, stereotypes and dichotomies.”³⁸⁵

The *Act* imposes unfair restrictions that limit which women can provide surrogacy services. Only married women within a limited age range, and with at least one child of their own can be surrogates, and they are only permitted to do so once.³⁸⁶ These restrictions infringe on the equality and reproductive autonomy of surrogates enshrined in Articles 14 and 21 of the Indian Constitution.

A complete ban on commercial surrogacy will also amount to depriving surrogates of their right to livelihood.³⁸⁷ The Supreme Court has time and again recognised right to earn livelihood as an essential part of the right to life guaranteed under Article 21.³⁸⁸ In *Olga Tellis v. Bombay Municipal*

³⁸² In *Tulsa & Ors v. Durghatiya & Ors* 2008 4 SCC 520, the SC held that where a couple has been living together for a long time, there is a presumption of marriage between them. In *Suchitra Srivastava*, *supra* note 381, the SC declared discrimination based on marital status as a contravention of the fundamental Right to Equality guaranteed under Article 14 of the Indian Constitution.

³⁸³ In *National Legal Service Authority v. Union of India* AIR 2014 SC 1863, the SC Recognised third gender; In *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321, the SC decriminalized homosexual sex. Same-sex marriages remain illegal in India.

³⁸⁴ Article 14 guarantees equality before law and equal protection of law to every citizen of India.

³⁸⁵ Swati Gola, “The Indian Surrogacy (Regulation) Bill 2020: Enforcing Gender Binarism?” (2021) Article 843 Academia Letters 1 at 2, online: < <https://doi.org/10.20935/AL843>>.

³⁸⁶ *The Surrogacy (Regulation) Act*, *supra* note 6 at s 4 (iii) (b).

³⁸⁷ “A Critical Analysis of the Surrogacy (Regulation) Bill, 2020, *Lexforti* (4 December 2020), online: < <https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/>>.

³⁸⁸ *Arun Muthuvel*, *supra* note 379 at 64.

Corporation, the Supreme Court held, “the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation.”³⁸⁹

As already mentioned, surrogacy had become one of the routes through which surrogates were able to secure basic social needs for themselves and their family members.³⁹⁰ Until more sources of employment are created or the conditions of work in the already existing sources of employment are improved, a ban on commercial surrogacy will most likely end up harming surrogates instead of protecting them from exploitation and harm.

I should acknowledge here that fundamental rights are not absolute, and reasonable restrictions can be imposed on them by the State.³⁹¹ But, given the conditions of poverty and other sources of employment available to Indian surrogates, a complete ban on commercial surrogacy seems excessive. The ban will most likely make surrogates return to their previous jobs where pay will be less and conditions of work will be similar or more exploitative than surrogacy, participate in sex work where the risk of exploitation can be high, or participate in underground commercial surrogacy arrangements where no legal protection will be available and chances of exploitation will be high.

If banning commercial surrogacy does lead to an underground market, surrogates will be more vulnerable than they would be in a context where commercial surrogacy is permitted and

³⁸⁹ *Olga Tellis v. Bombay Municipal Corporation and Others*, 1986 AIR 180, 1985 SCR Supl. (2) 51.

³⁹⁰ See page 57.

³⁹¹ Under Article 19 (6), the State can exercise restrictions in the interests of general public; Article 21 ensures Right to life and personal liberty “except according to procedure established by law”.

regulated.³⁹² The example of what happened in Nepal illustrates just how vulnerable these women can become.³⁹³ In 2015, around the same time when Indian surrogacy businesses had shifted part of their surrogacy operations to Nepal, Nepal was hit by an earthquake. The Israeli government airlifted babies belonging to Israeli gay men but initially left the Indian surrogates behind.³⁹⁴ This decision faced significant criticism, compelling the Israeli government to airlift the Indian surrogates carrying babies of Israeli gay men and allow them to complete the remaining term of their pregnancies in Israel.³⁹⁵ The initial move of the Israeli government of leaving Indian surrogates behind, left surrogates in a precarious situation. They were vulnerable because they were participating in an activity that was prohibited in India (surrogacy for gay couples) and naturally, their own government would not be asked to intervene. Had the Israeli government not rescued them, they would have been completely dependent on their agents for everything including their return tickets to India.³⁹⁶ Even if they had somehow managed to return to India, they would have lost their chance to earn the money promised to them and would probably have had to raise a child they never intended to keep.³⁹⁷ Additionally, I have heard anecdotal reports based on personal communication that commercial surrogacy arrangements are still taking place in India, more or less on the same lines as they used to before the law of 2021.

The main concern lawmakers have with commercial surrogacy is that money leads to exploitation of poor women who might be forced into surrogacy.³⁹⁸ This view ignores the fact that altruistic

³⁹² Pande, “Gestational Surrogacy in India”, *supra* note 261 at 275; Jargilo, *supra* note 249 at 355.

³⁹³ Amrita Pande, “Transnational Commercial Surrogacy in India: To Ban or Not To Ban”, in Miranda Davis, ed, *Babies for Sale? Transnational Surrogacy, Human Rights and the Politics of Reproduction* (London, England: Zed Books, 2017) 328 at 335 [Pande, “To Ban or Not to Ban”].

³⁹⁴ Rudrappa, “Why is India’s Ban”, *supra* note 248 at 81.

³⁹⁵ *Ibid.*

³⁹⁶ Pande, “To Ban or Not To Ban”, *supra* note 393 at 335.

³⁹⁷ *Ibid* at 334-335.

³⁹⁸ Rudrappa, “Why is India’s Ban”, *supra* note 248 at 90.

surrogacy can, in some cases, be even more exploitative than commercial surrogacy. In India, the main motivation for participation in surrogacy was money, so it is unlikely that women would be motivated to participate in altruistic surrogacy arrangements unless they are doing so to help their own family members. When altruistic arrangements take place within the family, it is assumed that no exploitation will take place because families are considered safe havens for women.³⁹⁹ This view ignores the fact that families have also been sites of ongoing gender subordination, domestic violence, and inequalities for women.⁴⁰⁰ Permitting only altruistic surrogacy disregards the fact that a relative might be forced or pressured to carry a baby for a family member against their wishes.⁴⁰¹ By banning commercial surrogacy, the government is in a way reinstating the gender roles that existed within the traditional heterosexual family where gestation, childbirth, and child-rearing are considered the roles of women because of their caring, compliant, and selfless nature and are not considered work or labor, which are the roles of men.⁴⁰² The State is furthering the notion that women are expected to provide “free biological and social reproductive labour” within their family.⁴⁰³

Section 2 (b) of the *Act* prohibits payments of any kind to the surrogate except for her medical expenses, insurance cover, and “such other prescribed expenses”.⁴⁰⁴ The Surrogacy (Regulation) Rules 2022, provide that prescribed expenses include medical expenses related to surrogacy, expenses in case of any complication in pregnancy, at the time of delivery and after birth, expenses on travel, loss of income, follow-up charges, legal expenses on acquiring parental order and birth

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ Arun Muthuvel, *supra* note 379 at 62.

⁴⁰² Rudrappa, “Why is India’s Ban”, *supra* note 248 at 90-91.

⁴⁰³ *Ibid.*

⁴⁰⁴ *The Surrogacy (Regulation) Act*, *supra* note 6 at s 2(b).

affidavit.⁴⁰⁵ But the ambit of these other expenses has not yet been provided, which makes this provision ambiguous. Based on the Canadian experience, we have an idea of the effect such ambiguities can have on the surrogacy practice in a country.

The purpose of The Surrogacy (Regulation) Act, 2021, is to enable infertile married heterosexual couples to become parents. In 2024, the MHFW issued an amendment according to which IPs can use donor gametes if either spouse cannot provide them.⁴⁰⁶ This means that where both partners have medical issues making it impossible for them to contribute their gametes, Indian law does not give them the option of surrogacy. In case of an intending woman opting for surrogacy, she can use only her own egg along with donor sperm.⁴⁰⁷ In my view, this would defeat this abovementioned purpose of the *Act*. Married heterosexual couples in which both partners are unable to provide their own gametes will not be able to start their families through surrogacy. The only options they would have are to either go abroad for surrogacy, provided they can afford it, or enter an underground surrogacy arrangement.

3.6. CONCLUSION

Money is almost always said to be the root cause behind the ill-practices and exploitation that cropped up in the Indian surrogacy industry, but what the lawmakers time and again fail to recognize is that the Indian surrogacy industry remained completely unregulated until 2015. In the absence of a law regulating it, surrogacy was booming in India and was benefiting everybody

⁴⁰⁵ Government of India, Ministry of Health and Family Welfare (Department of Health Research), *Surrogacy (Regulation) Rules, 2022*, G.S.R. 460 (E) [*Surrogacy (Regulation) Rules, 2022*].

⁴⁰⁶ The Gazette of India, Ministry of Health and Family Welfare (Department of Health Research) Notification, New Delhi, 21st February 2024, G.S.R. 119 (E).

⁴⁰⁷ *Ibid.*

involved – fertility clinics with money, IPs with getting a child of their own with little to no legal issues, but the poor vulnerable Indian surrogate was suffering.⁴⁰⁸

Surrogacy in India cannot be understood in a binary sense of good or bad, moral or immoral, ethical or unethical, as perceived in the West. It has a lot of intersectionalities at play like poverty, patriarchy, illiteracy, religion, lack of employment opportunities, and the law.⁴⁰⁹ It involved real actors and had real consequences.”⁴¹⁰ It was not as simple as the West made it appear that a foreign couple came, paid money, and changed the life of a surrogate.

Even the Parliamentary Standing Committee on Health and Family Welfare in its Report was of the view that the way surrogacy was being practiced in India, it was exploiting surrogates but, the reason behind the exploitation was not just money; there was a total lack of oversight and legal protections for surrogates.⁴¹¹

Given the socio-economic conditions prevalent in India, out of the already existing employment options available to surrogates, surrogacy offered similar or in some cases even better working conditions along with more money. By banning commercial surrogacy, the government is depriving surrogates of this opportunity to better their lives, which to me seems more exploitative. I therefore argue that regulated commercial surrogacy seems to be a better regulatory approach for India. I discuss my policy recommendations related to regulated commercial surrogacy in the next chapter.

⁴⁰⁸ Elder, *supra* note 40 at 370.

⁴⁰⁹ Vora, “Experimental Sociality”, *supra* note 249 at 300.

⁴¹⁰ Bailey, *supra* note 342 at 725; Pande, “Commercial Surrogacy in India”, *supra* note 247 at 972.

⁴¹¹ *One Hundred Second Report*, *supra* note 81 at 55.

CHAPTER 4 POLICY RECOMMENDATIONS FOR REGULATED COMMERCIAL SURROGACY FOR INDIA

Why is the ethical debate so often focused on whether surrogates are paid too much and so rarely on whether they are paid too little?⁴¹²

4.1. INTRODUCTION

In this chapter, I suggest policy recommendations for a regulated paid surrogacy framework for India. These recommendations are informed by the lessons learned from the Canadian and Indian surrogacy experiences. They have been designed with oversight and enforcement as cornerstones for future surrogacy policymaking in India. The objective of the recommendations is to safeguard and promote the interests of surrogates and prioritize their informed consent.

As discussed in Chapter 3, a blanket ban on commercial surrogacy in India without changing the existing social and economic conditions would deprive surrogates of a source of income.⁴¹³ Such a ban could end up contributing to the potential for harm and exploitation instead of minimizing it. It could result in pushing surrogacy practice underground to a grey market or a foreign country—most likely to a country where surrogacy services are cheap and the practice operates with little to no legal regulation.⁴¹⁴ Based on the discussion in this thesis, we know that restrictive surrogacy laws can have the unintended effect of encouraging people to pursue surrogacy outside their home jurisdictions. Part of the reason behind what happened in India was that IPs from countries with restrictive domestic surrogacy laws came to India for surrogacy.⁴¹⁵ While any harm or exploitation

⁴¹² Jenni Millbank, “Rethinking “Commercial Surrogacy in Australia” (2015) 12:3 Journal of Bioethical Inquiry 477 at 481.

⁴¹³ Melanie G. Fellowes, “Commercial Surrogacy in India: The Presumption of Adaptive Preference Formation, the Possibility of Autonomy and the Persistence of Exploitation” (2017) 17:4 Medical Law International 249 at 272; *One Hundred Second Report*, *supra* note 81 at 15.

⁴¹⁴ Pande, “To Ban or Not To Ban”, *supra* note 293 at 333-334.

