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COMMERCIAL SURROGACY IN SOUTH AFRICA: A RIGHTS-BASED APPROACH.

BY

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I, LILLEONAH CHIVENGE declare that:

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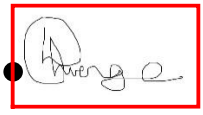
Signature 

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ABSTRACT

Commercial surrogacy is prohibited in South Africa and remains one of the most contentious and topical human rights issue in South Africa. Section 305 of the Children's Act[1] and section 276 of the Criminal Procedure Act[2] provide that it is a crime to contravene the prohibition against commercial surrogacy. The topic for discussion is whether in light of the social, economic and legal climate in South Africa it is time for the South African legislature to reconsider its stance on the prohibition of commercial surrogacy and develop the law to permit commercial surrogacy and adequately regulate the practice in a manner that safeguards the rights of all parties involved from all forms of exploitation. This is best evaluated from a rights-based analysis of the rights and interests which the prohibition is aimed at protecting. The purpose of this dissertation is to show that the Law Commission Report[3] that birthed Chapter 19 of the Children's Act was on the right track in so far as prohibiting commercial surrogacy is concerned.

There are various rights at play in the paradigm of commercial surrogacy. This dissertation will be a rights-based analysis aimed at showing that the limitation of some of the conflicting competing rights on commercial surrogacy is justifiable in an open and democratic society in so far as the continued prohibition of commercial surrogacy is concerned. These competing rights are the right to equality, right to dignity, right to freedom and security of the person, right to reproductive autonomy, right to not be subjected to slavery, servitude or forced labour, right to privacy, the paramount rights of children and the right to freedom of trade, occupation and profession. The state needs to balance conflicting interests and arrive at a conclusion that best protects the rights and interests of all the parties involved.

These rights at play in commercial surrogacy form the basis for opposing and proposing arguments on legislative regulation of commercial surrogacy. The constitutionality and adequacy of Chapter 19 of the Children's Act which presently governs surrogacy, has come under scrutiny in recent academic literature and case law. An individualistic, rights-based approach alone is an inappropriate foundation for the regulatory framework for commercial surrogacy. Focusing on the rights as well as the relationships that exist in commercial surrogacy and how those relationships come to exist gives a better perspective on commercial surrogacy. Therefore, looking at all the rights in play as they affect each of the parties in the surrogacy triangle gives a better perspective of the rights and freedoms at stake. The purpose of this

[1] Children's Act 38 of 2005.
[2] Criminal Procedure Act 51 0f 1977.
[3] SALRC Report on Surrogate Motherhood (1993).

analysis is to show that the rights that are being infringed by the prohibition of commercial surrogacy are being impinged on justifiably.

The history of the enactment of commercial surrogacy regulation in South Africa and the current legal framework on commercial surrogacy will be discussed. An assessment of whether the provisions regulating surrogacy hold up to constitutional scrutiny, given the legal, ethical and moral concerns on commercial surrogacy will be considered as these concerns form the basis for the rights-based analysis on commercial surrogacy. The interpretation of surrogacy regulations by South African courts will be briefly discussed to support the notion that the legal system is not ready to deal with the legalisation of commercial surrogacy. Understanding the aims of the SALRC in prohibiting commercial surrogacy will assist in the reinforcement of the recommendation that South Africa needs to maintain its stance on the current prohibition of commercial surrogacy.

The final section of this dissertation will discuss surrogacy regulation laws in the Netherlands and India. The legal penalties attached to contravening the prohibition against commercial surrogacy and the regulatory provisions in these jurisdictions will be discussed to give an analysis of how adequate enforcement of commercial surrogacy prohibiting regulations can protect, promote and fulfil the rights of the surrogate, the resultant child and the commissioning parents. Chapter 19 of the Children's Act only went so far as prohibiting commercial surrogacy but failed to lay down adequate criminal sanctions associated for contravening that prohibition. Section 276 of the Criminal Procedure Act is not commercial surrogacy specific, hence it is also an inadequate piece of legislation in the enforcement of the prohibition against commercial surrogacy. The regulatory provisions in India and the Netherlands will be used as inspiration for recommending strict legal penalties for contravening the prohibition against commercial surrogacy in South Africa.

