



**Surrogacy in South Africa. Is there a need to amend laws on
remunerated surrogacy?**

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DEDICATION

I dedicate this work to my parents, Lawrence and Maria for their unconditional love. You are the best, and may you live long. Thank you for the unwavering support you have always provided me, I appreciate. God bless you all.

ABSTRACT

The issue of surrogacy is gaining prominence, because of the rise of infertility in South Africa and globally. The availability of new technological innovations and improvements, shortage of children for adoption and the desire to have a child who is genetically related to the parents is prompting an increasing number of infertile couples to resort to surrogacy. One of the pertinent issues relates to the remuneration of the surrogate mother. The main purpose of this study has been to determine whether there is any need to amend the current laws on surrogacy in South Africa to include remuneration for work rendered by the surrogate mother through pregnancy and childbirth. From this understanding, this area remains relevant and needs attention.

Notwithstanding the potential gains that may be made by amending the laws on remunerated surrogacy, some scholars have expressed their objections and concerns that it gives rise to challenging legal, cultural, ethical, and moral issues, including exploitation, dehumanisation, marketing of surrogate mothers, exploitation and sale of children, and psychological harm and creation of black market. However, some scholars argue that remunerated surrogacy does not amount to the sale of children or the exploitation of children because the payment to the surrogate mother is not for the transfer of the child and the rights from the surrogate mother to the commissioning parents, but rather for the services rendered by the surrogate mother and for the pain and suffering endured during pregnancy and childbirth.

Since the issue of remunerated surrogacy is contentious not only in South Africa but internationally, the research examines illustrative examples from selected foreign jurisdictions with different approaches to remunerated surrogacy, such as India, Uganda and California.

The main argument that the study puts forth is that surrogacy laws should be amended to accommodate remunerated surrogacy, for instances where the surrogate mother is being compensated for the services that she rendered. Remunerated surrogacy agreements must be carefully regulated to avoid the dangers of permitting wholesale commercial surrogacy, resulting in the commodification of children and the exploitation of women. Ideally, the surrogate agreement between the parties and

the terms of the agreement must include the legal, financial and contractual rights that will bind the parties to the agreement. The agreements must be mutually beneficial to the parties (child, surrogate mother and commissioning parents) and couched in a way that will provide proper protection to the parties of the surrogacy agreements. The regulations must be in a way that protects the best interests of the child.

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CHAPTER 1: INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In Africa, parenthood is of paramount importance.¹ In traditional African society, many people cherish children for a variety of societal, personal, and economic reasons. The actual significance of marriage in African social norms is mostly realised when the couple conceives and bears children because children are regarded as a ‘source of power and prestige.’² Even though social norms are an adaptive system, with values that play a major part in giving society its uniqueness, society has ways of forcing its values on us daily, whether we are aware of it or not.³ In many societies, parents take pride in having many children since they are considered a source of social security and economic advantage.⁴ As a result, no matter how much we attempt to ignore societal expectations, such as the ‘necessity of having children’, they will always have an impact on people’s lives. The problem commences when one of the parties cannot bear or conceive children as will be discussed in the next section.

1.1.1 The problem of infertility

Infertility, defined as the inability to conceive after one year of regular intercourse,⁵ has been on the rise in the past few decades.⁶ The inability to fall pregnant after 12 months of regular and unprotected sexual intercourse is defined as primary infertility,⁷ while the inability to maintain a healthy pregnancy is defined as

¹ Dyer ‘You are a man’ 964.

² Leke, ‘Infertility’ 74.

³ Idang ‘African culture’ 110.

⁴ Ibid 110.

⁵ Hickman ‘Evaluation’ 55; see: PHEME ‘Perception’ 328.

⁶ Borghthb ‘Fertility and infertility’ 2.

⁷ Van Balen ‘Consequences’ 107.

secondary infertility.⁸ A woman who has experienced miscarriages would also be considered infertile.⁹ Regardless of sociocultural differences, the social repercussions of infertility in different locations are similar in most cases.¹⁰ Infertility has been considered to be one of the major causes of divorce, marital instability, and polygamy.¹¹

Küçükkaya and Kılıç conducted research to establish how stigma affects the level of infertility-related psychological suffering among women who are trying to conceive.¹² They concluded that infertile women face loss of social status, stigmatization, and ostracism.¹³ Stigmatised individuals develop despair, anxiety, a terrible mood, social alienation, low self-confidence, low self-efficacy, and a failure to manage stress.¹⁴

It is important to also state that men can also experience infertility due to factors such as low sperm count, age, surgical history, disease, inviable husbands inability to conceive.¹⁵ In Africa, women have often had to covertly conceive by another man, in some instances a brother or male relative of the husband and pass off the child as her husband in order to prevent social stigmatisation or devaluation of the husband.¹⁶

Between 1990 and 2010, the number of infertile people is estimated to have increased from 42 million to 52,6 million globally.¹⁷ Based on data from 1990 to 2021, the 2022 global infertility prevalence estimates are approximately one in six people have experienced infertility at some stage in their lives, globally and the

⁸ Agenor 'Infertility and Miscarriage' 529.

⁹ Ibid 529.

¹⁰ Dyer 'Value' 74.

¹¹ Leke, 'Infertility' 74; see: Dyer 'You are a man' 966.

¹² Küçükkaya 'Stigma' 13.

¹³ Ibid 23; Dyer 'Value' 754 'Infertility is related with feelings of guilt, humiliation, inadequacy, and devaluation on an intrapersonal level.'

¹⁴ Ayla 'Infertility stigma' 328.

¹⁵ Kumar 'Male factor fertility' 192.

¹⁶ Chisale 'Disabled motherhood' 3; PHEME 'Perception' 336.

¹⁷ Mascarenhas 'Infertility prevalence' 1.

lifetime prevalence of infertility is estimated to be 17.5%.¹⁸ More recently, this number is reported to have reached a new high, fluctuating between 48 million and 186 million, based on World Health Organization (hereafter WHO) data.¹⁹ In 2010, primary infertility affected approximately 1.9 per cent and 2.2 per cent of women between the age of 20 to 44 in the global population.²⁰ South Africa, one of the most industrialised countries in Africa, is not spared from this experience. Based on recent statistics, primary infertility is regarded as a challenge that affects between 10 per cent and 20 per cent of the country's population.²¹ This number is high by regional standards as it translates to about 5.5 million and 11 million people, respectively.

1.1.2 Options for the infertile

Despite the surge of infertility, infertile people have a variety of options to become parents at their disposal. Because the inability to bear children has severe social ramifications, infertility options have become a relevant topic of study. These options, which include surrogacy, adoption, fertility drugs, medical procedures in the form of assisted reproductive technology (hereafter ART) and artificial conception, such as artificial insemination, have become a major source of hope for infertile individuals. The advances and development in these variety of options may offer hope to many couples experiencing infertility because it can be emotionally draining and psychologically disturbing to infertile couples as highlighted earlier in this thesis.²²

First, the study defines and describes what ART is, then it delves into artificial conception. WHO defines ART as 'all treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos, to establish a pregnancy'.²³ ART has become increasingly globalised, with

¹⁸ WHO 'Infertility prevalence' 1.

¹⁹ WHO Fact Sheet 2021 'Infertility' 1.

²⁰ Mascarenhas 'Infertility prevalence' 10.

²¹ Botes 'Infertility' https://www.news24.com/parent/fertility/fertility_problems/infertility-and-why-sa-should-refine-disability-20170123. Since there is a generalized percentage of infertility, statistics regarding primary infertility in South Africa have not been provided.

²² Rahmani 'Gestational surrogacy' 139.

²³ Zegers-Hochschild 'The International Committee' 2685. ART includes, but is not limited to, invitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal

approximately 80 per cent of the world's population living in countries where ART is practised.²⁴

The most popular ART method is in vitro fertilisation (hereafter IVF), which involves extracting sperm and an egg cell from the intended parent or a donor, if one of the intended parents do not have a viable egg or sperm.²⁵ The fertilised ovum becomes a zygote or a blastocyst and grows into an embryo in a human uterus.²⁶ The 'embryo'²⁷ is inserted in the woman's uterus once the sperm and the egg have been successfully united in a laboratory.

The first successful IVF of this sort was performed by physicians in 1978 in England.²⁸ Even though Africa is considered resource deficient in terms of reproductive technologies, the first IVF operation was performed in South Africa in 1983, only five years after the initial procedure in England.²⁹ ARTs, including IVF, have been growing in popularity in South Africa owing to rising infertility and its ability to help individuals facing this predicament.³⁰

The report South African Registry for Assisted Reproductive Technology 2015 provides a collection of data from 16 Assisted Reproductive Technology (ART) centres.³¹ ART is when medical procedures are performed which involve treatments like In Vitro Fertilisation (IVF), Intracytoplasmic sperm injection (ICSI) and Oocyte (egg) donation. The 2015 report shows that a total of 5 681 aspirations were

embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy.

²⁴ Dyer 'Assisted reproductive technology' 169. Dow 'The men' 65; The Report of the Parliamentary Ad Hoc Committee on the SALCR on Surrogate Motherhood (1999) 7, para 5: '(IVF) means the placing of the product of a union of a male and female gamete or gametes, which have been brought together outside the human body, in the womb of a female person for the purpose of human reproduction.'

²⁵ Masakuni 'In vitro fertilization in Japan' 1187; Todd, 'Infertility' <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>.

²⁶ Medical Advisory 'In vitro fertilization' 5.

²⁷ Technically the fertilized egg is not yet an embryo because it only becomes an embryo once it starts growing in the human uterus.

²⁸ Steptoe 'Birth' 366.

²⁹ Dyer 'Assisted reproductive technology' 170.

³⁰ Nelson 'Global Trade' 240–42.

³¹ The report for the South African Registry for Assisted Reproductive Technology, 2015

performed at the ART centres in the preceding year.³² The report also shows that there were 2 193 pregnancies from the total procedures done involving the treatments IVF (Conventional IVF & ICSI) and Oocyte (egg) donation.³³

Artificial insemination is a popular method of artificial conception which is related to ART but does not fall under ART's definition.³⁴ This is because treatments that simply deal with sperm, such as intrauterine or artificial insemination, or procedures which do not contain any in vitro elements are not included under the definition of ART.³⁵ During artificial insemination, a syringe or similar instrument is used to inject a sperm into a woman's vagina. The only difference between artificial insemination and the actual intercourse is the use of donor sperm and the absence of actual sex.

1.1.3 Surrogacy

Owing to the stark rise in infertility across the world, as discussed previously, there has been a corresponding and widespread increase in the demand for surrogacy. Surrogacy, as one of the ART methods,³⁶ is gaining prominence since it has become an increasingly popular method of assisted reproduction. Golboni and Jalali's study which sought to establish factors leading to surrogacy, found that it gives hope to infertile individuals and their families to have children.³⁷ This reinforced their conclusion that infertile individuals wish to have children that are genetically related to them.³⁸

Opting for surrogacy is primarily motivated by the desire to start a family for individuals who are unable to do so due to medical conditions like primary infertility

³² SARART report, 7.

³³ Ibid 7.

³⁴ Yoon 'Stress, distress' 2764.

³⁵ Wilson 'Everything' <https://www.healthline.com/health/artificial-insemination>.

³⁶ Niekerk 'Section 294' 398.

³⁷ Golboni 'Factors' 207.

³⁸ Ibid 209.

and secondary infertility. This includes individuals who have experienced past trauma, miscarriages and those who are at an old age.³⁹

Other individuals who choose surrogacy are individuals who may be unable to conceive naturally at all, such as males in a same-sex relationship.⁴⁰ Such individuals choose surrogacy, usually using their sperm. Intending fathers have two options for conceiving. The first option is genetic surrogacy, in which conception takes place using one partner's sperm and the surrogate's egg. The second option is gestational surrogacy, in which an embryo is generated using one partner's sperm and the egg of a donor and then transferred to the surrogate.⁴¹ Importantly, section 9(3) of the Constitution of the RSA recognises equality and non-discrimination on various grounds including sexual orientation.

Since surrogacy is the main theme of this thesis, it is imperative to first understand it. Surrogacy is:

‘an agreement between a surrogate mother (surrogate) and commissioning parent (s) in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent(s) and in which the surrogate mother undertakes to hand over such a child to the commissioning parent(s) upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent(s)’.⁴²

Unnithan similarly defines surrogacy as an agreement in which a woman undertakes to carry to term a pregnancy obtained through ART and then hands the baby over to the person or people for whom she is acting as a surrogate.⁴³

There are two basic types of surrogacies, which include gestational surrogacy and traditional or partial surrogacy.⁴⁴ Gestational surrogacy occurs when the genetic

³⁹ MacCallum ‘Surrogacy’ 1336. The parents in this study either chose surrogacy as their only option to have a child genetically linked to the commissioning father while the commissioning mother is infertile or after a protracted period of infertility and, in many cases, numerous unsuccessful IVF treatments.

⁴⁰ Blake ‘Gay fathers’ 861.

⁴¹ Ibid 865.

⁴² Section 1(1) of Children’s Act; Allen, ‘Surrogacy, Slavery’ 139; Stark, ‘Transnational Surrogacy’ 369; Ex parte WH 2011 6 SA 514 (GNP) para 1; Oxford Dictionary of Law 6 ed (2006) 524.

⁴³ Unnithan ‘Thinking through’ 287.

father's sperm and the genetic mother's ovum are implanted into the womb of a surrogate mother through IVF.⁴⁵ It affords the commissioning parents an opportunity to conceive a child that is 100 per cent genetically related to them. In this type of surrogacy, the surrogate mother's egg is not used at all, so the child born from gestational surrogacy is not genetically related to the surrogate mother.

Partial or traditional surrogacy relies on the fertilisation of the commissioning father's or donor sperm⁴⁶ with the surrogate mother's egg.⁴⁷ In this type of surrogacy, the surrogate is impregnated through a process known as intrauterine insemination where the eggs of the surrogate are used together with the sperms of the commissioning father.⁴⁸ In this case, the surrogate will be genetically related to the child. This type of surrogacy is used in cases where the commissioning mother's egg cannot be used due to reasonable reasons and in the cases of same-sex male couples.

Surrogacy is categorised into two classes: commercial (or remunerate) and altruistic.⁴⁹ Altruistic surrogacy occurs when the surrogate agrees to bear a child for the commissioning parents for free and she does not receive any financial rewards for the surrogacy agreement or compensation that is beyond reimbursement for her medical cover, pregnancy-related expenses, and medical aid coverage.⁵⁰ In the context of surrogacy, compensation refers to paying back expenses incurred through the pregnancy.

Commercial or remunerated surrogacy occurs when the surrogate mother receives financial reward for her pregnancy beyond the payment of medical and other reasonable expenses.⁵¹ This means that a surrogate mother will be rewarded or

⁴⁴ Pyrcce 'Surrogacy and Citizenship' 929; Patel, 'Insight' 214; Rimm, 'Booming baby business' 1436.

⁴⁵ Pyrcce 'Surrogacy and Citizenship' 929; Lascarides 'A Plea' 1225.

⁴⁶ This does happen in some jurisdictions, but not in South Africa because neither parent will be genetically related to the child.

⁴⁷ Lascarides, 'A Plea' 1226; Patel 'Insight' 214.

⁴⁸ Voskoboynik, 'Clipping' 340.

⁴⁹ Burpee. 'Momma Drama' 309; Pyrcce 'Surrogacy and Citizenship' 930; Mortazavi 'Village' 2252.

⁵⁰ Kumar 'Women's rights' 65-67; Worldwide Surrogacy Specialist 'Commercial Surrogacy' <https://info.worldwidesurrogacy.org/blog/commercial-surrogacy-vs.-altruistic-surrogacy>.

⁵¹ Pande 'Commercial Surrogacy' <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118663219.wbegss100>; Patel 'Insight' 215.

earn a profit for the services she rendered. The services rendered by the surrogate mother include being pregnant for 40 weeks, the effect that this has on both her body and lifestyle, and the pain endured during childbirth. A common justification for payment raised in literature is that childbearing is arduous work, potentially life-threatening and objectively dangerous.⁵²

It can be noted that a single father or single woman who is unable to give birth who wants to have a child through surrogate mother can have one without having a wife or female partner or male partner.⁵³

The study concentrates on remunerated surrogacy by evaluating whether South Africa's surrogacy regulations should be modified to permit payment or reward to a surrogate. The motivation for choosing this class of surrogacy in this study will be explained in detail in the next sub-section.

1.2 THE MOTIVATION FOR THE STUDY

Given the rise in infertility and the rising demand for children through surrogacy, there is an increasing demand for surrogacy and surrogate mothers. However, in terms of South African law, surrogate mothers must act altruistically, and remunerated surrogacy is not permitted.⁵⁴ Since there is a growing perception that surrogate mothers in other places are seldom permitted to enter into surrogacy agreements for commercial reasons, as will be explored in the thesis, it might be time for South Africa to reconsider the surrogacy laws.

The dissertation specifically explores whether the surrogacy laws in South Africa should be amended to permit remuneration as payment for the services rendered in the form of being pregnant and through childbirth. This discussion will help determine whether accepting payment for working as a surrogate is ethically repugnant or whether it is related with the unfavourable comments highlighted in this thesis solely due to a lack of regulation. This conundrum had a role in the author's decision to investigate the issues associated with remunerated surrogacy. To help the

⁵² Knight 'Women's lives' <https://healthtalk.org/conditions-threaten-womens-lives-childbirth-pregnancy/what-is-a-life-threatening-complication-in-pregnancy-and-childbirth>.

⁵³ Section 294 of the Children's Act.

⁵⁴ S295(c) (v) of the Children's Act.

reader comprehend the subject that is being addressed in this thesis, the problem statement will be explained in more detail in the following chapter.

1.3 PROBLEM STATEMENT

The dynamic environmental landscape reflecting in the rise in infertility, an increased interest and willingness to use surrogacy, and technological innovation across the globe raises the question if South Africa should consider amending its surrogacy laws. It is important to determine whether the South African laws on surrogacy should be reviewed to assess the need for accommodating monetary remuneration to the surrogate mother. Against this background, this thesis provides an assessment of whether the ban on remunerated surrogacy is unconstitutional and violates the rights of women, including the right to freedom of trade, occupation and profession;⁵⁵ the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction;⁵⁶ and the right to health including sexual and reproductive health.⁵⁷ It also explores whether forbidding this form of work is an infringement of women's dignity or privacy rights (i.e. infringement of her autonomy) because the right to make decisions about reproduction is linked to the rights to dignity and privacy.

Importantly, the thesis explores whether permitting this form of work is unconstitutional because if for example, one decides that remunerated surrogacy is contrary to the best interests of the child it might be unconstitutional for that reason. Respect for these rights might require that surrogate mothers have the freedom to choose to enter into any surrogate agreement and may receive remuneration for their services.⁵⁸

Some scholars who support remunerated surrogacy in their advocacy for the rights of women argue that surrogacy laws providing for the compensation of

⁵⁵ S 22 of RSA Constitution; Article 13 on right to economic development of the Maputo Protocol; Article 11 of the CEDAW and General Comment No. 13 on Equal Remuneration for work of Equal value.

⁵⁶ S 12(2)(a) of RSA Constitution.

⁵⁷ Article 14(1) of the Protocol to the African Charter on Human and Peoples 'Rights on the Rights of Women in Africa 2003.

⁵⁸ Article 13 on right to economic development of the Maputo Protocol; Article 11 of the CEDAW and General Comment No. 13 on Equal Remuneration for work of Equal value.

incurred expenses should be extended to permit remuneration for the pregnancy itself.⁵⁹ Other scholars submit that women have the right to choose what they want to do with their bodies, and their human rights must be protected.⁶⁰ In trying to balance the rights of the surrogate, this thesis explores whether the laws on surrogacy in South Africa must be amended to include remuneration as payment for the services rendered by the surrogate mother through being pregnant and through childbirth to uphold the constitutional rights of would-be surrogate mothers.

In other jurisdictions,⁶¹ legislatures are reviewing their laws on remunerated surrogacy agreements.⁶² South Africa might also need to consider reviewing and drafting suitable laws on surrogacy agreements so that women may contract to provide their services as surrogate mothers and claim fair remuneration for their services under labour laws.⁶³

Currently, the legal framework of South Africa does not allow surrogate mothers to be compensated beyond the reimbursement of reasonable expenses related to the surrogacy agreement, pregnancy, loss of earnings and medical cover.⁶⁴ Therefore, it prohibits commercial or remunerated surrogacy. It is an offence to receive any form of financial or another reward for donating gametes.⁶⁵

Notwithstanding the potential gains that may be made by amending the laws on remunerated surrogacy, many scholars have expressed their objections and

⁵⁹ Andrews 'Surrogate Motherhood' 168.

⁶⁰ Tong 'Feminist perspective' 59.

⁶¹ Jurisdictions that recently amended laws on compensated surrogacy include California, Washington DC, New York, New Jersey. Nigeria is yet to accommodate a bill that will allow for monetary compensation. India and Thailand have recently banned commercial surrogacy.

⁶² Price 'The Future' 1311.

⁶³ There is other labour legislation that prescribes minimum wages and other conditions of service (and working conditions) these legislations include: The Basic Conditions of Employment Act 75 of 1997 which give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment, Employment Equity Act 55 of 1998 aim to achieve equity in the workplace by eliminating unfair discrimination.

⁶⁴ Section 301 of the Children's Act.

⁶⁵ Section 60(4)(a) of the National Health Act; section 28 of Human Tissue Act.

concerns about such changes.⁶⁶ These scholars have argued that remunerated surrogacy gives rise to challenging legal, cultural, ethical, moral and medical issues, including exploitation, degradation, dehumanisation, marketing of surrogate mothers, exploitation and sale of children, and psychological harm.⁶⁷ These issues will be discussed in detail in Chapter 3 of this thesis, to determine whether these are the primary reasons why remunerated surrogacy was prohibited, or whether the laws should be amended to permit remunerated surrogacy.

This thesis explores ways in which the surrogacy laws might be amended to accommodate remunerated surrogacy. It suggests that remunerated surrogacy agreements must be carefully regulated to avoid the dangers of permitting wholesale commercial surrogacy, resulting in the commodification of children and the exploitation of women. The regulations must ensure that the agreements do not lead to exploitation and violation of human rights. The agreements must be mutually beneficial to the parties (child, surrogate mother and commissioning parents) and couched in a way that will provide proper protection to the parties of the surrogacy agreements and the resulting child. The payment to the surrogate mother could be regulated so that the surrogate mother is not underpaid, and the commissioning parents are not overcharged. There could be an implementation of stricter prerequisite criteria for potential surrogate mothers.

1.4. SIGNIFICANCE OF THE STUDY

The study is vital to South Africa because it aims to compare current South African regulations with those of several worldwide jurisdictions that permit remunerated surrogacy. The aim is also to ascertain if remunerated surrogacy is feasible in South Africa in light of the Republic of South Africa's 1996 Constitution and pertinent international law requirements. Additionally, suggestions on the best way to govern the practise will be provided. If these recommendations are put into practise, the remunerated surrogacy process will be transformed into a well-regulated, mutually

⁶⁶ Anderson 'Commodity?' 80; *Ex parte WH* case, where some of the cases were highlighted by the court. McLachlan 'Commodification of Children' 96; Posner 'The Ethics' 21.

⁶⁷ Anderson 'Commodity?' 80.

beneficial arrangement free from abuse and exploitation. This implies that women who choose to volunteer as surrogates will get just compensation for their efforts.

1.5 RESEARCH METHODOLOGY

To determine if there is a need to amend surrogacy laws in South Africa to allow remunerated surrogacy, the thesis adopted a qualitative study based on desk review largely relying on secondary evidence or literature from the various sources such as the Constitution of the RSA, South African legislation, international legislation and conventions, and case law. It additionally relies on secondary sources such as textbooks, journal articles, internet sources and reports from international organisations such as the treaty bodies such as CEDAW and the Committee on the Rights of the Child and non-government organisations working on reproductive rights.

The thesis uses a comparative approach and investigates law, policy and practice in foreign jurisdictions to assess whether the said foreign jurisdictions' experience can provide useful lessons and guidance to South African laws on remunerated surrogacy. It also analyses the laws of other jurisdictions that have recently adopted new laws on remunerated surrogacy and those that have recently banned remunerated surrogacy. The jurisdictions considered include India, California and Uganda.

1.6 RESEARCH QUESTIONS

The study seeks to answer the research question: whether South African law should be changed to permit remunerated surrogacy. In order to answer this question, the thesis examines these sub-questions:

1. Why is remunerated surrogacy illegal?
2. Is the ban on remunerated surrogacy unconstitutional?
3. What are the dangers of permitting remunerated surrogacy?
4. How can remunerated surrogacy be regulated to avoid these dangers?

5. To what extent do the decisions and laws on remunerated surrogacy in other jurisdictions able to provide lessons and guidance for the South African legal system?
6. What recommendations and conclusions can be drawn from the findings?

1.7. RESEARCH OBJECTIVES

1. To understand the argument around the illegality of remuneration of surrogate mothers.
2. To explain the unconstitutionality of the ban or prohibition of remuneration of surrogate mothers.
3. To determine the extent to which remuneration of surrogate mothers can be dangerous or pose a danger and discuss ways in which these dangers can be mitigated or regulated.
4. To interrogate best practices from selected jurisdictions like India, Uganda and California
5. To draw or make relevant recommendations and conclusions.

1.8 SCOPE AND LIMITATION OF THE STUDY

The study is focused on remunerated surrogacy specifically, rather than surrogacy in its entirety. Since remunerated surrogacy is prohibited in South Africa, the purpose of this thesis is to ascertain whether the laws governing surrogacy need to be amended to cater for remunerated surrogacy. The research's primary focus is on how the change would impact the commissioning parents, surrogate mothers and most importantly, the child born from surrogate motherhood agreements. When evaluating whether legislation pertaining to remunerated surrogacy has to be amended, the period of time taken into account is from the inception of surrogacy in South Africa to the date.

The research is restricted to the sources listed under the methodology. Although the majority of the sources used are for South Africa, other sources on other countries in Africa and beyond are included for a more comprehensive understanding and appreciation of specific practises and other concerns related to this research topic. The author selected India because it is one of the nations that has experienced several problems connected to the research topic. This is imperative to the study because commercial surrogacy was recently outlawed in India owing to a lack of regulations, the black market, and other issues that will be covered later in the thesis. California is one of the jurisdictions that explicitly permits remunerated surrogacy and it highly regulated thus, South Africa may learn something from the legislation in California. California offers a viable framework for developing remunerated surrogacy legislation in South Africa. It is important to emphasise that Uganda is now an African jurisdiction that considers the surrogate mother's remuneration for the services she provided therefore, Uganda might serve as a model for South Africa.

1.9 CHAPTER OUTLINE

Chapter 1 has introduced the study by highlighting the background and outlining the motivation, aim and objectives for conducting this study. It also provides the research problem, the research methodology, research questions and the chapter outline.

Chapter 2 provides an overview of the concept of surrogacy. It also analyses the regulatory framework of surrogacy and focuses on the laws around surrogacy payments in South Africa.

Chapter 3 examines whether there is a need to amend laws on surrogacy to accommodate remunerated surrogacy. It first gives an overview of why remunerated surrogacy is prohibited in South Africa and an international context. The thesis analyses whether the ban is justified. It does so by giving reasons why the ban should be lifted, and the laws which would be amended to allow remunerated surrogacy. It also shows the dangers of permitting remunerated surrogacy.

Chapter 4 discusses the legal framework of remunerated surrogacy for countries such as India, Uganda and California. It highlights why certain jurisdictions

amended their laws to allow remunerated surrogacy and why other jurisdictions are amending or have amended their laws to ban remunerated surrogacy.

Chapter 5 concludes the study by giving recommendations on how remunerated surrogacy can be regulated to avoid the dangers of permitting remunerated surrogacy.

CHAPTER 2: SURROGACY IN SOUTH AFRICA

2.1 INTRODUCTION

Surrogacy customs have been chronicled in local history, inscribed in ancient writings, and passed down through family mythology. When Pat Anthony, a Tzaneen grandmother, gave birth to her grandchildren through surrogacy in 1987, it became a popular topic of debate in South African families.⁶⁸ Karen Ferreira Jorge, Anthony's daughter, adopted the children and raised them as her own.⁶⁹ Although surrogacy is still legal in South Africa, the media attention surrounding the birth of the Ferreira Jorge triplets has never been equalled: it generated a slew of legal, ethical, and religious concerns concerning surrogacy.⁷⁰

When the triplets were born, there was no legislation regulating surrogacy agreements in South Africa.⁷¹ However, some Acts, such as the Human Tissue Act,⁷² the Child Care Act,⁷³ and the Children's Status Act⁷⁴, were used to regulate surrogacy indirectly but they did not provide a suitable framework within which to accommodate surrogacy contracts. These Acts are explained in detail in the following sections.

⁶⁸ Pretorius, 'Practical Aspects' 52; SALC *The report on surrogate motherhood* 95.

⁶⁹ Pretorius, 'Practical Aspects' 52; Nicholson 'Surrogate motherhood agreements' 511; SALC report on surrogate motherhood 95.