⁴¹⁵ Pande, *Wombs in Labor*, *supra* note 242 at 12.

that takes place in jurisdictions other than India is not the responsibility of the Indian government, it seems important to acknowledge that restrictive domestic surrogacy laws in one country have the potential to cause harm and exploit women and children in other countries.

In arguing in favour of regulated commercial surrogacy, I am not suggesting that commercial surrogacy does not have the potential for harm and exploitation. It undoubtedly does. Money has the power to commodify children and the reproductive capacity of women.⁴¹⁶ Money can also induce women who are otherwise unwilling to participate to take part in surrogacy.⁴¹⁷ But based on the discussion in this thesis, the concerns of harm and exploitation related to commercial surrogacy, though valid, do not seem to be enough to warrant its prohibition. In my view, most of the concerns can be adequately addressed through a regulated commercial surrogacy framework.

4.2. POLICY RECOMMENDATIONS

Before suggesting policy recommendations, it is important to acknowledge that regulation-making in the context of India would have to be undertaken very carefully because the concerns of harm and exploitation linked with surrogacy were a reality in India. Corruption and bribery are commonplace in India, therefore, if regulation-making is not undertaken carefully, permitting commercial surrogacy could inadvertently lead to harm and exploitation of surrogates. To ensure that surrogacy laws and rules are getting complied with, the policy recommendations suggested in this chapter have been backed up by several checks and balances at every step of the surrogacy process. These measures will likely make circumventing the law difficult and less attractive.

⁴¹⁶ Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford: Hart Publishing, 2013) at 332 [Nelson, *Law, Policy and Reproductive Autonomy*].

⁴¹⁷ *Ibid.*

4.2.1. A ROBUST SYSTEM OF OVERSIGHT AND ENFORCEMENT

The biggest lesson that comes from the discussion in this thesis is that in order to ensure compliance with the law and minimize the potential for exploitation of surrogates, just having surrogacy legislation might not be enough. Law along with an effective and efficient system of oversight and enforcement is required to achieve this objective. For this reason, my overall recommendation for India is that there should be a robust system of oversight and enforcement. My other recommendations related to surrogacy agreements, surrogacy agency governance, brokers, fertility clinic governance, among others, make up the more specific aspects of the system they are being discussed within. I should note here that several of my recommendations draw from the work of other scholars working in jurisdictions other than India, but I am recommending the application of these ideas in Indian law and policy.⁴¹⁸

As discussed in Chapter 3, The Surrogacy (Regulation) Act, 2021 provides for the constitution of a National Board, State Boards or Union Territory Assisted Reproductive Technology Boards and one or more Appropriate Authorities (Authorities).⁴¹⁹ The system of oversight and enforcement under my policy recommendations will comprise of these same bodies. In order to ensure that the surrogacy law is getting properly enforced and complied with, it is necessary to have such an extensive system of oversight and compliance. Additionally, while it is difficult to predict the exact scale of surrogacy once regulated commercial surrogacy is legalized in India, recent media reports indicate a growing trend of Indians traveling abroad for surrogacy due to restrictive domestic

⁴¹⁸ I think it is important to acknowledge here that readers may find that many ideas discussed in this section have already been discussed by other scholars in the context of different countries. While I have tried to cite the authors wherever I found such an overlap between their ideas and mine, there still might be instances where I have not done so. This is due to the fact that it is not possible for me to read the entire body of literature on the topic.

⁴¹⁹ *The Surrogacy (Regulation) Act*, *supra* note 6, s 35.

surrogacy laws. It is likely that the number of domestic surrogacy arrangements will increase once regulated commercial surrogacy is permitted.⁴²⁰ Therefore, such a robust system of oversight and enforcement seems prudent.

The primary functions of these bodies would remain the same under my recommendations. I have chosen to keep the same bodies as provided under the current law for two reasons. Firstly, the Indian government has established a robust mechanism for oversight and enforcement under the current law. Considering that these bodies are already operating and have gained some experience in discharging their functions under the current law, it would be more efficient in terms of cost and resources to retain them rather than spending time and resources on establishing new bodies. Secondly, having a regulatory body at every level would help ensure close oversight and compliance with the law, which will ultimately protect surrogates against exploitation. For ease of understanding, before I start discussing the functions of these bodies, I demonstrate their hierarchy using Figure 1.

⁴²⁰ Editorial, “Express View on Indians seeking surrogacy abroad: For love of a child, *The Indian Express* (5 April 2024), online: <<https://indianexpress.com/article/opinion/editorials/express-view-on-indians-seeking-surrogacy-abroad-for-love-of-a-child-9252032/>>.

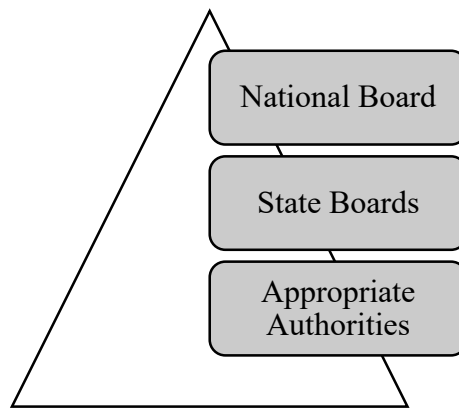


Figure 1 - Hierarchy of the System of Oversight and Enforcement for my policy recommendations

In the next section, I will first briefly explain the functions of these bodies under The Surrogacy (Regulation) Act, 2021, as far as they are relevant to this thesis. I will then discuss their functions under my policy recommendations.

The Surrogacy (Regulation) Act, 2021, provides for the appointment of one or more Authorities for an entire state or any part of it, and union territory.⁴²¹ Appropriate Authorities are at the bottom of the chain of hierarchy of bodies created to regulate the practice of surrogacy under the current surrogacy law. They are responsible for the registration, renewal, cancelation, and suspension of registration of surrogacy clinics.⁴²² The Authorities maintain a record of the grant, renewal, and cancellation of registration of surrogacy clinics and submit it to the National Board.⁴²³ In case of any violations by surrogacy clinics, Authorities investigate the matter and take the required action.⁴²⁴ They oversee the implementation of the provisions, rules and regulations made under the

⁴²¹ *The Surrogacy (Regulation) Act*, *supra* note 6, s 35.

⁴²² *Ibid* ss 12, 36.

⁴²³ *Ibid*.

⁴²⁴ *Ibid*.

Act.⁴²⁵ Appropriate Authorities also make recommendations to the National and State Boards in case any rules and regulations need to be modified.⁴²⁶

Next in the chain of hierarchy are the State Boards. State Boards are constituted for each Indian state and union territory.⁴²⁷ Each State Board reviews the working of Authorities under its jurisdiction.⁴²⁸ State Boards also oversee the implementation of the surrogacy law and recommend changes related to it to the National Board.⁴²⁹ Each State Board sends consolidated reports of surrogacy-related activities undertaken in its respective state to the National Board and central government.⁴³⁰

At the top of this chain of hierarchy is the National Board. This Board is constituted to review and monitor the implementation of the surrogacy law at the national level. The National Board sets minimum standards for infrastructure, equipment, qualified manpower, and a code of conduct at surrogacy clinics.⁴³¹ The National Board monitors the working of the Authorities and State Boards and assists them in performing their functions effectively.⁴³² It also advises the central government on policy matters concerning surrogacy.⁴³³

A National Assisted Reproductive Technology and Surrogacy Registry (National Registry or Registry) is established under The Assisted Reproductive Technology (Regulation) Act, 2021 (*ART*

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid* s 26; State Legislature is the law-making body at State level.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid* s 17.

⁴³² *Ibid* s 25.

⁴³³ *Ibid* ss 17, 25.

Act).⁴³⁴ It is important to note that this thesis discusses the Registry only in the context of surrogacy. The functions of the Registry as assigned under the *ART Act* are not relevant to this discussion. Therefore, under The Surrogacy (Regulation) Act, 2021, the Registry is responsible for keeping a record of the number of surrogacy clinics operating in the country.⁴³⁵ I will now explain the functions of these bodies specific to my policy recommendations.

Under my policy recommendations, the appointment of Appropriate Authorities will be similar to that provided under the current law with one difference. The current law provides for one or more Authorities for the entire state or part thereof. Under my policy recommendations, I propose that each state should have only one Appropriate Authority. This is because of three reasons. Firstly, in the event regulated commercial surrogacy gets legalized in India, the scale of the surrogacy practice will not be the same as it was when commercial surrogacy was unregulated in the country. At that time, most IPs were foreigners, which will not be the case now. Secondly, based on the previous history of surrogacy practice in India, fertility clinics and surrogacy agencies are mostly concentrated in major cities. Therefore, there does not seem to be any need for a state to have more than one Appropriate Authority. Thirdly, having only one Appropriate Authority in each state seems to be an effective approach considering the money and other resources that go into the establishment and maintenance of such bodies.

The functions of the Appropriate Authorities would remain the same under my policy recommendations as provided under the current Indian surrogacy law. Under my policy recommendations, Authorities would be responsible for the registration of surrogacy agencies.

⁴³⁴ *The Assisted Reproductive Technology (Regulation) Act, 2021*, No. 42 of 2021, s 9.

⁴³⁵ *The Surrogacy (Regulation) Act*, *supra* note 6, s 15.

They would have the power to refuse, renew, or cancel any such registrations and keep a record of the same. The Authorities would also be responsible for monitoring surrogacy hostels and conducting periodic inspections of hostels. In case of any violations by surrogacy agencies or hostels, the Authorities would conduct investigations and take required action. Authorities should collect data from fertility clinics, surrogacy agencies, and surrogacy hostels on the various aspects of a surrogacy arrangement along with information on surrogates and forward it to the National Registry. In case the Authorities encounter any challenges in discharging their functions, they must bring the matter before their respective State Board for advice.

As regards State Boards, the appointment and functions would remain the same under my policy recommendations as provided under the current Indian surrogacy law. For the National Board, its appointment and functions related to overseeing the implementation of the surrogacy law, monitoring the working of the Authorities and State Boards, setting minimum standards for surrogacy clinics, and advising the central government on policy matters concerning surrogacy would remain the same under my policy recommendations.

The appointment and overall functions of the National Board would remain the same under my policy recommendations as provided under the current Indian surrogacy law. The functions of the National Board specific to my policy recommendations would include holding consultations with State Boards and stakeholders about the overall functioning of regulated commercial surrogacy and identifying areas of law that require further research and improvement. A consolidated report of the National Board's activities, including recommendations for changes to the surrogacy law, would then be forwarded to the central government.

Together, these three bodies would be responsible for oversight and enforcement of the surrogacy law. The National Assisted Reproductive Technology and Surrogacy Registry will act as a central database for data related to different aspects of surrogacy. I now turn to discuss the specific aspects within my system of oversight and enforcement.

4.2.1.1. SURROGACY AGREEMENTS

Surrogacy arrangements must be captured in a surrogacy agreement. Key components of the agreement include health and life insurance for surrogates. India does not have a publicly funded healthcare system like Canada. Therefore, the surrogacy agreement should require that IPs take out a health and life insurance policy for the health and life of the surrogate.⁴³⁶ The health insurance policy should cover all expenses related to the surrogate's pregnancy along with any pregnancy-related health complications that may arise during or after delivery.⁴³⁷ The policy must also provide for compensation to the surrogate in case of any permanent injuries resulting from her participation in the arrangement.⁴³⁸ Additionally, a life insurance policy should be taken out for the surrogate's life. In case the surrogate passes away due to complications from surrogacy, her family would receive the insurance money and be taken care of.⁴³⁹

⁴³⁶ *Illinois Gestational Surrogacy Act*, 750 ILCS 47/1-47/75, 2005, s 20 (a) (6) [*Illinois Gestational Surrogacy Act*]. This Act provides that the surrogate should obtain a health insurance policy to cover the main medical treatments and hospitalization for the duration of pregnancy and eight weeks after the birth of the child. The intended parents can also take the policy on behalf of the surrogate.

⁴³⁷ Jennifer Rimm, "Booming Baby Business: Regulating Commercial Surrogacy in India" (2009) 30:4 *University of Pennsylvania Journal of International Law* 1429 at 1461.