In conclusion, this dissertation will recommend that South Africa does not need to reevaluate its prohibition of commercial surrogacy but must amend the existing provisions to ensure that they are constitutionally compliant and that the prohibition of commercial surrogacy can be effectively implemented through strict but nuanced surrogacy specific penalties. The current prohibition against commercial surrogacy is warranted from a rights-based perspective as it protects the rights of the surrogate, the resultant child and the commissioning parents.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

Commercial surrogacy is prohibited in South Africa[1] and remains one of the most contentious human rights topics of the 21st century. Commercial surrogacy encroaches upon various human rights and these rights are entrenched in the Bill of Rights of the Constitution of the Republic of South Africa [2] (hereinafter referred to as the Constitution). Proponents and opponents of commercial surrogacy draw their arguments from these Constitutional rights. These rights are: the right to equality (right to equal protection and benefit of the law)[3], the right to human dignity[4] (which goes hand in hand with the right to life[5] in so far as living a dignified life is concerned), the right to freedom and security of the person[6], the right to reproductive autonomy[7], the right to not be subjected to slavery, servitude or forced labour[8], the right to privacy[9], the paramount rights of children[10] and the right to freedom of trade, occupation and profession.[11] The right to privacy[12], the right to freedom of religion, belief and opinion[13] and the right to freedom of expression[14] apply indirectly to the concept of commercial surrogacy.

Commercial surrogacy entails a clash of competing rights. Each of the parties involved in the commercial surrogacy equation: the commissioning parents, the surrogate mother (the word surrogate mother will be used interchangeably with the word surrogate throughout this dissertation) and the resultant child have certain rights that can be violated by the legalisation of

[1] Section 301 of the Children's Act 38 of 2005.
[2] The Constitution of the Republic of South Africa Act 108 of 1996.
[3] Section 9.
[4] Section 10.
[5] Section 11.
[6] Section 12.
[7] Section 12(2).
[8] Section 13.
[9] Section 14.
[10] Section 28(2).
[11] Section 22.
[12] Section 14.
[13] Section 15.
[14] Section 16.

commercial surrogacy. Paradoxically, they also have rights that are presently being violated by the current prohibition of commercial surrogacy in South Africa. Focusing on the relationships and rights that exist in commercial surrogacy and how they come to exist also gives a better perspective on commercial surrogacy. Therefore, looking at all the rights at play as they affect each of the parties in the surrogacy triangle gives a better perspective of the rights and freedoms at stake.

1.2 Definition of terms

Surrogacy under South African law is regulated by Chapter 19 of the Children's Act 38 of 2005[15] (hereinafter referred to as the Children's Act).

Surrogacy is whereby a woman (the surrogate) agrees to become pregnant and give birth to a child with the understanding that she will hand over that child after birth to the commissioning parents.[16]

The Children's Act defines a **surrogate motherhood agreement** as:

> "an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent".[17]

There are two types of surrogacy, altruistic surrogacy and commercial surrogacy:

> **Altruistic surrogacy** whereby the surrogate agrees to gestate for the intending parents for no monetary compensation beyond the reimbursement of medical costs. Altruism entails assisting for the common good or from the goodness of one's heart. The surrogate will be assisting the intending parents in creating or expanding their family for no commercial or competing interest.

[15] Children's Act 38 of 2005.
[16] David McQuoid-Mason and Mohamed Dada *A-Z of Medical Law* (2011) 410.
[17] Section 1 of the Children's Act.

Commercial surrogacy is whereby the surrogate is compensated or paid for her gestational services beyond the reimbursement of medical expenses. The surrogate might be interested in assisting the prospective parents in creating or expanding their family but she herself primarily has a commercial interest in the arrangement. Commercial surrogacy is prohibited in South Africa.[18] At its core, commercial surrogacy is spearheaded by the extreme polarization in the social and economic standing of the surrogate versus the commissioning parents. It has been noted that commercial surrogacy denotes a radical shift from the normal way society perceives and understands motherhood.[19] This is based on the fact that surrogacy introduces a third party to the procreation process. A member whose sole purpose is to provide the womb (and the ovum in some cases) for the incubation of the resultant child. More so, the idea that the third party is paid for the services of the womb and to give up any rights she may have over the resultant child sparks the commodification argument on the sanctity of life to the effect that there are some things money should not buy.

The development of gestational sciences and the separation of genetics has led to a further distinction in surrogacy between traditional surrogacy and gestational surrogacy. The Children's Act permits both of these types.[20]

Traditional surrogacy (partial surrogacy) is whereby the surrogate is artificially inseminated with the commissioning father's sperm using her own ovum and then carries the resultant child to term and delivers it for the commissioning parents.[21] The surrogate is genetically related to the resultant child. Artificial reproductive technologies[22] have made it possible for a woman to get pregnant through three forms of traditional surrogacy;

[18] Section 301 of the Children's Act 38 of 2005 prohibits payments in respect of surrogacy. Section 301(1) provides that '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 in kind' Section 302(2) that deals with prohibition of certain acts prohibits the advertisement of commercial surrogacy services. The section provides that 'No person may in any way for or with a view to compensation make known that any person might possibly be willing to enter into a surrogate motherhood agreement.'