⁷⁰ William 'Surrogate granny'

<https://www.washingtonpost.com/archive/politics/1987/04/12/surrogate-granny-sparks-debate-in-south-africa/985ca032-597d-4360-b139-1ec85361a5c0>, the author stated that the case of 48-year-old grandmother Patricia Anthony has alternately captured and repulsed the public imagination; Jacobs 'Gives birth' available at <https://www.upi.com/Archives/1987/10/01/Grandmother-gives-birth-to-daughters-triplets/1733560059200/>; Battersby 'SA Woman', <https://www.nytimes.com/1987/10/02/world/south-africa-woman-gives-birth-to-3-grandchildren-and-history.html>.

⁷¹ Pretorius, 'Practical Aspects' 53; see: SALC report 96.

⁷² 65 of 1983; The Human Tissue Act was repealed and replaced by the National Health Act (NHA) 61 of 2003.

⁷³ 74 of 1983.

⁷⁴ 82 of 1987.

2.2 THE HUMAN TISSUE ACT

The Human Tissue Act, as amended by the Human Tissue Amendment Act 51 of 1989, came into operation on 12 July 1985 and inter alia regulates artificial fertilisation of humans in South Africa.⁷⁵ The Act, as well as the regulations promulgated under it, provides requirements to guarantee that the donors of gametes used in artificial insemination remain anonymous.⁷⁶ The Act concentrated on keeping the gamete donor anonymous, rather than addressing surrogacy, thus it was ineffective in regulating surrogate motherhood arrangements.⁷⁷

Noteworthy is that the Act was not only concerned about anonymity, but also outlawed payment. The topic of gamete payment has always been contentious due to the Act's restrictions on gamete payment.⁷⁸ The artificial fertilisation regulations from 1986, on the other hand, stipulate that anyone who has donated or withdrawn the gamete may be reimbursed for the reasonable expenses that he or she would have incurred.⁷⁹ Given that both regulations would apply to surrogacy, it is clear that the topic of payments for surrogate motherhood agreements has always been an issue.

2.3 THE CHILD CARE ACT

The Child Care Act⁸⁰ did not address surrogacy because it focused on the establishment of children's courts and the appointment of child welfare commissioners. It also addressed child safety and welfare, as well as child adoption. Technically, adoption may be linked to surrogacy, but they are two different concepts. The link between adoption and surrogacy can be shown in what happened in case of Pat Anthony in 1987. The Act did not cover surrogate motherhood agreements, and it focused on the child's interests and protection after delivery,

⁷⁵ SALC report on surrogate motherhood 81.

⁷⁶ Van Heerden *Boberg's Law of Persons and the Family* 338.

⁷⁷ Section 33(1)(c) of the Act Read together with section 19(c) of the Human Tissues Act.

⁷⁸ Section 28(1) of the Act provides that no person other than an authorised institution or importer of gametes may receive any payment in respect of the import or the supply of the gamete.

⁷⁹ Regulation 7 of the Government Notice No. R. 1182 of June 1986.

⁸⁰ 74 of 1983.

rather than both before and after birth.⁸¹ The Act was repealed by section 313 of the Children's Act 38 of 2005 with effect from 1 April 2010.

2.4 CHILDREN STATUS ACT

In the case of Pat Anthony, the Children's Status Act⁸² was promulgated on the 30th of December 1987, 13 days after the triplets were born. The Act contained provisions on paternity, guardianship, and the status of certain children, including those conceived because of artificial insemination.⁸³ Since it was the only statute that focused specifically on aspects of ART, relating to surrogacy, it was utilised as a rule to govern surrogacy.⁸⁴ This Act incorporated provisions that marginally accommodated surrogacy because it dealt with artificial insemination.

The Act complicated surrogacy agreements since the legislation was not drafted particularly for surrogacy and it had many ambiguities. In terms of the Act, the gestational mother and her husband, if he consented to artificial insemination, were the parents of a child born of artificial insemination using donor sperm or eggs.⁸⁵ As a result, any child born through surrogacy would be the child of the gestational woman and, in the case of spousal consent to the insemination, her husband. The major objective of surrogacy is for the surrogate mother to bear a child for the commissioning parents and for the commissioning parents to be legal parents of the child delivered by the surrogate, so the effect of this interpretation defeated the purpose of surrogacy.⁸⁶

Imposing parenthood on a surrogate mother (and potentially her husband, if she is married), who entered into the agreement for altruistic reasons and certainly not to retain the child for themselves, is unjust and unreasonable. Furthermore, it is against the best interests of the child to face unfavourable repercussions just because his or her parents chose to employ the option of surrogate motherhood on behalf of

⁸¹ SALC report on surrogate motherhood 88.

⁸² 82 of 1987.

⁸³ Children's Status Act 82 of 1987.

⁸⁴ Pretorius 'Practical Aspects' 52.

⁸⁵ Section 5(1)(a) of Children's Status Act.

⁸⁶ SALC report on surrogate motherhood 92.

the commissioning parents. Pretorius further argued that section 5 of the Children's Status Act was unnatural and untenable because it assigned parental rights to a surrogate mother who had no intention of keeping the child and a father who had minor participation, at best.⁸⁷

It is also important to note that, because the surrogate mother and her husband (if she is married) were recognised as the child's parents, it was up to the commissioning father to prove that he was the child's father.⁸⁸ The father could file a paternity lawsuit if he establishes through a paternity test that he is the child's genetic father. However, the legal status of the various kinds of 'parents' in this scenario would not actually change because this would still necessitate filing an adoption lawsuit because adoption would terminate the parental rights of the surrogate and her husband. If the commissioning parents fail, the surrogate mother and her husband will be required to adopt the child.⁸⁹

Only a small proportion of the thousands of children conceived through surrogate mothers worldwide end up in court or cause major disagreements.⁹⁰ One could counter that the concerns highlighted have more to do with the child's parentage than they do with the payment that would have been given to the surrogate mother for her services. Certainly, the issue of payment will be raised while assessing the child's paternity, but that is not the reason the case would have been brought before a court.

Children born as a result of a woman's artificial insemination, with her husband's approval, were regarded as the couple's legal children.⁹¹ Clark argued that if a fee was paid as part of the adoption agreement between the surrogate mother and the commissioning parents, it was regarded as illegal (currently it is illegal in terms of Children's Act) because it violated section 24 of the Child Care Act.⁹² Pretorius, however, concluded that the legislature should resolve the confusion induced by the

⁸⁷ Pretorius 'Practical Aspects' 52, 53.

⁸⁸ Clark, 'Surrogate Motherhood' 770.

⁸⁹ Ibid 770.

⁹⁰ Richards 'Unrelated Commercial Surrogacy' 235; Kerian 'Last resort' 113, 130.

⁹¹ Ibid 170.

⁹² 74 of 1983, as amended by section 8 of the Child Care Amendment Act 86 of 1991.

joint impact of the Children's Status Act and the Child Care Act. This led to the formulation of the South African Law Commission on Surrogacy Motherhood Agreements.

2.5 THE SOUTH AFRICAN LAW REFORM COMMISSION

In June 1987, when the first case of surrogate motherhood agreement was reported in the newspapers, the legal implications of it were discussed in the Commission's programme, titled Surrogate Motherhood.⁹³ The Draft Surrogate Mother Bill,⁹⁴ was first released as part of the Law Commission's report on surrogate motherhood at the end of 1991.⁹⁵ In 1991, a Commission was established to investigate the ethical, legal, and moral implications of surrogate motherhood agreements.⁹⁶ The SALC⁹⁷ attempted to rectify this gap and confusion in the surrogacy laws by compiling written submissions from diverse stakeholders, holding public hearings, and examining comparative best practices from the United Kingdom and the USA.⁹⁸

The SALC's first Report on Surrogate Motherhood was published in 1993, including final recommendations and a draft statute. In February 1999, the ad hoc Committee issued its final report. In the discussion paper, the Commission recommended that the provisions in the proposed new Surrogacy Act, on the legal status of children born through surrogacy, be replicated in the new Children's Statute.⁹⁹ The Committee urged each state department with surrogacy-related legislation, such as the Human Tissue Act of 1983, the Child Care Act of 1983, and the Children's Status Act of 1987, to review them.¹⁰⁰ This was because they were campaigning for a new law that particularly dealt with surrogacy and that would be modified under the 1996 South African Constitution.

⁹³ SALC report on surrogate motherhood 3.

⁹⁴ GG 16479/114-6-1995.

⁹⁵ Pretorius 'Surrogate motherhood' 114.

⁹⁶ Silkstone *A critical analysis of SALC report* <http://hdl.handle.net/11427/17506>.

⁹⁷ Previously referred to as the South African Law Commission.

⁹⁸ Louw 'Surrogate motherhood' 19.

⁹⁹ SALC report on surrogate motherhood 3.

¹⁰⁰ *Ibid* 4.

In the report and Draft Children's Bill on the Review of the Child Care Act Project 110 in 2002, the Commission's main goal was for the new Children's Bill to repeal the existing Child Care Act of 1983 and, specifically, to include provisions relating to parental rights and obligations, children's best interests, children in exceptionally challenging situations, adoption, surrogacy, and children's consumer rights.¹⁰¹

Since there were no regulations to regulate surrogacy, many researchers and critics viewed it, particularly remunerated surrogacy, in a variety of ways. In the Report of the Ad Hoc Committee on the Report of the SALC on Surrogate Motherhood, dated 11 February 1999, surrogacy, according to most commentators, was viewed as a technique to help irreversibly infertile people have children, rather than to conduct a business.¹⁰² Therefore, it is provided that the surrogate should engage in the surrogacy agreement for altruistic reasons, rather than for financial benefit.¹⁰³ The report further mentioned that the vast majority of infertile persons and surrogates are willing to enter into paid arrangements. According to one's viewpoint, if the state is involved in regulating the fee, the remuneration of the parties may be accommodated.¹⁰⁴

The SALJ took into account a variety of viewpoints before choosing non-payment under surrogate agreements; these include the argument that such a decision would dehumanise the surrogate mother and reduce her to nothing more than an incubator.¹⁰⁵ The Commission argued that if pregnancy is chosen for financial benefit, it becomes less valuable because there should be some things in life that money cannot buy.¹⁰⁶ Another argument was that the goal of non-commercialism was to avoid 'rent-a-womb' situations. However, it can be argued that payments to surrogate mothers would demonstrate the unfairness of surrogacy agreements because it forbids surrogacy women from making money from their services, while

¹⁰¹ SALC report on surrogate motherhood 4.

¹⁰² Nicholson 'Surrogate motherhood' 517.

¹⁰³ SALC report on surrogate motherhood 108.

¹⁰⁴ Ibid 108.

¹⁰⁵ Ibid 138.

¹⁰⁶ Ibid 139.

permitting doctors and attorneys that are also involved in infertility treatment cases to profit financially for their services.¹⁰⁷

2.6 CHILDREN'S ACT 38 OF 2005

In South Africa, after the recommendations by the SALC, surrogacy remained unregulated and ambiguous, despite all the legislative reform initiatives. The Children Status Act did not guarantee the commissioning parents that the child conceived would be genetically theirs in terms of the law. It is important to note that the genetic origins of the child are not determined by the law because this is a physical fact, and it depends on who provided the sperm and who provided the ovum, but it needs to be regulated by law. Therefore, it was rather a radical idea in South African law that a surrogate mother could give birth to a baby on behalf of the commissioning parents and not be the baby's mother in the eyes of the law and without an adoption involved.

Currently, in South Africa, surrogacy is comprehensively recognised and regulated in Chapter 19 of the Children's Act. The final provisions in Chapter 19 of the Children's Act, as discussed in the next subsection, are the result of several in-depth investigations, including the Law Commission's Report on Surrogate Motherhood Project 65 in 1993 and 1999, and its Discussion Paper on the Report and Draft Children's Bill on the Review of the Child Care Act Project 110 in 2002.¹⁰⁸

2.7 CHAPTER 19 OF THE CHILDREN'S ACT

Chapter 19 of the Children's Act (sections 292 – 303) focuses on the formalities of the surrogacy motherhood agreement; the effects of the surrogacy motherhood agreement on the status of the child; the termination of the agreement and its effects; termination of pregnancy; and the payment in relation to the surrogacy motherhood agreements.

Section 292 of the Children's Act outlines the criteria that must be followed for surrogacy agreements to be declared valid and binding. It provides that the

¹⁰⁷ Ibid 139.

¹⁰⁸ SALC *Report and Draft Children's Bill on the Review of the Child Care Act Project 110* (2002) 167.

surrogate motherhood agreement must be in writing and signed by all parties. The surrogate mother and at least one of the commissioning parents must be domiciled in the RSA. Importantly, the agreement must be entered into in the RSA.¹⁰⁹ Failure to meet the requirement in section 292 may render the agreement void and unenforceable.

If the commissioning parent is married or in a permanent relationship, the court may confirm the surrogacy agreement after the spouse of the commissioning parent has given his or her consent to the agreement and has become a party to the agreement.¹¹⁰ This also applies to the surrogate: if she is married or in a permanent relationship, the court may only approve the surrogate agreement after the spouse or partner gives written consent to the agreement.¹¹¹

Section 294 of the Children's Act provides that the surrogate motherhood agreement is only valid if the conception of the child is effected by the use of the gametes of either both or one of the commissioning parents, if the other one cannot provide the gamete due to medical reasons.¹¹² Essentially, the main point is that at least one of the commissioning parents must be a genetic parent to the child born through surrogacy. If this rule is not complied with then the court will not confirm the agreement.¹¹³

The genetic link requirement has been very controversial in South Africa. However, the issue of genetic requirement is relevant to the study's argument about remunerated surrogacy because the remuneration seems more like payment for the service of being pregnant and less like buying a baby if the commissioning parents' gametes have been used. If the baby is the product of the surrogate's own ovum and donor sperm, then it might seem more like buying a baby. This is a completely different case in which none of the commissioning parents' gametes was used, as this would appear to be the buying of a child.

¹⁰⁹ Children's Act S292 (1) (d).

¹¹⁰ S293(1).

¹¹¹ S293(2).

¹¹² S294.

¹¹³ *AB and Another v Minister of Social Development* [2016] ZACC 43 para 19; see: *Ex Parte DW* (11432/2021P) [2022] ZAKZPHC 11 (8 April 2022).

As a result, if one of the commissioning parents' gametes is utilised, there is a genetic relationship, and the child is less likely to be referred as being bought by the commissioning parents. It is a prerequisite in South Africa for one of the commissioning parents to use their gamete, therefore, this is a compelling basis for altering legislation regarding surrogacy payments in South Africa.

Section 294 of Children's Act is in accordance with widely held notions that a child's psychological wellbeing depends on knowing their genetic origins and that a child's genetic relatedness ensures a bond between parents and child. It is understood that the best interests of the resulting child lie in fostering a close link between parents and children and in guaranteeing the growth of a sound psychological state.¹¹⁴ However, this provision excludes prospective parents who are both infertile and single persons who also want to have children through surrogacy. It is important to note that surrogacy is becoming more popular in society as it provides infertile couples with an opportunity to have a child that is genetically related to them or one of them.

In the case of *AB and Another v Minister of Social Development (Centre for Child Law as Amicus Curiae)*,¹¹⁵ AB filed an application with the Pretoria High Court, seeking an order declaring that section 294 of the Children's Act¹¹⁶ to be unconstitutional and invalid.¹¹⁷ The court considered a legal question: Is the distinction between individuals who are able to give their own gametes and those who are unable to do so rational and justifiable? In the case, a single woman named AB wanted to use a surrogate in order to conceive a child.¹¹⁸ Due to her infertility, AB was forced to use double-donor gametes to create the child that would be borne by a surrogate.¹¹⁹ This involved using both a sperm and an egg donor. According to

¹¹⁴ *AB and Another v Minister of Social Development* [2016] ZACC 43 para 19.

¹¹⁵ (40658/13) [2015] ZAGPPHC 580.

¹¹⁶ Section 294 of the Children's Act provides that 'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'

¹¹⁷ *AB* para 115.

¹¹⁸ *Supra* para 16.

¹¹⁹ *Supra* para 16.

the evidence presented to the High Court at the time, the genetic connection between parents and offspring did not appear to matter as much as previously believed.¹²⁰ The High Court held that section 294 of the Children's Act unjustifiably infringed upon AB's rights to equality, human dignity, reproductive autonomy, privacy, and access to health care. As a result, it ruled that the said section was unconstitutional.¹²¹

AB requested that the Constitutional Court (CC) uphold this judgment. On appeal, the issues that were heard in the CC were whether section 294 was legitimately interpreted to limit AB's rights to psychological integrity, human dignity, equality, privacy, and access to reproductive health care and, if so, whether section 294 limits AB's rights in a fair and rational manner.¹²² The CC ordered that 'the order of constitutional invalidity in respect of section 294 of the Children's Act 38 of 2005 made by the High Court, Pretoria is not confirmed.'¹²³ Thus, contrary to what AB argued in this instance, the requirement for a genetic link does not limit anyone's rights. This demonstrates the significance of the genetic link between a child and commissioning parent in surrogacy agreements. The majority found that the High Court's reasoning was flawed.¹²⁴ The CC reasoned that the High Court had 'overemphasised the interests of the commissioning parent(s) and overlooked the purpose of the impugned provision and the best interests of children.'¹²⁵ The court concluded that 'the possible harm to self-identity and self-respect brought about by a child not knowing the identity of either of their genetic parents "is, unquestionably, all important."'”¹²⁶ Therefore, the majority judgment concluded that the disputed provision did not violate AB's rights and therefore it is constitutional.¹²⁷

¹²⁰ Jadya, 'Surrogacy families' 3008.

¹²¹ AB para 115.

¹²² 2017 (3) BCLR 267 (CC) para 273.

¹²³ Supra para 330.

¹²⁴ Supra para 294.

¹²⁵ Supra para 293.

¹²⁶ Supra para 153, 290.

¹²⁷ Supra para 330.

In addition, confirming on the *AB* case from the CC, the court in the case of *APP and Another v NPK*¹²⁸ confirmed that the objective of the surrogacy provisions in the Children's Act is to enable couples to have a child who is genetically related to them.

Meyerson argued that the majority judgment in the case of *AB* ignored constitutional issues, such as the violation of the equality right in section 9(1) of the Constitution.¹²⁹ This is because the distinction made by Section 294 of the Children's Act is not logically related to the lawful objective of safeguarding children's best interests.¹³⁰ She further argues that the section violates section 9(3) of the Constitution by unlawfully discriminating against commissioning parents who want to enter into a surrogacy agreement but cannot provide genetic material.¹³¹ Thaldar argued that the premise in the *AB* case is reinforced by traditional black South African cultural principles concerning kinship formation, which still have an impact on South Africa's modern society.¹³² Therefore, Thaldar concluded that South Africa cannot agree with the majority ruling in *AB* since these cultural norms discriminate against children depending on their social backgrounds.¹³³

The issues relating to section 294 of the Children's Act were also raised in the case of *Ex parte DW*.¹³⁴ In the case, the applicant requested a declaratory judgment from the court about the acceptable options under section 294 of the Children's Act for the child's genetic lineage to have a child with the aid of a surrogate mother. He requested a court order stating that he may use sperm from Donor 6293 of Fairfax Cryobank for the purposes of his intended surrogate motherhood agreement. This is because he was a single man who was effectively infertile, and the infertility prevented him from contributing his own gamete.¹³⁵

¹²⁸ (17962/2020) [2021] ZAWCHC 69 (11 March 2021) para 24.

¹²⁹ Meyerson 'Surrogacy, Geneticism' 320.

¹³⁰ *Ibid* 320.

¹³¹ *Ibid* 320.

¹³² Thaldar 'Instrument of Prejudice' 352.

¹³³ *Ibid* 353.

¹³⁴ (11432/2021P) [2022] ZAKZPHC 11 (8 April 2022).

¹³⁵ *Ex parte DW* para 1.

The applicant's request for a declaratory order appeared to conflict with how Section 294 is worded. However, he argued that the section, when read with a purposive interpretation, aims to ensure that the child will eventually be aware of its genetic lineage.¹³⁶ Therefore, he requested the court to rule that he has the right to use sperm from a donor who resides in the USA and who consented to having his identity revealed to the child once the latter reaches the age of 18.¹³⁷ He argued that this application is distinct from the customs in South Africa, where sperm banks exclusively provide donors who can remain anonymous.¹³⁸ His application was dismissed because the judge did not agree with his interpretation on the section. This is from the background that the court issue was that the child born of surrogacy must have a genetic link with at least one of the commissioning parents.¹³⁹

The ruling in the case of *AB* and *Ex parte DW* has an impact on the debate over remunerated surrogacy because it was held that the commissioning parents must be genetically related to the child born from surrogacy. As discussed in Chapter 3, some have argued that remunerated surrogacy amounts to 'sale of babies'. However, if the surrogate bears and gives birth to a child that is the genetic child of the commissioning parents, it becomes more obvious that the remuneration is for the services of pregnancy and childbirth.

It is important to note that if the surrogate mother is in fact the genetic mother of the child, then she is legally permitted to keep the child (may refuse to hand the child over to the commissioning parents).¹⁴⁰ If she is not the genetic mother of the child, then she is supposed to hand the child over to the commissioning parents, but some women might become bonded with the baby during pregnancy and might end up refusing to hand over the child after delivery.

Importantly, Section 295 of the Children's Act provides that the surrogate mother must, among other things, have a documented background that includes at least one pregnancy and successful delivery, as well as a living child of her own, for

¹³⁶ *Ex parte DW* para 3.

¹³⁷ *Supra* para 3.

¹³⁸ *Supra* para 3.

¹³⁹ *Supra* para 14.

¹⁴⁰ Section 298 of the Children's Act.

a court to confirm a surrogacy arrangement. Additionally, the agreement must be justified considering each party's personal circumstances for the court to provide approval to the agreement.¹⁴¹ These measures are necessary because both parties must agree to the terms of the agreement to avoid one party refusing to hand over the child after delivery or abandoning their duties over the child. The surrogate agreement must also be confirmed by the High Court that has jurisdiction over the matter.¹⁴² Given that the agreement involves children, the child's best interests must take precedence.

When deciding whether to confirm surrogacy agreements, the court considers a variety of factors, including those discussed in the recent case of *Ex Parte JCR*¹⁴³ and those described in Chapter 19 of the Children's Act. The *Ex Parte JCR* case recently established that one of the most crucial factors to consider is the best interests of the children born through surrogacy arrangements, as well as the children already born by the surrogate mother or one of the commissioning parents. The judgment of this Court in *Ex Parte JCR* raised a legal question, 'should it, as a rule, be required that a clinical psychologist assess the existing child(ren) of commissioning and surrogate parents to determine whether they are prepared for the surrogacy and its outcome?' in the case of *Ex parte: Three Surrogacy Applications*.¹⁴⁴ The court ordered that 'it is not a requirement of general application in applications for the confirmation of surrogate motherhood agreements that existing children of commissioning parents and surrogate mothers are assessed by a clinical psychologist to determine whether the children are prepared for the surrogacy and its outcome.'¹⁴⁵ To prevent duplication, The study shall discuss the significance of the best interests of children as discussed in the aforementioned case within the section on best interests of children in Chapter 3 of the thesis.

¹⁴¹ S295 of the Children's Act.

¹⁴² S292(1)(e).

¹⁴³ (51606/21) [2022] ZAGPPHC 209; 2022 (5) SA 202 (GP) (16 March 2022).

¹⁴⁴ (8749/22;9353/22;34190/22) [2022] ZAGPPHC 848 (25 October 2022).

¹⁴⁵ *Supra* para 46.

Further, in deciding whether to confirm a surrogate agreement, the court in *Ex Parte JCR* case was also concerned about the health of the surrogate mother.¹⁴⁶ According to the judge, there is no exception to the rule requiring experts to submit general findings that help the court determine whether the surrogate is fit and healthy enough to carry a child.¹⁴⁷ From Judge Neukircher's decision, it can be inferred that if the court can generate new criteria to safeguard the surrogate mother's children, as well as the health of the surrogate mother, it can also develop new guidelines for each application involving remunerated surrogacy. This includes that the application will have to be evaluated in order to safeguard the rights and interests of all parties involved. However, *the three Surrogacy Applications* insists that the court must retain discretion to decide on the child's best interests and not have this discretion fettered by new rules.

Judge Neukircher concluded that, in order to create a framework within which the surrogate motherhood applications were constructed, and within which the courts could consistently assess each application.¹⁴⁸ The Judge stated that there is no set formula that a judge can use to evaluate the application because each of these applications must be evaluated on its own merit and in light of the circumstances that are being considered by the court.¹⁴⁹ This plays a significant role in my argument for regulating remunerated surrogacy since the court's ability to make the final decision on surrogacy applications can help enforce the surrogacy agreement. For instance, if remunerated surrogacy is permitted, the court will employ specific criteria to ensure that neither party to the surrogacy agreement is being disadvantaged or that the agreement is against *bonis mores*,¹⁵⁰ and all parties are complying with the requirements. It is important to point that it is fine for the court to develop guidelines, but one should bear in mind that the court must still be able to exercise its discretion to decide the best interests of the child. The court may establish a set of guidelines

¹⁴⁶ Supra para 20.

¹⁴⁷ Supra para 20.

¹⁴⁸ Supra para 1.

¹⁴⁹ Supra para 1.

¹⁵⁰ *Bonis mores* is a Latin word which means good morals.

that will consider agreements for remunerated surrogacy, which will be legally obligatory on all parties.

Section 297 of the Children's Act provides that the surrogate is required to hand over the child after birth to the commissioning parents, as they will assume parental responsibility.¹⁵¹ A surrogate mother, who is also the child's genetic parent, may terminate the surrogacy motherhood agreement at any point before the sixty days following the child's birth by filing a written notification with the court.¹⁵² Importantly, the surrogate mother may elect to keep the baby of whom she is the genetic mother.

The South African legal framework prohibits compensated surrogacy beyond reimbursement for reasonable direct expenses, as shown in section 301 of the Children's Act, which provides that:

- 1) 'Subject to subsections (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or kind.
- 2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the
 - a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;
 - b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or
 - c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

In addition, Section 295 (c) of the Children's Act provides that the surrogate mother:

- (iv) is not using surrogacy as a source of income;
- (v) has agreed for altruistic reasons and not for commercial purposes.

¹⁵¹ S 297 of the Children's Act.

¹⁵² S 298.

In the case of *Ex Parte WH*,¹⁵³ the first and second applicants (referred to as the commissioning parents) were two married males who approached the Court to confirm a surrogacy motherhood agreement in accordance with the Children's Act. The surrogate mother was the third applicant, and her life partner was the fourth. The applicants did not have children of their own and, because they were both males, they were unable to have genetically related children unless they used surrogacy.¹⁵⁴ This was an application for the confirmation of a surrogacy agreement under section 295 of the Children's Act. It was one of the first surrogacy cases determined after the Act came into effect. The court suggested that, to reduce the risk of abuse, a complete list of surrogacy expenses with adequate specificity be provided.¹⁵⁵ For transparency and preventing remunerated surrogacy, the court additionally demanded a proper list of projected costs, for example maternity garments, health, and life insurance, as well as copies of any extra agreements between the surrogate and the commissioning parents.¹⁵⁶

In above mentioned case, the commissioning parents and the surrogate mother were introduced to each other by an agency called Baby-2 Mom. The commissioning parents also acknowledged that there were no payments for the surrogate mother's introduction.¹⁵⁷

In its judgment, the Court also held that unique surrogate mother expenses should be justified in the agreement, as there are possibilities that generic payments for expenses without specificity might be used to disguise the payment of compensation.¹⁵⁸ Thus, remunerated surrogacy can be easily concealed, and illegal payments can be included under the guise of legal and lawful payments.¹⁵⁹ The court

¹⁵³ (2011) (6) SA 384 GNP.

¹⁵⁴ *Ex Parte WH* para 14.

¹⁵⁵ *Supra* para 29; Sloth-Nielsen 'South African style' 21-23.

¹⁵⁶ Sloth-Nielsen 'South African style' 22.

¹⁵⁷ *Ex Parte WH* para 12.

¹⁵⁸ *Supra* para 64.

¹⁵⁹ *Supra* para 64.

concluded that the parties to the surrogacy agreement are required to confirm that the agreement is for altruistic rather than remunerated reasons.¹⁶⁰

The court established additional requirements that must be satisfied before a surrogacy agreement can be confirmed. These include recommendations for involving agencies that may be involved in surrogacy, which the Act currently does not address.¹⁶¹ In some countries, such as Vietnam, adoption agencies do operate as a commercial service, for example, one hires an agency and pays them to find a baby for adoption.¹⁶² As a result, this can happen in circumstances of remunerated surrogacy, where an agency is hired to find a surrogate.