⁴³⁸ *Ibid.*

⁴³⁹ Instead of having two separate insurance policies, another way this can be done is by taking a single insurance policy for the surrogate, as mentioned in *The Surrogacy (Regulation) Act*, *supra* note 6, s 4 (iii) (a) (III). The Act provides for an insurance coverage for the surrogate for a period of thirty-six months, which covers post-birth delivery complications, taken from an insurance company or agent under the Insurance Regulatory and Development Authority Act, 2000. This insurance coverage includes compensation for medical expenses, health issues, specified loss, damage, illness, or death of surrogate mother during surrogacy.

There are concerns that the bodily autonomy of surrogates gets comprised because of their participation in surrogacy.⁴⁴⁰ To minimize this concern, surrogacy agreements must expressly mention that the surrogate, along with her fertility doctor, would have control over medical decision-making throughout pregnancy. This way IPs will not be able to force surrogates to have an abortion or fetal reduction in case of multiple pregnancy. All decisions related to abortion must require the surrogate's consent and must be made in compliance with the grounds for termination of pregnancy provided under The Medical Termination of Pregnancy Act, 1971.⁴⁴¹ This will ensure that the surrogate is not treated as a mere carrier and has some say in matters related to her own body during pregnancy.

Some other ways through which surrogate's position can be strengthened and her interests be protected within surrogacy agreements are - outlining the payment structure and schedule in the surrogacy agreement, providing remedies in case IPs renege on the agreement after implantation,⁴⁴² and in the case of a miscarriage, entitling the surrogate to receive some portion of the total payment she would have received had the pregnancy been successful.⁴⁴³

4.2.1.2. SURROGACY AGENCY GOVERNANCE

Surrogacy agencies should be governed within a regulated commercial surrogacy regime with a view to minimizing the potential for exploitation of surrogates. Prior to the prohibition of commercial surrogacy, surrogacy agencies operated in a free market without any regulation, and

⁴⁴⁰ See page 9-10.

⁴⁴¹ *The Medical Termination of Pregnancy Act, 1971*, Act No. 34 of 1971, ss 3-5.

⁴⁴² *Illinois Gestational Surrogacy Act*, *supra* note 436. The Act is considered exemplary surrogacy legislation by many. It includes progressive requirements like mental health screening, independent legal consultation, a minimum age requirement for surrogate, and the obligation for IPs to support the child, which they cannot refuse to do.

⁴⁴³ Busby & Vun, *supra* note 59 at 89.

their business flourished in India. IPs entered surrogacy arrangements either with fertility clinics or surrogacy agencies.⁴⁴⁴ If surrogacy agencies are left unregulated, driven by the incentive of money, they could prioritize the interests of the IPs over those of surrogates.⁴⁴⁵ As a result, there is a high risk of exploitation for surrogates.⁴⁴⁶

In Canada, despite the *AHRA* prohibiting surrogacy agencies from taking payments for arranging surrogacy arrangements, surrogacy agencies are charging money for such services, and their business is flourishing. The experience of both countries suggests that regulating surrogacy agencies is important to prevent contravention of the law and reduce the potential for exploitation of surrogates.

Currently, The Surrogacy (Regulation) Act, 2021 is silent about the legal status of surrogacy agencies in India. In my view, in order to give Indian surrogacy practice some structure, professional for-profit surrogacy agencies are essential, but their role should be strictly separated from fertility clinics. These agencies play an important role in facilitating a smooth surrogacy arrangement.⁴⁴⁷ In their absence, parties can find navigating the complexities of surrogacy arrangements difficult.⁴⁴⁸

Every surrogacy agency operating in a state or union territory must be registered with its respective Appropriate Authority. The maximum fee these agencies can charge for their services should be

⁴⁴⁴ See generally Pande, *Wombs in Labor*, *supra* note 242; Deomampo, *Transnational Reproduction*, *supra* note 304 at 50.

⁴⁴⁵ Rims, *supra* note 437 at 1457-1458.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Millbank, *supra* note 412 at 483.

⁴⁴⁸ *Ibid* at 490.

fixed by law. This is done with a view to prevent surrogacy agencies from charging unjustifiably high amounts from already vulnerable IPs.

Surrogacy agencies should work only with surrogates who are registered with them. This will help keep track of the number of surrogates each agency works with. To safeguard surrogates' interests, there should be no limit on the number of agencies a surrogate can register with. This way, if a surrogate is unhappy with an agency, she is free to work with another agency she is registered with.

Before registering a surrogate, surrogacy agencies must screen her. Screening will evaluate the mental and physical capacity of surrogate and help ensure that her decision to participate in surrogacy is free from any coercion or undue influence.⁴⁴⁹ The same screening process must be followed for IPs as well. This will ensure that IPs are mentally prepared for surrogacy and have the financial capacity to pay for surrogacy expenses.⁴⁵⁰

When commercial surrogacy was thriving in India, there were instances where minor girls were coerced by their families into surrogacy for financial gain. Surrogacy agents forged documents and produced fake age proofs to show these minors as adults.⁴⁵¹ To reduce the risk of such practices, surrogacy agencies must prioritize age verification during the screening process. Furthermore, it should be mandatory for these agencies to maintain copies of age proof provided by surrogates.

⁴⁴⁹ *Illinois Gestational Surrogacy Act*, *supra* note 436, s 20, sets forth the requirement for the surrogate to complete a mental health evaluation before entering a surrogacy arrangement.

⁴⁵⁰ Busby & Vun, *supra* note 59 at 87.

⁴⁵¹ Jargilo, *supra* note 249 at 348.

After the initial screening, surrogacy agencies must provide clear and complete information to the surrogate about the surrogacy arrangement, including risks, rights, liabilities, and duties.⁴⁵² Surrogacy agencies must also provide psychological counseling, both jointly and individually to the surrogates and IPs.⁴⁵³ This should be done with the help of professionals like counselors, and psychologists. The cost of such services will be paid by the IPs. This counseling should be provided before the parties enter the surrogacy agreement and must extend even after delivery.

At least one former surrogate must be hired as part of the psychological counseling team. In Chapter 3, I mentioned that during their stay at the surrogacy hostel, first-time surrogates often clarify doubts or questions related to their pregnancy with experienced surrogates living there.⁴⁵⁴ Therefore, surrogates can gain a lot from the experiences of former surrogates. Including a former surrogate in the counseling team will enable current surrogates to learn from and find support in similar experiences of former surrogates.

Surrogacy agencies must provide surrogates with independent legal consultation from a legal counsel of the surrogate's choice.⁴⁵⁵ The cost of these services will be paid by the IPs. To ensure that surrogacy agreements are not exploitative, the surrogate should be able to clarify doubts and have the terms of her agreement reviewed by a legal counsel.⁴⁵⁶ Legal advice will also give

⁴⁵² Millbank, *supra* note 412 at 483-485; Busby & Vun, *supra* note 59 at 87-88; Rims, *supra* note 437 at 1458.

⁴⁵³ Iannacci, *supra* note 10 at 1267. Joint counseling is essential for avoiding conflicts or misunderstandings between the parties. Ideally conducted with a health care professional, this counseling allows surrogates and intended parents to discuss their expectations from the arrangement and from each other. They can also address any potential problems that might arise during the arrangement. This joint counseling facilitates 'pre-conception relationship building between parties', the benefits of which are discussed in footnote 458.

⁴⁵⁴ See page 54.

⁴⁵⁵ Rims, *supra* note 437 at 1459.

⁴⁵⁶ *Illinois Gestational Surrogacy Act*, *supra* note 436. A similar provision is provided under s 20 (a)(5) of the *Illinois Gestational Surrogacy Act*. See also Brett Thomaston, "A House Divided against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System" (2016)

surrogates a better understanding of their rights and obligations within the arrangement. All communication made with the surrogate during screening, counseling, and legal consultation must be in a language the surrogate understands.

Surrogacy agencies must be required to collect data on the characteristics of surrogates, their demographics, mental health, average family income, amount of payment received by surrogates under regulated commercial surrogacy regime, benefits of counseling and consultation received, and overall satisfaction of surrogates with the arrangement. The agencies should also be required to maintain a record of the screening, counseling and legal consultation sessions.

Additionally, screening and counseling will enable surrogacy agencies to carefully select and match like-minded parties together.⁴⁵⁷ Matching like-minded parties is likely to reduce the chances of misunderstandings or disputes later on in the arrangement, as both parties will have a fair idea of what to expect from the arrangement.⁴⁵⁸ In case any misunderstanding or dispute does arise, surrogacy agencies can refer the parties to professionals, such as a mental health professional or

49:4 John Marshall Law Review 1155 at 1165; Devon Quinn, "Her Belly, Their Baby: A Contract Solution for Surrogacy Agreements" (2018) 26:2 Journal of Law and Policy 805 at 832.

⁴⁵⁷ Millbank, *supra* note 412 at 483-484; Rims, *supra* note 437 at 1457.

⁴⁵⁸ Rims, *supra* note 437 at 1457; Millbank, *supra* note 412 at 483-484; CB Kleinpeter, TL Boyer, & ME. Kinney, "Parent's Evaluation of a California-based Surrogacy Program" (2006) 13:4 Journal of Human Behavior in the Social Environment 1 at 23; Janice C. Ciccarelli, The surrogate mother: A post birth follow-up (Ph.D. Dissertation, California School of Professional Psychology 1997) at 51; See Busby & Vun, *supra* note 59 at 87-88. Karen Busby and Delaney Vun argue that empirical evidence has established that 'pre-conception relationship building' between the parties is important to the success of a surrogacy arrangement. This is facilitated by individual advice, as well as individual and joint counseling on issues that might arise during surrogacy, at the time of birth, or even after birth. This enables the parties to come to a common understanding about the arrangement and allows potential issues to be addressed and resolved early on. Ultimately, this contributes to the success of the arrangement; See also Yee, Hemalal, Librach, "Not my child to give away", *supra* note 173 at 8. Even Yee's empirical study found that pairing 'like-minded' surrogates and intended parents together increased the chances of a long-lasting harmonious relationship.

mediator, depending on the nature of the dispute.⁴⁵⁹ This will ultimately ensure informed consent of the surrogates and contribute to successful surrogacy outcomes.⁴⁶⁰

4.2.1.3. BROKERS

During the commercial surrogacy boom in India, surrogacy agencies and clinics often recruited surrogates through brokers. Typically, former surrogates or egg donors acted as brokers.⁴⁶¹ These brokers were paid to induce poor women from their communities to participate in surrogacy.⁴⁶² In some cases, another layer was added to this recruitment process with the “higher-level agent” who screened surrogates and acted as a broker between brokers and surrogacy clinics.⁴⁶³ These brokers charged a brokerage fee to both the clinic or agency and the surrogate.⁴⁶⁴ Under my policy recommendations, brokers would be prohibited from mediating the relationship between surrogates and the surrogacy agency or between surrogates and the fertility clinic. This is done to eliminate the risk that poor vulnerable women might be pressured or induced out of their need to earn money to pay a brokerage fee to get introduced to surrogacy agencies.

4.2.1.4. FERTILITY CLINIC GOVERNANCE

Before commercial surrogacy was banned, India witnessed an unprecedented growth in the number of fertility clinics when commercial surrogacy was at its peak. Fertility clinics operated without any legal regulation and exploited Indian surrogates. In a regulated commercial surrogacy legal

⁴⁵⁹ Millbank, *supra* note 412 at 484; Yee, Hemalal, Librach, “Not my child to give away”, *supra* note 173 at 8.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Pande, *Wombs in Labor*, *supra* note 242 at 66; Deomampo, *Transnational Reproduction*, *supra* note 304 at 51.

⁴⁶² Pande, *Wombs in Labor*, *supra* note 242 at 46, 58; Deomampo, *Transnational Reproduction*, *supra* note 304 at 51.

⁴⁶³ Deomampo, *Transnational Reproduction*, *supra* note 304 at 51.

⁴⁶⁴ Pande, *Wombs in Labor*, *supra* note 242 at 95, 47; Deomampo, *Transnational Reproduction*, *supra* note 304 at 51.

regime, it seems imperative that these clinics are regulated so that the potential for exploitation of surrogates is minimized.

The current surrogacy law and *ART Act* have separated surrogacy clinics from assisted reproductive technology clinics. Ideally, there should be no such separation because surrogacy uses ARTs, and usually, the same clinics offer both surrogacy and ART procedures.⁴⁶⁵ Instead of separating the two, it is recommended that clinics providing ART services should be comprehensively regulated under the *ART Act*.⁴⁶⁶ The Surrogacy (Regulation) Act should provide for the regulation of aspects specific to surrogacy.⁴⁶⁷ The discussion in the following section is limited to the surrogacy- related aspect of these clinics, which I will refer to as fertility clinics.