[19] Marita Carnelly & Sheetal Soni 'A tale of two mummies. Providing a womb in South Africa: Surrogacy and the legal rights of the parents and the Children's Act 38 of 2005. A brief comparative study with the United Kingdom' (2008) 22 (2) *SPECULUM JURIS* 36 at 37.

[20] Section 298 of the Children's Act.

[21] PQR Boberg (ed) *Boberg's Law of Persons and the Family* (1999) 2ed at 341.

[22] Assisted Reproductive Technologies refers to all treatments and procedures that which involve in-vitro handling of human ovum, sperms or embryos for the purposes of establishing pregnancy- Silke Juliane Dyer & Thinus Frans

i. through the use of her own ovum and the sperm of her partner;
ii. through the use of her ovum and the sperm of a donor and
iii. through the use of her ovum and the sperm of the commissioning father.

Gestational surrogacy (also known as total or full surrogacy) is whereby an embryo that has been created through In Vitro Fertilization (IVF) is implanted into the surrogate and she carries the pregnancy to term, delivers the resultant baby and surrenders him/her to the commissioning parents.[23] The surrogate is not genetically related to the resultant child. The surrogate mother can become pregnant through five different ways;

i. through the use of the commissioning mother's ovum and donor sperm,
ii. through the use of a donor's ovum and the sperm of the commissioning father,
iii. through the use of donor ovum and sperm (the resultant child will not be genetically related to the commissioning parents),
iv. through the use of donor ovum and the sperm of the commissioning father and
v. through the ovum and sperm of both the commissioning parents.

In either circumstance (traditional or gestational surrogacy), the Children's Act requires that the gametes of both or one of the commissioning parents must be used for the artificial insemination or IVF process to establish a genetic link between the intending parents and the resultant child.[24] The National Health Act[25] and its regulations[26] govern how artificial insemination and IVF processes are to be carried out.

1.3 Background of the research topic

Surrogacy, in and of itself, sparks much legal and ethical debate. The focus of this dissertation is on commercial surrogacy and it is important to note that reproduction and women's rights have

Kruger 'Assisted reproductive technology in South Africa: First results generated from the South African Register of Assisted Reproductive Techniques' (2012) 102(3) *SAMJ* 167 at 167.
[23] PQR Boberg (ed) *Boberg's Law of Persons and the Family* (1999) 2ed at 341.
[24] Section 294 of the Children's Act.
[25] National Health Act 61 of 2003.
[26] Regulations Relating to Artificial Fertilisation of Persons Government Notice No. R. 1156 30 September 2016. Government Gazette 30 September 2016 No. 40312 pp 30-51.

become highly debated and contentious issues in the 21st century leading to various 'firsts' in the development of human rights, particularly as they relate to women and other marginalised groups. These legal milestones include decriminalisation of abortion,[27] decriminalisation of homosexuality and legalisation of same-sex marriages[28], decriminalisation and regulation of prostitution,[29] criminalisation of forced sterilisation,[30] wide spread education on reproductive health and use of contraceptives,[31] criminalisation of genital mutilation[32] and the legalisation of commercial surrogacy. Out of 195 countries in the world, only Israel, Russia, Armenia, Georgia, Kazakhstan, Ukraine and only 8 states in the United States of America (Illinois, Arkansas, Maryland, Washington DC, Oregon, New Hampshire, New Jersey and California) expressly allow commercial surrogacy. Commercial surrogacy is either completely outlawed or unregulated in the rest of the world. In *Ex parte HPP and Others; Ex parte DME and Others*[33], the court held that the potential for abuse in commercial surrogacy outweighs any possible advantage and this is recognized in most countries and consequently legal surrogacy is the exception and not the norm.[34] Commercial surrogacy embodies both aspects of reproduction and women's rights therefore the topic attracts much legal and ethical debate.