The National Health Act

The National Health Act is also part of the legislation that were introduced to complement the surrogacy related statutes and to regulate surrogacy agreements in South Africa. Section 60(4)(a) of the National Health Act¹⁶³ supports the prohibition of payments to a donor (in cases of surrogacy agreement, to the surrogate mother) beyond reasonable expenses. Regulation 5 of the Regulations Relating to Artificial Fertilisation of Persons¹⁶⁴ states that the donor may only be reimbursed ‘for any reasonable expenses incurred by him or her to donate a gamete.’ Some surrogate mothers effectively donate gametes because their own ova are used but, in other cases, only the gametes of the commissioning parents are used when there is another possibility, as in *Ex Parte WH*, where donor ova were also used. Therefore, even though ‘reasonable expenses’ are permitted under the National Health Act, the scope of the reasonable expenses does not include remuneration for services rendered, particularly when the Children’s Act forbids this expressly.

In conclusion, it is now possible in South African law for the commissioning parents to be recognised as the legal parents of the baby, instead of the surrogate as

¹⁶⁰ Supra para 40.

¹⁶¹ Supra para 66.

¹⁶² Article 12 of Law No. 52/2010/QH12 of June 17, 2010, on adoption.

¹⁶³ 61 of 2003.

¹⁶⁴ Regulations Relating to Artificial Fertilisation of Persons. GN R1165 GG 40312, 30 September 2016.

the biological mother. However, to answer the main thesis question: the surrogate mother cannot perform her pregnancy services for a fee, thus she cannot be remunerated. This is so because the Children's Act expressly forbids paying surrogate mothers any payment beyond pregnancy-related expenses. Therefore, if there has been any payment beyond the expenses associated with the pregnancy and childbirth, the court that must confirm the surrogacy agreements will refrain from confirming them. The question of whether it is now appropriate to amend the discussed laws to include remunerated surrogacy is posed because the laws as discussed were adopted based on that generation¹⁶⁵ and their negative thoughts towards remunerated surrogacy and maybe they should be updated to meet the demands of the current generation. This question is addressed in the next chapter.

¹⁶⁵ The generation wherein the remunerated surrogacy was prohibited.

CHAPTER 3: REMUNERATED SURROGACY: A Call for Legislative Reform

3.1 INTRODUCTION

Chapter 3 examines whether there is a need to amend surrogacy laws to allow for remunerated surrogacy in South Africa. This chapter examines the arguments against remunerated surrogacy and suggests that many of the objections are misplaced or could be overcome through careful legislative drafting. It gives an overview of why remuneration is prohibited due to the unfavourable attitudes that they are thought to induce in South Africa and elsewhere around the world.

The laws prohibiting remuneration are based on theories and arguments against remunerated surrogacy. In the following sections, the study discusses the arguments and dangers of permitting remunerated surrogacy. Furthermore, the chapter determines whether the ban on remunerated surrogacy is justified.

When analysing the human rights implications of surrogacy in general, children, surrogate mothers and commissioning parents, as well as states and intermediaries, have separate and frequently opposing interests that must be examined and balanced.¹⁶⁶ Regardless of differences in viewpoints, it is important to respect the rights of all people involved in surrogacy arrangements. The thesis attempts to evaluate whether there is a need to amend South African laws regarding remunerated surrogacy, while balancing the rights of all parties concerned.

The study begins by discussing the arguments for prohibiting remunerated surrogacy that are based on a consideration of the children born as a result of remunerated surrogacy. Some have argued that remunerated surrogacy could be construed as the sale and exploitation of children thus amounting to the psychological harm of the children. In contrast, the dissertation argues that remunerated surrogacy is different from selling or exploiting children. It is of paramount importance to also discuss the importance of the best interests of the child

¹⁶⁶ University of Chicago Law School, 'Human Rights Implications' 10, <https://chicagounbound.uchicago.edu/ihr/10>.

born as a result of the surrogacy arrangements. The study further looks at the comparison between surrogacy and adoption remunerated surrogacy and sale of a child for adoption.

Furthermore, the study discusses on the drawbacks of remunerated surrogacy that affect the surrogate mother, including the commodification of surrogate mothers, their exploitation, psychological suffering, and a violation of human dignity. Contrarily, the study makes an argument for why the laws governing paid surrogacy may be amended while still protecting the surrogate's rights. The counterclaims include safeguarding women's autonomy and their freedom to freely choose their professions. The thesis promotes the notion that there should be laws governing paid surrogacy, and such laws should make it clear that the surrogate will only get payment for the services she rendered. Finally, the chapter determines whether the amendment of remunerated surrogacy legislation would affect commissioning parents.

3.2 CHILDREN BORN FROM SURROGACY AGREEMENTS

Section 3.2 of the chapter looks particularly at the arguments against remunerated surrogacy based on the effect this may have on the children who are born from surrogacy arrangements.

3.2.1 Sale of children

One of the main arguments against remunerated surrogacy contracts is that such contracts promote the sale of children.¹⁶⁷ It has been argued that surrogacy arrangements, including remunerated surrogacy, amount to selling of children under international human rights law, and so should not be legalised.¹⁶⁸ According to scholars, the link between remunerated surrogacy and the sale of children is based on

¹⁶⁷ Article 1 of Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002; Anderson 'Commodity? 72; Smolin, 'The Sale of Children' 265; McLachlan 'Commodification of children' 96. Posner 'The Ethics' 21.

¹⁶⁸ Smolin 'The Sale of Children' 265.

that the surrogate mother will be remunerated by the intended parents in exchange for the child and parental rights over a child.¹⁶⁹

It has been argued that remunerated surrogacy is a form of child commodification because the surrogate mother receives financial gain from the surrogacy agreement.¹⁷⁰ Furthermore, some scholars also argued that the payment of a fee beyond reasonable expenses to a surrogate mother is the ‘moral equivalent of baby selling and should be prohibited’.¹⁷¹

According to Anderson, ‘remunerated surrogate agreements reprehensibly commodify children because they portray parents’ rights over their children as property.¹⁷² She argues that parental rights are treated as if they were property rights and if the rights are property rights, then the object of the right would be a thing, meaning that there is commodification of children. She is of the view that commodification of children does not properly value them and does not treat them as human beings who must be respected because they are treated like goods that can be sold and exchanged.¹⁷³ This means that remunerated surrogacy violates moral principles by treating children like commodities and diminishes their natural value as human beings.¹⁷⁴

McLachlan and Swales argue that remunerated surrogate motherhood contracts do not involve the commodification of children, in opposition to Anderson’s criticisms on remunerated surrogacy.¹⁷⁵ The study agrees with McLachlan and Swales that Anderson’s reasoning is unpersuasive since it does not follow that paying the woman who carried a child before birth will cause the child to be treated inappropriately or like a commodity.¹⁷⁶ They used the example of dating and matrimonial agencies, which are paid for their assistance in bringing together

¹⁶⁹ Ibid 265; McLachlan, ‘Commodification of Children’ 96.

¹⁷⁰ SALC Report on surrogate motherhood (1992) paras 2.5 and 8.2.8; Warlen, *The Renting of the Womb* 589; Field ‘Surrogacy Contracts’ 7.

¹⁷¹ Rae *The Ethics* 9; Field ‘Surrogacy Contracts’ 7.

¹⁷² Anderson ‘Unethically Commodifies’ 19.

¹⁷³ Anderson ‘Commodity?’ 72.

¹⁷⁴ Anderson *Value* 186.

¹⁷⁵ McLachlan ‘Commodification of Children’ 91.

¹⁷⁶ McLachlan ‘Babies, Child Bearers’ 6.

potential partners. In cases where the partners get married and have children, there has never been any claim that the spouses and children are treated as commodities because there was remuneration involved in the facilitation of the relationship.¹⁷⁷ This indicates that, even though the surrogate mother receives payment, the child is not treated as a commodity because the money is paid in exchange for the surrogate's services as will be explained later in this subsection.

To examine whether remunerated surrogacy contract amounts to baby selling one needs to investigate the meaning of 'sale'. A sale is a 'contract in which one party undertakes to deliver to another the free possession of a thing in exchange for a price in money.'¹⁷⁸ It is imperative to give an example of what constitute the sale of a child. A sale of a child would be a legally binding contractual relationship between the surrogate mother and the commissioning parent(s) established at conception, in which the transfer of the child would be made conditional upon payment.¹⁷⁹ In situations when the child is not genetically related to either of the commissioning parents, the surrogate mother would be paid for her services, as well as the sale of the child, because the child is solely genetically related to the surrogate mother. If a mother chooses to place her child for adoption after giving birth and receives payment for doing so, such a circumstance could also be compared to the sale of a child.

However, if the surrogate mother is paid for the services, she provides her services by carrying the child until delivery, there is no sale of children. Another better example of sale of a child would be the literal example of a woman who gives birth to a child who then just sells the child for money. Unfortunately, such things do happen in this world for example, poor women who cannot afford to raise a child and are paid when giving up the child for adoption.

Hanna's argument to determine whether the children's rights are affected by the issue of the sale of children that is associated with remunerated surrogacy argued that remunerated surrogacy may be based on the delivery of product principle, which

¹⁷⁷ Ibid 6.

¹⁷⁸ Hutchison *The Law of Contract in SA*, glossary.

¹⁷⁹ Preamble and Article 2(a) and Article 3 of the Optional Protocol to the CRC on the sale of children.

states that if two persons enter into a commercial contract in which one party receives things if the other pays, the latter receives rights to the items.¹⁸⁰ This can be comparable to remunerated surrogacy arrangements in that surrogacy agreements may include a commercial contract in which the surrogate mother earns money and the commissioning parents obtain the child and parental rights. This is, however, particularly when it is the surrogate mother's genetic child because, under normal circumstances, a woman who gives birth to her genetic baby and then hands it over for money does indeed seem to be selling her baby. Since the genetic mother already has parental rights over the child to whom she gives birth, as has been explained in Chapter 2, the amount she will receive from commissioning parents in exchange for giving them parental rights of the child makes it appear as if the child is being sold.

Hanna was, however, against the delivery of product principle because he believed 'that parental rights are obtained by those who have claims to the reproductive labour that generates the child, not necessarily by those who perform the labour themselves.'¹⁸¹ In SA law a woman who gives birth to a child is the legal mother even if she is not the genetic mother unless there is a valid surrogacy agreement. If she is not the genetic mother, the reason that she becomes the 'legal mother' is indeed because of her 'reproductive labour'. So, in our common law performing reproductive labour in the sense of pregnancy and childbirth does indeed result in parental rights the biological mother is the legal mother even if she is not the genetic mother. It is in fact this reproductive labour pregnancy and childbirth that the commissioning parents pay for. This is much clearer if the commissioning parents are the genetic parents.

Hanna contended that a solution that takes into account the fact that a woman typically possesses parental rights over her genetic children properly justifies the objection to the sale of children.¹⁸² He argued that it is false to assert that the surrogate receives payment for both her reproductive labour and the transfer of her

¹⁸⁰ Hanna 'Revisiting' 343.

¹⁸¹ Hanna 'Revisiting' 341.

¹⁸² Ibid 344.

parental rights.¹⁸³ His argument seems to be that the surrogate is paid only for her labour (pregnancy and childbirth) and she is not paid for the transfer of the parental rights. If she were to be paid for the transfer of the parental rights, then that would maybe look like the sale of the child. However, this is not what the fee is for as the fee is only a fee for the services only.

The study argues that when it comes to the transfer of parental rights, if the commissioning parents are genetically related to the child as per the compliance of Section 294 of Children's Act, no parental rights will be transferred; instead, the commissioning parents will acquire rights and responsibilities for the child from the child's birth. As a result, those who support child selling must agree that paying a surrogate mother is simply payment for her reproductive services, not for the child. After evaluating the arguments on remunerated surrogacy and child, Hanna concluded that, whereas a woman's reproductive labour would normally confer parental rights to a surrogate, the commissioning couple obtains parental rights by paying for the woman's services rather than rights to a child.¹⁸⁴

Importantly, the main premise of this thesis is that there is no sale of children in remunerated surrogacy agreements because the payment to the surrogate mother is for services rendered¹⁸⁵ and the pain and suffering endured during pregnancy and childbirth, not for the transfer of the child and rights from the surrogate mother to the commissioning parents. Lupton's viewpoint that there is nothing wrong with a surrogate mother being financially motivated to participate in a surrogacy agreement because she will be paid for her services was taken into account by the Commission¹⁸⁶ in its investigation into the desirability, ethical or moral problems of surrogacy.¹⁸⁷ As a proponent of remunerated surrogacy, Lupton believes that if the

¹⁸³ Ibid 345.

¹⁸⁴ Ibid 345.

¹⁸⁵ McLachlan 'Babies, Child Bearers' 11. In their recommendations, they suggested that because paid surrogate motherhood agreements involve the purchase of surrogate mother's services, they should be legal, recognized, and enforceable; Kornegay 'Baby selling' 45, 49, it was argued that, the commissioning parents of remunerated surrogacy pay the surrogate mother for the services of carrying and giving birth to the baby rather than for the child itself, according to Kornegay's analysis of the claim that remunerated surrogacy is a type of baby-selling rather than service-selling.

¹⁸⁶ SALC Report on surrogate motherhood' Project 65 para 2.4.12.

¹⁸⁷ Lupton 'The right to be born' 41.

surrogate mother's motives are apparent after a thorough investigation, there is nothing wrong with her getting remuneration for her services as a surrogate mother.¹⁸⁸ Therefore, while regulating remunerated surrogacy to eliminate child sales, the question of payment for the surrogate's services should be a major consideration.¹⁸⁹

The issue in the California case of *Johnson v. Calvert*¹⁹⁰ was to establish whether the commissioning parents had parental rights over the child and the surrogate mother had no parental rights to the child.¹⁹¹ The surrogate, Anna Johnson, was to be paid in instalments throughout the pregnancy, with the final amount due six weeks after the baby was born.¹⁹² The California Supreme Court had to determine whether the remunerated surrogacy agreements amounted to the sale of children. The Court held that the contract was not for the purchase of a child, but rather for the purchase of reproductive services, since payments were paid throughout the pregnancy.¹⁹³ The case's outcome also supports the notion that the surrogate mother will be remunerated for her services. Nevertheless, this raises the question of whether the timing of the payments will influence whether the contract was for the transfer of the child or for the services. The summary of the case explains the decision that was made regarding the payment for the services.

In the *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* in relation to illegal adoptions,¹⁹⁴ it was concluded that the international regulatory vacuum that exists in respect to international remunerated surrogacy arrangements exposes children born through this method to rights violations, and the practice frequently amounts to child sale.¹⁹⁵ They argued that remunerated surrogacy as currently practised usually constitutes the sale

¹⁸⁸ Ibid 41.

¹⁸⁹ Kornegay 'Baby selling' 45, 49.

¹⁹⁰ 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (1993).

¹⁹¹ Supra 778.

¹⁹² Supra 778.

¹⁹³ *Johnson v Calvert* 851 P.2d 782

¹⁹⁴ A/HRC/34/55 Agenda item 3.

¹⁹⁵ Supra A/HRC/34/55 para 52.

of children as defined under international human rights law.¹⁹⁶ According to the report, ‘surrogacy arrangements constitute sale of children whenever the surrogate mother or a third party receives remuneration or any other consideration in exchange for transferring the child.’¹⁹⁷ In a nutshell, the report concluded that remunerated surrogacy amounts to the sale of children, which is prohibited under international law.

In response to the latter report (A/HRC/34/55), the A/HRC/34/60 report was presented to address the gap in relation to the relationship between the sale of children and remunerated surrogacy.¹⁹⁸ As a result, it investigates whether surrogacy arrangements are considered the sale of children under international human rights law.¹⁹⁹ The report concludes that:

‘Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable...’²⁰⁰

This quotation from the report provides recommendations about remunerated surrogacy since it emphasises that the surrogacy procedure should be carried out in a way that makes it apparent that the surrogate mother is being paid just for her services, not for the transfer of the resulting child. Noteworthy is that, in terms of the genetic link requirement, the surrogate is bearing and birthing the commissioning parents' child because they are the genetic parents. She is not selling the child once born thus, she is just being paid for her services.

¹⁹⁶ Supra A/HRC/37/60 para 41.

¹⁹⁷ Supra A/HRC/37/60 para 42.

¹⁹⁸ Supra para 8.

¹⁹⁹ Supra para 9.

²⁰⁰ Supra para 72.

The Report of the Special Rapporteur went on to conclude that unless an appropriate regulatory structure, including a clear and complete legislative framework, is in place, American states should prohibit remunerated surrogacy.²⁰¹ This obviously suggests that remuneration for surrogate services may be permitted if the proper laws are in place. Even though the Special Rapporteur is clear that most of the existing practices of remunerated surrogacy amount to the illegal sale of children, it does suggest a path forward for remunerated surrogacy under specific conditions.²⁰² Thus, the arguments that remunerated surrogacy amounts to the sale of children may be regarded invalid because the regulations explicitly show that there is an exchange of payment for the services rendered by the surrogate mother, rather than an exchange of payment for the child. The commissioning parents pay for the services because the child that will be born will be, in cases where their gamete is used, their child.

To make it clear why the commissioning parents will be paying the surrogate mother for her services, it is necessary to stipulate in the contract that is signed prior to the surrogacy arrangement that they will be the parents of the child born by the surrogate mother. If it is not stated that the commissioning parents will be the child's parents, there will be a concern since it raises the question of why the commissioning parents would be paying the surrogate mother if the child would be hers. According to the definition of a surrogacy motherhood agreement, the surrogate mother must consent to bear and give birth to a baby for the commissioning parents.

Concerns were expressed by organisations, academics, and individual specialists²⁰³ in response to a Special Rapporteur on the sale and sexual exploitation of children. They echoed their concerns about comparing surrogacy with the selling of children when there is a monetary exchange in recent reports by the Special Rapporteur. They used the term 'compensated surrogacy,' which is referred to as

²⁰¹ *Supra* para 75.

²⁰² Baird *Perspectives* 136.

²⁰³ Sama Resource Group for Women and Health, India, www.samawomenshealth.in, Centre For Reproductive Rights, <https://reproductiverights.org>, Sexual and Reproductive Health Matters, www.srhm.org.

remunerated surrogacy in this study.²⁰⁴ They also pointed out that in compensated surrogacy, the individual functioning as a surrogate is paid for the gestational services and reproductive labour she provides, not for the child's transfer.²⁰⁵ The report also acknowledges that 'commercial surrogacy includes the sale of gestational services, as the surrogate mother agrees to undergo artificial insemination or embryo transfer, to gestate and to give birth to the child'.²⁰⁶

Other scholars have also criticised the argument that the payment to the surrogate mother is for the services she rendered. In Meyer's argument to determine whether remunerated surrogacy amounts to sale of children or payment for services, he argued that there are two arguments against this proposition.²⁰⁷ He also took into account the opposing viewpoint, which I strongly agree with, that the objections are somewhat problematic because they fail to take into account the possibility that it might occur that what one wants to get when one buys something is not always the same as what one actually pays for.²⁰⁸ As a result, paying for the services does not involve selling a child. For instance, if someone pays to attend a comedy show with the hope of finding anything amusing, if he or she does not get entertained, it does not mean that they have not obtained the services they paid for.²⁰⁹

When comparing this example to remunerated surrogacy, when commissioning parents pay for the surrogate mother's services to deliver the child, the money is not for the child but for the services. If she is unable to deliver the baby, maybe due to pregnancy difficulties, the commissioning parents should still pay the surrogate mother for her services, even if they do not get the child. The question of paying if the surrogate mother does not deliver a child should also be addressed in

²⁰⁴ They defined compensated surrogacy as 'an arrangement where the person acting as surrogate is paid a fee in addition to reimbursement for 'reasonable' medical expenses, where the person acting as a surrogate is being paid for the gestational services and reproductive labour she is providing.' This is similar to the definition of remunerated surrogacy in this thesis.

²⁰⁵ Sama Resource Group for Women and Health, India, [www. samawomenshealth.in](http://www.samawomenshealth.in), Centre For Reproductive Rights at 2.

²⁰⁶ A/HRC/37/60 para 60.

²⁰⁷ Meyer 'The idea of selling' 177.

²⁰⁸ Ibid 177.

²⁰⁹ Ibid 177.

the legislation, as it should be clear that the money is for the services and not for the child's transfer.

The proper description of the services rendered is that the child is gestated for the commissioning parents. Meyer's use of the verb 'for'²¹⁰ suggests to me that the child belongs to the commissioning parents, and the surrogate is simply carrying the child for them, therefore she is only being remunerated for her services of carrying the child to term and not for selling a child. Although this raises other questions if the surrogate refuses to hand the child over, in this situation the law that says the gametes of at least one of the commissioning parents must be used could be valid.²¹¹ If the gametes of both commissioning parents have been used, then it means they are the genetic parents and, thus, it is very easy to argue that this is their child. However, if the surrogate's own ovum has been used it is more problematic.

Baird's argument about whether remunerated surrogacy amounts to child sale raises a number of conundrums, such as whether the timing of the surrogate mother's payment affects whether or not it may be considered as a sale of children?²¹² She argued that remunerated surrogacy agreement is not a contract for the sale of children since, in practice, a surrogacy agreement is concluded prior to the child being conceived and without having assurance that the child will be born alive or not.²¹³ This is supported by the notion that many surrogacy agreements pay the surrogate mother at different phases of the pregnancy rather than a once off single payment when the child is delivered.²¹⁴

Therefore, some researchers' arguments that the remunerated surrogacy results in child sale are incorrect because the payment to the surrogate and the agreement would be reached before the child was born, and the child's rights would not be violated. In addition, Smolin also argued that the timing of contract execution can prevent surrogacy contracts from constituting the sale of children because if the contract is signed before the creation of the embryo or before the transfer of the

²¹⁰ Ibid 176.

²¹¹ Section 294 of the Children's Act.

²¹² Baird *Commercial Surrogacy* 117.

²¹³ Ibid 122.

²¹⁴ Ibid 122.

embryo, then there will be no sale of children because there is no human being to be transferred.²¹⁵

The child that is born of a surrogate mother in accordance with the surrogate agreement is for all intents and purposes a child of the commissioning parents.²¹⁶ There is no sale of the child to the commissioning parents as the child is already theirs from the moment of conception. Some would argue that the foetus is part of the surrogate mother's own body while it is growing inside her. This is part of the argument supporting choice on termination of pregnancy because it is her body and respect for the pregnant woman's bodily integrity gives her the power to choose what to do. If a surrogate has chosen to gestate someone else's foetus and has consented to have this foetus growing inside her, of course if she changes her mind, she does still have the option of termination.

Because the contract is signed before the child is born, it is reasonable to assume that by the time the child is delivered, he or she will be the child of the commissioning parents, as stipulated in the surrogacy contract. This is significant because the child becomes a legal person and a child at the moment of birth. Thus, as soon as the foetus becomes a child, the commissioning parents are already the parents. Therefore, since children are not exchanged for money, there is no risk of the commodification of children.

Meyer is correct to say that the surrogate's service is clearly a unique type of caretaking engagement as it does not offend the child's dignity as a human being because it does not degrade the child by treating him or her as a commodity.²¹⁷ This is because the surrogate does not sell the child to fulfil her financial or emotional needs, but she sells her services. After considering all the critics on remunerated surrogacy and the sale of children, Meyer concluded that some cases of remunerated surrogate motherhood agreements are best compared to baby selling and some are not.²¹⁸ She concluded that the best policy in this case is not the overall prohibition but the regulation of remunerated contracts to sell gestational services. This shows

²¹⁵ Smolin 'The Sale of Children' 316.

²¹⁶ Section 297(1)(a) of the Children's Act.

²¹⁷ Baird *Perspectives* 117.

²¹⁸ *Ibid* 180.

that the relationship between remunerated surrogacy and sale of children is not always true because if there are strict regulations in place then maybe all remunerated surrogacy agreements will not amount to sale of children.

The other main argument against remunerated surrogacy is that remunerated surrogacy falls within the definition of the sale of children in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereafter the OPCRC).²¹⁹ The study made an argument in terms of the Protocol before and now she is making a slightly different argument. The OPCRC prohibits and criminalises the sale of children, child prostitution and child pornography. The OPCRC defines the sale of children as ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’.²²⁰ Additionally, Article 35 of the CRC also states that ‘Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.’

It has been argued that a remunerated surrogacy agreement fits the concept of the sale of a child based on the common definitions of the terminology used in the OPCRC and Article 5 of CRC.²²¹ Tobin, in his argument to determine whether remunerated surrogacy involves the sale of children as in the OPCRC and the Article 35 of the CRC, relied on the Vienna Convention.²²² The Vienna Convention outlines how a treaty should be interpreted as it provides that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’²²³

Tobin argued that the ordinary meaning of terms such as ‘transfer’, ‘remuneration’ and ‘consideration’ indicates that a remunerated surrogacy will fall

²¹⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

²²⁰ Ibid Article 2 (a).

²²¹ Tobin ‘To prohibit or permit’ 335; Smolin ‘Sale of Children 273; Hyder-Rahman ‘Commercial Gestational Surrogacy’ 137.

²²² Tobin ‘To prohibit or permit’ 335.

²²³ Article 31 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155 331.

within the definition of the sale of a child under the OPCRC.²²⁴ Based on the ordinary meanings, the person referred to in the definition of ‘sale of children’ may be the surrogate mother, whilst the transfer refers to the child being transferred from the surrogate mother to the intended parents, and that the remuneration refers to the money paid to the surrogate mother.²²⁵ Furthermore, he contended that the phrases ‘any form’ in Article 2(a) of the OPCRC and ‘for any purpose or in any form’ in Article 35 imply that the terms are so general that the intention behind the transfer and sale is irrelevant.²²⁶

However, the Sama Resource Group argued that norms and critics against child selling emerged as a reaction to the harms caused by the sexual and labour exploitation of children, as well as child organ trafficking.²²⁷ Using a literal interpretation of the term ‘sale of children’ to conflate surrogacy with the sale of children gives rise to neglecting the norm’s foundation, which is to protect children from all kinds of harm.²²⁸ They came to the conclusion that associating remunerated gestational surrogacy with child sales is problematic because it misrepresents and misunderstands the intention of intended parents and surrogate mothers.²²⁹

Wade opposed Tobin’s argument as she argued that remunerated surrogacy might not even qualify under the concept of sale of a child under a purposive interpretation of the CRC.²³⁰ Johnson supported Wade in terms of considering the purpose of the treaty by arguing that remunerated surrogacy is not the sale of children as defined by the Protocol, and that any legal challenge to remunerated

²²⁴ Tobin ‘To prohibit or permit’ 335; Smolin ‘Sale of Children’ 278, ‘As suggested by the very word ‘sale,’ the essence of the sale of children is some kind of transfer of the child in exchange for some kind of financial benefit or consideration: a quid pro quo contractual sale of a child’; Boer-Buquicchio ‘All rights’ 276.

²²⁵ Tobin ‘To prohibit or permit’ 335.

²²⁶ Ibid 336.

²²⁷ Sama Resource Group for Women and Health, 4.

²²⁸ Ibid 4.

²²⁹ Ibid 4.

²³⁰ Wade ‘The regulation of surrogacy’ 122.

surrogacy made considering the Protocol is not only futile but also serves to divert attention from the purpose of the treaty.²³¹

Wade's study investigated how surrogacy is currently governed in England from the standpoint of children's rights; she made use of the 1989 United Nations (hereafter UN) CRC and its Optional Protocols, as well as the General Comments and Concluding Observations of the Committee on the Rights of the Child, to examine how closely the current surrogacy regulatory framework adheres to a children's rights perspective.²³² She employed a participatory approach by highlighting the significance of taking into consideration specific children's opinions in choices that impact them and making sure that research on children's experiences informs law, policy, and implementation.²³³

Expanding on the purposive interpretation of the Optional Protocol, Article 3(1)(a)(i) of the Optional Protocol further specifies that 'the types of conduct to be criminalized in the context of the sale of children are those involving the offering, delivering, or accepting of a child for the 'purpose' of (1) sexual exploitation of the child, (2) transfer of organs of the child for profit, or (3) the engagement of the child in forced labour'.²³⁴ The section clearly states that the Protocol's definition of selling of children refers to the circumstances just mentioned, and there is no mention of remunerated surrogacy. Furthermore, none of the three objectives can be connected to remunerated surrogacy because there is no sexual exploitation of the child involved, and no organs of the child are being given away for a profit. The study disagrees with the argument that remunerated surrogacy amounts to sale of children since the key point, which has been made, is that there is no transfer of a child for financial gain or sale of child because the surrogate is only receiving payment for her services. Last, but not least, remunerated surrogacy does not mean the child is being coerced into forced labour. These elucidations suggest that the concepts of 'sale of children' may not mention any about surrogacy agreements, because the leading

²³¹ Johnson 'Commercial surrogacy' 701.

²³² Wade 'The regulation of surrogacy' 113.

²³³ Ibid 114.

²³⁴ Article 3 of the OPCRC explains the context of the sale of children defined in Article 2(a).

treaty on the topic does not mention surrogacy or remunerated surrogacy in the context of the sale of children.