The surrogacy law should mandate the registration of every fertility clinic operating within a state or union territory with its respective Appropriate Authority.⁴⁶⁸ This registration should be subject to renewal every few years. The Authorities shall have the power to refuse to renew or cancel the registration of fertility clinics for failing to meet legal requirements.⁴⁶⁹ These requirements include adhering to registration protocols, properly obtaining informed consent of surrogates, maintaining minimum standards for equipment and staff qualifications, keeping records of surrogacy arrangements, and complying with compensation regulations.⁴⁷⁰

⁴⁶⁵ Aditya Kumar, “Issues for Consideration: Assisted Reproductive Technology (Regulation) Bill, 2021”, PRS Legislative Research, Institute for Policy Research Studies (December 4, 2021), online: <<https://prsindia.org/billtrack/prs-products/issues-for-consideration>>.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ It is not clear why the Indian government has separated surrogacy clinics under *The Surrogacy (Regulation) Act, 2021* and assisted reproductive technology clinics under *The Assisted Reproductive Technology (Regulation) Act, 2021*.

⁴⁶⁹ *The Surrogacy (Regulation) Act*, *supra* note 6. This power is similar to what is already provided under ss 11-13.

⁴⁷⁰ *The Surrogacy (Regulation) Act*, *supra* note 6, s 4; *The Assisted Reproductive Technology (Regulation) Act*, *supra* note 435, s 15.

Doctors at fertility clinics must provide complete information about the medical and psychological aspects of surrogacy to surrogates before the treatment begins as well as throughout the pregnancy. Surrogates should be informed about the risks involved in IVF, multiple pregnancies, selective reduction, and c-section deliveries. They should be made aware of their right to withdraw consent at any time before implantation. This information must be provided in a language the surrogate understands.⁴⁷¹

Fertility clinics should keep a record of every surrogacy arrangement taking place on their premises. At a minimum, this record should include the age and other health related information of the surrogate, number of embryos transferred and the reasons for this decision, how surrogates respond to fertility treatment as compared to other IVF patients, and details of the method of delivery. In case of c-section deliveries, the record should also include the reason behind the decision.

The surrogacy experiences of Canada and India suggest that the number of embryos transferred to the surrogate has been a cause for concern and requires strict regulation. Transferring more embryos increases the likelihood of multiple births, which can be risky for both the mother and babies, with potential long-term effects.⁴⁷² One way the number of embryos to be transferred can be regulated is by implementing the practice of elective single embryo transfer (eSET), similar to the approach adopted in the UK.⁴⁷³ In the UK, fertility clinics select one embryo instead of two for

⁴⁷¹ Pande, *Wombs in Labor*, *supra* note 242 at 177.

⁴⁷² Human Fertilisation & Embryology Authority, “One at a time: Better outcomes from fertility treatment”, online: <<https://www.hfea.gov.uk/about-us/our-campaign-to-reduce-multiple-births/>>.

⁴⁷³ *Ibid.* One at a Time is a campaign launched by the Human Fertilisation & Embryology Authority in the UK to reduce the high multiple birth rates from IVF in the country.

patients who qualify. Under this practice, fertility clinics develop their own criteria for determining which patients qualify for single embryo transfer and the Human Fertilisation and Embryology Authority (HFEA) acts as an oversight agency to monitor and inspect clinics for compliance.⁴⁷⁴ This approach has significantly reduced the number of multiple pregnancies.⁴⁷⁵

The Indian government published The Surrogacy (Regulation) Rules, 2022, which stipulate that only one embryo can be transferred to the surrogate per IVF cycle, with exceptions allowing up to three embryos in certain cases.⁴⁷⁶ The effectiveness of this rule remains to be seen. However, in my view, simply setting a limit on the number of embryos may not be sufficient to prevent the transfer of multiple embryos. It is crucial that compliance with this rule is monitored. For this, requiring fertility clinics to collect data on the number of embryos transferred per IVF cycle and imposing strict punishments for violations, including the cancellation of registration of fertility clinics, could be helpful.

4.2.1.5. SURROGACY HOSTELS

Surrogacy hostels garnered considerable criticism during the days of unregulated commercial surrogacy in India, and rightly so, because they confined surrogates and controlled their life for the duration of pregnancy. However, these hostels also offered surrogates better living conditions and an opportunity to escape the social stigma attached to surrogacy in India.

In my view, surrogacy hostels are a necessary evil in the practice of surrogacy in India. Since Indian surrogates come from an impoverished socio-economic background, if they stay at home during

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.* Multiple births fell from 24% in 2008 to 10% in 2017.

⁴⁷⁶ *Surrogacy (Regulation) Rules, 2022, supra* 405. The circumstances necessitating a transfer of three embryos must be stated.

pregnancy, there is a high possibility that they will continue to perform household duties and not get adequate rest. This could lead to serious health implications, including miscarriage, which could result in surrogates losing the money promised to them for the surrogacy and the IPs losing their chance to start a family. One way to avoid this situation is by providing surrogates with money to hire help for household work and child support during their pregnancy. However, it would be difficult to ensure that this money is used for its intended purpose. There is a high chance that surrogates might want to save this money instead of hiring help. Therefore, in my opinion, giving surrogates the option to stay at a surrogacy hostel can help ensure a smooth pregnancy.

The management of these hostels will need to change under the regulated commercial surrogacy regime. One way these hostels can be managed is by permitting only registered surrogacy agencies or fertility clinics, or both, to jointly operate them. Surrogates should have the option to live at home with their families or at the hostel during pregnancy. Surrogates cannot be forced to stay at the hostels against their will. The hostels will serve as a place of boarding and lodging for surrogates. Family members of surrogates will be allowed to visit but not stay overnight.

It would be mandatory for hostels to meet certain minimum standards related to sanitation, quality of food, staff required to manage and maintain the premises, providing enough privacy and space to each surrogate, and offering recreation facilities like TV and other forms of entertainment. Additionally, hostels must provide vocational training to surrogates during their stay. This training will enable surrogates to become gainfully employed or self-employed post-surrogacy.

Another way to manage surrogacy hostels can be by permitting only the state government to operate them. State governments can open one or more surrogacy hostels (depending on the

demand for surrogacy) in the city or cities with highest concentration of registered clinics and agencies. All other aspects of management and administration shall remain the same as discussed in the previous paragraph. Additionally, every hostel will be required to keep a record of information related to the surrogates residing in the hostel, which could include the number of surrogates, maximum capacity of the hostel, and the surrogate's opinion about vocational training offered at the hostel.

4.2.1.6. PAYMENT STRUCTURE

Now comes an important question: what should the payment system within a regime of regulated commercial surrogacy in India look like? Before answering this question, it is important to acknowledge that payment, irrespective of the amount, gives rise to a market in reproduction. But commercial surrogacy is not tantamount to the sale of children. In the case of surrogacy, parties enter into the contract even before the child is conceived.⁴⁷⁷ Therefore, even though surrogacy contracts involve children as their focus, this does not equate to treating children as commodities within these contracts.⁴⁷⁸

The surrogate agrees to carry the child to term, changes her lifestyle according to the medical requirements of pregnancy, undergoes numerous medical exams, undertakes the risks involved in IVF and pregnancy, and gets paid only if she delivers the baby.⁴⁷⁹ The money she receives is not for selling the baby but for her reproductive labor.⁴⁸⁰ Additionally, for numerous women who

⁴⁷⁷ For detailed discussion see R Jo Kornegay, "Is Commercial Surrogacy Baby-selling?" (1990) 7:1 Journal of Applied Philosophy 45 at 46; Jason K.M. Hanna, "Revisiting child-based objections to commercial surrogacy" (2010) 24:7 Bioethics 341 at 345.

⁴⁷⁸ *Johnson v Calvert*, 851 P.2d 776 (Cal. 1993) [*Johnson v Calvert*].

⁴⁷⁹ Kornegay, *supra* note 477 at 46; Hanna, *supra* note 477 at 343.

⁴⁸⁰ Kornegay, *supra* note 477 at 46; Hanna, *supra* note 477 at 345.

pursue surrogacy, economic hardship is a compelling factor, yet this motivation does not degrade or strip surrogacy arrangements from their respectability.⁴⁸¹

As regards surrogates, the payment system should be designed to ensure that surrogates are paid fairly for their participation without being exploited. It is evident that the main motivation for Indian surrogates to participate in surrogacy was money. Surrogacy offered money which was equivalent to nearly ten years of surrogate's regular earning, along with similar or better working conditions. Therefore, while payments to surrogates should be permitted, they must be managed carefully and not be left to market forces. In my opinion, implementing a system of minimum and maximum payments would be beneficial.

Every surrogate should be entitled to a minimum payment for her participation in surrogacy.⁴⁸² This payment could cover her lost wages if she is employed or reasonable living expenses if she is unemployed before conception, along with medical, and other pregnancy-related expenses, for a period of twelve months.⁴⁸³ Reasonable living expenses should be determined based on the prevailing social and economic conditions in the country.⁴⁸⁴ The minimum payment should also include the surrogate's fee for the time, commitment, energy, and risk she undertakes in carrying and delivering the child.⁴⁸⁵ The fixed minimum should not be subject to negotiation. This will

⁴⁸¹ *Johnson v. Calvert*, *supra* note 478.

⁴⁸² Katarina Trimmings & Paul Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" (2011) 7:3 *Journal of Private International Law* 627 at 643. The idea of fixing "minimum compensation" in the context of international surrogacy has been suggested by Katarina Trimmings and Paul Beaumont in this article. The same concept can be transplanted to fit the Indian context.

⁴⁸³ *Ibid* at 643-644.

⁴⁸⁴ The example given in the article by Trimmings and Beaumont is that reasonable living expenses could be equal to three times the minimum salary in surrogate's home country.

⁴⁸⁵ Sarah Jefford, "Compensated or Commercial Surrogacy?", online: (blog) < <https://sarahjefford.com/compensated-or-commercial-surrogacy/>>. Sarah Jefford is an Australian surrogacy lawyer who advocates that surrogates should be compensated for the time, commitment, energy, and risk they undertake by being pregnant and delivering the child, which are difficult to quantify.

protect the surrogate against any pressure from IPs, agencies, or clinics to accept less than fair payment for her participation in surrogacy.

The maximum payment that can be paid to surrogates for participating in surrogacy should be capped.⁴⁸⁶ This amount should be determined based on the social and economic context of the country. The central government or National Board should fix a generally applicable maximum payment, and the Appropriate Authority shall determine in each case whether the set amount is sufficient, considering any special physical or mental needs or risks to the parties, and make adjustments to this amount if necessary. Any payments made in violation of minimum and maximum amounts fixed by law should be subject to criminal punishment.⁴⁸⁷ The Appropriate Authority shall be responsible for ensuring that payments made to surrogates comply with the law.

If the maximum amount is not capped, the cost of surrogacy would be left to be determined by surrogacy agencies, clinics, and IPs, like before. This could have two potential disadvantages. Firstly, some IPs may be willing to pay more in order to exercise greater control over the surrogate throughout her pregnancy. Clinics might get induced by such IPs' offers to pay more than the going rate for their services and transfer more embryos to the surrogate than permitted.⁴⁸⁸ Secondly, not capping the maximum payment can potentially make surrogacy arrangements costly. As seen in the Canadian experience, the absence of regulations determining which surrogacy expenses are legally permitted to be reimbursed has made surrogacy expensive.⁴⁸⁹ Similarly, not capping the

⁴⁸⁶ Nelson, "Toward Permissive Regulation", *supra* note 100 at 202. Erin Nelson has suggested capping the maximum amount that can be paid to surrogates in Canada. A similar system of payment can be implemented in India.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Motluk, "Anatomy of a Surrogacy", *supra* note 161. In some cases of surrogacy, IPs try to control every aspect of a surrogate's life, including her lifestyle, diet, exercise, and other related areas.

⁴⁸⁹ Carsley, "Regulating Reimbursements", *supra* note 137 at 826.

maximum payment for surrogacy could lead to a situation where only affluent IPs can afford surrogacy in India. This would be unfair to IPs who cannot afford the high costs of surrogacy. Capping the maximum payment will help keep surrogacy more accessible for all IPs. It will also provide uniformity to payments made for surrogacy throughout the country and prevent the formation of a competitive market in surrogacy.