[27] *Roe v Wade* 410 U.S 113 (1973). This case decriminalised abortion on the basis that the right to privacy protects women's rights to choose whether or not to have an abortion. It has become a landmark case on women's rights to reproductive autonomy. The Choice on Termination of Pregnancy Act 92 of 1996 legalised abortion in South Africa.
[28] Civil Union Act 17 of 2006 legalised same-sex marriages in South Africa. Equality rights in the South African Constitution formed the basis for various court decisions granting specific rights to couples in same-sex relationships until the legislature promulgated the Civil Union Act.
[29] New Zealand was the first country to decriminalise sex work through the Prostitution Reform Act No. 28 of 2003. This act creates a framework to safeguard the human rights of sex workers and to protect them from exploitation while promoting occupational health and safety of sex workers and preventing the prostitution of children. South Africa is yet to decriminalise sex work.
[30] Sterilisation Act 44 of 1998 recognises the rights of all persons to have access to safe, affordable and acceptable means of sterilisation and to be informed of such procedures. The Act recognises that it is discriminatory and a blatant violation of medical duty and human rights for medical practitioners to force or coerce women into sterilisation. The Rome Statute UN General Assembly Rome Statute of the International Criminal Court 17 July 1998 classifies forced sterilisation as a crime against humanity. Article 39 of the Istanbul Convention prohibits forced sterilisation. Council of Europe The European Convention on Preventing and Combating Violence against Women and Domestic Violence November 2014.
[31] *Griswold v Connecticut* 381 U.S 479 (1965).
[32] Article 38 (a) of the Istanbul Convention recognises female genital mutilation as a form of violence against women. It is hoped that this convention will be a major step in eradicating female genital mutilation. Council of Europe The European Convention on Preventing and Combating Violence against Women and Domestic Violence November 2014.
[33] *Ex Parte HPP and Others; Ex parte DME and Others* (2017 (4) SA 528 (GP).
[34] *Ibid* at 26.

A report by Statistics South Africa showed that one couple in every six couples suffers from infertility.[35] This is 15 per cent to 20 per cent of the population. An analysis of the 2010 World Health Organisation Fertility and Reproductive Survey data concluded that 1,9 per cent of women aged between 22 and 44 years had primary infertility and were unable to have their first live birth and 10,5 per cent of women had secondary infertility and were unable to have additional live births despite having had previous live births.[36] This study estimated that as of 2010, 48 million couples worldwide were unable to have children.[37] This burden of infertility has not displayed any significant decrease in the last ten years.[38] One in every six couples in South Africa suffers from infertility and this accounts for 15 per cent to 20 per cent of the population.[39] When we cascade these statistics, it is statistically sound to conclude that there is a problem of infertility in South Africa.

Infertility is not the only factor that leads to the need of a surrogate. The concept of family is dynamic and rapidly changing. In *Minister of Home Affairs v Fourie*[40] the court held that "South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the socially and legally acceptable one."[41] The concept of family now also applies to same-sex couples, persons in civil unions, cohabiting persons in permanent life partnerships and single people.[42]

Therefore, artificial reproductive technologies like pre-implantation genetic testing, surrogacy, intra-cytoplasmic sperm injection, ovulation induction, artificial insemination, donor conception, in-vitro fertilization and gamete intra-fallopian transfer are a welcome development in assisting infertile couples as well as homosexual couples[43] to procreate and have biological children of their own. These scientific developments are highly welcomed as they have developed the field of

[35] Statistics South Africa 'Census 2011: Fertility in South Africa' Report 03-01-63. Pretoria: Statistics South Africa (2015).
[36] Maya N Mascarenhas et al 'National, regional and global trends in infertility prevalence since 1990: A Systematic Analysis of 277 Health Surveys' (2012) 9 (12) *PLOS Medicine* 1 at 5.
[37] Maya N Mascarenhas et al (note 37 above at 9)
[38] https://www.who.int/reproductivehealth/topics/infertility/perspective/en/ , accessed on 1 June 2020.
[39] https://www.parent24.com/Fertility/Fertility_problems/infertility-and-why-sa-should-refine-disability-20170123#:~:text=In%20South%20Africa%2C%20infertility%20occurs,or%20adoption%20to%20become%20parents, accessed on 1 June 2020.
[40] *Minister of Home Affairs v Fourie* 2006 3 BCLR 255 (CC)
[41] *Minister of Home Affairs v Fourie* supra at 59.
[42] David Meyerson "Surrogacy Agreements' (1994) *Acta Juridica* 121 at 123.
[43] *Minister of Home Affairs v Fourie* 2006 (note 39 above at 57. And also the Civil Union Act 17 of 2006.

assisted reproduction. They have also advanced the realm of commercial surrogacy and surrogacy agreements and have provided an alternative for people who are unable to have biological children of their own.[44]

The right to a family and the right to procreation — entrenched in Article 16 of the Universal Declaration of Human Rights to which South Africa is a signatory — provides that "men and women of full age have a right to marry and to found a family and that the family is the natural and fundamental group unity of society and that this right is entitled to protection by society and the State."[45] The South African legal framework through Chapter 19 of the Children's Act supports the right to procreation through the legislative regulation of altruistic surrogacy. The provisions of this Act as they relate to surrogacy are discussed in Chapter 2 of this dissertation.