Therefore, this view that remunerated surrogacy amounts to the sale of children of children is fundamentally flawed. Johnson argues that arguments against remunerated surrogacy fall short of demonstrating that remunerated surrogacy constitutes the sale of children as the Optional Protocol intended, thus the dependence on them offers limited legal avenues for outlawing remunerated surrogacy.²³⁵ She further argues that using the Protocol to address the challenges surrounding remunerated surrogacy is a misrepresentation of the Optional Protocol's objective.²³⁶ This is because countries that signed the Optional Protocol believed that its goal was to focus on child sales and sexual exploitation, including child prostitution, child pornography and other sexual abuse material, rather than alleged child sales in the context of remunerated surrogacy.²³⁷

If the concept of the sale of children was expanded beyond what the countries had anticipated, it would be difficult to enforce.²³⁸ It is important to note that of course the sale of a child, for any reason, even to loving adoptive parents, is wrong because people should not be sold for money. If various countries interpret the Protocol differently, the resultant disconnect could reduce the Protocol's usefulness. The study agrees with Johnson that, although a government can prohibit remunerated surrogacy for any reason, it should not do so based on the Protocol because this could lead to different interpretations of the same treaty, inconsistent application, and international tensions.²³⁹ Therefore, it is vital to keep in mind that the definition must be interpreted from the perspective of the Protocol's overall context and parameters.²⁴⁰

It is imperative to emphasise that remunerated surrogacy had not yet become topical at the time the Optional Protocol was drafted, so the issue of remunerated

²³⁵ Johnson 'Commercial Surrogacy' 713.

²³⁶ *Ibid* 714.

²³⁷ *Ibid* 720.

²³⁸ *Ibid* 720.

²³⁹ *Ibid* 721.

²⁴⁰ *Ibid* 714.

surrogacy could not have been included in the definition of child sale. One can also argue that it could have been included but it was unlikely because no one was concerned about it at that time. There is also no evidence that, even if remunerated surrogacy is incorporated in the treaty, it is included in the definition of child sale.

The UN CRC in its concluding observations on the consolidated third and fourth periodic reports of India stated that the ‘commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children’s rights.’²⁴¹ This, however, is vague and too broad because it does not give an explanation or more detail on how remunerated surrogacy relates to the sale of children. The study concurs with Wade who mentioned that the Committee’s statement ‘gives little guidance on the children’s rights implications of commercial surrogacy’.²⁴² She based her argument on two grounds. The first was that the statement was ambiguous about which rights are violated by paid surrogacy and how paid surrogacy might be deemed a form of child sale.²⁴³ Secondly, the statement was vague since it did not specify whether the issue with remunerated surrogacy is that it is improperly regulated or that it should be outlawed to safeguard the rights of children.²⁴⁴ With this in mind, it is plausible to think that the ambiguity can be resolved if surrogacy laws are properly regulated.

The Human Rights Committee on the Right to Life confirms that the right to life commences after the child is born,²⁴⁵ and, thus, treating remunerated surrogacy as a sale of children suggests that the foetus is a child with rights, which is contrary to human rights’ standards outlined in numerous human rights’ mechanisms. The Sama Resource Group argues that portraying remunerated surrogacy as a sale of children ignores the reproductive labour of women who function as surrogates and suggests that human rights apply before birth, undermining the current human rights

²⁴¹ UN CRC, Concluding observations on the consolidated third and fourth periodic reports of India, 13 June 2014, CRC/C/IND/CO/3-4, para 57 (d): <https://www.refworld.org/docid/541bee3e4.html>.

²⁴² Wade ‘The regulation of surrogacy’ 122.

²⁴³ Ibid 122.

²⁴⁴ Ibid 121.

²⁴⁵ Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc CCPR/C/GC/36, para. 2.

paradigm.²⁴⁶ A woman's freedom to choose to terminate her pregnancy will be impeded if the foetus is a person with the right to life. Accordingly, if the remunerated surrogacy agreement is entered into and concluded before the child is born or before conception, there is no child during the time of agreement, so there will be no sale of a child.

Therefore, remunerated surrogacy does not include the sale of children by definition or in practice, and there is no evidence to support the idea that it amounts to the sale of children. Remunerated surrogacy does not amount to child sale because it does not involve the exchange of a child for money, as defined by the OPCRC.

3.2.1.1 Comparison between adoptions and surrogacy

Some scholars make a comparison between the sale of a child for adoption and remunerated surrogacy because the sale of a baby for adoption can be comparable to remunerated surrogacy. It however, differs in that the sale of baby for adoption is most likely born unintentionally and unwanted, as opposed to a child born through surrogacy, which is planned and in some cases the commissioning parents will be the genetic parents of the child.

It has been argued that payment in the adoption agreements amount to sale of children, just like the argument in cases of remunerated surrogacy. Importantly, the sale of children for adoption is illegal,²⁴⁷ and should remain illegal, because there is a direct exchange of payment for a child, as opposed to remunerated surrogacy, where it can be argued that the payment is made for the surrogate's services rather than for the child. The same argument may be raised about the adopted baby: that the biological mother has also been pregnant for nine months and gone through childbirth and, thus, there are reasons to argue that payment made to the mother in the case of the adopted baby when the baby is handed over is payment for the pregnancy. The argument would be that in the case of adoption, the mother is already carrying her own child, whilst in the case of surrogacy, payment agreements are concluded before the child's conception.

²⁴⁶ Sama Resource Group 3.

²⁴⁷ Section 249(1) of the Children's Act provides that no person may give or receive any consideration in cash for adoption.

In addition, in all South African cases, the surrogate mother carries a child that is genetically related to the commissioning parents and, thus, in that case, the surrogate mother will need to be reimbursed for her services; whilst in adoption, there appears to be a sale of a child because the woman is giving away the child that she carried for her own reasons.²⁴⁸ In South Africa, section 294 of the Children's Act provides that surrogacy agreements are only valid if the child is genetically related to either or both commissioning parents, while in the cases of adoption, the child will not be related to the intended parents. Further proof that money is solely given for a surrogate's pregnancy services and not for her agreement to adoption comes from the fee payment structure. Such agreements for payment show that the surrogate is being paid simply for her pregnancy services and not for giving the child up for adoption.²⁴⁹

3.2.2 Psychological harm to children

Some opponents of remunerated surrogacy argue that children born as a result of remunerated surrogacy arrangements may suffer psychological harm because they will grow up with a new family, where it will be assumed that they were bought from their biological mother, who in this case is the surrogate mother.²⁵⁰ As set above, surrogacy does not amount to sale of children even if it is remunerated surrogacy. However, the child might feel insecure or undermined if they know that someone was paid to be pregnant and give birth to them. Thus, the worry is about the child's own perception of their origins.²⁵¹ It is, however, a subjective feeling in the child's own mind and perhaps a prejudice of the people who interact with the child and know the child's history.²⁵²

According to Anderson, if remunerated surrogacy became widespread, it could psychologically endanger all children because it would change how people appreciate children as it will look like they are moving them from being deserving of

²⁴⁸ Watson 'Renting a Womb' 547.

²⁴⁹ Ibid 548.

²⁵⁰ Golombok 'Parent-child' 1922.

²⁵¹ Golombok 'ART children' 745.

²⁵² Golombok 'Parent-child' 1923.

love and respect from their parents to ‘being the alienated objects of commercial profit making’.²⁵³

However, studies have revealed no negative psychological impacts on children born through surrogacy and, while children born through remunerated surrogacy could theoretically be mistreated, there is no evidence that surrogacy practices present a greater risk than any other parenting method.²⁵⁴ Golombok, in her study to determine the psychological well-being of the ART, argued that the psychological well-being of children who grow up in ART-created homes are dependent on the well-being of their parents, the quality of their interactions with their parents, and the societal circumstances in which they grow up.²⁵⁵ Therefore, the main consideration is the home the child grows up on and not the circumstances of their pre-birth origins, thus despite the payment for the services rendered to the surrogate mother during pre- birth, if the child is brought up in a loving home, there will be no risk of psychological harm to the children.

Wade suggested two reform ideas that could be effective in decreasing any potential psychologically negative consequences of remunerated surrogacy on children.²⁵⁶ First, it would be beneficial to have a court or approvals committee accept the financial aspects of a surrogacy contract in advance. For instance, in Israel, an advisory board controls the procedure, which involves individual interviews and mental assessments of each participant to guarantee that the surrogate gives consent that is free and informed.²⁵⁷ Noteworthy is that, in SA law, the court must in any case confirm the agreement and so the payment structure would be part of this.

Second, to avoid the possibility that intended parents would refuse to pay a surrogate in an effort to exert control over her behaviour during the pregnancy,

²⁵³ Anderson *Value* 172.

²⁵⁴ Golombok ‘Parent-child’ 1922.

²⁵⁵ Golombok ‘ART children’ 745.

²⁵⁶ Wade ‘The regulation of surrogacy’ 10.

²⁵⁷ *Ibid* 11.

payments to the surrogate could be sent through an intermediary agency.²⁵⁸ Wade concluded by suggesting that there should be more investigation into how remunerated surrogacy may affect the psychological health of children.²⁵⁹ Since Wade's research examines the extent whereby the regulations on remunerated surrogacy are in line with a children's rights approach,²⁶⁰ she argued that the remunerated surrogacy process could cause harm to children.²⁶¹ She believed that more research on the influence of remunerated surrogacy on children's rights is needed, as well as input from children, in order to reform the law in this area in a child-centred manner.²⁶²

As a result, in this case, since there are no compelling arguments linking remunerated surrogacy to psychological harm to children, it might be argued that psychological harm to children is a far-fetched reason why remunerated surrogacy is prohibited.

3.2.3 Best interests of the children

Aside from the debate over the harm that comes with the selling of children and the exploitation of children, one can question if a surrogacy arrangement is in the best interests of the child who will be born as a result. In South African law, the question of best interest of the child is always the most paramount²⁶³ question and it is always something that the court must investigate when it confirms the surrogacy contract.

The case of *Ex Parte JCR*²⁶⁴ is a good recent example of the issue of best interests of the child as discussed above. In the case of *Ex Parte JCR*, the issue was whether regulations should be put in place to safeguard the interests of minor children, given that the court serves as the Upper Guardian of all minor children and

²⁵⁸ Ibid 11.

²⁵⁹ Ibid 11.

²⁶⁰ It draws attention on the UN Convention on the Rights of the Child 1989 and its Optional Protocols, as well as General Comments and Concluding Observations from the Committee on the Rights of the Child.

²⁶¹ Wade 'The regulation of surrogacy' 122.

²⁶² Ibid 113.

²⁶³ Section 28 of the Constitution of RSA; General Comment No. 14(2013) of CRC Committee and Article 4 of the ACRWC.

²⁶⁴ (51606/21) [2022] ZAGPPHC 209; 2022 (5) SA 202 (GP) (16 March 2022).

that the Constitution, and the children's Act have certain requirements that should be met.²⁶⁵ The intended surrogate mother in this case was married and had two young children, 10 and 7 years old.²⁶⁶ She had previously served as a surrogate mother when the children were 6 and 3 years old, so this was not the first time. The judge expressed concern about the psychological well-being of the surrogate mother's children because they would witness their mother's pregnancy, but they would not witness her bringing the new-born home from the hospital to join the family.²⁶⁷

In making her ruling, Judge Neukircher took into account the issue of psychological health of the surrogate mother's children, and she raised that every application for a surrogacy affects not only the rights and interests of the unborn child but also those of the children who are already a member of the surrogate's family and in some cases the commissioning parents.²⁶⁸ As a result of this decision, she held that a new criterion for surrogacy applications be established, namely that it is in the best interests of any children born to the surrogate (the surrogates' own children) for the purpose of confirming the agreement that they be psychologically evaluated.²⁶⁹ A court must take this into account when deciding whether or not to ratify the agreement, if it were discovered that the surrogacy might negatively impact the intended parents' psychological health.²⁷⁰

The court held that 'where there are children born to the surrogate it is in the best interests of that child(ren) for purposes of confirmation of the agreement that they be assessed'.²⁷¹ In determining whether to allow remunerated surrogacy, it is important to note that the amendment must be in the child's best interest. If Parliament amends the legislation to allow remunerated surrogacy, the legislation itself must be in the best interests and the amendments could well be subject to

²⁶⁵ Supra para 8.

²⁶⁶ Supra para 14.

²⁶⁷ Supra para 17.

²⁶⁸ Supra para 35.

²⁶⁹ Supra para 36.

²⁷⁰ Supra para 37.

²⁷¹ Supra para 35.

constitutional challenge. In addition, every surrogacy contract must be in the best interests of the child, as was held in the case of *Ex Parte JCR*.

However, in the recent case of *Ex parte Three Surrogacy Applications and Others*,²⁷² the court had a different view in terms of evaluating the psychological health of the surrogate mother's minor children. According to the court, there is no psychological evidence to support the idea that a parent using a surrogate has a detrimental impact on the children.²⁷³ The court based their opinion on a clinical psychologist's report that suggested that there is no evidence in the psychology literature that surrogate mother's children should get psychological preparation for their mother's surrogate pregnancy.²⁷⁴ Contrarily, research shows that the surrogacy experience will probably not have a detrimental impact on the child.²⁷⁵ The court concluded that when evaluating applications to confirm surrogate motherhood agreements, courts have a discretion to compel any existing children of commissioning parents and surrogate mothers to undergo evaluations by clinical psychologists to assess whether the children are ready for the surrogacy and its outcome.²⁷⁶

In the case of *Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements*,²⁷⁷ it was highlighted that 'court confirmation of agreements is not automatic', as courts must guarantee that the interests of children are prioritised and that cases are assessed on their merits. In the matter, the court held that court confirmation of surrogacy agreements is not automatic, because courts have a duty to guarantee the best interests of children, as they are prioritised and that cases are assessed on their merits.²⁷⁸ It was concluded that the court must assess the interests of the child that will be born from the surrogacy and grant the order only if it is satisfied that it is in the best interests of the resultant child.

²⁷² 2023 (1) SA 627 (GP).

²⁷³ *Ex parte Three Surrogacy Applications and Others* para 17.

²⁷⁴ *Supra* para 17.

²⁷⁵ *Supra* para 17.

²⁷⁶ *Supra* para 46.

²⁷⁷ 2011 (6) SA 22 (GSJ).

²⁷⁸ Louw 'Surrogacy in SA' 568.

The CRC, the SA Constitution, the African Charter on the Rights and Welfare of the Child and the Children's Act provide that, in all actions concerning children, the best interests of the child must be a paramount or a primary consideration.²⁷⁹ This means that all actions or decisions affecting children in the context of surrogacy, in general, shall not breach their rights, and children born through surrogacy should not face discrimination in the enjoyment of their rights as a result of how they were conceived.²⁸⁰ It also means that if laws on remunerated surrogacy are to be changed or amended, legislators should amend the said laws with the children's best interests in mind. The core question is whether it is against the best interest of the child to pay for services of the surrogate.

The Children's Act protects the best interests of the child because it provides that, before the confirmation of a surrogacy agreement, the court must determine that the commissioning parents are in all respects suitable parents for the child to be conceived and the surrogate is also in all respects a suitable person to act as a surrogate mother.²⁸¹ The court may only confirm the surrogacy agreement if the agreement shows adequate provisions, such as contact, care, upbringing and general welfare of the child to be born in a stable environment.²⁸² These are examples of inquiries not asked to individuals who become parents in a normal way but it is important to note that all parents have a legal obligation to perform the parental obligations as set out in the Children's Act, even if no one can assess them before the birth. These questions which were asked in court are about children born through surrogacy, also the surrogate's own children and the commissioning parents' other

²⁷⁹ Section 28 of the Constitution of RSA, 1996 provides that a child's best interests are of paramount importance in every matter concerning the child; see Article 3 of CRC, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49; see: Section 7 of the Children's Act; General Comment No. 14(2013) of CRC Committee and Article 4 of the ACRWC.

²⁸⁰ Wade 'The regulation of surrogacy' 3.

²⁸¹ Section 295 (b) & (c) of Children's Act.

²⁸² *Supra* Section 295 (d) & (e).

children.²⁸³ Therefore, children that are involved in the surrogacy agreements are, in theory, better safeguarded than most children.

Therefore, if remunerated surrogacy is permitted, the same safeguards that apply to altruistic surrogacy can be used in this context. This means that whether the surrogate was remunerated or not, the rights of the child born through surrogacy will be protected.

According to the Commission's report on surrogacy motherhood agreements, it can be exceedingly challenging to strike a balance between societal expectations, infertile couples' goals and wants, and the best interests of the child, in cases of remunerated and surrogacy in general.²⁸⁴ The SALC urged a cautious approach with the child's best interests taking precedence and saw surrogacy regulation as the best course of action.²⁸⁵

Fenton-Glynn Claire argued that it may also be a positive development for children, as they are less likely to be negatively affected by learning that they were born as a consequence of a remunerated surrogacy arrangement if the procedure is perceived as legal, transparent, approved by the court and equitable to all parties involved.²⁸⁶ She was of the view that legalising payment is not against the child's best interests and on the contrary it might also be in the child's best interests. This also implies that the transaction does not amount to the sale of the child because a court would never approve of the sale of children.

Therefore, to minimise any potential psychologically negative consequences of remunerated surrogacy on children and protect the children's best interests, the remunerated aspects of a surrogacy arrangement should first be approved by a court or an approvals committee.²⁸⁷

²⁸³ *Ex parte JCR*, according to the judge, each application for a surrogacy impacts not only the rights and interests of the unborn child but also those of the children who are already a member of the surrogate's family and (in some cases) the commissioning parents.

²⁸⁴ The Commission's report on surrogacy motherhood agreements at para 7.6.4.

²⁸⁵ *Ibid.*

²⁸⁶ Fenton-Glynn 'Outsourcing ethical' 62.

²⁸⁷ Wade 'The regulation of surrogacy' 3.

Concisely, the rights of children should always be safeguarded under whatever circumstances. Following the logic of the above arguments, the study argues that remunerated surrogacy does not constitute the sale or commercialisation of children since the surrogate is compensated for her services. The emphasis should be on payment for services rendered. The study considers that if laws are amended to state that the surrogate will be compensated for her services, all the arguments raised about commodifying children will be moot. This is because it will be clear that the payment is specifically for services rendered and not for transfer of the child. Proper regulation is the best manner to safeguard children from negative effects of remunerated surrogacy.

3.3 SURROGATE MOTHERS

This thesis examines whether South African law should make provision for remunerated surrogacy. Section 3.3 of the chapter particularly considers the arguments against remunerated surrogacy based on its possible effect on potential surrogate mothers. Some feminists have argued that prostitution; surrogate motherhood, more especially remunerated surrogacy; and even marriage contracts portray financial transactions in the area of female sexuality, as demeaning to women and involve a damaging commodification, exploitation of surrogates, and alienation of women's sexual and reproductive capacities.²⁸⁸ However, this section also examine the other viewpoint, which contends that remunerated surrogacy does not account for all of the criticism aimed at surrogate motherhood.

3.3.1 The exploitation of surrogate mothers

The first argument against remunerated surrogacy is that remunerated surrogacy amounts to the exploitation of surrogates. It has been argued that remunerated surrogacy is prohibited on account of the perceived exploitation of surrogates²⁸⁹ Remunerated surrogacy is viewed as exploitative for several reasons, including the

²⁸⁸ Anderson *Value*; Anderson, 'Commodity?' 83; Radin *Contested Commodities* 158; Radin 'Market-Inalienability' 1849.

²⁸⁹ Anderson 'Commodity?' 87; Wilkinson, 'The Exploitation Argument' 179.

likelihood of inadequate remuneration given the benefits received by the commissioning parents and, more significantly, the risk involved.²⁹⁰

Exploitation is an act of treating someone unfairly to derive a profit from their labours.²⁹¹ Additionally, it has been suggested that all ART, including surrogacy, exploits women by enhancing their reproductive capacity.²⁹² Anderson argued that the risks of exploiting surrogate in a case of remunerated surrogacy are too large to disregard.²⁹³ She asserted that the surrogate is exploited because her emotional needs and vulnerabilities are not considered as qualities that require care, but rather as variables that may be used to persuade her to make a significant sacrifice for the commissioning parents' benefit.²⁹⁴ She further added that surrogates are exploited because their emotions are manipulated by signing the parenting contract.²⁹⁵ This form of exploitation takes place when one participant in a transaction is focused on the trade of 'gift' values, such as love, gratitude, and respect for others, while the other party acts in line with market standards, such as the sale of goods.²⁹⁶ In these cases, whilst the surrogacy agency solely adheres to market norms, the surrogate mother will be acting out of love and passion to help the commissioning parents.²⁹⁷

Exploitation relates to taking unfair advantage of other people and to take advantage of their vulnerability for one's own benefit.²⁹⁸ Nicholson argued that the ubiquitous poverty in South Africa creates an environment in which destitute women's capacity to refuse an opportunity to earn money through paid surrogacy is jeopardised, leaving them vulnerable to exploitation by the wealthy.²⁹⁹ She further

²⁹⁰ Wilkinson, 'The Exploitation Argument' 179.

²⁹¹ Matt *Exploitation* <https://plato.stanford.edu/archives/sum2017/entries/exploitation/>.

²⁹² Corea, *The Mother Machine*: 1985.

²⁹³ Anderson 'Commodity' 89.

²⁹⁴ *Ibid* 87.

²⁹⁵ *Ibid* 84.

²⁹⁶ *Ibid* 84.

²⁹⁷ Anderson 'Commodity?' 85.

²⁹⁸ Matt 'Exploitation'.

²⁹⁹ Nicholson 'Surrogacy as Labour' 504.

argued that the desire to earn money could jeopardise the surrogate's dignity and, in the worst-case scenario, result in her being subjected to forced labour.³⁰⁰

However, answering the question of whether remunerated surrogacy exploits surrogates, Wilkinson argued that the following questions must be addressed: first, what exactly does the exploitation argument amount to; second, is commercial surrogacy in fact exploitative; third, if it were exploitative, would this provide a sufficient reason to prohibit it?³⁰¹

Wilkinson divided his first inquiry into the following two parts: First, is it unfair how the commissioning parents and the surrogate share benefits and risks, and second, is the surrogate's consent invalid?³⁰² He argued that surrogacy will only be exploitative if and only if each of these sub-questions is answered in the affirmative. This indicates that exploitation will occur if the risks and rewards are not balanced, and the surrogate's consent is deemed illegitimate. For instance, when one party to an agreement bears risk while the other party benefits, and it is proven that the permission of the risky party was obtained by coercion or manipulation, it can be said that there is exploitation.

In addition to Nicholson's argument, Runzheimer and Larsen also argued that some women who choose to be surrogates come from low-income families and are driven by the financial and material benefits that come with becoming a surrogate.³⁰³ The fact that there is a significant economic, social, and, in most cases, educational disparity between surrogates and intended parents renders this practice open to exploitation.³⁰⁴ Additionally, some have argued that remunerated surrogacy from low-income nations is problematic because surrogates from underdeveloped economies cannot give valid consent because they are forced to agree to the surrogacy agreement owing to their circumstances.³⁰⁵ For instance, a surrogate from a low-income country is likely to accept inadequate payment and be exploited due to

³⁰⁰ Ibid 504.

³⁰¹ Wilkinson, 'The Exploitation Argument' 169.

³⁰² Ibid 179.

³⁰³ Runzheimer 'Science' 171.

³⁰⁴ Ibid 179.

³⁰⁵ Wilkinson 'Exploitation' 135.

a background of economic hardship. if a surrogate from a low-income background is given an inadequate payment, she might still take it because it will mean a lot to her.

Research conducted in India showed that, in some cases, a typical surrogate has limited education and low income which makes surrogacy an income opportunity.³⁰⁶ The study's argument is that surrogacy should be an income opportunity as it is the form of labour available to her and a job opportunity that she chooses. Therefore, it would be best to regulate the industry to ensure that the surrogate is not exploited but is paid fairly and is treated fairly. Pregnancy and childbirth can be dangerous hence a minimization of this risk through diligent medical care throughout the pregnancy and during the childbirth is necessary.

A surrogate might lack the bargaining power to insist on a good deal. This often happens in family law. Many feminist scholars have remarked that women entering antenuptial contracts may lack bargaining power to insist on a good deal for the marital property arrangements because they are poorer.³⁰⁷ This may be the case with surrogacy arrangements as well, because poor surrogates may lack the bargaining power to negotiate favourable terms in a surrogacy deal.³⁰⁸

To answer Wilkinson's second question, it can be argued that exploitation of women can also happen even if the surrogacy is not remunerated. The Joint Submission on the Sale of Children made the point that 'altruistic' surrogacy is not always very altruistic or voluntary.³⁰⁹ Their argument is that there could be insurmountable pressure piled on a woman by her family, for example, to be a surrogate for a sister-in-law or sister even against her will. This demonstrates a legal ambiguity in the laws that prohibit remunerated surrogacy because it exploits women, while there may also be evidence of exploitation in altruistic surrogacy. If we are to accept that all forms of surrogacy—whether altruistic or remunerated surrogacy—amount to the exploitation of surrogate mothers, it would be ideal if there are proper laws to regulate it to prevent exploitation, rather than prohibition.

³⁰⁶ Arvidsson 'Praiseworthy or stigmatized' 132.

³⁰⁷ Meyerson, 'Surrogacy Agreements' 135.

³⁰⁸ Ibid 135.

³⁰⁹ Sama Resource Group 2.

It has been argued that accepting payment for the use of one's body is not inherently bad as most people live in that manner, and formalising and properly regulating that reality through a contract is typically advantageous as it provides security.³¹⁰ Nicolson concluded that, notwithstanding the risk of exploitation, whether remunerated or altruistic, poor women with limited should not be denied the means to improve their families' miserable situations.³¹¹ She suggested that, in order to safeguard parties against some exploitation, there should strictly control and supervise the laws on remunerated surrogacy.³¹²

One of the comments incorporated into the SALC Report on Surrogate Motherhood argued that the prohibition on remunerated surrogacy amounts to possibilities of abuse of surrogate mothers because they will be used for bearing children without receiving payment in return for the services they rendered.³¹³ Anderson argued that remunerated surrogacy amounts to 'harmful exploitation'.³¹⁴ She argued that surrogacy, in general, should be prohibited since the commissioning parents benefit from the arrangement while the surrogate makes a 'grave self-sacrifice'.³¹⁵

This may mean that if the surrogate is remunerated, there will be no exploitation as the surrogate mother would have benefited. In addition, it can be argued that permitting remunerated surrogacy may amount to a mutually advantageous arrangement if the surrogate mother receives adequate remuneration for the services she rendered.³¹⁶ This would counter the issue of unfairness between the surrogate mother and the commissioning parents since both would benefit: the commissioning parents by receiving a child and the surrogate mother by being adequately remunerated for the service she rendered.

³¹⁰ Nussbaum 'For Bodily Services' 723.

³¹¹ Nicholson 'Surrogacy as Labour' 514.

³¹² *Ibid* 514.

³¹³ Clark 'surrogate motherhood' 769.

³¹⁴ Anderson 'Commodity?' 88.

³¹⁵ *Ibid* 88.

³¹⁶ Wertheimer 'Surrogacy and Exploitation' 217.

The unfairness triggered by inadequate remuneration is inconsistent with the equality clause.³¹⁷ The equality clause prohibits unfair discrimination on certain grounds, such as sex, and prohibits practices that worsen the disadvantage of a marginalised group, such as women. Therefore, if an Act is banning a whole field of potential labour opportunities for poor women, then it can be argued that they are being discriminated against because there is non-recognition of a form of labour that only women can perform and thus a denial of employment opportunities that applies only to women. There is discrimination because one form of potential income-generating labour is banned, for example remunerated surrogacy. This ban affects only women because only women have a uterus and only a woman can be a surrogate. While the law might look gender-neutral, no one may earn money through pregnancy because this rule is far from gender neutral in practice, since only women are affected by this ban on a line of work.

The study concurs with Meyerson who recommended that, in order to prevent surrogate women from being exploited in remunerated surrogacy, the surrogate should be paid a fixed fee.³¹⁸ Therefore, Meyerson supports altering the regulations on remunerated surrogacy to include a fixed fee that is regulated by the government. The only method to guarantee that this possibility of exploitation is minimised in case of remunerated surrogacy is to ensure that regulations are implemented that will protect both the commissioning parents and the surrogate mother.

A ban on remunerated surrogacy in South Africa, according to Trimmings, would simply informalize surrogacy arrangements and increase the likelihood of exploitation.³¹⁹ In other words, the prolonged restriction of remunerated surrogacy opens the door to unlawful remunerated surrogacy, which has a financial negative impact on surrogates.³²⁰ The review of foreign jurisdictions will examine some of the dangers that arise when illegal surrogacy is performed on the black market.

Therefore, concisely, to minimise exploitation, the amendment on surrogacy laws must also include laws on remunerated surrogacy that include the surrogate's

³¹⁷ Section 9 of the Constitution of RSA provides that everyone must be treated fairly.

³¹⁸ Meyerson, 'Surrogacy Agreements' 137.

³¹⁹ Trimmings 'International Surrogacy Arrangements' 622.