4.2.1.7. CONSULTATION WITH SURROGATES

For surrogacy policies to be effective, it is important to include the voices of surrogates in policymaking. Throughout Canadian legislative history on surrogacy, there has been no explicit attention to or call for feedback from Canadian surrogates. This suggests that their voices might be absent from the Canadian surrogacy debate.⁴⁹⁰ Similarly, in India, the voices of Indian surrogates have not been given due consideration by lawmakers throughout the history of surrogacy laws. When the ICMR issued the letter banning foreigners from coming to India for surrogacy, several protests were carried out by Indian surrogates against the ban.⁴⁹¹ Additionally, in the empirical studies mentioned in this thesis, Indian surrogates expressed the need for and importance of the money they earned from surrogacy arrangements.⁴⁹² Despite this, the government went ahead and first banned commercial surrogacy for foreigners and then banned it entirely.

Surrogates are the most directly affected by any policy decisions on surrogacy, so it only makes sense that their voices and opinions be included in future policymaking on surrogacy. This

⁴⁹⁰ See Chapter 2.

⁴⁹¹ TNN, “Surrogate mothers stage protest in Anand”, *The Times of India* (30 October 2015), online: < <https://timesofindia.indiatimes.com/city/ahmedabad/Surrogate-mothers-stage-protest-in-Anand/articleshow/49589988.cms>>; TNN, “Women protest surrogacy ban for foreigners”, *The Times of India* (1 November 2015), online: < <https://timesofindia.indiatimes.com/city/delhi/Women-protest-surrogacy-ban-for-foreigners/articleshow/49612904.cms>>; Jargilo, “Regulating the Trade”, *supra* note 249 at 353.

⁴⁹² Pande, *Wombs in Labor*, *supra* note 242 at 176.

inclusion will ensure that their interests are reflected in the reformed law. Surrogates should be encouraged to participate in deliberations and decision-making on surrogacy policy. This way, Indian surrogates will be able to find their voices in the surrogacy debate. Additionally, lawmakers will gain awareness of the actual experiences and concerns of the surrogates related to the surrogacy law and practice. Policies that reflect the needs of the population they are designed for tend to be more effective.⁴⁹³

Participation of surrogates in surrogacy policymaking can be achieved by developing a public consultation mechanism focused specifically on participation of surrogates.⁴⁹⁴ Surrogates form a minority of the general public, and there is a risk that their interests may get undervalued relative to other segments of the public if the public as a whole is consulted. To prevent their interests from seeming relatively unimportant, a targeted public consultation mechanism dedicated to involving surrogates must be established. Some ways to prioritize the involvement of surrogates include – specialized forums like online platforms, town hall meetings, establishing advisory panels consisting of surrogates, surveys, and in-depth interviews with surrogates.

It should be noted that including the voices of surrogates does not guarantee that the potential of harm and exploitation in surrogacy will be alleviated or that all interests of surrogates will be represented in the final policy. However, in my opinion, including surrogates' voices in surrogacy

⁴⁹³ OECD Development Policy Papers, "What Does "Inclusive Governance" Mean? Clarifying Theory and Practice" (March 2020) OECD Publishing No. 27 at 24.

⁴⁹⁴ Vanessa Gruben & Angela Cameron, "Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forward" (2017) 54:3 Alberta Law Review 665 at 679. In this article, the authors recommend public consultation before making policy decisions on AHR in general and sperm and egg donation in particular. They argue that, in order to make changes in the law related to gamete donation in Canada, everybody involved in the process of donation - i.e. donor conceived persons, donors, and intended parents - should be heard so that their interests are reflected in the reformed law. The same idea can be applied to surrogacy policymaking.

policymaking is a good starting point in ensuring that at least some interests of surrogates are represented in future surrogacy laws and policies. This approach will ultimately help mitigate the potential for exploitation of surrogates.

4.2.1.8. DATA COLLECTION

It is important to mandate data collection on surrogacy arrangements in India. Based on the surrogacy experiences of Canada and India, the absence of a central database, makes it difficult to evaluate the effectiveness of surrogacy laws and policies. Therefore, collecting data on the experiences of surrogates and other aspects of surrogacy arrangements is crucial for drafting evidence-based surrogacy policy. The data will provide clarity on how surrogacy is practiced in the country and determine whether permitting regulated commercial surrogacy is exploiting or benefiting surrogates.⁴⁹⁵ The structure for data collection under my policy recommendations has already been explained under the discussion related to Appropriate Authorities, State Boards, and the National Registry.

4.2.1.9. REVIEW OF SURROGACY LAW

We cannot know the full effects of any regulatory approach without actually implementing it and observing the results. To enable lawmakers to determine whether the law is working as intended, the legislation should contain a provision for periodic review by a committee or panel constituted by the central government.⁴⁹⁶ The purpose of the review will be to assess the actions taken by the

⁴⁹⁵ Nelson, “Toward Permissive Regulation”, *supra* note 100 at 202-203.

⁴⁹⁶ Ottawa, Health Canada, *Government of Canada Launches Legislative Review of the Cannabis Act* (Ottawa, ON, 22 September 2022), online: < <https://www.canada.ca/en/health-canada/news/2022/09/government-of-canada-launches-legislative-review-of-the-cannabis-act.html>>. This recommendation is inspired by legislative review of the *Cannabis Act* S.C. 2018, c.16.

oversight bodies toward achieving the objectives of the surrogacy law and to evaluate how successful these bodies have been in meeting those objectives.

The review will also help in identifying areas that need further improvement and ensure that the law keeps up with advances in the science of assisted human reproduction and achieves its objectives. The committee or panel can also advise oversight bodies if they are facing any challenges. If, after advising, the committee or panel believes that any or all oversight bodies are still not performing their functions effectively, it can recommend that the central government issue a warning or dissolve the concerned body and constitute a new one, as the case may be.

4.3. CONCLUSION

When it comes to regulating surrogacy, surrogacy is best described as a legal aporia.⁴⁹⁷ No approach to regulating it is the perfect approach.⁴⁹⁸ Every regulatory approach will give rise to some moral, legal, and ethical issues. Therefore, the quest is not to find a solution that addresses all issues but to determine “which of the several flawed alternatives seems least harmful.”⁴⁹⁹ In my opinion, based on the evidence discussed in this thesis, regulated paid surrogacy seems to be that least harmful approach. The policy recommendations proposed in this chapter would be a good starting point for future surrogacy law in India. They will likely minimize the potential for harm and exploitation and significantly promote the interests of surrogates.

⁴⁹⁷ Pande, *Wombs in Labor*, *supra* note 242 at 170-174.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Brandel, *supra* note 12 at 490.

CHAPTER 5 CONCLUSION

In 2024, one thing that looks quite clear is that surrogacy is here to stay, and demand is only going to increase. When one international destination closes its doors to surrogacy, another one comes along - this cycle will keep on going. I have discussed Canada and India as two specific examples in this thesis. But surrogacy arrangements are entered into all over the world and are not limited to just these two countries.

The discussion in this thesis has highlighted that restrictive domestic laws on surrogacy either push surrogacy to an underground market or to an international destination where such arrangements are legally permitted, or the surrogacy industry operates in a legal vacuum. Where surrogacy gets pushed to an underground market or to a country where it operates in a legal vacuum, the chances of exploitation of surrogates are high.

Today, surrogacy is considered a valid family building method. Therefore, instead of restricting it, domestic laws should facilitate it. But countries usually completely ban commercial surrogacy and permit altruistic surrogacy instead of undertaking the complex task of regulating surrogacy in a way that minimizes the potential for harm and exploitation associated with the practice and safeguards the interests of surrogates.

In my opinion the time is now to start acknowledging the fact that money is not the main concern (or the only concern) for exploitation to become a reality in a surrogacy arrangement. There is a need for pragmatic domestic surrogacy laws and policies to regulate the practice. Based on the discussion in this thesis, that pragmatic approach in my opinion is – regulated commercial

surrogacy. I should acknowledge that by permitting regulated commercial surrogacy we might end up creating new problems while trying to solve some of the old ones, but until we put it into effect, we will never know its potential. The built-in system of review recommended in this thesis will help keep track of the impact regulated commercial surrogacy will have on surrogates. While this approach will not alleviate all the concerns around surrogacy, it offers a pragmatic starting point to initiate a meaningful change in future surrogacy regulation.

BIBLIOGRAPHY

LEGISLATION: CANADA

Assisted Human Reproduction Act SC 2004, c2.

The Constitution Act, 1876, 30 & 31 Vict, c 3.

Cannabis Act S.C. 2018, c.16.

LEGISLATION: INDIA

The Surrogacy (Regulation) Bill, 2016, No.37/LN/Ref./July/2018.

The Surrogacy (Regulation) Bill, 2019, Bill No. 156-C of 2019.

The Assisted Reproductive Technology (Regulation) Act, 2021, No. 42 of 2021.

The Constitution of India, 1950.

The Medical Termination of Pregnancy Act, 1971, Act No. 34 of 1971.

The Surrogacy (Regulation) Act, 2021, No.47 OF 2021, C-1.

LEGISLATION: USA

Illinois Gestational Surrogacy Act, 750 ILCS 47/1-47/75, 2005.

JURISPRUDENCE: CANADA

R v. Picard and Canadian Fertility Consulting Ltd: Agreed Statement of Facts, online:

Novel Tech Ethics

www.dal.ca/content/dam/dalhousie/pdf/sites/noveltechethics/AHRA_Facts.pdf

(accessed: 29 July 2024).

Reference re: Assisted Human Reproduction Act, 2008 QCCA 1167.

Reference re Assisted Human Reproduction Act, 2010, SCC 61.

JURISPRUDENCE: INDIA

Arun Muthuvel v. Union of India & Ors, (2022).

Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

Jan Balaz v. Anand Municipality and Ors. High Court of Gujarat (India), LPA 2151/2009 (Gujarat H.C. 2009).

National Legal Service Authority v. Union of India, AIR 2014 SC 1863.

Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

Olga Tellis v. Bombay Municipal Corporation and Others, 1986 AIR 180, 1985 SCR Supl. (2) 51.

Suchita Srivastava v. Chandigarh Administration, (2009) 14 SCR 989, (2009) 9 SCC 1.

Tulsa & Ors v. Durghatiya & Ors, 2008 4 SCC 520.

JURISPRUDENCE: USA

Johnson v Calvert, 851 P.2d 776 (Cal. 1993).

In the Matter of Baby M, 217 NJ Super 313 (Ch Div 1987), rev'd 109 NJ 396 (1988).

SECONDARY MATERIAL: BOOKS

Andrews, Lori, 1989, *Between Strangers: Surrogate mothers, Expectant fathers, and Brave New Babies* (New York: Harper and Row, 1989) at 259.

Atwood, Margaret, *The Handmaid's Tale*, (Toronto: Random House, 2019).

Cattapan, Alana, Vanessa Gruben & Angela Cameron, "Introduction: Regulatory Pasts and Futures" in Vanessa Gruben, Alana Cattapan, & Angela Cameron, eds, *Surrogacy in Canada: critical perspectives in law and policy* (Toronto: Irwin, law, 2018) 1.

Corea, Gena, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, (New York: Harper & Row, 1985).

DasGupta, Sayantani & Shamita DasGupta, "Motherhood jeopardized: reproductive technologies in Indian communities" in Wendy Chavkin & JaneMaree Maher, eds, *The Globalisation of Motherhood: Deconstructions and reconstructions of biology and care* (London: Routledge, 2010) 131.

Deomampo, Daisy, *Transnational Reproduction: race, kinship, and commercial surrogacy in India*, (New York: New York University Press, 2016).

Gruben, Vanessa, "Regulating Reproduction" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy*, 5th edition, (Toronto: Lexis Nexis, 2017).

Haase, Jean, "Canada: The Long Road to Regulation" in Eric Blyth & Ruth Landau, eds, *Third Party Assisted Conception Across Cultures: Social, Legal & Ethical Perspectives* (United Kingdom: Jessica Kingsley Publishers Ltd, 2004) 55.