In addition to the infertility problem and the need for couples to have their own biological children, South Africa is also characterised by a high rate of unemployment. South Africa has a 29 per cent unemployment rate, which amounts to 6,7 million people being jobless.[46] Although the Constitution provides for the right to freedom of trade, profession and occupation, there are few jobs that the job-seekers can compete for, hence 71,5 per cent of those who are unemployed have been seeking for a job for a year or longer.[47] Unemployment and illiteracy rates are substantially higher in women that in men[48] thus making commercial surrogacy an appealing option for women who are in dire economic situations and in need of financial freedom.

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[44] Rika Pretorius 'A comparative overview and analysis of a proposed surrogate mother agreement model' (1987) *CILSA* 275.

[45] Article 16 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III). This right is also entrenched in:
Article 23 of the UN General Assembly International Covenant on Civil and Political Rights 16 December 1966 United Nations Treaty Series Vol. 999 pg 171,
Article 8 of the Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950 ETS 5 and
Article 18 of the African Union (AU) African Charter on Human and People's Rights (Banjul Charter) 27 June 1981 CAB/LEG/6/7/3 rev 5,21 I.L.M. 58 (1982).

[46] Department of Statistics South Africa 'Quarterly Labour Force Survey: Quarter 2 2019' July 2019. See also Siphelele Dludla 'At least 6.7 million South Africans jobless with unemployment rate at an 11-year high' *Business Report* 29 October 2019, available at https://www.iol.co.za/business-report/economy/at-least-67-million-south-africans-jobless-with-unemployment-rate-at-an-11-year-high-36210237 , accessed on 29 October 2019.

[47] Discouragement decreases and unemployment increases in the second quarter of 2019, available at http://www.statssa.gov.za/?p=12376 , accessed on 23 October 2019.

[48] Thulebona Mhlanga 'Unemployment lower, but black women, the youth remain the most vulnerable' *Mail and Guardian* 13 February 2018 available at https://mg.co.za/article/2018-02-13-unemployment-lower-but-black-women-the-youth-remain-the-most-vulnerable accessed on 22 October 2019. See also

While employment opportunities are scarce in South Africa and unemployment rates remain high, the human trafficking business especially in women and children is thriving as a result.[49] The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[50] (hereinafter referred to as the Palermo Protocols) recognises that although the knowledge on trafficking in persons remains incomplete, it is widely acknowledged that certain factors make an individual, community or social group more vulnerable to trafficking and related exploitation. The Palermo Protocols in their preamble note that discrimination and denial in the distribution of social and economic opportunities and rights plunges certain groups into poverty. This results in lack of legally authentic choices, resulting in poor choices and leading certain individuals into taking risks and decisions that they would not otherwise have made had their basic needs been met. Hence, when women seemingly choose to participate in commercial surrogacy agreements, this decision cannot be viewed as a justified enforcement of the right to freedom of trade, occupation and profession because certain economic and social situations will be driving such women to participate in such agreements.

Article 3 of the Palermo Protocols defines human trafficking or trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons by means of a threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services or practices similar to slavery, servitude or the removal of organs."[51] This definition is wide enough to cover human trafficking in commercial surrogacy agreements and is expounded upon in detail in Chapter 3 of this dissertation.

Given the problem of infertility, the need to have one's own biological children, the economic situation in South Africa, the high rates of unemployment, the possibility of exploitation and

https://www.news24.com/Archives/City-Press/Unemployment-illiteracy-higher-for-women-Stats-SA-20150429 , accessed on 22 October 2019.

[49] Lawrence Mashabela 'SA needs to curb rise in human trafficking' Sunday Independent 4 November 2018, available at https://www.iol.co.za/sundayindependent/dispatch/sa-needs-to-curb-rise-in-human-trafficking-17766404 ,accessed on 13 September 2019.

[50] UN General Assembly Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime 15 November 2000.