³²⁰ Piersanti 'Procreative Tourism' 10.

working conditions, for example time to sit around and rest in the weeks before and after the birth, and good medical care for the pregnancy, birth and post-partem period. The birth must be in a facility that the surrogate mother approves of, and she must be offered things like an epidural, if this is what she wants. In essence, with remunerated surrogacy, it would be a question of how much the surrogate is paid (needs a decent wage) and whether she is treated well (needs excellent health care during pregnancy and childbirth and good care after the birth). The court must approve the surrogacy contract as it will not permit an unfair or exploitative contract. She should have an epidural to minimise the pain of childbirth and should be paid enough so that she can take time off and rest in the last weeks of pregnancy and recover in the weeks following the birth. Another issue might be whether she prefers to have a C-section or deliver vaginally but of course there are emergency situations sometimes that require a C-section.

Dr Patel, the medical director of Akanksha Infertility Clinic in India, argued that remunerated surrogacy helps everyone involved in the agreement:

‘A woman who becomes a surrogate is paid more than she could ever make in her lifetime. She is doing something she believes is right and makes her proud, bearing a child for a couple yearning to establish a family while still providing for her own. People in India and elsewhere who have never faced infertility or poverty can easily claim that this is exploitation. However, we provide a service that significantly improves people’s lives.’³²¹

However, she acknowledged the possibility of abuse and exploitation of surrogate mother if there is an involvement of remuneration. She, however, argued that at her clinic, she ensures that surrogate mothers freely consent to the surrogate agreements and are not coerced by their husbands or families.³²² She also supports the idea that, to ensure that women are not exploited in future, the remunerated surrogacy regulations must be monitored and enforced.³²³ Everyone wants work that they can be proud of and this could be a big difference between surrogacy and sex

³²¹ Dunbar ‘Wombs to Rent’ <https://www.dailymail.co.uk/news/article-500601/Wombs-rent-Childless-British-couples-pay-Indian-women-carry-babies.html>.

³²² Ibid.

³²³ Ibid.

work as has been discussed earlier because many sex workers are ashamed of their work.

The research of Vertommen examined the complex correlations between remunerated surrogacy labour and unwaged mothering labour, as well as the labour forms that exist between these two points.³²⁴ Noteworthy is that, in this context, this might refer to the work of being pregnant and giving birth to a child which would not be paid for in a normal non-commercial surrogacy contract. Alternatively, if a woman has given birth to two children and nobody ever paid her for this, this is the typical condition of all mothers because they bear, give birth too, breastfeed and raise their children and are never paid a wage. This is also the standard ‘gendered division of labour’ that any feminist will acknowledge exists. The study tries to make sense of the repeated moral outrage, rescue measures, and penalties that occur when women abandon motherhood and use their reproductive bodies for a living.³²⁵ They concluded that surrogacy labour is highly exploitative, underpaid, and subject to poor working conditions, exactly because the job of pregnancy and motherhood is not recognised or regarded as work at all.³²⁶

3.3.2 Commodification of pregnancy

One major criticism against the surrogacy contracts is that it promotes commodification of pregnancy.³²⁷ This criticism is based on the premise that when resources are allowed to be exchanged through a contract, it requires that the resources be commodified.³²⁸

Anderson considered the question of whether or not women’s reproductive ability belongs in the same category as other services and came to the conclusion that remunerated surrogacy constitutes an unacceptable exploitation of women’s reproductive capacities.³²⁹ She argued that remunerated surrogacy commodifies a

³²⁴ Vertommen ‘The in/visible wombs of the market’ 2.

³²⁵ Ibid 2.

³²⁶ Ibid 3.

³²⁷ Laufer-Ukeles, ‘Reconsidering Difference’ 417; Anderson *Value* 175.

³²⁸ Wagner, ‘Contractual Re-allocation’ 7.

³²⁹ Anderson ‘Commodity’ 75.

form of labour that should never be traded for money.³³⁰ As an example, Nicholson and Bauling noted that the way surrogacy in South Africa is advertised in newspapers may amount to the commodification of surrogacy pregnancy, as it is referred to as ‘renting a womb or womb for hire’.³³¹ In the case of *Ex Parte WH*, the court comes out with a very negative statement about ‘womb for hire’, wherein the stated that ‘one would be naïve not to see how it is possible to develop to a point where ‘a womb for hire’ could become *de facto* part of surrogacy practise’.³³² Anderson further argued that remunerated surrogacy entices surrogate mothers to be involved in an activity that may harm their moral character by selling their reproductive labour at a price.³³³ This is on the basis that a surrogate mother will be remunerated for carrying a child for the commissioning parents, thus implying that she will be marketing her womb.

Surrogate mothers are referred to in the press as ‘baby factories’³³⁴ The risk of child abuse is enhanced because there is no explicit comprehensive regulation to control the practice.³³⁵ Due to a lack of regulation, the prevalence of ‘baby factories,’ where females are impregnated and their babies are said to be sold to people in need of children, has grown.³³⁶

Anderson believed that something is appropriately classified as a commodity when market norms are adequate for ‘regulating its production, exchange, and enjoyment’.³³⁷ Thus, in this case, it means a remunerated surrogate agreement applies the market norms. This means that contract pregnancy then turns the labour of women into a commodity because women will be turned into objects of mere utility and, thereby, they will be degraded.³³⁸

³³⁰ Ibid 75.

³³¹ Nicholson ‘Surrogate motherhood agreements’ 518.

³³² *Ex parte WH* para 64.

³³³ Anderson ‘Commodity?’ 72.

³³⁴ Smietana, ‘Moral frameworks’ 379.

³³⁵ Oluwaseyi ‘Rights of children in Nigeria and South Africa’ 36.

³³⁶ Ibid 37.

³³⁷ Ibid 72.

³³⁸ Anderson *Value* 175; Anderson ‘Commodity?’ 75.

Pillai argued that surrogate motherhood creates a market for gestational and genetic services because the infertile couples or individual search for a surrogate woman and avail her procreative services for helping them in begetting child.³³⁹ Thus, surrogate motherhood treats the ability to procreate as a tradable commodity. It focuses upon the services provided by the surrogate mother and thus fosters a 'commodification' of pregnancy.³⁴⁰

The study now reviews the counter arguments for the arguments raised on commodification of pregnancy. It has been further argued that a surrogacy contract is not seen to be the commercialisation of motherhood and is not morally or legally improper.³⁴¹ This is because there are many situations in which people utilise their skills and abilities for both their own and other people's gain.³⁴² For instance, just as a surrogate uses her womb, a model uses her face and body, a construction worker uses his physical power, and a professional uses his intelligence, character, and objectives.³⁴³ It is important to note that everyone has the freedom to utilise their bodies anyway they see fit, as long as it does not infringe on others' rights.³⁴⁴

If a surrogate mother is allowed to freely participate where she does not receive remuneration, then remunerated surrogacy cannot be considered unacceptable merely because it involves monetary rewards. Nussbaum argued that it is reasonable to assume that an opera producer would be exploiting artists if they took the stance that singers should not be paid on the basis that doing so involves an illegal form of commodification and even market alienation of those talents.³⁴⁵

Consequently, this furthers the argument that paid surrogacy does not facilitate the commercialisation of women or children because the surrogate mother will be remunerated for her services, rather than having her womb sold. There will not be room for criticism of remunerated surrogacy if lawmakers amending the

³³⁹ Pillai *Surrogacy contracts* 234.

³⁴⁰ *Ibid* 234.

³⁴¹ *Ibid* 234.

³⁴² Hill, 'Biology' 412-413.

³⁴³ *Ibid* 412.

³⁴⁴ Pillai *Surrogacy contracts* 237.

³⁴⁵ Nussbaum 'Bodily Services' 694.

surrogacy laws emphasise the issue of services rendered by surrogate mothers. Surrogacy will fall under the other professions if the legislation specifies that the surrogate will be providing services, as will be elaborated in the subsequent subsection.

3.3.3 The right to freely choose their trade, occupation or profession

Most professionals, such as teachers, doctors and nurses love their jobs and care about the people with whom they deal in their professional lives but are still providing their services for money as this is their job which they expect to be paid for. The Constitution provides everyone with the right to freely choose their trade, occupation or profession.³⁴⁶ This right is not unlimited because the legislature is allowed to outlaw certain kinds of occupation, and this is not unconstitutional, provided certain requirements are met.³⁴⁷ The freedom to choose an occupation cannot be curtailed by law unless if it is a statute with general application that are justifiable in terms of the criteria outlined in section 36 of the Constitution, the limitation clause.³⁴⁸ Regulation of the practice of a trade, occupation or profession is subject to a less stringent standard of justification and, thus, law can govern practice as long as it is rationally justified.³⁴⁹

The laws governing paid surrogacy would be regulations that are logically justifiable if they are carefully structured to clarify that the payment is for the services rendered by the surrogate mother and not for the selling of children or the commodification of pregnancy. Surrogate mothers have the right to enter their specific occupation and be remunerated for it and, therefore, it would be unfair to conclude that it is immoral for a surrogate mother to receive remuneration for the services rendered in the same way as people in other professions.

³⁴⁶ Section 22 of the Constitution of RSA; Article 23 of the UDHR guarantees everyone ‘the right to work, to free employment, to just and favourable conditions of work and to protection against unemployment’; The ICESCR provides in article 6(1) for the ‘right to work, which includes the right of everyone to the opportunity to gain his living by work’; Article 8, paragraph 3 (a), of the International Covenant on Civil and Political Civil Rights (ICCPR).

³⁴⁷ Currie *Bill of Rights Handbook* 466.

³⁴⁸ Ibid 467.

³⁴⁹ Ibid 467.

The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. The government has the obligation to ensure good working conditions by making sure that the laws and regulations on the labour practice are respected. The surrogate mother is protected by the right to fair labour practice,³⁵⁰ and she may also be remunerated for the services she rendered. In addition, the surrogate mother is protected by the Employment Equity Act,³⁵¹ which aims to achieve equality by promoting fair treatment and equal opportunities in employment.

Everyone employed gets remunerated for the use of their bodies and for their services.³⁵² For example, professors, factory workers, lawyers, opera singers, surgeons, and lawmakers all use parts of their bodies to do tasks or services in exchange for pay.³⁵³ This also applies to surrogate mothers, as they can also fall within the category of the employed individuals who are also entitled to be remunerated for the services. Nussbaum also noted that ‘some people have relatively high levels of control over their working conditions, while others have little or none; some people have many employment possibilities, while others have very few; some persons are socially stigmatised, while others are not.’³⁵⁴ This supports my argument because, in circumstances like those involving surrogacy, the employment conditions, opportunities, and pay vary. Therefore, if surrogacy is a form of employment, work should not be prohibited based solely on the remuneration received because people who engage in other forms of employment also receive remuneration and some may be subject to social stigma.

³⁵⁰ Section 22 of the Constitution; Labour Relations Act 66 of 1995.

³⁵¹ 55 of 1998.

³⁵² Nussbaum ‘Bodily Services’ 694.

³⁵³ Ibid 694.

³⁵⁴ Ibid 694.

In *Affordable Medicines Trust & others v Minister of Health & others*,³⁵⁵ the Constitutional Court addressed the constitutional right to freedom of trade, occupation, and profession as follows at paras [59] - [61]:

...Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. Though economic necessity or cultural barriers may, unfortunately, limit the capacity of individuals to exercise such choice, legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest. Limitations under the right to freely choose a profession are not to be likely tolerated...

This implies that it is up to an individual to choose a certain economic activity in which they would like to engage. The court's decision places a strong focus on the idea that one should not be limited from following a career path that they find comfortable simply because others may have negative perceptions about it. The court also recognised that there are now cultural and economic barriers preventing people from making those autonomous judgments, but they concluded that these obstacles should not prevent people from exercising their right to choose their profession freely. They also accepted that the right may be restricted if it only goes against the general public interest; hence, if properly regulated, paid surrogacy will not impact the public interest.

Despite certain voices pushing for the legalisation of remunerated surrogacy, it is not permitted since, in the opinion of the majority, the risk of abuse outweighs any potential benefits. Due to moral and ethical concerns that have been brought up, remunerated surrogacy is against the public's best interests. Surrogates might be recognised as temporary caregivers or healthcare professionals rather than to be treated like dehumanised incubators.³⁵⁶

³⁵⁵ 2006(3) SA 247, (CC).

³⁵⁶ Humbyrd 'Fair trade' 115.

3.3.4 Surrogacy and sex work

The other occupation that is forbidden in South Africa is sex work, which can be described as another form of selling one's body. Even though surrogacy is different from sex work, just like sex work, surrogacy services may not be remunerated. In both cases, sex work and surrogacy, it is the payment that makes the work illegal. It is important to determine whether the right to choose an occupation as set out in section 22 of the Constitution is unlimited or whether the approach in the case of *S v Jordan*, based on the Interim Constitution 26(2), remains correct now that the wording of the section has changed.

According to some feminist theorists, surrogacy agreements are a type of prostitution or slavery in which a woman is forced to sell her body in exchange for money.³⁵⁷ The idea that sex work is a legitimate career option is rejected by the South African Law Reform Commission since it devalues women and represents the pinnacle of male dominance over them.³⁵⁸ In general, the South African Law Reform Commission stands against legal rights that would provide women more freedom to engage in a paid sex activity.³⁵⁹ The Commission is of the view that surrogacy ought to be forbidden as well because prostitution is illegal on moral grounds. However, Nussbaum claimed that problem of morality and legality of prostitution should be dealt with from a larger understanding of a culture's views in connection to the practise of receiving payment for the use of their bodies to a broader knowledge of the alternatives and choices that a woman has.³⁶⁰

Liberal feminists claim that sex work should be accepted as a valid kind of employment and that women have the same freedom to choose to engage in it as they do with any other type of employment.³⁶¹ Liberal feminists often call for the

³⁵⁷ Lorio, 'Alternative Means' 1641, 1657; Corea 'The mother machine' 275; Kopytoff 'Law of Surrogacy.' 596-7 (payment in surrogacy commodifies something that should not be sold and thereby degrades the participants.)

³⁵⁸ SALRC *Sexual offences: Adult prostitution* 60.

³⁵⁹ *Ibid* 60.

³⁶⁰ Nussbaum 'Bodily Services' 698.

³⁶¹ SALRC *Sexual offences: Adult prostitution* 56.

decriminalisation of sex work, as well as the protection offered by labour laws.³⁶² For them, the emphasis is on acknowledging choice, minimising damage, and creating minimum working conditions.³⁶³

It can be said that the surrogate is not building the usual mother-child relationship with the foetus, thus she is only doing it for the money. However, the study argues that if the surrogate gets paid for her services and for helping families have children, she is acting ethically as alluded earlier in the thesis wherein the Indian doctor said that the surrogates were proud of their work and pleased that they could help other people.

The intention of allowing remunerated surrogacy is for the surrogate mother to be paid for her services. The surrogate mother's ability to choose her job should not be restricted, as she has the freedom to do so. The failure to accommodate remunerated surrogacy may result in the unfair discrimination of surrogate mothers, violating their rights as provided in the Bill of Rights.

There are circumstances, nonetheless, under which the Legislature may decide to ban a certain trade. Because there is an intention involved in the contracts, banning commercial surrogacy differs from banning commercial sex. First off, with commercial sex, the parties enter into an arrangement for their own sexual pleasures; this is typically done by parties who do not know one another, and the female can engage in sexual activity with numerous males in a single night. Even though she chose to engage in those acts, there has nonetheless been a violation of her right to privacy. In contrast, paid surrogacy is a relationship between the surrogate and the commissioning parents. Although the surrogate mother would prefer to be paid for her services, she is helping the commissioning parents as a generous gesture. She is not engaging in sexual activity, but because she conceives through IVF, her anonymity is safeguarded. Therefore, to prove that commercial sex work violates women's privacy rather than the surrogacy agreement, it is crucial to establish the intention of entering into these agreements.

³⁶² Ibid 58.

³⁶³ Ibid 58.

3.3.5 Violation of human dignity

In the *Makwanyane* case,³⁶⁴ the court used the inherent dignity paradigm to uphold dignity in instances of harsh and unusual punishment and to avoid treating the person who had been convicted as an object when being punished for a crime. It was argued that doing so deprives the condemned individual of all dignity and treats them like a target for the state to eradicate.³⁶⁵ This ruling demonstrates that treating someone like an object constitutes a violation of their dignity. When human beings are treated in a way that it seems they do not have the value that they deserve, then those people have been degraded.

In the case of *Makwanyane*, O'Regan J described human dignity as:

‘It is the untouchability and equality contained in the right to human dignity that results in man's right to life being a specific right to human life (over and above animals' and artificial subjects' right to being); on the other hand, dignity as a fundamental right does not have meaning for the individual if he or she is dead. ... Human dignity is a naturally accompanying quality of human life.’³⁶⁶

Human dignity violations are defined as ‘behaviour and beliefs that directly violate or devalue the dignity and worth of individuals.’³⁶⁷ Lyons-Hutton has argued that remunerated surrogacy is prohibited on the basis that it would result in the violation of surrogate mothers’ dignity.³⁶⁸ It is argued that surrogacy, specifically remunerated surrogacy, amounts to the dehumanisation and degradation of women.³⁶⁹ It dehumanises the surrogate mother by making her an ‘incubator’ and treating her as a mere object to bear children.³⁷⁰ Thus, if a person is degraded and

³⁶⁴ *S v Makwanyane* [1995] ZACC 3; 1995 3 SA 391 (CC) para 26 per Chaskalson J.

³⁶⁵ *Supra* para 26.

³⁶⁶ *Supra* para 326.

³⁶⁷ Schachter ‘Human dignity’ 848-9.

³⁶⁸ Lyons-Hutton ‘Evaluation’ http://www.academia.edu/1491471/Evaluation_of_the_surrogacy_debate_between_Anderson_and_Arneson_Laufer-Ukeles, ‘Reconsidering Difference’ 409; Anderson ‘Commodity?’ 72.

³⁶⁹ Anderson ‘Commodity?’ 72.

³⁷⁰ Report of the Ad Hoc Committee SALC.

dehumanised, her right to human dignity is also violated, which violates the Bill of Rights in South Africa.³⁷¹ It should be noted that the right to human dignity is a basic human right that is found in international human rights treaties as well.

Some feminists argue that functioning as a ‘human incubator,’ which is linked to remunerated surrogacy,³⁷² is against human dignity, while others believe that a responsible woman may make an informed decision about whether to agree.³⁷³ An individual woman might not feel dehumanised by this, but this is not necessarily about that individual woman as it is about the institution. It is important to determine whether remunerated surrogacy as an institution treats women as human incubators and, in this way, violates the human dignity of all women, whether they are happy to do it as individual or not. In a report for Surrogate Motherhood by the SALC,³⁷⁴ a surrogate mother is referred to as a ‘hostess mother’, thereby implying that a child is merely a visitor in the surrogate mother’s womb, as he or she will be handed over to the commissioning parents, who will become the child’s family after birth. The surrogate mother’s dignity may have been violated by being called a hostess mother.

However, one may also argue that remunerated surrogacy does not amount to the violation of the surrogate’s dignity because there is inherent dignity in her line of work, just as there is inherent dignity in all sorts of labour including garbage collectors or other low-status industries, while pregnancy is a high-status occupation. It can be argued that the Protocol to the ACHPRR of Women in Africa,³⁷⁵ provides that women have the right to control their fertility,³⁷⁶ the right to decide whether to have children, the number of children and the spacing of children.³⁷⁷ Remunerated surrogacy may not be banned on account of the dehumanisation of a surrogate

³⁷¹ Section 10 of the SA Constitution provides that everyone has the right to dignity.

³⁷² This is because the surrogate mother simply carries a child and delivers it to the commissioning parents after childbirth.

³⁷³ Damelio ‘Enhancing autonomy’ 271.

³⁷⁴ SALC *Report* para 8.2.13.

³⁷⁵ Article 14(1) of the Protocol to the African Charter on Human and Peoples ‘Rights on the Rights of Women in Africa 2003.

³⁷⁶ *Supra* Article 14(1)(a).

³⁷⁷ *Supra* Article 14(1)(b).

mother, because she has rights over her womb and may decide on what she wants to do with it, provided that she is not coerced.

3.3.6 Autonomy argument

Joseph Raz defines autonomy as:

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is an author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions through their lives.³⁷⁸

There is, however, no right to autonomy in the International Bill of Rights or in the SA Constitution. In the case of *S v Jordan*, the minority judgment held that ‘while we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy.’³⁷⁹ In terms of the Constitution, no one can force a woman to be pregnant and no one can prevent a woman from becoming pregnant because she has the right to make those choices. However, the thesis is arguing that surrogate mother has a right to be remunerated for this and that she will not be the legal parent of the child she is carrying since she is doing this for someone else.

The Constitution protects a woman’s right to her body, but it does not necessarily give her a right to charge for a pregnancy. However, a woman’s personal decisions about whether she wants to become or remain pregnant are often described as part of her right to autonomy. The surrogate mother’s autonomy is protected usually as part of the right to human dignity or as part of the right to privacy and her right to bodily integrity as set out in section 12(2)(a) of the South African Constitution. This autonomy interest can be understood as part of the right to human dignity.

In addition, the rights discussed are also protected by the Constitution, which provides for the freedom and security of all people, including the right to make

³⁷⁸ Raz *The Morality of freedom* 369.

³⁷⁹ *S v Jordan* para 53.

decisions concerning their reproduction and the right to control their body.³⁸⁰ This shows that the surrogate mother may exercise a choice as to whether to enter into the surrogacy contract, knowing the implications of entering into that agreement. Importantly, she is exercising an autonomous choice about what to do with her own body and whether she chooses to be pregnant.

Schachter argued that ‘the concept of respect for dignity is embodied in the idea of the freedom of choice of an individual, groups or communities, which in turn is manifested by a strong emphasis on the will and consent of the governed.’³⁸¹ He further emphasised that ‘respect for the intrinsic worth of a person requires that the person is entitled to have his or her own beliefs, attitudes, ideas and feelings.’³⁸² This means that determining what constitutes women’s degradation or a violation of the right to human dignity is a matter of personal belief, and what someone feels about a certain thing or action. Thus, something that is a breach of dignity in one person’s opinion may not be a violation of another’s opinion.

Lupton has argued that ‘it is unfair and paternalistic for the law to deny women the freedom to decide how best to utilise their procreative ability and to fulfil their role in life.’³⁸³ According to Meyerson, banning remunerated surrogacy would be tantamount to denying women the freedom to make their own decisions, which would have a negative impact on their capacity to improve their financial circumstances and ameliorate their dire and poor circumstances.³⁸⁴

Maud De Boer-Buquicchio emphasised that the reports do not show any interpretation that restricts women’s autonomy to decide their right to sexual rights.³⁸⁵ In her recommendations she noted that ‘nothing in these recommendations should imply that women, including women who act as surrogates, cannot make

³⁸⁰ Section 12(2) of the Constitution of RSA.

³⁸¹ Schachter ‘Human dignity’ 850.

³⁸² Ibid 850.

³⁸³ Lupton ‘The right to be born’ 40.

³⁸⁴ Meyerson ‘surrogacy Agreements’ 130 – 1.

³⁸⁵ Boer-Buquicchio ‘Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material’ A/72/162 para 84.

independent decisions about the autonomy of their own bodies during pregnancy.’³⁸⁶ This demonstrates that if the laws on remunerated surrogacy are reviewed, the ban in South Africa could be lifted, as the Special Rapporteur believes that women’s reproductive rights must be respected.

Nussbaum, the leading liberal feminist scholar, focuses on sex work but her arguments about bodily functions also apply to surrogacy.³⁸⁷ Therefore, courts must honour and enforce contracts that are freely concluded,³⁸⁸ and remunerated surrogacy agreements may be honoured if there was no coercion.

Most importantly, the suggestion that remunerated surrogacy may amount to the violation of women’s dignity may be disputed on the basis that everyone has the freedom to decide to sell their bodies for money in exchange of the services they have rendered.³⁸⁹ In the same manner, it is the surrogate mother’s choice to enter into any surrogacy agreement.

The respect for autonomy is one of the principles of biomedical ethics.³⁹⁰ When people are respected for their autonomy, they have the freedom to act intentionally and voluntarily without being controlled by others. Because everyone has an inalienable personal autonomy to be respected, liberal individualists argue that women have a reproductive right to choose whether to participate in a remunerated surrogacy agreement. Respect for autonomy includes respect for the freedom to charge for their services because a free society necessitates individual choice and prioritisation of freedom.³⁹¹ This supports the idea that, despite concerns about immorality, a surrogate mother can enter a surrogacy agreement since everyone must respect her decision.

³⁸⁶ Ibid para 108; see: A/ HRC/37/60 para 11.

³⁸⁷ Nussbaum ‘Human Rights’ 21; Nussbaum ‘Capabilities’ 13; Kusum ‘Feminist Perspectives’ 34.

³⁸⁸ Hutchison & Pretorius *The Law of Contract in South Africa* 2 ed (2012).

³⁸⁹ Osilama ‘Ethical issues’ 1599; See: The cornerstones of the South African law to contract include freedom of contract, the sanctity of contract, good faith and privity of contract in Hutchison & Pretorius, *The Law of Contract in South Africa*; Tong ‘Feminist Perspectives’ 59.

³⁹⁰ Beauchamp *Principles of Biomedical Ethics*.

³⁹¹ Van Zyl ‘Interpretations’ 407.

3.3.7 Freedom and security of the person: Reproductive freedom

CEDAW and the South African Constitution both protect various reproductive rights, such as health, medical care for pregnancy, childbirth, and the right to choose whether or not to terminate a pregnancy. Reproductive rights do not include the right to charge for surrogacy, but these rights may be useful in my argument when responding to concerns raised against remunerated surrogacy, such as surrogates being mistreated or put in danger. Another criticism is that she will be compelled to become and remain pregnant even if she does not want to, which is implausible because all women have the right to terminate their pregnancy.

The Constitution of RSA provides for the right to freedom and security of the person.³⁹² In General Comment No. 14, the Committee also explains that the right to health includes both freedoms and entitlements, including ‘the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation’.³⁹³ This also supports that the surrogate mother also has the right to control her body, so if she decides to enter into the surrogacy agreement, she is just exercising her right to the reproductive and sexual freedom. Even though women will have the right to become pregnant and even act as a surrogate, the question is whether she can receive money for same. Considering that women can choose to be surrogates, it should not be a problem if they choose to be remunerated for their services.

The CEDAW³⁹⁴ protects a woman’s right and freedom to make reproductive choices. One may argue that remunerated surrogacy might threaten her reproductive choice if she becomes involved in a contract in terms of which she is contractually obliged to become pregnant and remain pregnant until such time as the baby is born. If she is not the genetic parent of the child, she might also be forced to turn over the baby to the commissioning parents after birth.

³⁹² Section 12 (2) of the Constitution of RSA.

³⁹³ OHCHR and WHO, Fact Sheet on ‘The Right to Health’ 47 Cf. Para. 14 of General Comment No. 14 on the right to the highest attainable standard of health, 2000.

³⁹⁴ United Nations Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 (CEDAW).

CEDAW also seeks to eliminate unfairness against women in the field of health care to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning.³⁹⁵ This means that the Convention protects women, including surrogate mothers. Therefore, women entering remunerated surrogacy agreements may be protected if they rely on this treaty.

CEDAW provides a general foundation for remunerated surrogacy. This is because the issue of exploitation, freedom to choose a trade, dignity and autonomy, as well as reproductive rights, are protected under the treaty. It also provides that 'states shall ensure to provide women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation'.³⁹⁶ This would not necessitate a prohibition on remunerated surrogacy but, rather, nations would be able to tailor laws to preserve women's equal bargaining rights.³⁹⁷ One may argue that simply compensating the surrogate for pregnancy- related expenses excludes the postpartum time because the pregnancy contract would have expired by then, thus leaving the surrogate without protection. However, the surrogate would be able to care for herself during the post-natal time had she been remunerated.

Based on several rights that are protected by CEDAW, the acknowledgment of women's human rights, in general, would bolster the argument for remunerated surrogacy because surrogates would get payment for their services and would be shielded from criticism of remunerated surrogacy due to the protections provided by CEDAW.

Reproductive rights, as conceptualised in the ICPD's 'Programme of Action,' had an impact on human rights documents, as well as how these reproductive rights

³⁹⁵ Article 12 of CEDAW.

³⁹⁶ Article 12(2) of CEDAW; see: Article 14(2)(b) of African women's Protocol provides that States Parties shall take all appropriate measures to establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.

³⁹⁷ Johnson 'Is the Sale of Children' 701.

were drafted in South Africa, as shown by the Constitution of South Africa's formulation of these rights.³⁹⁸

3.3.8 Psychological harm of surrogate mothers

The handing over of the child to the commissioning parents may lead the surrogate mothers to sustain psychological harm.³⁹⁹ The practice amounts to emotional manipulation because surrogate mothers may become attached to the child, which makes it difficult for them to give the child to the commissioning parents.⁴⁰⁰ A surrogate could suffer harm because, even though she might have mentally prepared herself to think of the growing foetus as belonging to the commissioning couple, by the time she delivers the child she is likely to start thinking of the foetus as her own.⁴⁰¹ This would make it difficult to give up a baby at birth, resulting in sadness, despair and depression.⁴⁰² However, a surrogate mother who is a genetic parent of the child has an option to keep the child after birth before the lapse of sixty days from the day the child is born.⁴⁰³

In contrast, there is scholarly evidence supporting the view that despite a few surrogate mothers who are affected by relinquishing the baby to the commissioning parents, most surrogate mothers believe that surrogate agreements do not affect them psychologically.⁴⁰⁴ This may also not be used as a debating point opposing remunerated surrogacy because even in the context of altruistic surrogacy, a surrogate mother must hand over the child to the commissioning parents.