- Kaur, Harleen, *Laws and Policies on Surrogacy: Comparative Insights from India*, 1st ed (Singapore: Springer, 2021).
- Klein, Alana, "Jurisdiction in Canadian Health Law" in Joanne N. Erdman, Vanessa Gruben, Erin Nelson, eds, *Canadian Health Law and Policy*, 5th ed (Toronto, Ontario: LexisNexis, 2017) 29.
- Madge, Varada, "Gestational Surrogacy in India: The Problem of Technology and Poverty", in Sayantani DasGupta & Shamita Das Dasgupta, authors, *Globalisation and transnational surrogacy in India: outsourcing life* (Lanham: Lexington Book, 2014) 45.
- Majumdar, Anindita, *Oxford India Short Introductions Surrogacy*, 1st ed (New Delhi: Oxford University Press, 2019).
- . *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*, 1st ed (New Delhi: Oxford University Press, 2017).
- Nelson, Erin, *Law, Policy and Reproductive Autonomy* (Oxford: Hart Publishing, 2013).
- . "Surrogacy in Canada: Toward Permissive Regulation" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 185.
- Overall, Christine, *Ethics and Human Reproduction: A Feminist Analysis* (Boston: Allen and Unwin, 1987).
- Pande, Amrita, *Wombs in Labor: Transnational Commercial Surrogacy In India*, (Delhi: Primus Books, 2018).
- . "Gestational Surrogacy in India: New Dynamics of Reproductive Labour" in Noronha, E., D'Cruz, P, eds, *Critical Perspectives on Work and Employment in Globalizing India* (Singapore: Springer, 2017) 267.
- . "Transnational Commercial Surrogacy in India: To Ban or Not To Ban" in Miranda Davis, ed, *Babies for Sale? Transnational Surrogacy, Human Rights and the Politics of Reproduction* (London, England: Zed Books, 2017) 328.
- Petropanagos, Angel, Vanessa Gruben, & Angela Cameron, "Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements? Legal and Ethical Recommendations for a Revised Approach to Reimbursement" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 155.

- Ragone, Helena, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Press, 1994).
- Rudrappa, Sharmila, *Discounted Life: The Price of Global Surrogacy in India*, (New York: New York University Press, 2015).
- Shalev, Carmel, *Birth power: the case for surrogacy* (New Haven: Yale University Press, 1989).
- Tanderup Malene, et al, “Breastfeeding and Bonding: Issues and Dilemmas in Surrogacy” in Tanya Cassidy & Abdullahi El Tom, eds, *Ethnographies of Breastfeeding* (London: Routledge, 2020) 157.
- Vora, Kalinidi, “Medicine, Markets and the Pregnant Body: Indian Commercial Surrogacy and Reproductive Labor in a Transnational Frame” in Kalindi Vora, *Reimagining Reproduction, Essays on Surrogacy, Labor, and Technologies of Human Reproduction* (London: Routledge India, 2022) 10.
- Wertheimer, Alan, *Is surrogacy exploitative?* (Toronto, Ontario: Law and Economics Programme, Faculty of Law, University of Toronto, 1992).
- White, Pamela M, "Why We Don't Know What We Don't Know" About Canada's Surrogacy Practices and Outcomes" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 51.

SECONDARY MATERIAL: ARTICLES

- Allen, Anita L., “The Socio-Economic Struggle for Equality: The Black Surrogate Mother” (1991) *Harvard Blackletter Journal* 17.
- Anleu, Sharyn Roach, “Surrogacy: For Love but Not for Money?” (1992) 6:1 *Gender and Society* 30.
- Atwell, Barbara L., "Surrogacy and Adoption: A Case of Incompatibility" (1988) 20:1 *Columbia Human Rights Law Review* 1.
- Bailey, Alison, “Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy” (2011) 26 *Hypatia* 715.

- Baslington, Hazel, "The Social Organization of Surrogacy: relinquishing a baby and the role of payment in the psychological detachment process" (2002) 7:1 *Journal of Health Psychology* 57.
- Baylis, Francoise, Jocelyn Downie, & Dave Snow, "Fake it Till You Make it: Policymaking and Assisted Human Reproduction in Canada" (2014) 36:6 *Journal of Obstetrics and Gynaecology Canada* 510.
- Baylis, Francoise & Jocelyn Downie, "The Tale of Assisted Human Reproduction Canada: A Tragedy in Five Acts" (2013) 25:2 *Canadian Journal of Women and the Law* 183.
- Blyth, Eric, "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life:' Interviews with surrogate mothers in Britain" (1994) 12 *Journal of Reproductive and Infant Psychology* 189.
- Brandel, Abby, "Legislating Surrogacy: A Partial Answer to Feminist Criticism" (1995) 54:2 *Maryland Law Review* 488.
- Brett, Taylor E., "The Modern Day Stork: Validating the Enforceability of Gestational Surrogacy Contracts in Louisiana" (2014) 60:3 *Loyola Law Review* 587 at 588.
- Brugger, Kristiana, "International Law in the Gestational Surrogacy Debate" (2012) 35:3 *Fordham International Law Journal* 665.
- Burpee, Ailis L., "Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy" (2009) 37:2 *Georgia Journal of International and Comparative Law* 305.
- Busby, Karen, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25:2 *Canadian Journal of Women and the Law* 284.
- Busby, Karen & Delaney Vun, "Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 *Canadian Journal of Family Law* 13.
- Carsley, Stefanie, "Regulating Reimbursements for Surrogate Mothers" (2021) 58:4 *Alberta Law Review* 811.
- Cascao, Rui, "The Challenges of International Commercial Surrogacy: From Paternalism towards Realism" (2016) 35:2 *Medicine and Law* 151.
- Casonato, Marta & Stéphanie Habersaat, "Parenting without being genetically connected" (2015) 3 *Enfance* 289.

- Caster, Austin, "Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime" (2011) 10:2 Connecticut Public Interest Law Journal 477.
- Cattapan, Alana, "Rhetoric and Reality: Protecting Women in Canadian Public Policy on Assisted Human Reproduction" (2013) 25:2 Canadian Journal of Women and the Law 202.
- . "Risky Business: Surrogacy, Egg Donation and the Politics of Exploitation" (2014) 29:3 Canadian Journal of Law and Society 361.
- Caulfield, Timothy, "Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001) 39:2 Alberta Law Review 335.
- Chatterjee, Dr. Sangeeta, "Surrogacy (Regulation) Act 2021 in India: Problems and Prospects" (2022) 2 Aequitas Victoria 52.
- Chaudhary, Jyoti, "Consequences of Surrogacy on Surrogates in India" (2019) 49:2 Indian Anthropologist 91.
- Ciccarelli, Janice C. & Linda J. Beckman, "Navigating Rough Waters: An overview of Psychological Aspects of Surrogacy" (2005) 61:1 Journal of Social Issues 21.
- Conklin, Caitlin, "Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation" (2013) 35:1 Women's Rights Law Reporter 67.
- Deomampo, Daisy, "Gendered geographies of reproductive tourism" (2013) 27:4 Gender and Society 514.
- . "Transnational Surrogacy in India: Interrogating Power and Women's Agency" (2013) 34:3 Frontiers: A Journal of Women Studies 167.
- Dorfman, Doron, "Surrogate Parenthood: Between Genetics and Intent" (2016) 3:2 Journal of Law and Biosciences 404.
- Downie, Jocelyn & Francoise Baylis, "Transnational Trade in Human Eggs: Law, Policy, and (in) Action in Canada" (2013) 41:1 Journal of Law, Medicine and Ethics 224.
- Elder, Ashley Hope, "Wombs to Rent: Examining the Jurisdiction of International Surrogacy" (2014) 16:2 Oregon Review of International Law 347.
- Feldman, Eric A., "Baby M Turns 30: The Law and Policy of Surrogate Motherhood" (2018) 44:1 American Journal of Law and Medicine 7.

- Fellowes, Melanie G., "Commercial Surrogacy in India: The Presumption of Adaptive Preference Formation, the Possibility of Autonomy and the Persistence of Exploitation" (2017) 17:4 *Medical Law International* 249.
- Francis, Leslie P., "Is Surrogacy Ethically Problematic" (2017) *Utah Law Digital Commons*, Utah Law Faculty Scholarship 388 at 394, online:< <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1145&context=scholarship>>.
- Fulfer, Katy, "A Partial Defense of the Non-Commercialization of Surrogacy" (2020) 3:3 *Canadian Journal of Bioethics* 88.
- Godsoe, Cynthia, "Adopting the Gay Family" (2015) 90:2 *Tulane Law Review* 311.
- Gola, Swati, "One step forward or one step back? Autonomy, agency and surrogates in the Indian Surrogacy (Regulation) Bill 2019" (2021) 17:1 *International Journal of Law in Context* 58.
- . "The Indian Surrogacy (Regulation) Bill 2020: Enforcing Gender Binarism?" (2021) *Article 843 Academia Letters* 1 at 2, online: < <https://doi.org/10.20935/AL843>>.
- Golombok, Susan et al, "Families created through surrogacy arrangements: parent-child relationships in the 1st year of life" (2004) 40:3 *Developmental Psychology* 400.
- . "Families created through surrogacy: mother-child relationships and children's psychological adjustment at age 7" (2011) 47:6 *Developmental Psychology* 1579.
- . "Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at the age of 2" (2006) 47:2 *Journal of Child Psychology and Psychiatry* 213.
- . "Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at the age of 3" (2006) 21:7 *Human Reproduction* 1918.
- Gordon, Eric A., "The Aftermath of *Johnson v. Calvert*: Surrogacy Law Reflects a More Liberal View of Reproductive Technology" (1993) 6:1 *St. Thomas Law Review* 191.
- Gruben, Vanessa & Angela Cameron, "Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forward" (2017) 54:3 *Alberta Law Review* 665.
- Gupta, Anu & Sheela Prasad, " 'Outsourced Pregnancy': Surrogate narratives from Hyderabad" (2019) 53:2 *Contributions to Indian Sociology* 299 at 313.

- Guzman, Victoria R., "A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy" (2016) 38:2 *Houston Journal of International Law* 619.
- Hanna, Jason K.M., "Revisiting child-based objections to commercial surrogacy" (2010) 24:7 *Bioethics* 341.
- Haskell, John, "The Parent Trap: Implications of Surrogacy on Motherhood, Fatherhood, and the Family" (2006) 6:1 *Whittier Journal of Child and Family Advocacy* 107.
- Hibino, Yuri, "The advantages and disadvantages of altruistic and commercial surrogacy in India" (2023) 18:8 *Philosophy, Ethics, and Humanities in Medicine* 1.
- Hofheimer, Alice, "Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy" (1991) 19:3 *NYU Review of Law and Social Change* 571.
- Hohman, Melinda M. & Christine B. Hagan, "Satisfaction with Surrogate Mothering: A Relational Model" (2001) 4:1 *Journal of Human Behavior in the Social Environment* 61.
- Horsey, Kristy, "Not Withered on the Vine: The Need for Surrogacy Law Reform" (2016) 4:3 *Journal of Medical Law and Ethics* 181.
- Iannacci, Briana R., "Why New York Should Legalize Surrogacy: A Comparison of Surrogacy Legislation in Other States with Current Proposed Surrogacy Legislation in New York" (2018) 34:4 *Touro Law Review* 1239.
- Imrie, Susan & Vasanti Jadvā, "The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements" (2014) 29:4 *Reproductive Biomedicine Online* 424.
- Jadvā, Vasanti, et al, "Parents' relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location" (2019) 111:3 *Fertility and Sterility* 562.
- . "Surrogacy: the experiences of surrogate mothers" (2003) 18:10 *Human Reproduction* 2196.
- . "Surrogate Mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child" (2015) 30:2 *Human Reproduction*, 373.
- Jargilo, Izabela, "Regulating the Trade of Commercial Surrogacy In India" (2016) 15:2 *Journal of International Business and Law* 337.