[51] Article 3 of the Parlemo Protocols.

human trafficking and the various rights at play in commercial surrogacy agreements, it is very important to review laws to ensure that they remain consistent with the *boni mores* and the needs of society. Laws must be constantly reviewed and updated in accordance with the prevailing *boni mores* of the society. The main aim of this dissertation is to explore the subject of commercial surrogacy and establish whether or not the South African social, economic and legal position has evolved to the extent where it is in the best interest of the society, children and women to decriminalise commercial surrogacy. The law does not remain stagnant. We must constantly review the status quo. This research will ultimately conclude that the legislation made a constitutionally justifiable decision by criminalising commercial surrogacy. This decision will be evaluated and supported.

1.4 Outline of the topic for debate

The surrogate mother plays a principal role in ensuring that the commissioning parents fulfill their dream of having a child biologically related to them. The surrogate mother has fundamental human rights that are protected by the constitution and cannot be violated. Above all else, the surrogate has a right to life and a dignified life. Section 10 of the South African Constitution provides for the right to dignity.[52] Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights.[53] Article 4 of the African Charter on Human and People's Rights (Banjul Charter) states that "Humans are inviolable. Every human shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."[54]

Section 12 (1) of the Constitution provides for the right to freedom and security of the person. This includes the section 12(1) (e) right to not be treated in a cruel, inhuman or degrading way.[55] This right is closely linked with the section 13 right to not be subjected to slavery, servitude or forced

[52] Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996.
[53] Article 1 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).
[54] Article 4 of the African Union (AU) African Charter on Human and People's Rights (Banjul Charter) 27 June 1981 CAB/LEG/6/7/3 rev 5,21 I.L.M. 58 (1982).
[55] Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996. This right is also protected by Article 6 of the Banjul Charter and Articles 3, 4 and 5 of the Universal Declaration of Human Rights.

labour. Article 21 of the Convention on Human Rights and Biomedicine[56] provides that "the human body and its parts, shall not give rise to financial gain."[57] The voluntary and informed consent of the patient or subject must be respected in accordance with the procedures and regulations laid down in the relevant law.

The current prohibition on commercial surrogacy ensures the protection of these rights in support of the argument that commercial surrogacy agreements violate the human dignity of the surrogate and that of the resultant child by reducing them to objects of commercial contracts. The surrogate and her womb are treated merely as a means to an end, a way for the commissioning parents to fulfill their goal of having a child of their own. The commissioning parents may impose conditions of conduct on the surrogate by restricting her movements and diet. This would be violation of the surrogate's right to freedom and security of their own person. Pregnancy can be dangerous to a woman's health although the counter-argument for this can easily be that women carry pregnancies everyday all across the world and for free. The most potent argument in relation to this maybe that the surrogate's life is relegated to second place in case of complications as the resultant child's life is usually the main concern.

It has been argued that it is a cruel and inhumane punishment to ask a woman to be completely alienated from the child she carries and bonds with for nine months under the guise that her pregnancy was paid work. However, it can also be argued that commercial surrogacy recognises and respects women's rights to agency and control over their own bodies. The Constitution provides for the right to reproductive autonomy and the right to make decisions concerning reproduction.[58]

There are arguments to the effect that commercial surrogacy is akin to any work or profession and women must be allowed to use their bodies for financial gain. The Constitution protects the "right to freely chooses one profession, trade, occupation and occupation with the limitation that the trade, occupation or profession may be regulated by law."[59] It has been noted that most surrogates

[56] Council of Europe European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) 04 April 1197.
[57] Article 21 of the Oviedo Convention.
[58] Section 12(2)(a) of the Constitution of the Republic of South Africa Act 108 of 1996.
[59] Section 22 of the Constitution. This right is also protected by Article 23 of UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).

are poor, illiterate women in dire economic situations. This begs the question of whether a surrogate is really an autonomous and willing party to the commercial surrogacy agreement and whether she can be said to give her free, voluntary and consciously informed consent to the surrogacy agreement. This question also needs to be balanced with the realisation that surrogates are also independent thinkers and their poverty or economic crisis does not take away from their inherent and fundamental right to make decisions about reproduction or to choose a trade, occupation or profession. In fact, any assumption that commercial surrogates are incapable of making such valid choices can be said to be classist and elitist and in some instances, racist.

Given the conflicting and competing rights at play with regards to the surrogate mother, it is important to bear in mind that commercial surrogacy agreements open up surrogates to the risk of exploitation, human trafficking, violence against surrogates, and abuse of the social, economic and legal vulnerability of the surrogates by commissioning parents, surrogacy agents and surrogacy brokers.