Importantly, even though a woman may experience some psychological suffering as a result of giving up the child, 'paternalistic protection of women in

³⁹⁸ Shozi 'Something old' 5. The South African Constitution specifically make preference to reproductive rights in section 12 of the Bill of Rights, which deals with the freedom and security of the person, and in section 27, which relates to socio-economic rights.

³⁹⁹ Anderson 'Commodity?' 74; Ryznar 'International commercial surrogacy' 1030: Psychological issues are related to the natural emotional distress that mothers may face after giving up a child they have carried for nine months.

⁴⁰⁰ Heaton, 'The Pitfalls of International Surrogacy' 24.

⁴⁰¹ Lupton 'The Right to Be Born' 40.

⁴⁰² Ibid 40.

⁴⁰³ Section 298(1) of the Children Act.

⁴⁰⁴ Jadva 'Experiences of surrogate mothers' 2199.

modern society should not be tolerated.⁴⁰⁵ The study agrees with Wertheimer who concluded that a surrogate mother is not susceptible to psychological manipulation, because it is her decision whether or not to risk her life before she participates in the surrogacy contract, with all the repercussions and risks that would be explained to her.⁴⁰⁶ It can be emphasised that with proper regulation and proper health care, the surrogate mother will not be risking her life.

Ultimately, the surrogate mother makes the decision but there is still a line of argument that she is forced to do it because there is absolutely no other source of income for her. Even though the surrogate mother should sign a surrogacy agreement without being coerced, one can argue that the financial incentive from the commissioning parents may push her to decide she would regret if the influence on her life were assessed objectively.⁴⁰⁷ This would imply that the surrogate mother would have been psychologically manipulated or coerced.

Therefore, even though the surrogate could sometimes suffer psychological harm, if the law is amended to include rules governing how the surrogate mother can be assisted by psychologists, so that they can comprehend the implications of the arrangement before they sign it, she would not have to risk doing so. Once she is aware of the repercussions, she must determine if she wishes to carry out the agreement. According to surrogacy legislation in SA, the surrogate mother who is genetically linked to a baby may decide to keep the child after birth but before 60 days.⁴⁰⁸ In some ways, this can help prevent psychological harm because she will not have to give up the baby.

One reason for the debates on remunerated surrogacy is the societal stigma associated with taking payment for reproductive services.⁴⁰⁹ The issue of stigma may, however, lead to the psychological harm of the parties involved in the agreement. For example, women in the USA who participate in surrogacy for monetary gain are looked down upon since there is a widespread idea that children

⁴⁰⁵ Ibid 2201; Nicholson 'Surrogacy as labour' 502.

⁴⁰⁶ Wertheimer 'Surrogacy and Exploitation' 225.

⁴⁰⁷ Ibid 235.

⁴⁰⁸ Section 298(1) of Children's Act.

⁴⁰⁹ Drabiak 'A call for uniformity.' 305.

are valuable and that receiving money in exchange for surrogacy is unethical.⁴¹⁰ In contrast, some women are passionate about wanting to be surrogate mothers, and it has become a well-known reality that middle- and lower-class surrogate mothers provide services for others as a method of earning money,⁴¹¹ and feeling proud as quoted by the Indian doctor (mentioned earlier in the thesis).

3.3.9 Limitation of human rights

It may be suggested that remunerated surrogacy may be permitted on the basis that a surrogate mother is protected by the rights outlined above.⁴¹² It is, however, important to establish whether the limitation of those rights is justified.⁴¹³ The Constitution of South Africa provides that the rights in the Bill of Rights may be limited in some certain circumstances.⁴¹⁴ Any restriction on a right must be reasonable and proportional, in that the impact or extent of the restriction must match the importance of the aim served by the limitation of the right.⁴¹⁵

To ascertain whether a right has been factually limited, the scope of application of a right must be ascertained. Additionally, in order to determine whether a right has been proportionately limited, an assessment of the right's importance in relation to other rights must be made. In the case of remunerated surrogacy, the personal freedom of the surrogate mother to be remunerated for services rendered should be considered together with the relevant factors in the limitation clause. Firstly, the weight of the interests and rights that the restriction protects, or advances is determined by the significance of the limitation's intended outcome. Evidence on how invasive the limitation is with regard to the performance and interests that are protected by the right is described as the nature and extent of the limitation.

⁴¹⁰ Ibid 305.

⁴¹¹ Hibino 'Non-commercial Surrogacy' 147.

⁴¹² Nicholson 'Surrogacy as Labour' 507.

⁴¹³ Meyerson 'Surrogacy Agreements' 137.

⁴¹⁴ The South African Constitution has a general limitation clause (section 36) that says that rights may be limited by a law of general application that is 'reasonable and justifiable in an open and democratic society based on dignity, freedom, and equality'.

⁴¹⁵ Section 36(1) of the Constitution of RSA.

Secondly, information on the relationship between a limitation and its purpose refers to whether the limitation can help achieve the goal. When there are two or more suitable ways to further the aim of a limitation effectively, the one that interferes with the right that is to be limited least severely must be chosen.

Thirdly, information about less restrictive ways to achieve the objective is related to the proportionality aspect. Therefore, the study considers that the personal freedom of those who engage in paid surrogacy should not be restricted since doing so would not be justified as it would not shield the surrogate mother from violations of her rights, such as those related to human dignity.

Contrary to the violation of dignity, freedom is yet another aspect that must be safeguarded. The restriction of a surrogate mother's freedom does not guarantee that the restriction will prevent the surrogate mother from having her right to dignity violated. This is based on the argument that there is no breach of the surrogate's personal freedom to be remunerated for services performed, which is treated the same as any other occupation, and so there is no violation of their right to dignity.

However, this implies that the rights that are considered when remunerated surrogacy is prohibited may be restricted so that remunerated surrogacy may be permitted. This extends to the point where the court may limit the surrogate mother's ability to practice her chosen profession or exercise her reproductive rights. The practice of chosen profession can be limited because section 22 of the Constitution probably still has some innate limitation, even though it is not quite the same as section 26(2) in the Interim Constitution.

It is also crucial to remember that the contract for remunerated surrogacy must specify what the surrogate mother is not permitted to do while pregnant, such as refraining from using drugs or alcohol, refraining from skydiving, and requiring a COVID vaccination. Some of these conditions constitute serious violations of her personal freedom. To determine whether it is justifiable to restrict the personal freedom of a surrogate women, one should consider whether there are restrictions in a private contract.

Therefore, as contracts are governed by the Constitution, paid surrogacy can be protected by the Constitution's personal freedoms and may be restricted

circumstances provided the restriction is reasonable. The decision of whether to uphold remunerated surrogacy agreements in various situations should be left to the court's discretion. The legislation allowing compensated surrogacy would also need to define the kinds of acceptable restrictions. This implies that while some personal freedoms will be protected, others will be constrained.

3.4 COMMISSIONING PARENTS

It can be argued that if remunerated surrogacy becomes legal, commissioning parents will be disadvantaged since they will be compelled to pay the compensation outlined in the Children Act while also remunerating the surrogate mother.

This, however, can be disputed in the sense that if the laws are correctly regulated, the commissioning parents will be obligated to pay the surrogate mother a reasonable amount that will not disadvantage the surrogate mother or the commissioning parents. If a reasonable fee is set by the authorities, this would mean that it would no longer be possible to have altruistic surrogacy, as we have at the moment. A woman might want to help her sister or brother by being a surrogate for them, but if they are allowed to waive the fee then this introduces the possibility of abuses by women who do not want to waive the fee. Importantly, it might be hard to see when it is voluntary and when it's not, thus rather just have a fixed fee.

Noteworthy too is that the commissioning parents are likely to become emotionally invested in their child even while it is still in utero. It is normal for a pregnant woman to become emotionally attached to their baby even while it is still in the womb, particularly when they see the child in an ultrasound.⁴¹⁶ This also applies to the commissioning parents or even fathers of the children, who of course are not pregnant themselves.⁴¹⁷ These technologies include ultrasound scans wherein foetuses are gendered and given names before they are born.⁴¹⁸ Therefore, it is important to consider the commissioning parents' interests in addition to the financial factors.

⁴¹⁶ Morgan 'An Anthropological Critique' 59.

⁴¹⁷ Ibid 59.

⁴¹⁸ Ibid 59.

However, if the surrogate mother wishes to keep the child, there will be a problem because one of the parents must be the child's genetic parent according to South African surrogacy laws. In the first place, there would be a breach of the contract, and in the second, there would be a conflict of interest since the father, who is also the child's genetic parent, would have parental rights.

The surrogate mother may decide to terminate the pregnancy for many reasons, such as if she no longer wants to be a surrogate or if she decides to threaten the commissioning parents that she will terminate the pregnancy so that can get more money from the intended parents in exchange for carrying the child to term.⁴¹⁹ It can also be even personal health concerns about the physical consequences of the commissioned pregnancy. Under SA law, a woman can choose to end her pregnancy for any reason as in accordance with the Constitution. However, it is obvious that the commissioning parents are at a major disadvantage here. The law must offer protection to the commissioning parents, bearing in mind that the pregnant woman's right to choose to terminate her pregnancy cannot be threatened in any way, including by a threat of punitive contractual damages.

Therefore, the laws that will be amended should cover such scenarios because they will dictate how such events could occur. In the event of a dispute, the laws will need to expressly clarify that the surrogate and the genetic parent will be held to the same standards of responsibility for the child. The laws will need to have proper protection of the surrogate mother, as well as the commissioning parents.

3.5 ETHICS AND MORALS

Remunerated surrogacy is viewed by some as an unethical or immoral agreement. This is because, since immorality is a violation of people's norms, remunerated surrogacy should be prohibited, given the bad perceptions surrounding it.⁴²⁰

However, according to the Kantian maxim, what matters in terms of morality is that individuals consider their acts appropriately. In terms of the motivation

⁴¹⁹ Ryznar 'International Commercial Surrogacy' 1025.

⁴²⁰ Pikee 'Surrogacy' 211.

underlying their actions, we must evaluate them on an equal moral foundation.⁴²¹ This suggests that morality is determined by the purpose of the individual acting immorally. Since the surrogate mother is required to undergo screening before signing a surrogacy arrangement, her intent which is to make money because it is her job will be determined at that time. In the event of remunerated surrogacy, the surrogacy mother would engage in the agreement with good intentions, as the surrogacy mother's aim, would be to help the commissioning parents, rather than for financial gain. Alternatively, even if the surrogate mother's intention is financial gain, the question is whether being pregnant for financial gain is wrong, like some people say that having sex for financial gain is wrong. The argument in both cases is that this kind of work is immoral.

However, looking at Beauchamp and Childress in the book titled 'principles of biomedical ethics'⁴²² who proposed four principles that are established in medical law, it can be stated that financial gain is not wrong. These principles are respect for autonomy, justice, beneficence and non-maleficence.⁴²³ These principles were developed to assist health care workers to deal with the inevitable ethical problems they face when treating their patients.⁴²⁴

The principle of beneficence requires health care workers to behave in the patient's best interests and underpins a variety of moral laws that defend and preserve others' rights, stop harm before it happens, get rid of danger-inducing situations, assist people with disabilities, and save those in peril.⁴²⁵

The principle of nonmaleficence focuses on the duty of a doctor to act in the patient's best interest by weighing the advantages and drawbacks of all interventions and treatments, avoiding those that are unduly burdensome, and selecting the optimal course of action for the patient.⁴²⁶

⁴²¹ Kant: Metaphysics *The Internet Encyclopedia of Philosophy*, available at <https://iep.utm.edu/kantmeta/>.

⁴²² Beauchamp *Principles of Biomedical Ethics* 57,113, 165.

⁴²³ *Ibid* 57,113,165.

⁴²⁴ Wadekar 'Wombs for rent' 11.

⁴²⁵ Varkey 'Clinical ethics' 18.

⁴²⁶ *Ibid* 20.

The principle of informed consent includes that the patient or subject must be competent to understand and make decisions, receive a full disclosure, comprehend the disclosure, act voluntarily, and assent to the planned action.

The protection of the surrogate mother's autonomy, as well as the delicate balance between beneficence and non-maleficence, are frequently discussed in the context of remunerated surrogacy.⁴²⁷

Furthermore, the principle of respect for autonomy might be compared to a religious context. Even though it is a life-threatening decision, doctors have an obligation to respect the patients' religion in this circumstance. Similarly, in remunerated surrogacy, it is up to the surrogate mother to determine whether she wishes to participate in IVF, notwithstanding the immoral concerns raised by certain scholars about remunerated surrogacy.

Both the commissioning couple and the surrogate would have deliberately accepted some limitations on their autonomy due to the nature of the deal. For both parties, the agreement establishes dominant moral obligations. The surrogate voluntarily agrees to carry a child to term and deliver it on behalf of another couple, and she concurrently consents to some autonomy limits.

Surrogacy is also possible without IVF if sperm is just inserted into the vagina so that the ovum is fertilised in the body in a natural way and no fertilised ova need to be destroyed. A surrogate who has religious objections to the procedures will not become a surrogate mother because it is her choice.

Doctors might not want to perform this kind of procedure. Some doctors, for example, do not want to participate in the termination of pregnancy because it is against their religious beliefs.⁴²⁸ It can be argued that doctors with such religious beliefs will not work at a clinic that provides for example IVF services.

South Africa is a secular state, and the laws are not guided by religious doctrine. This emerges clearly in the *Fourie* case,⁴²⁹ where Sachs J talks about the

⁴²⁷ Ramskold 'Commercial surrogacy' 398.

⁴²⁸ Keogh 'Conscientious objection to abortion' 8.

⁴²⁹ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

‘mutually respectful’ stance of church and state. It means that there is a balance between religious norms, as well as human rights. Because the principle of justice focuses on the issue of fairness in the healthcare system, the surrogate mother, even if she is involved in remunerated surrogacy, must be treated equally, just like other patients. Even though she is remunerated, the surrogate mother should be able to make her own medical decisions, and she should be accommodated.

Meyerson supports remunerated surrogacy from an ethical and philosophical perspective. She argued that opponents of remunerated surrogacy use rhetorical phrases like 'wombs for rent', 'baby farming', 'reproductive prostitutes', and 'stud-farm' mentality to describe remunerated surrogacy and that should be avoided when engaging in surrogacy agreements.⁴³⁰ Her biggest concerns are that the commissioning parents would not want to accept the child because of its disability and that the surrogate might refuse to give the child to them after birth.⁴³¹ She contended that opponents oppose remunerated surrogacy because they believe it to be immoral and degrading, rather than because it has consequences that are unfair to the parties to the contract or harmful to third parties.⁴³²

3.6 CONCLUSION

In conclusion, this thesis is exploring whether South African law should make provision for remunerated surrogacy agreements. The study has examined this question by looking at the children, surrogate mothers and commissioning parents. The study has concluded that despite the concerns raised about remunerated surrogacy, it seems that on balance it is better to provide for it with proper regulation that forbid it completely. Outlawing of regulated remunerated surrogacy has led to an unregulated black market, full of abuses, therefore, it is better to provide a legal space and regulate it properly so that the black market does not thrive.

Barring remunerated should surrogacy be reconsidered, because social scientific data reveals that remuneration alone cannot be used to distinguish between

⁴³⁰ Meyerson, 'surrogacy Agreements' 121.

⁴³¹ Ibid 135.

⁴³² Ibid 123.

'good' and 'bad' surrogacy agreements.⁴³³ This is significant because just because the arrangement involves payments does not mean it was a bad deal; after all, there is nothing wrong with a surrogate mother getting paid for bearing a child on behalf of the commissioning parents.⁴³⁴ Millbank believes that when a birth mother makes an informed decision to use surrogacy and transfer the child, it is not a harmful practice.⁴³⁵ It is reasonable to conclude that the transfer of the child from the surrogate mother to the commissioning parents is not detrimental.

Finally, this chapter examined whether or not South Africa's laws on remunerated surrogacy should be amended. It has been demonstrated that, while remunerated surrogacy is prohibited because it amounts to child sale, exploitation, the commodification of surrogate mothers, violation of dignity, and immorality, the laws should be amended to include remunerated surrogacy because the surrogate mother is protected by human rights and has freedom of trade, as well as the right to procreate. This requires balancing the interests and rights of all the parties to the surrogacy arrangement. Furthermore, it is crucial that all decisions about the agreement be made with the child's best interests as the primary consideration.

⁴³³ Millbank 'Commercial' Surrogacy in Australia' 477.

⁴³⁴ This will be explained further in the section that argues about the right to freedom of trade, and profession.

⁴³⁵ Millbank 'Commercial' Surrogacy in Australia' 477.

CHAPTER 4: INTERNATIONAL PERSPECTIVE

4.1 INTRODUCTION

The jurisdictions that are studied in this thesis include India, California and Uganda. This comparative examination supports and advances my investigation into whether South Africa should permit remunerated surrogacy. This chapter will provide an analysis on the decisions and laws on remunerated surrogacy in other jurisdictions in order to provide lessons and guidance for the South African legal system. It highlights why certain jurisdictions amended their laws to allow remunerated surrogacy and why other jurisdictions are amending or have amended their laws to ban remunerated surrogacy.

As a result of heated arguments at both the national and global levels of democratic accountability over the allegedly unethical nature of surrogacy, major remunerated surrogacy countries, such as India has banned remunerated surrogacy in recent years, pressuring surrogacy organisations to close or go underground.⁴³⁶

4.2 INDIA

4.2.1 Introduction

India was well-known as the world leader in remunerated surrogacy and fertility tourism.⁴³⁷ Remunerated surrogacy in India was recognised as a multi-billion-dollar industry and was the first emerging country to have a thriving national and international remunerated surrogacy sector.⁴³⁸ It became a central to international remunerated surrogacy and was recognised as the ‘surrogacy capital of the world’.⁴³⁹ This is because of factors such as low-cost healthcare facilities, the availability of Indian women as potential surrogates, well-equipped fertility clinics, and a lack of regulations to govern remunerated surrogacy.⁴⁴⁰ The infertility treatment industry in

⁴³⁶ Vertommen ‘The in/visible wombs of the market’ 7.

⁴³⁷ Witzleb ‘Surrogacy in India’ 168.

⁴³⁸ Blazier ‘The ethics of commercial surrogacy’ 622; Gupta ‘The Indian Ban’ 2020.

⁴³⁹ Ibid 622.

⁴⁴⁰ Bhutia ‘Legal and Ethical Aspects’ 288.

India also attracted international clients looking for low-cost surrogates and treatments.⁴⁴¹

Even though remunerated surrogacy was allowed in India, there were no laws specifically governing remunerated surrogacy in clinics before 2002.⁴⁴² India had almost 3000 largely unregulated surrogacy clinics.⁴⁴³ With minimal rules controlling the surrogacy procedures and agreements, remunerated surrogacy was thriving with little official interference.⁴⁴⁴

4.2.2 History of remunerated surrogacy laws in India

In 2002, the Indian Council of Medical Research (ICMR) proposed a draft with national guidelines for the ‘accreditation, monitoring and supervision’ of ART clinics.⁴⁴⁵ In the same year, India legalised remunerated surrogacy under the reproductive tourism policy of the Ministry of Tourism.⁴⁴⁶ This resulted in the rapid rise of various remunerated organisations and firms claiming expertise in surrogacy law, guiding and assisting foreign tourists.⁴⁴⁷ It seemed that remunerated surrogacy was turned into a bit of an industry. The study argues that turning surrogacy to an industry is something that the South Africans might fear. This is because there are risks that may be associated with an industry like that. For example, it gives a bad feeling of a baby farming industry or women involved in surrogacy to earn a living may end up being exploited.

In 2005, the Ministry of Health and Family Welfare approved draft national guidelines,⁴⁴⁸ but these guidelines only guided surrogacy but did not regulate it. The Indian Council of Biomedical Research, which authorised surrogacy contracts,

⁴⁴¹ Ibid 288.

⁴⁴² Pande ‘Gifts for global sisters?’ 619.

⁴⁴³ Ibid 619.

⁴⁴⁴ Pande ‘Global reproductive’ 246.

⁴⁴⁵ Srivastava ‘The Surrogacy Regulation’ 145.

⁴⁴⁶ National Tourism Policy in India 112.

⁴⁴⁷ Raghavi ‘Analysing the Draft Assisted Reproductive Bill’; Bhardwaj ‘Surrogacy in India’ <https://www.legalserviceindia.com/legal/article-782-surrogacy-in-india.html>.

⁴⁴⁸ Srivastava ‘The Surrogacy Regulation’ 145.

imposed guidelines on fertility facilities.⁴⁴⁹ The guidelines explicitly recommended gestational surrogacy with the requirement that the child be genetically related to the commissioning parents and mandated that they adopt the baby within six weeks after childbirth.⁴⁵⁰

The case of *Baby Manji Yamada v. Union of India*⁴⁵¹ raised ethical issues related to remunerated surrogacy. In this case, there were complications with regard to the nationality of Manji and the payment that was paid to the surrogate mother.⁴⁵² This is because the Indian surrogate was remunerated for her services by the commissioning parents who were Japanese nationals.⁴⁵³ Baby Manji was born on the 25th of July 2008, during a time when the remunerated surrogacy sector was thriving, and there was no proper legislation governing remunerated surrogacy.⁴⁵⁴

Yuki Yamada and Ikufumi Yamada, a Japanese couple, engaged in a surrogacy agreement in Gujarat's Anand district, using Mr Yamada's sperm and an anonymous Indian donor's egg for a fee. A month before the baby was delivered, the commissioning parents divorced.⁴⁵⁵ Before the child was born, the father's visa expired out, prompting him to return to Japan. The issue in this case emerged when the NGO Satya challenged the legal ambiguity surrounding surrogacy and the parental status of the child Manji.⁴⁵⁶ The child's grandmother travelled to India and petitioned the Supreme Court for adoption of the baby as the father could not return due to visa restrictions.⁴⁵⁷ The court allowed the grandmother and baby Manji's return to Japan. Although this case is crucial for establishing surrogacy as a legal

⁴⁴⁹ Statement of Specific Principles for Assisted Reproductive Technologies, Ethical guidelines for bio-medical research and human participants, Indian Council of Medical Research 101-102 (New Delhi, 2006).

⁴⁵⁰ The Guidelines mandated that the intending parents agree to adopt the baby after six weeks of birth and that they were to undergo genetic (DNA) fingerprinting to prove that they were the intending parents, and the record was to be kept with the clinic.

⁴⁵¹ *Baby Manji Yamada v Union of India & ANR* (2008) INC 1656 (India); see: *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518.

⁴⁵² *Baby Manji* 521, para 4; Points 'Fertility tourism in India' 3.

⁴⁵³ *Baby Manji* para 4; Points 'Fertility tourism in India' 4.

⁴⁵⁴ *Baby Manji* para 4; Mohapatra 'Bioethical analysis' 418-20.

⁴⁵⁵ *Baby Manji* para 4.

⁴⁵⁶ Jwala 'The Babies M' 84.

⁴⁵⁷ *Ibid* 86.

way for parents who are unable to have a child of their own to have a genetic child, the ruling mostly omits crucial information about surrogacy regulations in India.

A significant flaw in the decision of the court was the failure to go into detail about the surrogacy contract and the facts of the case. Even though it did write about the many types of surrogacies, and as far as surrogacy for monetary remunerated is concerned, it merely delegated to the Commission the duty of determining the legality of these surrogacy agreements.⁴⁵⁸ Furthermore, the court's statements did not mention the absence or necessity for a law to regulate remunerated surrogacy in India, even though under their definition of commercial surrogacy, they included that it can amount to commodification of the surrogate mothers.⁴⁵⁹ It was, however, the public outcry that led to the government proposing regulations on remunerated surrogacy. Therefore, even though the subject of remunerated surrogacy's legality under Indian law was not raised, the Indian Supreme court was of the view that it is permissible in India.⁴⁶⁰

In an effort to safeguard the interests of the intended or commissioning parents, the child, and the surrogates, in that order, the proposed bill on ART was drafted in 2008⁴⁶¹ and revised in 2010⁴⁶² by the Indian Ministry of Health and Family Welfare (in collaboration with the ICMR). The ART Bill in 2008 allowed surrogate mothers to receive money for carrying the child, as well as for all the expenses incurred during the pregnancy.⁴⁶³ The Bill's main purpose was to control and monitor cases of surrogacy in India.⁴⁶⁴

⁴⁵⁸ Ibid 523, para 13; *Baby Manji Yamada*, Judgment in the Supreme Court of India Civil Original Jurisdiction Writ Petition (C) No. 369 of 2008.
<http://www.commonlii.org/in/cases/INSC/2008/1656.html>.

⁴⁵⁹ Ibid 523, para 13.

⁴⁶⁰ Sharma 'Surrogacy Laws in India' 2019; *Baby Manji* para 13.

⁴⁶¹ ART (Regulation) Bill & Rules, 2008.

⁴⁶² ART (Regulation) Bill & Rules, 2010.

⁴⁶³ Clause 34 of the Surrogacy- ART (Regulation) Bill, 2008; Srivastava 'The Surrogacy Regulation' 145.

⁴⁶⁴ Pande 'Resisting the stigma' 295.

The Law Commission of India's 228th report,⁴⁶⁵ however, recommended that appropriate legislation must be enacted to prohibit remunerated surrogacy and enable ethical altruistic surrogacy. They raised that the moral difficulties linked with surrogacy includes objections that surrogacy disrupts the relationship between the mother and child, commodifies children, interferes with nature, and exploits underprivileged women in developing nations who sell their bodies for money.⁴⁶⁶ The Supreme court found in the instance of Baby Manji that the legislation to regulate remunerated surrogacy in India was urgently needed.⁴⁶⁷

4.2.3 The ban on remunerated surrogacy in India

Since the guidelines for remunerated surrogacy in India were published in 2002, there have only been proposed bills that the Parliament has never passed to law. Despite not being passed, the Bills promoted the practise of remunerated surrogacy. The study explains how various negative stories about remunerated surrogacy were brought on by the absence of an appropriate regulation to regulate this practise.

Some scholars have argued that 'commercial surrogacy was inherently imperialist and oppressive'.⁴⁶⁸ Saravanan argued that India is an environment with good illustrations for worldwide inequality in the practice of remunerated surrogacy due to injustices, inadequate management, ambiguous surrogacy laws, and unethical practices.⁴⁶⁹ The purpose of her research was to use the 'capabilities approach' to explore possibilities for global justice via human fellowship in the context of

⁴⁶⁵ The 228th Report of the Law Commission of India on the Need for Legislation to Regulate Assisted Reproductive Technology Clinics, As well As Rights and Obligations of Parties to a Surrogacy August 2009, D.O. No. 6(3)/157/2009-LC (LS), proposed new legislation to regulate the surrogacy procedure in India.

⁴⁶⁶ Ibid para 1.8

⁴⁶⁷ The September 2008 ruling of the Supreme Court regarding Baby Manji was the first national court decision regarding commercial surrogacy and surrogacy tourism in India. *Baby Manji Yamada v. Union of India & Anr.* (2008) INSC 1656 (29 September 2008). Judgment in the Supreme Court of India Civil Original Jurisdiction Writ Petition (C) No. 369 of 2008. <http://www.commonlii.org/in/cases/INSC/2008/1656.html>.

⁴⁶⁸ 'India bans foreigners from hiring surrogate mothers' *The Guardian* <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers>; Bronwyn 'Regulation of surrogacy'. Sama-Resource Group 13-14; 'National Consultation on ARTs: Emerging Concerns and Future Strategies.' New Delhi, India. Personal communication with Sarojini, N.B. Executive Director of Sama Resource Group for Women and Health, October 30, 2008.

⁴⁶⁹ Saravanan 'Global justice' 295.

remunerated surrogacy.⁴⁷⁰ She was of the view that there are concerns about global injustice as a result of inequities among surrogacy participants in India.⁴⁷¹ These inequities include insufficient rights for surrogates, their part of surrogacy expenses, a lack of social assistance insufficient legal and healthcare support, violations of their basic human rights, and their willingness to adhere with unpleasant restrictions within the surrogacy arrangement in India.⁴⁷²

In the context of a global industry, South African Medical Association's research of the scenario underpinning a woman's decision to engage as a surrogate analyses globalisation and poverty dynamics, as well as the placement of a mutually beneficial situation.⁴⁷³ The organisation acknowledges that, in the context of globalisation, Indian women are looking for new market opportunities, and that they have recognised their reproductive services as an opportunity to enter into the new market.⁴⁷⁴ In the interviews with the Indian surrogates, it was established that extreme poverty, a lack of employment alternatives, and financial desperation are frequently stated as reasons why Indian women choose surrogacy as a career option.⁴⁷⁵

Rozée and Unisa, et al⁴⁷⁶ conducted a study in India between 2013 and 2014 to investigate surrogate experiences in relation to remunerated and international surrogacy. They observed that India had a significant reserve of reproductive workers due to gender norms and inequality that create poor conditions for women.⁴⁷⁷ Underneath the women's rights protection, the prohibition of remunerated surrogacy could be understood as an effort to preserve traditional family and gender

⁴⁷⁰ Ibid 295.