- Kindregan Jr., Charles P., & Maureen McBrien, "Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos" (2004) 49:1 Villanova Law Review 169.
- Kim, Minsung, "The Regulatory-Permitted Approach for Responsible Uses of Commercial Surrogacy: Who Cares about Surrogates in the Commercial Practice of Gestational Surrogacy?" (2022) 25:1 Quinnipiac Health Law Journal 1.
- Kleinpeter, CB, TL Boyer, & ME. Kinney, "Parent's Evaluation of a California-based Surrogacy Program" (2006) 13:4 Journal of Human Behavior in the Social Environment 1.
- Kleinpeter, Christine Hagan & Melinda M. Hohman, "Surrogate motherhood: personality traits and satisfaction with service providers" (2000) 87:3 Psychological Reports 957.
- Kornegay, R Jo, "Is Commercial Surrogacy Baby-selling?" (1990) 7:1 Journal of Applied Philosophy 45.
- Kumar, Aditya, "Issues for Consideration: Assisted Reproductive Technology (Regulation) Bill, 2021", PRS Legislative Research, Institute for Policy Research Studies (December 4, 2021), online: <<https://prsindia.org/billtrack/prs-products/issues-for-consideration>>.
- Lanes, A et al, "CARTR Plus: the creation of an ART registry in Canada" (2020) 3 Human Reproduction Open 1.
- Laufer-Ukeles, Pamela, "Mothering for Money: Regulating Commercial Intimacy" (2013) 88:4 Indiana Law Journal 1223.
- Lee, JY, "Surrogacy: beyond the commercial/altruistic distinction" (2023) 49:3 Journal of Medical Ethics 196.
- Lestienne, Mazarine, "Applying Mediation to the Complexities of Surrogacy Arrangements" (2020) 13 American Journal of Mediation 183.
- Lieber, Katherine B., "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered" (1992) 68:1 Indiana Law Journal 205.
- Majumdar, Anindita, "Conceptualizing Surrogacy as Work-Labour: Domestic Labour in Commercial Gestational Surrogacy in India" (2018) 13:2 Journal of South Asian Development 210.
- Martin, Gabriella Judith, "Ethical Perspectives on Commercial Surrogacy" (2021) 2:2 Indian Journal of Law and Legal Research 1.

- Merryfield, Michaela, "(You're) Having My Baby: Surrogacy Fees as a Cost of Future Care Award in Canadian Tort Law" (2019) 24 *Appeal Review of Current Law and Law Reform* 135.
- Millbank, Jenni, "Rethinking "Commercial Surrogacy in Australia" (2015) 12:3 *Journal of Bioethical Inquiry* 477.
- Mora, Jesús, "Parenthood, altruism, and the market: a critique of essentialist constructions of women's nature in commercial surrogacy" (2021) 17 *The Age of Human Rights Journal* 276.
- Motluk, Alison, "First Prosecution under Assisted Human Reproduction Act Ends In Conviction" (2014) 186:2 *Canadian Medical Association Journal* E75- E76.
- Mukherjee, Ritika & T.V. Shekher, "Women at Risk in the Unregulated Surrogacy 'Industry': Evidence from a Study of Commercial Surrogates in Kolkata" (2015) 50:26/27 *Economic and Political Weekly* 83.
- Munjal-Shankar, Diksha, "Commercial Surrogacy in India: Vulnerability Contextualised" (2016) 58:3 *Journal of the Indian Law Institute* 350.
- . "Medical Tourism, Surrogacy & The Legal Overtones- The Indian Tale" (2014) 56:1 *Journal of the Indian Law Institute* 62.
- Nelson, Erin, "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy" (2013) 41:1 *Journal of Law, Medicine and Ethics* 240.
- O'Brien, Shari, "Commercial Conceptions: A Breeding Ground for Surrogacy" (1986) 65:1 *North Carolina Law Review* 127 at 127-128.
- Panda, Sasthibrata & Sanskar Jain, "Understanding Commercial Surrogacy: The Pact between Barren and Broke" (2022) 1 *Dharmashastra National Law University Student Law Journal* 18.
- Pande, Amrita, "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker" (2010) 35:4 *Signs: Journal of Women in Culture and Society* 969.
- . "Transnational Commercial Surrogacy in India: Gifts for global sisters?" (2011) 23:5 *Reproductive Biomedicine Online* 618.
- Panitch, Vida, "Commodification and Exploitation in Reproductive Markets: Introduction to the Symposium on Reproductive Markets" (2016) 33:2 *Journal of Applied Philosophy* 117.

- Parry, Bronwyn & Rakhi Ghoshal, "Regulation of surrogacy in India: whenceforth now?" (2018) 3:5 BMJ Global Health, online: < <http://dx.doi.org/10.1136/bmjgh-2018-000986>>.
- Pascoe, John, "Sleepwalking through the Minefield: Legal and Ethical Issues in Surrogacy" (2018) 30:Special Issue Singapore Academy of Law Journal 455.
- Payne, Jenny Gunnarsson, "Autonomy in altruistic surrogacy, conflicting kinship grammars and intentional multilinear kinship" (2018) 7 Reproductive Biomedicine and Society Online 66.
- Phillips, John W & Susan D Phillips, "In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience" (1980) 69:4 Kentucky Law Journal 877.
- Pizitz, Todd D., Joseph McCullaugh & Alexa Rabin, "Do women who choose to become surrogate mothers have different psychological profiles compared to a normative female sample?" (2013) 26:1 Women and Birth e15.
- Purvis, Dara E., "Intended Parents and the Problem of Perspective" (2012) 24:2 Yale Journal of Law and Feminism 211.
- Qadir, Abdul & T.M. Meghana, "Surrogacy as Modern Form of Emerging Exploitation – A Time to Think" (2017) 2 Supremo Amicus 1.
- Quinn, Devon, "Her Belly, Their Baby: A Contract Solution for Surrogacy Agreements" (2018) 26:2 Journal of Law and Policy 805.
- Rae, Scott B., "Parental Rights and the Definition of Motherhood in Surrogate Motherhood" (1994) 3:2 Southern California Review of Law and Women's Studies 219.
- Richardson, Paige, "Redefining Motherhood: How Reproductive Technologies Change the Way We Think About Motherhood" (2017) 2 Revue Your Review (York Online Undergraduate Research) 79.
- Rimm, Jennifer, "Booming Baby Business: Regulating Commercial Surrogacy in India" (2009) 30:4 University of Pennsylvania Journal of International Law 1429.
- Rothman, Barbara Katz, "Reproductive Technology and the Commodification of Life" (1988) 13:1-2 Women and Health 95 at 100.
- Rozee, Virginie *et al*, "The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018" (2020) 20:234 BMC Women's Health 1.

- Rudrappa, Sharmila, "Why Is India's Ban on Commercial Surrogacy Bad for Women" (2018) 43:4 North Carolina Journal of International Law 70.
- Ruparelia, Rakhi, "Giving Away the Gift of Life: Surrogacy and the Canadian Assisted Human Reproduction Act" (2007) 23:1 Canadian Journal of Family Law 11.
- Sanger, Carol, "Developing Markets in Baby-Making: In the Matter of Baby M" (2007) 30:1 Harvard Journal of Law and Gender 67.
- Saxena, Pikee, Archana Mishra & Sonia Malik, "Surrogacy: Ethical and Legal Issues" (2012) 37:4 Indian Journal of Community Medicine 211.
- Schneider, Elizabeth M., "Changing Perspectives of the Family" (1994) 5 Drake Law Review 11.
- Schultz, Stephanie F., "Surrogacy Arrangements: Who Are the Parents of a Child Born through Artificial Reproductive Techniques" (1995) 22:1 Ohio Northern University Law Review 273.
- Scott, Elizabeth S., "Surrogacy and the Politics of Commodification" (2009) 72:3 Law and Contemporary Problems 109.
- Shelton, Katherine H et al, "Examining differences in psychological adjustment problems among children conceived by assisted reproductive technologies" (2009) 33:5 International Journal of Behavioral Development 385.
- Shephard, Sophia, "Regulating International Commercial Surrogacy: A Balance of Harms and Benefits" (2022) 32:2 University of Florida Journal of Law and Public Policy 293.
- Shetty, Priya, "India's unregulated surrogacy industry" (2012) 380:9854 Lancet 1633.
- Simopoulou, M. et al, "Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period" (2018) 2018 BioMed Research International 1.
- Smerdon, Usha Rengachary, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" (2008) 39:1 Cumberland Law Review 15.
- Snow, Dave, Francoise Baylis & Jocelyn Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery" (2015) 9:1 McGill Journal of Law and Health 1.
- Tanderup Malene, et al, "Informed consent in medical decision-making in commercial gestational surrogacy: a mixed methods study in New Delhi, India" (2015) 94:5 Acta Obstetricia et Gynecologica Scandinavica 465.

- . “Reproductive Ethics in Commercial Surrogacy: Decision-Making in IVF Clinics in New Delhi, India” (2015) 12:3 *Journal of Bioethical Inquiry* 491.
- Teman, Elly, “The Social construction of surrogacy research: an anthropological critique of the psychosocial scholarship on surrogate motherhood” (2008) 67:7 *Social Science & Medicine* 1104.
- Thomaston, Brett, "A House Divided against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System" (2016) 49:4 *John Marshall Law Review* 1155.
- Tieu, M. M., “Altruistic surrogacy: the necessary objectification of surrogate mothers” (2009) 35:3 *Journal of Medical Ethics* 171.
- Tonsing, Jenny C. & Kareen N. Tonsing, "Understanding the Role of Patriarchal Ideology in Intimate Partner Violence among South Asian Women in Hong Kong" (2019) 62:1 *International Social Work* 161.
- Townsend, Margaret D., "Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion" (1982) 16:2 *University of Richmond Law Review* 467.
- Trimmings, Katarina & Paul Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" (2011) 7:3 *Journal of Private International Law* 627.
- Unnithan, Maya, “Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women” (2013) 1:3 *Journal of Legal Anthropology* 287.
- van den Akker, Olga, “Genetic and gestational surrogate mothers' experience of surrogacy” (2003) 21:2 *Journal of Reproductive and Infant Psychology*, 145.
- Vora, Kalindi, “Experimental Sociality and Gestational Surrogacy in the Indian ART Clinic” (2014) 79:1 *Ethnos* 63.
- Voskoboynik, Katherine, "Clipping the Stork's Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism" (2016) 26:2 *Indiana International and Comparative Law Review* 336.
- White, Pamela M, “Hidden from view: Canadian gestational surrogacy practices and outcomes, 2001-2012” (2016) 24:47 *Reproductive Health Matters* 205.

- Yee, Samantha, Carly V Goodman & Clifford L Librach, "Determinants of gestational surrogate's satisfaction in relation to the characteristics of surrogacy cases" (2019) 39:2 Reproductive Biomedicine Online, 249.
- Yee, Samantha, Shilini Hemalal, Clifford L Librach, "Not my child to give away": A qualitative analysis of gestational surrogates' experiences" (2020) 33:3 Women and Birth: Journal of the Australian College of Midwives e256.
- Zalesne, Deborah, "The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art" (2017) 51:2 University of Richmond Law Review 419.
- Zimmer, Lisa R., "Family, Marriage, and the Same-sex Couple" (1990) 12:2 Cardozo Law Review 681.

GOVERNMENT WEBSITES

- European Parliament, Directorate-General for Internal Policies, Policy Department Citizen's Rights and Constitutional Affairs, *A comparative study on the regime of surrogacy in EU Member States* (2013), online: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf)> (accessed 29 July 2024).
- Government of Canada, Notice (Department of Health), (2016) C Gaz I, 2818 (Assisted Human Reproduction Act), online: <<https://gazette.gc.ca/rp-pr/p1/2016/2016-10-01/html/notice-avis-eng.html>>.
- Government of Canada, "Prohibitions Related to Surrogacy", online: *Government of Canada* <<https://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/%20reprod/surrogacy-substitution-eng.php>>, (text no longer exists).
- Government of Canada, *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193 (last amended on 9 June, 2020), online:<<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-193/page-1.html#h-1141415>>.
- Health Canada, *Compliance Approach for the Reimbursement Related to Assisted Human Reproduction Regulations*, Catalogue No H14-346/2020E-PDF (Ottawa: Health Canada, June 2020) (modified on 9 September 2020), online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/compliance->

- enforcement/information-health-product/compliance-approach-reimbursement-assisted-human-reproduction.html>.
- Health Canada, *New Reproductive Technologies and Genetic Technologies: Setting Boundaries; Enhancing health*, H21-127/1996 E (Ottawa – Ontario: Health Canada, June 1996).
- Human Fertilisation & Embryology Authority, “One at a time: Better outcomes from fertility treatment”, online: <<https://www.hfea.gov.uk/about-us/our-campaign-to-reduce-multiple-births/>>.
- Government of India, Ministry of Health and Family Welfare (Department of Health Research), *Surrogacy (Regulation) Amendment Rules, 2023*, G.S.R. 415 (E).
- Government of India, Ministry of Health and Family Welfare (Department of Health Research), *Surrogacy (Regulation) Rules, 2022*, G.S.R. 460 (E).
- Government of India, Ministry of Health & Family Welfare, Indian Council of Medical Research, *The Assisted Reproductive Technologies (Regulation) Bill – 2010* (Draft), online: <<https://main.icmr.nic.in/sites/default/files/guidelines/ART%20REGULATION%20Draft%20Bill1.pdf?>>>.
- Government of India, Ministry of Home Affairs, F.No.25022/74/2011-F.I (9 July 2012).
- Government of India, Ministry of Home Affairs, No. 25022/74/2011-F.I (Vol.III) (3 November 2015).
- Ottawa, Health Canada, *Government of Canada Launches Legislative Review of the Cannabis Act* (Ottawa, ON, 22 September 2022), online: < <https://www.canada.ca/en/health-canada/news/2022/09/government-of-canada-launches-legislative-review-of-the-cannabis-act.html>>.
- Parliament of Canada, Procedural Info, *Canadian Parliamentary System*, online: <https://www.ourcommons.ca/procedure/our-procedure/parliamentaryFramework/c_g_parliamentaryframework-e.html#:~:text=Since%20Canada%20is%20a%20federal,and%20for%20giving%20impartial%20judgments>.
- Quebec, Surrogacy, (last updated 29 April 2024), online: < <https://www.quebec.ca/en/family-and-support-for-individuals/pregnancy-parenthood/surrogacy>>.