The intending or commissioning parents' rights are also in play. The starting point in all commercial surrogacy agreements is the need for one's biological children and the need to procreate. The state has a duty to treat all citizens equally under the law and the legal regulation of surrogacy is one such way by which the state can seek to ascertain equality for all citizens. Surrogacy gives infertile couples, homosexual couples and single people an opportunity to procreate. It is insufficient to argue that the intending parents' decision to procreate via commercial surrogacy is a private matter protected by the section 9 Constitutional right to privacy.[60] This is because if procreation does not follow the natural order of things, then there is legislation governing the framework within which individuals who desire to utilise any form of assisted reproduction techniques may obtain such services. Such matters then become state regulated matters and cease to be completely private.

The major conflicting right with regards to the intending parents is the right of the intending parents to protect their unborn child and the surrogate's right to freedom and security of the person. The main issue is on the extent to which the commissioning parents can limit the freedom of the

[60] Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

surrogate mother in a bid to protect their resultant child and the recourse the intending parents have if the surrogate refuses to hand over the 'goods' she was paid to deliver.

The 'object' of a commercial surrogacy is the resultant child and the rights of that child are also in play in commercial surrogacy agreements. The resultant child is never a party to the negotiations or the agreement. The child is born to satisfy the intending parents' desire to have a child and the surrogate's financial needs. Section 28 of the Constitution lays down children's rights.[61] Children have the right to a name and nationality from birth[62], to a healthy family life[63], to dignity and to be protected from 'maltreatment, neglect, abuse, degradation'[64] and to be protected from exploitative labour practices.[65] The best interests of the child are of paramount importance in every matter involving the child.[66]

The most important issue in commercial surrogacy agreements is that of determining the best interests of the resultant child. Forward thinking is needed to avoid situations that would leave the resultant child in a legal limbo thereby leading to a violation of the child's rights. This may happen if:

i. the intending parents decide not to take custody of the resultant child (in international surrogacy agreements where the child ends up without a nationality);
ii. if the surrogate mother refuses to give up the resultant child to the commissioning parents or
iii. in extreme cases where the resultant child ends up being exploited.

All these human or children's rights violations can be seen to stem from the fact that commercial surrogacy agreements tend to treat children as goods in a contract that can be produced, gestated and handed over for monetary compensation and not as human beings worthy of dignified treatment.

This dissertation is structured as a rights-based critical analysis of the stance taken by the legislature to prohibit commercial surrogacy in South Africa and the rights briefly mentioned

[61] Section 28 of the Constitution of the Republic of South Africa Act 108 of 1996.
[62] Section 28(1)(a).
[63] Section 28(1)(b).
[64] Section 28(1)(d).
[65] Section 28(1)(e).
[66] Section 28(2).

above are discussed in detail throughout this dissertation. The topic for discussion is whether in light of the social, economic and legal climate in South Africa it is time for the South African legislature to reconsider its stance on the prohibition of commercial surrogacy and develop the law to permit commercial surrogacy and adequately regulate the practice in a manner that safeguards the rights of all parties involved from all forms of exploitation. This is best evaluated from a rights-based analysis of the rights and interests which the prohibition was aimed at protecting.

This dissertation evaluates the extent to which the limitation of rights that supports the prohibition of commercial surrogacy is justified in a democratic society bearing in mind that the "most convincing arguments against commercial surrogacy are those associated with the legal, economic, cultural, social and political context within which the practice takes place."[67] These arguments eliminate moralistic, individualistic and paternalistic views on commercial surrogacy.

1.5 Limitations of the research

It is undeniable that altruistic surrogacy can also violate several human rights and may turn out to be exploitative. For example, one family member may feel obligated to become a surrogate mother for another family member out of familial obligation and not necessarily out of the goodness of their heart.

There is also the risk that parties may or are already disguising commercial surrogacy agreements as altruistic surrogacy agreements. There is insufficient evidence to support or deny such occurrences. It is also highly likely that the current prohibition on commercial surrogacy may open up an underground black market and create untenable levels of human trafficking.

This dissertation does not discuss the merits, purity or detriments of altruistic surrogacy, partial surrogacy or gestational surrogacy beyond the already explained difference between commercial surrogacy and altruistic surrogacy in the definition section of this dissertation. It is limited to commercial surrogacy and the rights in play in commercial surrogacy agreements.

[67] Caroline Nicholson 'When moral outrage determines a legal response: Surrogacy as labour' 2013 *SAJHR* 496 at 513.