⁴⁷¹ Ibid 301; Saravanan 'An ethnomethodological approach' 10.

⁴⁷² Saravanan 'Global justice' 301; Saravanan 'An ethnomethodological approach' 10.

⁴⁷³ SAMA-Resource Group 'A study on commercial surrogacy' (2012), <http://www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf>.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid; see: Pande 'Not an 'Angel' 153; Pande 'Resisting the stigma' 292; Pande 'Manufacturing a perfect mother-worker' 970.

⁴⁷⁶ Rozée, 'The social paradoxes' 1.

⁴⁷⁷ Ibid 2.

equality.⁴⁷⁸ Surrogates, however, did not portray themselves as fragile women or victims, but rather as mothers and spouses in charge of their individual destinies.⁴⁷⁹ In society generally, remunerated surrogacy was deemed as demeaning labour, done for the surrogate's upkeep or in order to survive, and on the other hand, the surrogates themselves used surrogacy to advance themselves and their children.⁴⁸⁰

Another issue was that remunerated surrogacy amounted to the abuse of the surrogates. This is an example of maltreatment. Indian surrogates were constantly dominated by the medical establishment and had little voice in the surrogacy process.⁴⁸¹ They did not receive any legal or psychological assistance from the government or the health institutions. Some clinics did not provide surrogates with a copy of the surrogate contract and, thus, the chance of them defending legal actions was limited.⁴⁸²

Surrogate mothers were frequently told that they were nothing more than vessels for carrying the foetuses, throw away wombs, that they should not develop a link with the child, and that they would not even be permitted to look at the child after giving birth.⁴⁸³ The surrogates had to live a disciplined life and had to give up the baby after delivery.⁴⁸⁴

In order to scare the surrogate and prevent them from demanding a greater payment or speaking up about their concerns, surrogate brokers extorted or blackmailed the surrogate by repeatedly informing them of their maternal duties.⁴⁸⁵ This is an example of exploitation because of the unequal bargaining powers between the poor and sometimes illiterate surrogate and the wealthy commissioning parents.⁴⁸⁶ It is important to also state that remunerated surrogacy was perceived as

⁴⁷⁸ Ibid 9.

⁴⁷⁹ Ibid 1.

⁴⁸⁰ Ibid 2; Chandran 'Gendering Assisted Reproductive' 650.

⁴⁸¹ Ibid 5; Ibid 652.

⁴⁸² Saravanan 'An ethnomethodological approach' 10.

⁴⁸³ Pande 'Manufacturing a perfect mother-worker' 982.

⁴⁸⁴ Ibid 981.

⁴⁸⁵ Pande 'Manufacturing a perfect mother-worker' 983; Gupta 'Reproductive biocrossings' 47.

⁴⁸⁶ Ruby 'A call for regulation' 275.

being exploitative and that it gave rise to commodification and ill-treatment of surrogate mothers who were financially struggling.⁴⁸⁷ After all, it was regarded as a country where one can find cheap and popular surrogacy.⁴⁸⁸ India was the most popular surrogacy destination because women are not financially independent and are often exploited by third parties owing to illiteracy and poverty.⁴⁸⁹

Gupta contended that this manipulation and control of surrogates was performed out for the brokers' financial gain, as they stood to gain more payment if they could successfully deliver a healthy child to the commissioning parents, with no complications.⁴⁹⁰ The prohibition of remunerated surrogacy was argued to be primarily motivated by the demeaning treatment of surrogates, as their needs and goals were not respected.⁴⁹¹ In their argument, Blazier and Janssens posed the question of whether the prohibition of remunerated surrogacy was the result of the payment made to a surrogate mother or the maltreatment of women and children.⁴⁹² They believe that rather than outlawing remunerated surrogacy, regulations could have been put in place to treat the women and protect the children born through surrogacy because the treatment had nothing to do with the money the women were paid.⁴⁹³

Surrogates were also disadvantaged because they began the surrogate motherhood process without legal protection or sufficient health insurance.⁴⁹⁴ Pande also argued that surrogates frequently did not comprehend the specific medical treatments involved in surrogacy.⁴⁹⁵ Many women became surrogates without first ensuring that they were healthy enough to bear a healthy baby to the term, which was

⁴⁸⁷ Teman 'Unsustainable Surrogacy Practices' 115-127.

⁴⁸⁸ Raveendran 'Political in socioscientific' 92.

⁴⁸⁹ Sadaf 'surrogacy in India' 6.

⁴⁹⁰ Gupta 'Reproductive biocrossings' 251; Bailey 'Reconceiving surrogacy' 730.

⁴⁹¹ Blazier 'The ethics of commercial surrogacy' 624.

⁴⁹² Ibid 624.

⁴⁹³ Ibid 624.

⁴⁹⁴ Kumar 'India's Proposed Commercial Surrogacy', <https://undark.org/2019/11/07/india-commercial-surrogacy-ban/>.

⁴⁹⁵ Pande 'Resisting the stigma' 307.

a danger to them.⁴⁹⁶ Surrogates were not given adequate information about the risks of the surrogacy procedure.⁴⁹⁷

Pande argued that a surrogate was meant to be a regimented contract employee who relinquished the child at the end of the surrogacy contract.⁴⁹⁸ However, she was also encouraged to be both a caring mother for the baby and a generous mother who would not haggle over the amount of money she receives.⁴⁹⁹ This was unfair on the surrogate mother because some commissioning parents would underpay her as she was not expected to negotiate the amount of remuneration she was offered.⁵⁰⁰

In India, ineffective governance is evident in remunerated surrogacy activities. The formal registration of IVF clinics is irregular, with records revealing that many clinics remain unregistered. According to a recent ICMR survey, just 140 IVF clinics have been registered in India.⁵⁰¹ Since there are irregularities in the surrogacy sector, it signifies that surrogate mothers are not protected since they are not required to follow the right process due to inadequate governance. It is obvious that these anomalies are what clouds the surrogacy industry with negativity since it was incorrectly governed by the Indian state.

In Pande's reports from the research interviews with surrogates in India, she noted a trend that surrogate mothers' rights were infringed because they were forced to live in clinics or hostels during pregnancy, were subjected to stringent constraints and forced to follow rigid routines.⁵⁰² This means they were typically placed in clinics or hostels away from their families and would only see them once or less per

⁴⁹⁶ Ibid 307.

⁴⁹⁷ Bagri 'A Controversial Ban on Commercial Surrogacy' <https://time.com/6075971/commercial-surrogacy-ban-india/>.

⁴⁹⁸ Pande 'Manufacturing a Perfect Mother' 984.

⁴⁹⁹ Ibid 984.

⁵⁰⁰ Saran 'New laws ban.' 148-150.

⁵⁰¹ ICMR (2015) 'Enrolled assisted' <http://www.icmr.nic.in/icmrnews/art/List%20of%20Enrolled%20ART%20Clinis-5%203%202013.pdf>.

⁵⁰² Pande 'Manufacturing a Perfect Mother-Worker' 981; Saran, 'New laws ban.' 148-150.

week.⁵⁰³ Their nutrition and activity were strictly supervised by hostel leaders, and they did not have the power to make decisions pertaining to their pregnancy.⁵⁰⁴ Surrogates complained about a shortage of water, overcrowded accommodations, low food quality, and inadequate hygiene and sanitation at their residences.⁵⁰⁵ They were irritated by being over-monitored, over-fed, and barred from doing any housework.⁵⁰⁶

Given the openly remunerated aspect of surrogacy in India, surrogates were more outspoken about their compassion and gift-giving.⁵⁰⁷ However, according to the surrogates' narratives in Pande's research, benevolence and gift-giving were rarely cited as motivations to enter into remunerated surrogacy.⁵⁰⁸

Pushpa, an India surrogate, mentioned that:

'My husband feels proud of me. Well, he should. I have earned so much money and done something that even he couldn't have. Although he does not want me to do it again, I think I would. I want to keep some money in a fixed account for my old age.'⁵⁰⁹

With this comment from a proud surrogate, it can be deduced that, despite all the negatives surrounding remunerated surrogates, her being proud provides a sense of self-worth, which can transcend the perception of outsiders' violation of dignity. To demonstrate how important the payment is to them, surrogate mothers, she stated that she would like to do it again to save for her retirement. This means that she sees a future in the being a surrogate and she is willing to invest in her future.

⁵⁰³ Pande 'Manufacturing a Perfect Mother-Worker' 982; Kalantry 'Regulating Markets for Gestational Care' 671 (Many surrogates in India were not allowed to leave their surrogacy hostels during the process unless there were exceptional conditions.)

⁵⁰⁴ Pande 'Manufacturing a Perfect Mother-Worker' 982; see: Ibid.

⁵⁰⁵ Saravanan 'Global justice' 303.

⁵⁰⁶ Ibid 303.

⁵⁰⁷ Ibid 985.

⁵⁰⁸ Ibid 985.

⁵⁰⁹ Pande 'Resisting the stigma' 305.

In response to the negative reports of remunerated surrogacy that caused high international concern,⁵¹⁰ the Surrogacy (Regulation) Bill was proposed in August 2016. The aim of the Bill was to completely ban remunerated surrogacy and to make surrogacy agreements permissible only if performed altruistically.⁵¹¹ The Bill also aimed to avoid the potential exploitation of surrogate mothers caused by remunerated surrogacy.⁵¹² Timms, in her discussion on the 2016 regulations in India, argued that the country had injustice, inequalities, and poorly implemented laws that placed vulnerable women and children at risk.⁵¹³

The Surrogacy Regulation (2019) Bill was recently introduced by the Parliament of India⁵¹⁴ and is referred to as the successor to the Surrogacy (Regulation) Bill 2016, which the Parliament of India neglected to pass.⁵¹⁵ The Surrogacy Regulation (2019) Bill brought clarity to the rights of stakeholders in surrogacy arrangements and sought to protect the vulnerable.⁵¹⁶ The Bill aimed to defend the rights of women and children who were at risk of being exploited and commodified as third parties in ART infertility treatments.⁵¹⁷

The 102nd Report of the Indian Parliamentary Standing Committee⁵¹⁸ supports the altruistic arrangement in India thus criticising the prohibition on commercial surrogacy. According to this report, the Committee seemed persuaded that the altruistic surrogacy model which was the basis for the Surrogacy Bill 2016 that outlawed commercial surrogacy in India was founded more on moral

⁵¹⁰ Nair 'From abandonment to abuse' <http://indianexpress.com/article/india/india-news-india/surrogacy-bill-commercial-ban-indian-cases-sushma-swaraj-abandonment-abuse-girl-abortion-3019329>.

⁵¹¹ The Surrogacy (Regulation) Bill 2016, a Bill in relation to surrogacy laws; Saran, 'New laws ban commercial surrogacy in India' 149.

⁵¹² Unisa 'New issues for further research's 4.

⁵¹³ Timms 'Ending commercial surrogacy' 99.

⁵¹⁴ Srivastava 'The Surrogacy Regulation' 145; Hibino 'Ongoing Commercialization' 8.

⁵¹⁵ Ibid 145.

⁵¹⁶ Ibid 145.

⁵¹⁷ Ibid 145.

⁵¹⁸ Parliament of India, Rajya Sabha, the department-related parliamentary standing committee on health and family welfare 'the 102nd report on the surrogacy (regulation) bill, 2016' Presented to the Rajya Sabha on 10th August, 2017.

presumptions than on any scientific standards.⁵¹⁹ The report made clear that remunerated surrogacy in which surrogate mothers are allowed to receive monetary incentives as reasonable compensation is the result of what is commonly referred to as altruistic surrogacy throughout the world.⁵²⁰ The report supported that it is unreasonable to request a woman to serve as a surrogate and endure the whole financial, psychological, and physical burden of this arrangement for free or out of pure compassion.⁵²¹ Therefore, since a surrogate puts her life at danger during this entire procedure, she is, in fact, the most significant shareholder and ought to be rewarded for it.

The Surrogacy (Regulation) Act, adopted in 2021 and came into effect from January 2022, prohibits remunerated surrogacy and only allows altruistic surrogacy.⁵²²

4.2.4 Discussion

India's remunerated surrogacy prohibition did not solve disparities, as the wealthy upper-class may continue to employ poor lower-caste surrogates and international remunerated surrogacy occurs discreetly.⁵²³ If the law is well-regulated, the surrogacy sector will be less likely to thrive in underground marketplaces, and surrogates will be less likely to be exploited.⁵²⁴ There are worries that a prohibition on remunerated surrogacy alone could drive the sector underground and allow these surrogacies to continue operating, although illegally.⁵²⁵ If for example, there are keen parents and women who are willing to serve as surrogates, illegal agreements will be created as there is a good chance that people will turn to acceptable unlawful

⁵¹⁹ Ibid clause 5.22.

⁵²⁰ Ibid clause 5.22.

⁵²¹ Ibid clause 5.8 .

⁵²² Section 3(v)(b) Section 4(ii)(b) &(c) of the Surrogacy (Regulation) Act 47 of 2021 provides that 'no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist or any other person shall promote, publish, canvass, propagate or advertise or cause to be promoted, published, canvassed, propagated or advertised which

(b) is aimed at promoting a surrogacy clinic for commercial surrogacy or promoting commercial surrogacy in general;

⁵²³ Cheney 'Discordant Expectations' 12.

⁵²⁴ Srivastava 'The Surrogacy Regulation 146.

⁵²⁵ Ibid 149.

agreements to satisfy their requirements and there is a significant likelihood that people will find other ways to meet their needs.

Recently, the Centre for Reproductive Rights commented on the new surrogacy laws in India by arguing that ‘the restrictive criteria of surrogates might push surrogacy underground and put the lives and rights of women at risk.’⁵²⁶ According to scholars like Rudrappa and organisations like SAMA, the government’s intention to protect women by prohibiting remunerated surrogacy has the unintended consequence of fostering an underground market and resulting in undetected coercion of women.⁵²⁷ Effective regulation by the law will reduce the likelihood of surrogate exploitation.⁵²⁸ Therefore, a better solution would have been better and more rigorous regulation of remunerated surrogacy.

In her article examining the impacts of the remunerated surrogacy ban, Pande asserted that surrogacy was unquestionably a ‘win-win’ arrangement for intended parents in India. The ban on remunerated surrogacy has the immediate effect of shifting attention away from contract implementation and payment arrangements.⁵²⁹

However, Yangchen, one of the scholars who are against the ban on remunerated surrogacy in India, argued that rather than simply prohibiting remunerated surrogacy, the proposed law should recommend that the government regulate it carefully.⁵³⁰ Singh also added to Yangchen’s argument that remunerated surrogacy should not be completely prohibited in India, but rather be strictly regulated for the sake of the country’s benefit.⁵³¹ The scholar went on to argue that remunerated surrogacy legislation should contain measures requiring the intending couple to pay the surrogate mother’s expenses following the delivery of the baby

⁵²⁶ Centre for Reproductive Rights ‘New Laws in India Regulate Assisted Reproduction and Surrogacy’ 16 August 2022, <https://reproductiverights.org/assisted-reproduction-and-surrogacy-in-india/#:~:text=The%20Surrogacy%20Act%20and%20the,protecting%20children%20born%20through%20ART.>

⁵²⁷ Rudrappa ‘Reproducing dystopia’ 7. Sarojini *Contested terrain* 2016.

⁵²⁸ Srivastava ‘The Surrogacy Regulation’ 149.

⁵²⁹ Pande ‘Revisiting surrogacy in India’ 400.

⁵³⁰ Buthi ‘Legal and ethical aspects’ 159; Singh, ‘Critical Evaluation’ 294.

⁵³¹ *Ibid* 159-160.

because the payment earned through surrogacy is used to treat herself after the delivery.⁵³²

Mark⁵³³ argued that the government exerts authority over a woman's physical autonomy and right to privacy and that a person's rights should not be restricted simply because the government has failed to regulate them. Because it interferes with a person's ability to enter into a contract, the prohibition is a gross violation of Article 21 of the Indian Constitution. Banning remunerated surrogacy is not the answer to all the problems faced in surrogacy agreements, but one should rather regulate it to address the issues.⁵³⁴ Therefore, rather than the new ban on surrogacy in India, surrogates' rights as employees should be protected and the laws should be properly regulated.⁵³⁵

4.2.5 Conclusion

India could have introduced proper regulations that protect the rights of surrogate mothers other than completely banning remunerated surrogacy. This could have been done by allowing surrogate mothers to stay with their families during pregnancy, paying them sufficiently and explaining the risks associated with the surrogacy procedure and also ensuring excellent medical care. Therefore, the South African legal system may learn from the Indian legal system because the reasons that led to the ban on remunerated surrogacy were highlighted and, thus, they should be taken into consideration when the new laws on remunerated surrogacy are to be amended.

4.3 UGANDA

The prevalence of infertility in Uganda is quite substantial, and the country places a high value on procreation.⁵³⁶ As a result, many infertile Ugandan women and men just like in South Africa experience social poverty, stigmatisation, divorce, and/or

⁵³² Ibid 160.

⁵³³ Mark 'Capabilities Approach' 73.

⁵³⁴ Ibid 78.

⁵³⁵ Jana 'Reproductive Work' 1.

⁵³⁶ Hörbst 'IVF in Africa as in Europe' 109 -110.

social marginalisation.⁵³⁷ In Uganda, the use of ART, particularly IVF, which is the most popular reproductive technique, is mostly unregulated.⁵³⁸ There are no laws that completely regulate the use of ART.⁵³⁹ Although Uganda had no laws governing assisted reproductive technology, there has been a rise in the number of married couples who want children experiencing both primary and secondary infertility over the years.

In 2005, Dr. Ubane successfully delivered the first baby after IVF treatment at the Makanga clinic in Kampala.⁵⁴⁰ The first Ugandan woman to participate in the surrogacy arrangement was a 29-year-old mother who was paid around 4,500,000 Uganda Shillings to bear a pregnancy for another woman.⁵⁴¹ This marked the beginning of surrogacy in Uganda. As planned, after giving birth, she promptly handed over the twins to the woman who had hired her to carry her healthy twins.⁵⁴² She was not permitted to spend even a single second with the children. This woman (name withheld) became the nation of Uganda's first surrogate mother. This made it possible for many more women to commit to assisting childless couples.

4.3.1 Surrogacy in Uganda

The surrogate mother, who wished to remain anonymous, expressed her excitement about the experience in a phone interview with Sunday Vision on July 29, 2006.⁵⁴³ She stated that although she first did it for financial gain, she is now extremely pleased of having helped and rendered service for a mother who lost her womb to cancer at the age of 22.⁵⁴⁴ Money was the topic as there was no legislation governing surrogacy or assisted reproduction, leaving out any potential medical, psychological,

⁵³⁷ Ibid 110.

⁵³⁸ Nampewo 'Assisted reproductive technologies in Uganda'.

⁵³⁹ Ibid.

⁵⁴⁰ Hörbst 'You cannot do IVF in Africa as in Europe' 111; Hörbst 'Transnational connections' 364.

⁵⁴¹ Ibid 111; Ibid 364; 4,500,000 Uganda Shillings is currently equivalent to 1,250 USD.

⁵⁴² Natukunda 'Born of a surrogate mother' <https://www.newvision.co.ug/news/1311947/born-surrogate-mother>.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

or physical effects that would follow enforceable permission.⁵⁴⁵ As a result, the rapidly expanding Assisted Reproductive Health Clinics may employ gametes that jeopardise the surrogate mother and the resulting children if they are not governed by the law. Because it has been proposed that rigorous regulation is the best approach to prevent any negative effects related to paying surrogate mothers for their services, the topic of strict regulation is significant in most countries.

Neither Uganda nor its national medical associations had any clear legislation or regulations governing the use of assisted reproductive technologies.⁵⁴⁶ However, there has lately been some progress in Africa since Uganda introduced a Ugandan ART draft Bill 2021, aimed at regulating married couples' use of assisted reproductive technologies, including surrogacy. The Bill's objectives include regulating married couples' use of assisted reproductive technology, establishing registered practitioners, designating and approving fertility centres, approving banks that store assisted reproductive technology, allowing for surrogacy, providing access to information about these services, and dealing with related issues.

In Uganda, the surrogate mother might get remuneration for her services because the same is not mentioned in the Draft Bill. Unlike in South Africa, the Ugandan Draft Bill does not explicitly prohibit payment for the services hence the reason why this might be acceptable that the surrogate is quite obviously performing the services.⁵⁴⁷ The Bill does not explicitly explain its viewpoint or provide further information on issues that should be resolved by legislation, such as whether commercial surrogacy is permitted in Uganda.⁵⁴⁸ Therefore, the surrogate clearly provides the services of growing and carrying the married couple's own child;⁵⁴⁹ therefore, the commissioning parents in this scenario are the baby's genetic parents.

⁵⁴⁵ Abaho 'Isn't it the right time' <https://parliamentwatch.ug/blogs/isnt-it-the-right-time-uganda-enacts-law-regulating-surrogacy/>.

⁵⁴⁶ Ibid 110; Hörbsta 'Transnational connections' 363.

⁵⁴⁷ Children's Act s295 (c) which, in contrast, does explicitly prohibit remunerated surrogacy.

⁵⁴⁸ Nayiga 'ART Bill' 10.

⁵⁴⁹ Clause 22 of the Ugandan ART Bill provides that a married couple may use surrogacy if after medical examination, it is discovered that surrogacy is the only alternative for the married couple to have a child.

There is no question about selling the baby because it is obvious that the child belongs to the commissioning couple. One of the things that has been mentioned in the thesis about the genetic link requirement in SA is that requiring a genetic link might allow for payment for the surrogacy service because if one or both commissioning parents in the genetic parent then it does not look as if the surrogate is selling a baby. The Ugandan Bill does require the married couple to use their own gametes for AI.⁵⁵⁰ Clause 20(2) provides however, that where there are circumstances in which the married couple may use donated gametes, there is no explicit requirement for the genetic link in the context of surrogacy in the Bill.

Given the low wages and high unemployment rate in Uganda's labour market, egg donation and surrogacy, in particular, represent a very lucrative possibility, especially for young women with no formal education and professional experience.⁵⁵¹ ART will be lucrative business for men too, especially those who are willing to donate sperms for a fee.

In the South African situation, it is possible that one of the commissioning parents is not the genetic parent, and in fact, the surrogate mother may be the genetic mother herself. If there is payment, this may make the scenario appear more like baby selling. It seems that surrogacy in Uganda is only available to married couples,⁵⁵² which would not be constitutional in South Africa because it discriminates on the grounds of marital status. The Bill is extremely comprehensive with quite a lot of regulation and protection envisaged for example, the surrogate must be 25 or older and fertility centres must be registered, thus it is considerably more conservative than in South Africa. This is due to the fact that the married couple must utilise their own gametes; otherwise, couples without their own sperm or ova would not have this choice. It appears that this is a solution exclusively for women, who have their own viable ovaries but are unable to carry a baby to term.⁵⁵³

⁵⁵⁰ Clause 20 of the Draft Bill.

⁵⁵¹ Hörbst ‘‘You cannot do IVF in Africa as in Europe’ 114.

⁵⁵² Clause 7 of the Draft Bill.

⁵⁵³ Clause 20(2) of the Draft Bill.

It is important to note that before any assisted reproductive technology procedure is performed on a woman who plans to be a surrogate mother, the surrogacy agreement must be signed. Therefore, it is vital to underline that there is now a jurisdiction in Africa that considers the remuneration of surrogate mother for the services they rendered, thus this may be a model of South Africa.

4.4 CALIFORNIA

4.4.1 Introduction

As one of the most surrogacy-friendly jurisdiction in the world, California draws intended parents from all over the world who want to take advantage of the jurisdiction's favourable legislation and thriving surrogacy market.⁵⁵⁴ California's advantageous rules for both intended parents and surrogates, make it an epicentre of remunerated surrogacy.⁵⁵⁵ Remunerated surrogacy arrangements are lawful and binding, and intended parents are not required to be married in order to be listed as parents on the birth certificate.⁵⁵⁶

4.4.2 Remunerated surrogacy

California has the most liberal surrogacy laws of any jurisdictions.⁵⁵⁷ Prior to 2013, the Uniform Parentage Act and case law, especially *Johnson v. Calvert* 1993⁵⁵⁸ and *Bazzunca* 1998,⁵⁵⁹ regulated surrogacy in California.⁵⁶⁰ Indeed, numerous California courts have affirmed remunerated surrogacy agreements. On September 23, 2012, California Governor, Jerry Brown, signed AB 1217, a law that regulates surrogacy contracts.⁵⁶¹ One family law expert lauded the Bill as the most important surrogacy

⁵⁵⁴ Kennedy 'Can I have your baby?' 187.

⁵⁵⁵ Mohapatra 'Bioethical analysis' 426-427.

⁵⁵⁶ Ibid 428.

⁵⁵⁷ Pande 'Gifts for global sisters?' 619. See also Yakuppur 'Tourism' 79.

⁵⁵⁸ *Johnson v Calvert*, 851 P.2d 776 (Cal. 1993).

⁵⁵⁹ *In re Marriage of Buzzanca* 61 Cal. App. 4th 1410 (1998).

⁵⁶⁰ UN Special Rapporteur on the sale and sexual exploitation of children 14 May 2019.

⁵⁶¹ California Enacts Landmark Legislation Giving Same Sex Parents Via Surrogacy Equal Parenting Rights, PR NEWSWIRE, (Oct. 17, 2012).

legislation ever passed in the state of California.⁵⁶² On January 1, 2013, the ‘Surrogacy Law’ became effective in the state of California, and provided that a parental relationship can be established between the child born by the surrogate mother and individuals who apply for this procedure.⁵⁶³

The new Act confirms and codifies the landmark 1993 judgment, *Johnson v. Calvert*,⁵⁶⁴ where the Supreme Court of California ruled that remunerated surrogacy agreements were enforceable.⁵⁶⁵ Mark and Crispina Calvert and Anna Johnson signed a contract on January 15, 1990, stating that an embryo generated by Mark’s sperm and Crispina’s egg would be inserted in Anna and the child born would be taken into Mark and Crispina’s home as their baby.⁵⁶⁶ Anna agreed to relinquish all parental rights to the child to Mark and Crispina. In exchange, Mark and Crispina agreed to pay Anna \$10 000 in six instalments, the last amount six weeks after the child’s birth.⁵⁶⁷ Mark and Crispina were also supposed to pay for Anna’s \$200 000 life insurance coverage. Anna sent Mark and Crispina a letter in July 1990 demanding the balance of the funds owed to her or she would refuse to hand over the child once it was born.

The next month, Mark and Crispina filed a lawsuit, claiming they were the legal parents of the unborn child. Anna launched her own lawsuit asking to be declared the child’s mother. The trial court found that Mark and Crispina were the child’s ‘genetic, biological, and natural’ parents, that Anna lacked ‘parental’ rights to the child,⁵⁶⁸ and that the surrogacy contract was valid and enforceable in the face of Anna’s claims. The court also nullified the visitation order. A consideration of the

⁵⁶² Richard Vaughn, ‘Governor Signs California Surrogacy Bill’ *INT’L FERTILITY L. GRP*, 26 September 2012, available at <https://www.iflg.net/governor-signs-california-surrogacy-bill/>.

⁵⁶³ Yakuppur ‘Tourism’ 79. In 2013, the legality of surrogacy in California was officially confirmed with the passage of California Assembly Bill 1217; part of California Family Law Sections 7960-7962.

⁵⁶⁴ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Johnson v. Calvert* para 87.

⁵⁶⁷ *Ibid.* See also Allen ‘Black surrogate’ 21.

⁵⁶⁸ California Code, Family Code§ 7962.

child's best interests influenced Judge Parslow's decision to grant the Calverts sole legal and physical custody of the child.

Anna appealed the trial court's judgment. Judge Parslow had said:

'I see no problem with someone getting paid for her pain and suffering. There is nothing wrong with getting paid for nine months of what I understand is a lot of misery and a lot of bad days. They are not selling a baby; they are selling pain and suffering.'⁵⁶⁹

The Supreme Court of California ruled that remunerated surrogacy agreements were enforceable.⁵⁷⁰ The hefty price is a result of agency fees, a surrogate fee (often between \$30,000 and \$50,000), medical costs, insurance costs, legal fees, and other expenditures.⁵⁷¹ Note that this list includes a considerable fee that is paid directly to the surrogate for her labour.

In California, the parentage should be determined by the intent-based test as originating in the *Johnson* case.⁵⁷² The annotations to the California Family Code in terms of surrogacy agreements, make provision for the parties to expressly declare and allocate parenthood of the child to be born. The *Johnson* case established that the intention of the parties involved at the time of the gestational surrogacy agreement must be considered when resolving a conflict of rights to the child between an egg donor and a surrogate.⁵⁷³ It is important to note that California law does not mention if it requires that one or both of the commissioning parents provide a gamete.