Quebec, Québec Parental Insurance Plan, *Surrogacy Project: Royal Assent Given to Bill 12 And Future QPIP Benefits*, (6 June 2023), online: <<https://www.rqap.gouv.qc.ca/en/news/surrogacy-project-royal-assent-given-to-bill-12-and-future-qpip-benefits>>.

The Gazette of India, Ministry of Health and Family Welfare (Department of Health Research) Notification, New Delhi, 21st February 2024, G.S.R. 119 (E).

U.S. Attorney Office, San Diego Division, “Prominent Surrogacy Attorney Sentenced to Prison for Her Role in Baby-Selling Case” (24 February 2012), online: <<https://archives.fbi.gov/archives/sandiego/press-releases/2012/prominent-surrogacy-attorney-sentenced-to-prison-for-her-role-in-baby-selling-case>>.

GOVERNMENT REPORTS, OTHER DOCUMENTS

Centre for Social Research (CSR), *Report of the National Conference on: “A Policy Dialogue on Issues around Surrogacy in India”* (2014), online: <https://drive.google.com/file/d/0B-flXIdglJC_ZmlsZXQwY3VvcW8/view?resourcekey=0-4GR8Raz4KPPIc4XiAqn4dQ>.

Eichler, Margrit & P Poole. *The Incidence of Preconception Contracts for the Production of Children among Canadians: A Report Prepared for the Law Reform Commission of Canada* (Toronto: Law Reform Commission of Canada and Ontario Institute for Studies in Education, 1988).

Government of India, Law Commission of India, *Need for Legislation To Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties To A Surrogacy*, Report No. 228 (2009), online: <https://prsindia.org/files/bills_acts/bills_parliament/2016/Law%20Commission%20Report-Surrogacy%20Bill.pdf>.

Government of India: Ministry of Health and Family Welfare, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (2005), online: <https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf>.

Health Canada, *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations*, Catalogue No H164-288/2019E-PDF (Ottawa: Health Canada, 2019).

Health Canada, *What We Heard Report: A Summary of Feedback from the Consultation: Toward a Strengthened Assisted Human Reproduction Act*, Catalogue No H164-228/2018E-PDF (Ottawa: Health Canada, 2018), online:<<https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/feedback-toward-strengthening-assisted-human-reproduction-act.html>>.

Min, Jason & Camille Sylvestre, *Clinical Practice Guidelines: Guidelines on the Number of Embryos Transferred* (Montreal: Canadian Fertility and Andrology Society 2013, online: <https://cfas.ca/_Library/clinical_practice_guidelines/CFAS_CPG_Embryo_Transfer_2013.pdf>.

OECD Development Policy Papers, “What Does “Inclusive Governance” Mean? Clarifying Theory and Practice” (March 2020) OECD Publishing No. 27.

Parliament of India, Rajya Sabha, Department-Related Parliamentary Standing Committee on Health and Family Welfare, *One Hundred Second Report, The Surrogacy (Regulation) Bill, 2016*, (2017) at 13, online: <https://prsindia.org/files/bills_acts/bills_parliament/2016/SCR-%20Surrogacy%20Bill,%202018.pdf>.

Parliament of India, Rajya Sabha, *Report of the Select Committee on The Surrogacy (Regulation) Bill, 2019* (5 February 2020), online: <https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf>.

Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Catalogue NO Z1-1989/3E (Ottawa: Minister of Government Services Canada, 1993) Volume 1.

Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Catalogue NO Z1-1989/3E (Ottawa: Minister of Government Services Canada, 1993) Volume 2.

SAMA, “Birthing A Market: A Study on Commercial Surrogacy” (2012) Sama- Resource Group for Women and Health.

SECONDARY MATERIAL: MEDIA ARTICLES, NEWS RELEASES AND BLOGS

- “A Critical Analysis of the Surrogacy (Regulation) Bill, 2020, *Lexforti* (4 December 2020), online: < <https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/>>.
- Baylis, Francoise and Jocelyn Downie, “Wishing Doesn’t make it so” (17 December, 2013), online: *Impact Ethics*, <<https://impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>>.
- Bhalla, Nita & Mansi Thapliyal, “India seeks to regulate its booming ‘rent-a-womb’ industry”, *Reuters* (30 September 2013), online: <<https://www.reuters.com/article/us-india-surrogates-idUSBRE98T07F20130930/>>.
- Blackwell, Tom, “Canadian fertility consultant received \$31K for unwittingly referring parents to U.S. ‘baby-selling’ ring”, *National Post*, (December 15, 2013), online: <<https://nationalpost.com/news/canada/canadian-fertility-consultant-received-about-30000-for-unwittingly-referring-parents-to-u-s-baby-selling-ring>>.
- . “Canadian surrogate eliminated baby from triplet pregnancy at urging of overseas couple”, *National Post* (9 September, 2015), online: <<https://nationalpost.com/health/canadian-surrogate-pressured-to-eliminate-baby-from-triplet-pregnancy-by-couple>>.
- . “This Ontario surrogate wanted to help another woman have a child, but the decision nearly killed her”, *National Post* (15 October, 2015), online: <<https://nationalpost.com/health/this-ontario-surrogate-wanted-to-help-another-mom-have-kids-it-was-a-decision-that-nearly-killed-her>>.
- Bogoraz, Karine, “Student Project: Surrogacy Research Guide: In The Matter of Baby M”, Pace University, Pace Law Library, Research Guides, online: <<https://libraryguides.law.pace.edu/surrogacy>>.
- Canadian Fertility And Andrology Society, “ART Live Birth Rates- Media Releases” (23 November 2016) online: CFAS <<https://cfas.ca/canadian-art-register.html>>.
- Carney, Scott, “Inside India’s Rent-a-Womb Business”, *Mother Jones* (April 2010), online: <<https://www.motherjones.com/politics/2010/04/surrogacy-tourism-india-nayna-patel/>>.
- Cohen, Margot, “A Search for a Surrogate Leads to India”, *The Wall Street Journal* (9 October 2009),

- online:<<https://www.wsj.com/articles/SB10001424052748704252004574459003279407832>>.
- DD News, “Indian Cabinet debriefing of the Surrogacy (Regulation) Bill 2016” (24 August 2016), online (video): < <https://www.youtube.com/watch?v=wtI4Mskjpnk>>.
- Editorial, “Express View on Indians seeking surrogacy abroad: For love of a child, *The Indian Express* (5 April 2024), online: < <https://indianexpress.com/article/opinion/editorials/express-view-on-indians-seeking-surrogacy-abroad-for-love-of-a-child-9252032/>>.
- Glover, Chris, Chelsea Gomez & Laura Clementson, “Why a lack of oversight of surrogacy in Canada leaves some parents feeling taken advantage of”, *CBC* (2 March 2022), online: <<https://www.cbc.ca/news/health/surrogacy-agencies-expenses-costs-oversight-canada-1.5476965>>.
- Haworth, Abigail, “Surrogate Mothers: Womb for Rent” (28 July 2007), online: *marieclaire* < <https://www.marieclaire.com/politics/news/a638/surrogate-mothers-india/>>.
- India News, “Centre Clarifies On Surrogacy Law In Supreme Court”, *NDTV* (8 February 2023), online: < <https://www.ndtv.com/india-news/centre-clarifies-on-surrogacy-law-in-supreme-court-3764667>>.
- Jefford, Sarah, “Compensated or Commercial Surrogacy?”, online: (blog) < <https://sarahjefford.com/compensated-or-commercial-surrogacy/>>.
- Lakshmi, Rama, “India to propose a ban on commercial surrogacy, ending a lucrative business”, *The Washington Post* (24 August 2016), online: < https://www.washingtonpost.com/world/rent-a-womb-industry-in-india-may-be-shut-down/2016/08/24/39684d60-79e3-42c9-893d-9ff5998ce179_story.html>.
- Motluk, Alison, “After pleading guilty for paying surrogates, business is booming for this fertility matchmaker”, *The Globe and Mail*, (28 February 2016), online: < <https://www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article28930242/>>.
- . “Anatomy of a Surrogacy” *Hazlitt* (6 November 2017), online: < <https://hazlitt.net/longreads/anatomy-surrogacy>>.

- . “The Baby-Making Business: on the front lines of Toronto’s booming, semi-legal surrogacy market”, *Toronto Life*, (3 February 2014), online: <<https://torontolife.com/city/baby-making-business-surrogacy-market-toronto/>>.
- . “Waiting Room” *Hazlitt* (30 August 2023), online: <<https://hazlitt.net/longreads/waiting-room-0>>.
- Pande, Amrita, “Surrogacy Bill’s missteps: Is the prohibitory approach, adopted by the Surrogacy (Regulation) Bill 2016, really the best way to protect the rights of surrogates and their children in India?”, *Himal Southasian* (12 October 2016), online: <<https://www.himalmag.com/surrogacy-bill-india-women-rights-labour/>>.
- Parry, Bronwyn & Rakhi Ghoshal, “Surrogacy Regulation Bill: Cause For Congratulation or Concern?”, *NDTV Profit* (26 December 2018), online: <<https://www.ndtvprofit.com/opinion/surrogacy-regulation-bill-cause-for-congratulation-or-concern>> .
- Saravanan, Sheela, “Surrogacy in India, A Globalized Bazaar Built on Women’s Exploitation – Interview with Sheela Saravanan” (3 September 2018) online: *CIAMS* <<http://abolition-ms.org/en/ressources-en/opinions-en/surrogacy-in-india-a-globalized-bazaar-built-on-womens-exploitation-interview-with-sheela-saravanan/>>.
- TNN, “Surrogate mother dies of complications”, *The Times of India* (17 May 2012), online: <<https://timesofindia.indiatimes.com/city/ahmedabad/surrogate-mother-dies-of-complications/articleshow/13181592.cms>>.
- TNN, “Surrogate mothers stage protest in Anand”, *The Times of India* (30 October 2015), online: <<https://timesofindia.indiatimes.com/city/ahmedabad/Surrogate-mothers-stage-protest-in-Anand/articleshow/49589988.cms>>.
- TNN, “Women protest surrogacy ban for foreigners”, *The Times of India* (1 November 2015), online: < <https://timesofindia.indiatimes.com/city/delhi/Women-protest-surrogacy-ban-for-foreigners/articleshow/49612904.cms>>.

THESES AND DISSERTATIONS

- Casparsson, Anne, *Surrogacy and the best interest of the child* (Master in Applied Ethics, Linköping University, 2014) [unpublished].

- Carsley, Stefanie, *Surrogacy in Canada: Lawyers' Experiences, Practices and Perspectives* (Doctor of Civil Law Dissertation: McGill University, 2020) [unpublished].
- Ciccarelli, Janice C., *The surrogate mother: A post birth follow-up* (Ph.D. Dissertation, California School of Professional Psychology 1997).
- Kashmeri, Shireen, *Unraveling Surrogacy in Ontario, Canada: An Ethnographic Inquiry on the Influence of Canada's Assisted Human Reproduction Act (2004), Surrogacy Contracts, Parentage Laws, and Gar Fatherhood* (MA Thesis, Department of Sociology and Anthropology, Concordia University, 2008) [unpublished].

OTHER MATERIALS

- “Commercial Surrogacy and Fertility Tourism in India”, online: *The Kenan Institute For Ethics at Duke University* <https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji_Case2015.pdf> (accessed 29 July 2024).
- Corea, Gena, “Testimony before the California Judiciary Committee.” April 5, 1988 cited in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Indianapolis: Indiana University Press, 1988).