Before a surrogacy agreement is concluded, California law stipulates several requirements. For example, a surrogacy facilitator directs the intended parents to put

⁵⁶⁹ *Johnson v. Calvert*, No. X633190 (Orange County Super. Ct. Oct. 22, 1990), Reporter's Transcript, Statement of Decision, at 1499. Scott 'Politics of commodification' 121-23); Dale, 'Surrogacy in California' 549.

⁵⁷⁰ Scott 'Politics of commodification' 123.

⁵⁷¹ *Ibid.* See also Field 'Surrogacy Contracts' 1161.

⁵⁷² Storrow 'Intention' 602 – 603; see also Hill, 'Biology'.

⁵⁷³ *Johnson v Calvert*, 851 P.2d 776, 782 (Cal. 1993).

money in either a trust account managed by an attorney or an independent, bonded escrow depository.⁵⁷⁴ California statute defines:

‘a surrogacy facilitator as “a person or organization that engages in either [a]dvertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement or charging a fee or other valuable consideration for services rendered relating to an assisted reproduction agreement”’.⁵⁷⁵

According to the description of a surrogacy facilitator and the tasks assigned to them by the law, the surrogate facilitators assist surrogate mothers when they are charging for the services that they render. This is helpful in the sense that there is no payment that will be made directly to the surrogate mother from the commissioning parents. This reduces cases such as those of exploitation as there is now a third party in the agreement.

California Code, Family Code§ 7961 provides that ‘a non-attorney surrogacy or donor facilitator must instruct the client to deposit all client payments into one of the two options, a trust account managed by a solicitor, or an independent, bonded escrow depository maintained by a licenced, independent, bonded escrow firm.’ It further states that a non-attorney surrogacy or donor facilitator is not permitted to have a financial interest in any escrow firm that is managing client money for the purposes of this section.⁵⁷⁶ The directors or employees of a non-attorney surrogacy or donor facilitator are not permitted to act as agents for any escrow business that is holding client money.⁵⁷⁷ The solicitor or escrow agent may distribute client funds only as specified in the aided reproduction agreement and money management agreement.⁵⁷⁸

California Code, Family Code§ 7962 (a) further provides that:

⁵⁷⁴ California Code, Family Code§ 7962.

⁵⁷⁵ California Code, Family Code§ 7960(a)(1)-(2).

⁵⁷⁶ California Code, Family Code§ 7961.

⁵⁷⁷ California Code, Family Code§ 7961.

⁵⁷⁸ Ibid.

‘An assisted reproduction agreement for gestational carriers shall contain the date on which the assisted reproduction agreement for gestational carriers was executed, the persons from which the gametes originated, the identity of the intended parent or parents and disclosure of how the intended parents will cover the medical expenses of the gestational carrier and the child to be born.’

A surrogate and the intended parent or intended parents must be represented by separate independent competent attorneys of their discretion prior to signing the written assisted reproduction agreement for gestational carriers.⁵⁷⁹ The parties must sign the assisted reproduction agreement for gestational carriers, and either a notary public or a witness must attest to the validity of the signatures.⁵⁸⁰ A copy of the gestational carrier assisted reproduction agreement must be included with the court action that is being brought to establish the parent-child relationship.⁵⁸¹

As a result, California's regulation of remunerated surrogacy is effective, and other states might learn from it. This is so because the Code specifically outlines how and what should be included in surrogacy agreements. It also stipulates that legal representation is necessary to prevent flaws in both the agreement and the procedure. It also includes provisions for the security of all contract participants.

Dale makes the argument that when women are denied financial rewards for accomplishments that are specifically theirs, the exploitation of women continues.⁵⁸² Remunerated surrogacy is not necessarily immoral or detrimental just because payment is exchanged for a surrogate's services.

California is one of the jurisdictions that explicitly permits remunerated surrogacy and it highly regulated. The California legislation may provide lessons to South Africa in this regard. California is a potential model that we can use as a basis from drafting remunerated surrogacy provisions in South Africa.

⁵⁷⁹ 7962 (b).

⁵⁸⁰ 7962 (c).

⁵⁸¹ 7962 (e).

⁵⁸² Dale ‘Surrogacy in California’ 553.

4.4. CONCLUSION

In conclusion, there is a need to review the laws on surrogacy in South Africa to permit remunerated surrogacy because the changes in society and public opinion. The lessons drawn from the comparative review present some guidance for South Africa on which types of models might be effective. Uganda is a jurisdiction that serves as a model for how South Africa might control its remunerated surrogacy laws without infringing on the parties' rights and avoiding all the negative aspects of the practice.

It is indisputable that India's failure to regulate remunerated surrogacy was adequately the cause of its ban in those countries because of the way remunerated surrogacy was regulated and specifically the important gaps in the regulation machinery. In my opinion, the surrogacy procedure would be safer for all parties involved if properly regulated, with criteria established for remunerated agencies fertility clinics and all other third parties involved. However, these regulations need to be strictly enforced to ensure their effectiveness.

Remunerated surrogacy should be properly regulated in all jurisdictions to protect the best interests of the minor child. There is unlikely to be an issue to relate South Africa' remunerated surrogacy regulations to human trafficking regulations if they are adequately controlled. Instead of outright prohibiting paid surrogacy, India might have passed appropriate legislation that safeguards surrogate mothers' rights. The ban of commercial surrogacy had the consequence that the practice was driven underground, and a completely unregulated illegal trade developed.

The laws must enable surrogate women to remain with their families throughout the course of their pregnancies if it is what they want, or they may live in other independent arrangements. They should be remunerated adequately with fair specified amount, and outlining the dangers involved in the surrogacy process. Because the factors that led to the prohibition on paid surrogacy were emphasised, the South African legal system may thus draw lessons from the other jurisdictions' legal system. As a result, these lessons learnt from the other jurisdictions will be explained in more detail in the following chapter as it will give an overview of how

the recommendations recommended for South Africa will be implemented in South Africa.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

This chapter gives recommendations on how remunerated surrogacy can be regulated in order to avoid the dangers of permitting it. This chapter shows what the regulations will achieve and how the recommendations are informed by the comparative research. It also shows how the problems that are evident in South Africa's current surrogacy system can be solved. The main problem is that the current system does not permit remunerated surrogacy. In this thesis thus far, the study has examined the objections to remuneration and has concluded that the reasons for the objections do not justify banning remuneration entirely, but they very much do indicate that remunerated surrogacy must be carefully regulated.

The thesis makes recommendations on whether surrogacy regulations should be amended to allow for remunerated surrogacy. It provides that, for remunerated surrogacy to be legal in South Africa, it must be properly regulated. The current legislation on compensated surrogacy may be preserved, with the addition of remunerated surrogacy provisions. The pre-conditions and obligations of the parties to the surrogate motherhood agreement may be specified in the regulations. The regulations' goal would be to protect women and children from being exploited and commodified, while also ensuring their welfare and safety. Surrogate mothers and commissioning parents' rights, as well as the child's, must be protected.

The thesis makes propositions to improve the remunerated surrogacy situation in South Africa. There must be an enactment of regulations to the main law, the Children's Act, clarify in greater detail the criteria that the courts are developing, such as surrogate and commissioning parent eligibility, authorised payments and benchmark amounts, and the role of intermediaries and third parties.

The current situation, in which there is no specific global regulation of surrogacy agreements and only a patchwork of contradictory national legislation that leaves gaps and removes protection for both the surrogate and the commissioning

parent(s), has sparked fears of exploitation and other negative consequences.⁵⁸³ It is important to bear in mind that there are relevant global human rights treaties that protect women such as surrogate mothers and children such as those born as a result of surrogacy. In South Africa, legislation governing surrogacy will be informed by the women's rights treaties and the children's rights treaties.

As a result, unregulated surrogacy services amount to exploitation of the surrogate mothers and imperil the fundamental human right to liberty, strengthening my opinion that strong legislation and regulation are required to make surrogacy a safe and respectable profession. Regulation could include assessing potential surrogates and commissioning couples to determine whether coercion occurred; assessing each party's psychological fitness to enter into such an arrangement; clarifying each party's understanding of the nature of the arrangement; and ensuring they are fully informed of its complexities.⁵⁸⁴ The Children's Act already requires that the court must confirm the surrogacy agreement and so now the court will confirm that there is no coercion.

Regulatory mechanisms could also be utilised to address potential issues, such as developing systems for dealing with complaints if the surrogate refuses to give up the child, the child is disabled in some way, or the commissioning couple no longer wishes to receive the child.⁵⁸⁵ It is important to note that South Africa has a system in place which is the ordinary legal system. For example, in South Africa courts routinely deal with matters about parental rights and responsibilities and children such as child custody and visitation rights thus the court can still deal with the matters of surrogacy.

California law provides a possible solution to the issue of who is the parent of the foetus and at what point they become the parent.⁵⁸⁶ The laws provides that if the commissioning parents are already the legal parents of the foetus, then they are responsible for the baby once it's been born. In each of these and other

⁵⁸³ Ramskold 'Gestational surrogacy' 397.

⁵⁸⁴ National Bioethics Consultative Committee, 'Discussion of Options', *Surrogacy Report 1* (1990) 45.

⁵⁸⁵ Goold 'Legal prohibition?' 216.

⁵⁸⁶ California Code, Family Code § 7962.

circumstances, the state could develop additional arrangements to promote the child's interests.⁵⁸⁷

In order to determine how remunerated surrogacy should be regulated, the study first give recommendations and then will analyse how the recommendations can assist the legal system focusing on remunerated surrogacy to thrive without facing any negativities, legally or in societies.

5.2 RECOMMENDATIONS

5.2.1 Regulation of remunerated surrogacy

The thesis's recommendations on the regulation of remunerated surrogacy relies on Schneider's analysis on five functions of family law, which are protectionist, facilitative, channelling, arbitral, and expressionist.⁵⁸⁸ Importantly, all systems of law including family law are subject to the Constitution and that family law must be compliant with the Constitution.

Family law in South Africa is ultimately governed by the Constitution. Two of the most significant human rights treaties, CRC and CEDAW will virtually always be directly applicable to events that take place within the private sphere of the family since family members often comprises of both women and children. Given that surrogacy involves acquiring a child as a new member of the family, it seems obviously to be under the purview of family law. Therefore, this must comply with human rights, just as all other aspects of family law. Of course, there are medical treatments involved with surrogacy, and they will be subject to medical restrictions. There is also a labour law component to remunerated surrogacy, hence labour law will unavoidably be important in this situation.

The framework for children's rights must serve as our guide for the child, and the framework for women's human rights must serve as our guide for the surrogate mother. The rules could be published in accordance with the Children's Act and other

⁵⁸⁷ Goold 'Legal prohibition?' 216.

⁵⁸⁸ Schneider 'The channelling function' 497.

supporting legal frameworks. Nonetheless, some of the restrictions could be published under labour or health legislation, as is the situation at the moment.

It should be emphasised that when the regulations on remunerated surrogacy have been adequately regulated, it is crucial that there be screening of the parties engaged in the agreement prior to the surrogate agreement being entered into, as will be discussed in the following section.

5.2.2 Screening

The High court must review any applications for confirmation of a surrogacy agreement, because it is the upper guardian of all matters involving children. The existing South African rules in the Children's Act about the jurisdictional issues can also be applied in this case.

A police clearance certificate, a clinical psychologist report confirming the surrogate's and commissioning parents' eligibility, and a medical report for the surrogate must be attached to the application.⁵⁸⁹ The regulations that will be implemented as explained above may also include the nationality of the surrogate mother because South African labour laws already has rules about the employment of non-South African citizens as there are many restrictions. In addition, non-South African citizens require work visas thus it might also be one of the requirements to have same.

Since the court has the authority to ensure that payments for pregnancy-related expenses are made under the present Children's Act, the court may also do same to the surrogate for the services she provided in the form of being pregnant and giving birth to the baby as she will be paid a set fee, which will be specified in the legislation. The court will check that the contract correctly records the compulsory fee.⁵⁹⁰

It is also important for the legislature to specify that all parties to any surrogate agreement undertake psychological examination, agree beforehand that the surrogate mother would not be granted custodial rights, have prior experience with

⁵⁸⁹ Laufer-Ukeles 'Mothering for money' 1265.

⁵⁹⁰ *Ex parte WH* para 56.

successful pregnancy and birth, and only use surrogates in situations where the genetic mother is unable to give birth as stated in the Children's Act. Regulations that demand extensive counselling and assessments of potential parents and surrogates will help to reduce the exploitation of individuals involved.⁵⁹¹

Stricter commissioning parents' screening, such as background or credit checks, could help lower the chances of the commissioning parents failing to fulfil their obligations.⁵⁹² This is important because it will determine if the commissioning parents will be able to cover both the costs of pregnancy and the payment to the surrogate mother for her services. As a result, commissioning parents must be thoroughly screened to demonstrate their willingness and commitment to safeguarding their children's rights, as children's rights must be safeguarded at all times.⁵⁹³ These checks and balances will be implemented to avoid unethical behaviours that may develop if the parties engage in the surrogacy contract with improper intent.

After the parties to the surrogacy agreement have been screened, they should give their consent to the agreement before they offer their services.

5.2.3 Consent

The surrogate agreement requires the voluntary informed consent of both the commissioning parents and the surrogate mother. This protects the surrogate mother from being coerced to bear the child on behalf of the commissioning parents, as well as the commissioning parents from being forced to sign the agreement. The surrogate mother must also consent to the amount she will be paid, and the commissioning parents must agree to the fixed amount they will pay to the surrogate mother for the surrogacy services (the pregnancy and childbirth). They cannot haggle or negotiate about this because the amount will be specified in the regulations.

Greater protection may be required in cases where the surrogate is less educated to secure informed consent. Any woman who chooses to be a surrogate

⁵⁹¹ Dale, 'Surrogacy in California' 556.

⁵⁹² Ibid 557.

⁵⁹³ University of Chicago Law School: Global Human Rights Clinic 23.

must do so voluntarily and with complete knowledge of the process. The decision to get pregnant, the pregnancy conditions, such as medical interventions and any restrictions on the surrogate's activity, as well as the delivery process and post-natal medical care, must all be voluntary and informed.⁵⁹⁴ This means that in order to provide informed consent, surrogates must understand the nature of the surrogacy operation, the health risks involved, and their legal rights. Thus, regulations in South Africa should include provisions to educate the public about surrogacy and ensure that women are fully informed about the procedure before opting to participate.

This informed consent may allow the surrogate mother to assess whether the payment of the set and compulsory amount of money is enough for her to decide that she wants to do the job. If the surrogate mother believes the amount, she will receive is not worth the dangers involved in the surrogacy operation, she will have the option to decline to sign the agreement. When a surrogate mother signs the agreement, she must be in sound mind and must be able to comprehend the provisions of the contract so that she does not lack capacity, and that might lead to the contract not to be binding on her. She must also be fully aware of the consequences of entering into the agreement (such as the requirement of giving up the child after delivery) before the agreement is entered into. This is comparable to an altruistic surrogacy situation, where the surrogate mother chooses to agree to help infertile people for free. To ensure free will and to prevent a conflict of interest, prospective surrogates should be individually represented by the lawyer who is chosen by the surrogate mother, but the commissioning parents must pay for the lawyer.⁵⁹⁵

Since the parties are required to give consent prior to entering into the agreement, the contents of the surrogacy contract should also be discussed in order to understand how the agreement will be structured and what it will constitute in order to prevent all drawbacks associated with these kinds of agreements.

⁵⁹⁴ University of Chicago Law School 10.

⁵⁹⁵ Dale 'Surrogacy in California' 556.

5.2.4 Surrogacy contract

Surrogacy contracts are a special kind of contract that must include certain information and certain terms if it is going to be valid. There are obviously other kinds of special contracts which have special rules for example is a contract for the transfer of immovable property which must be in writing. The regulations should specify minimum reasonable terms, as well as suitable administrative and payment procedures. Contractual terms must contain explicit provisions governing the parties' interactions; therefore, they should be intended to protect all parties. To ensure equitable conditions, surrogates should be supported or represented by lawyer paid for by the commissioning parents as stated above.⁵⁹⁶

According to the traditional contractual presumption, neither party would have entered into an agreement if the benefits to them did not outweigh the risks and issues.⁵⁹⁷ Notwithstanding issues like fraud or duress, this assumption is evaluated subjectively.⁵⁹⁸ The trade-off between what surrogates are ready to give up and what they anticipate to get in return might range significantly depending on their unique situations and motivations and, thus, contracts are made to control this variation.⁵⁹⁹

When properly regulated, remunerated surrogacy contracts must outline all the rights and obligations of each party, making it clear that the surrogate cannot harm or endanger the foetus by harmful conduct such as drinking, smoking, or taking any kind of medication or recreational drugs that might harm the foetus.⁶⁰⁰ She must follow the instructions of a doctor if it appears that the pregnancy is at risk if she does not rest. It should also be borne in mind that the surrogate retains her right to choose to terminate that pregnancy thus this should probably be confirmed in the contract so that all the parties are aware of it.

Surrogate contracts should be drafted to protect the surrogate against non-payment and non-performance. The payment must be made before the birth of the

⁵⁹⁶ University of Chicago Law School 23.

⁵⁹⁷ Kennedy 'Distributive and paternalist' 577.

⁵⁹⁸ Ibid 577.

⁵⁹⁹ Schneider 'The channelling function' 507.

⁶⁰⁰ Van Zyl 'Surrogacy, compensation' 383-387.

child. Thus, the contract must include a provision that payment will be made before the birth of the child. The contract should include provisions for payments along the way, for example first for the IVF process (even if this does not result in a pregnancy). If the IVF process does result in a pregnancy, then the balance of money is payable immediately. The contract conditions must be clear that the fixed fee applies even if the pregnancy does not lead to a live birth. This is however quite difficult because surrogates will be paid for a 40-week pregnancy if she never becomes pregnant at all. It can be suggested that she should be paid a fixed amount for the medical procedures that will lead to pregnancy such as her involvement in the IVF. The commissioning parents must continue to pay her if she does become pregnant and the surrogate must not risk the possibility that she ends up with an unwanted pregnancy.⁶⁰¹ It is important to note that everything relating to the surrogacy process must be highly regulated by statute in order to make absolutely certain that no abuses take place.⁶⁰²

In summary, a required signed surrogacy agreement between the surrogate agreement parties must be in a language understood by all parties and the regulations must regulate the nature and format of the information provided to surrogate mothers about the surrogacy arrangement and its implications; and the mechanisms guaranteeing that the concepts of surrogacy agreements are enforceable and legally binding.⁶⁰³

In order to be explicit and to avoid ambiguity, the study specifies how remuneration to surrogate mother for services rendered should be specified in the new surrogacy regulations. The remuneration will be set out in the regulations and will not be open to negotiation. The agreement will simply state that the amount of remuneration will be as established by regulation.

5.2.5 Remuneration for the services rendered

The legislation should specify a fixed amount that should be provided to the surrogate mother as remuneration, in addition to the amount the commissioning

⁶⁰¹ Blazier 'Ethics of commercial surrogacy' 625.

⁶⁰² University of Chicago Law School 23.

⁶⁰³ Allan 'The Surrogate in Commercial Surrogacy' 127.

parents will pay for any expenses related to the pregnancy and the surrogacy process.⁶⁰⁴ The government must set regulations outlining the standard price, for example an identical wage paid to everyone for the services they rendered. This is because poor women who are desperate to earn money do not have much bargaining power. In other words, in order to prevent absurdly high prices from motivating surrogates to behave irresponsibly because there is no other way for them to earn so much money, a standard price should be set.⁶⁰⁵ A standard wage also guards against women being ripped off by absurdly low prices.

The amount must be fair, reasonable, and determined in good faith and in terms of government bureaucrats determining an appropriate wage for this work, the study would suggest that it would be important for the department concerned to consult widely and rely on experts. Therefore, payment should be permitted and required by law. Altruistic surrogacy will not be permitted (because there is always the possibility that such arrangements might be coerced even a sister might feel coerced and even a sister must be paid. However, there should be a proviso or exception permitting altruistic surrogacy where there is a written waiver by the surrogate mother that they voluntarily waive remuneration for the service. This must also be screened and confirmed by the court that the waiver is voluntary and informed and not as a result of duress, coercion or force or misinformation etc. For instance, maybe it is a mother wishing to be a surrogate for her daughter, hence birthing her grandchildren. It is important to acknowledge both the surrogate work's financial value and the degree to which it involves relationships, intimacy.⁶⁰⁶ The surrogate's work involves a lot of work in the sense that her body will be put through a 40-week pregnancy then there is the childbirth. If she has a C-section, there is a lot of recovery involved.

The amount specified must not be determined by the quality of the gamete or the child's health. The intended parents are obliged to pay the determined amount to the surrogate mother and legally accept custody of the child regardless of the number, gender, and mental and physical condition of the child born. A specific

⁶⁰⁴ Mortazavi 'It Takes a Village' 2249.

⁶⁰⁵ Laufer-Ukeles 'Mothering for money' 1264.

⁶⁰⁶ Ibid 1264.

amount should also be provided to the surrogate in the event of a miscarriage or unanticipated medical problems. It is also important to consider that the surrogate must be paid even if the child born has a disability, which disability cannot be attributed to the negligent actions of the surrogate. Prior to the arrangement, the commissioning parents must also be informed of the specific amount if unanticipated medical complications emerge. This will also depend on the extent of the unexpected medical difficulty. Therefore, the commissioning parents must compensate the surrogate for all her expenses related to the pregnancy.

In the event that a surrogate decides to exercise her right to terminate the pregnancy, then the surrogate should be remunerated for her services until the time of termination of the pregnancy.

The commissioning parents are obliged to accept custody and parenthood of the baby once born. In this scenario, at least one of commissioning parents has provided the gametes and so at least one of them is already the genetic parent of the child. In a normal situation (ie sex) a genetic father will be the father of the baby as soon as the baby is born and will at least have the obligation to support the child as in section 21 (2) Children's Act.

The laws regulating remunerated surrogacy might also include explicit wording in terms of which a surrogate who is not a genetic parent of the child could nonetheless claim parental rights and responsibilities which could be considered by a court in the usual way. Regulating surrogate fees promotes intimacy and prevents exploitation, but it should not interfere with a surrogate's capacity to profit financially from the procedure.⁶⁰⁷

It is essential to note that in terms of the current provisions in the Children's Act the surrogacy process may not begin until the court has confirmed the agreement and that the payments are made well before the actual birth because payment after birth looks like selling the baby.⁶⁰⁸

⁶⁰⁷ Laufer-Ukeles 'Mothering for money' 1265.

⁶⁰⁸ In the case of *Ex Parte WH* the court held that the surrogate or the intermediary must submit details and proof of payment of any money for services rendered.

The stigma and instrumentalization would be lessened if people thought of reproductive employment as a legitimate way to make money and for women to be remunerated for their services. Instead of being treated like dehumanised incubators, surrogates might be seen as temporary caregivers or healthcare professionals.⁶⁰⁹

After setting a fixed payment for the surrogate, it is important to emphasise that the surrogate mother will also require care and the best environment feasible for her pregnancy, delivery, and postpartum, as will be explained below.

5.2.6 Care for the surrogate mother during pregnancy, birth and post-partum period and best working conditions

With remunerated surrogacy, it would be a question of the working conditions and how well she is treated. The surrogate needs excellent health care during pregnancy and childbirth, as well as good post-natal care.

During the surrogate mother's pregnancy, she must be cared for in the best facility she approves of as she must be permitted to remain in her private accommodation of choice if she prefers this. She must be offered pregnancy and birthing options, such as an epidural, if she desires one and an elective caesarean section is this is what she wants.⁶¹⁰ These are some of the issues that were problematic in some of the jurisdictions that were examined above. The surrogacy procedure must follow best reproductive medicine practices. It needs to be done by qualified medical experts with adequate resources and facilities. Surrogate mothers should receive proper medical care for a reasonable period before, during, and after the pregnancy. In a South African context, it is very likely that the commissioning parents would be required to pay for private health care if the surrogate prefers not to use the public facilities or if they are inadequate in her region. Therefore, surrogacy legislation should ensure that surrogates receive an alternate type of private care if chosen by the surrogate mother.⁶¹¹

⁶⁰⁹ Humbyrd 'Fair trade' 115.

⁶¹⁰ Goli 'A reproductive health-care' 3.

⁶¹¹ University of Chicago Law School 10.

The legislation should also include post-delivery care for the surrogate mother so that she can relax and recover after the pregnancy. She should be compensated well enough to be able to take time off and rest in the last weeks of pregnancy and the weeks after the birth. Because surrogacy can be classified as a job, it is necessary that the working conditions be favourable. It should be noted that other workers have a maximum number of working hours per day and per week and get weekends off a holiday and vacation leave, however, surrogate mothers must work (be pregnant) 24 hours a day and seven days per week for 40 weeks or maybe even more if the pregnancy is longer.

The regulation should include provision for commissioning parents to cater for the surrogate's funeral expenses if there is an issue of death of a surrogate during pregnancy as result of pregnancy related complications, or during childbirth complications.

Counselling may be offered to commissioning couples and prospective surrogates to make sure they comprehend the intricate nature of these arrangements, fostering autonomy and preventing exploitation.⁶¹² The commissioning parents may need to pay for many of these services such as counselling or the compulsory access to further legal advice provided to the surrogate mother during her pregnancy after the birth.

The surrogacy laws might make provision for how the commissioning parents should be responsible for services such as counselling or legal advice.⁶¹³ The commissioning couple and the surrogate should each receive information and counselling about all the emotional and physical dangers and advantages of the arrangement.⁶¹⁴ Surrogate satisfaction rates may be increased with professional assistance and intervention, including counselling, both before and throughout the surrogacy process.⁶¹⁵

⁶¹² Laufer-Ukeles 'Reproductive' 616- 617.

⁶¹³ California Code, Family Code § 7962.

⁶¹⁴ Ciccarelli 'Navigating rough waters' 34.

⁶¹⁵ Laufer-Ukeles, 'Mothering for money' 1263.

5.3 CONCLUSION

In conclusion, despite the fact that remunerated surrogacy is prohibited in South Africa, the study concludes that the laws on surrogacy should be amended to allow remunerated surrogacy in South Africa. Due to the rise in infertility, growing interest in and willingness to use surrogacy, and technical advancements, it is reasonable to argue that remuneration surrogacy should be considered in South Africa.

Although there are some strong views that remunerated surrogacy amounts to exploitation of children and surrogate mothers, psychological injury, and immorality, the study considers that there are also some strong views that remunerated surrogacy legislation should be allowed rather than prohibited. With all the recommendations and the current laws on compensated surrogacy, it is possible to lift the ban on remunerated surrogacy and for all the surrogacy to be paid for her services. Surrogate mothers, like all other professionals, must be given the option to work as surrogate mothers and be paid for their services. Importantly, the negative aspects associated with remunerated surrogacy will be eliminated if it is clarified that the payment made to the surrogate mother is for her services, not for the child exchange.

To prevent the risks of allowing widespread commercial surrogacy, which might lead to the commercialization of children, the exploitation of women, and the black market, remunerated surrogacy arrangements must be strictly regulated. The payment made to the surrogate mother should be a fixed fee that is made prior to the birth of the child. The international viewpoint discussed gives an indication of what can happen if remunerated surrogacy is legalised without sufficient regulation, as it is in India. The recent adoption of remunerated surrogacy laws in other jurisdictions allows for South Africa to follow suit. Uganda, as one of the African countries, may provide insight into the possibility of allowing remunerated surrogacy under the proper regulations.

If there are suitable regulations in place that properly regulate remunerated surrogacy, the dangers of allowing surrogacy are believed to be eliminated. Surrogacy has human rights implications in general: children, surrogate mothers, commissioning parents, states, and intermediaries all have separate and often contradictory interests that must be evaluated and balanced.

Ms de Boer-Buquicchio, who was appointed as Special Rapporteur on the sale and sexual exploitation of children by the UN Human Rights Council, said that ‘there is an undeniable, urgent need for surrogacy to be regulated and if nothing is done, abusive remunerated surrogacy networks will continue to move from one jurisdiction to another.’⁶¹⁶

Conclusively, one possibility would be to recognise surrogacy as a service for which the surrogate should be paid a service fee. Therefore, laws on surrogacy in South Africa can be amended to allow remunerated surrogacy. It is important to note that remunerated surrogacy will need to be highly regulated to ensure that no-one is abused or exploited and to avoid some of the dangers and problems that are evident from the experience in other places or as evident in the concerns raised by those who oppose remunerated surrogacy. Therefore, this shows that the most crucial factor that needs to be taken into account is for the laws to be properly regulated to allow remunerated surrogacy, thereby filling the gaps that exist in the laws on surrogacy.

⁶¹⁶Maud de Boer-Buquicchio, ‘Children risk being ‘commodities’ as surrogacy spreads, UN rights expert warns surrogacy concerns’ Human Rights Council in Geneva 6 March 2018.

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