The Children's Act provides that a surrogacy agreement can only be recognised in South Africa if that agreement was entered into in South Africa.[68] The surrogate mother and her partner and one of the commissioning parents must be domiciled in South Africa at the time of entering into the surrogacy agreement.[69] A literal interpretation of these provisions means that foreign surrogacy agreements or transnational surrogacy agreements are prohibited in South Africa except in exceptional circumstances whereby the court may dispose of the domicile requirement for the surrogate mother. Since this matter is already finalised in law, this dissertation does not discuss transnational surrogacy agreements. It is limited to a discussion of commercial surrogacy agreements within South Africa. Transnational surrogacy agreements are referred to for reference and as examples but they are not the focus of this dissertation.

1.6 Research goals

There are various rights at play in commercial surrogacy. The main objective of this dissertation is to show that the legislature was on the right track 25 years ago when they opted to prohibit commercial surrogacy and that the current prohibition of commercial surrogacy is constitutional. In arriving at that conclusion, this dissertation will evaluate the competing rights in support of and against commercial surrogacy. This dissertation evaluates whether or not South Africa needs to reevaluate its stance on commercial surrogacy and legalise commercial surrogacy. This dissertation will evaluate whether or not the limitation of some of these competing rights is a violation of other human rights and whether such limitations can be justified in an open and democratic society.

This dissertation assesses the current legal position in South Africa and makes recommendations on how the law can be amended or developed in order to bring any constitutionally offending provisions in line with the constitution and to ensure effective enforcement of commercial surrogacy prohibiting provisions. This is due to the fact the Children's Act only creates the

[68] Section 292(1)(b) of the Children's Act 38 of 2005.
[69] Section 292(1)(c) and Section 292(1)(d) of the Children's Act.

prohibition against commercial surrogacy agreements but fails to stipulate clear penalties attached to contravening that prohibition.

This dissertation considers the way courts have interpreted the current legislation in the confirmation of surrogacy agreements in a bid to show the shortfalls in the current legislation and make recommendations on how the current legislation can be amended in order to ensure legal certainty and consistency in court judgments.

Comparison with foreign jurisdictions as a form of benchmarking in order to pave the way forward for South Africa is detailed. The comparison chapter will focus on India and the Netherlands.

The research objectives will be achieved by asking the following questions:

1. Whether there are any interests that are worthy of protection by the current prohibition of commercial surrogacy.
2. Whether the current prohibition of commercial surrogacy is constitutional on a rights-based analysis.
3. Whether or not the limitation of certain rights in the prohibition of commercial surrogacy is justifiable in an open and democratic society.

1.7 Research methodology

The research study was a desktop study rather than an empirical study. It was based on a critical analysis of legal principles surrounding commercial surrogacy and human trafficking. This included statutory material, reports of committees, legal history, case law (reports and judgments) and academic literature. The dissertation critically analyses the legal doctrine of commercial surrogacy and how it has been developed in South Africa and in foreign jurisdictions. In so doing a combination of methodologies was used.

This dissertation is by and large a rights-based analysis of commercial surrogacy as a means to ascertain and evaluate the rights at play in commercial surrogacy agreements. These rights include the right to equality (right to equal protection and benefit of the law); right to human dignity; right to freedom and security of the person; right to reproductive autonomy; right to not be subjected to slavery, servitude or forced labour; right to privacy; the paramount rights of children and the right

to freedom of trade, occupation and profession. In light of these rights, this dissertation evaluates whether the infringements of any rights caused by the prohibition of commercial surrogacy and any potential infringement that may occur as a result of the legalisation of commercial surrogacy is justified in a just, open and democratic society.

This research adopted a comparative methodology. This method compares and contrasts the law in the foreign jurisdictions of the Netherlands and India. This was done in a bid to assess how and why commercial surrogacy is either regulated or prohibited in these jurisdictions and the extent to which such prohibitions protect the rights of all parties involved and how they are enforced. The micro-comparative legal study of specific laws and institutions carefully evaluated the similarities between South Africa, the Netherlands and India. This was aimed at obtaining a critical perspective into different legal practices and assisted in formulating recommendations for the South African legal system.

This was not another case of legal transplantation. Eurocentric or Western centric views were not used to dominate or dictate the field of commercial surrogacy in South Africa. These views were used as guidelines but with an understanding and appreciation that these jurisdictions are legally futuristic and ahead in terms of the human rights development and medical technology. Similarity and harmonization of laws is unrealistic in a legal universe characterized by complexity, ambiguity and heterogeneity. This dissertation goes beyond a collation of laws and strives for true comparison and analysis taking into account cultural, economic, and social polarization in South Africa to determine whether commercial surrogacy has a place in the South African society.

The socio-legal method was used through the examination of the main legal, moral and ethical concerns put forward by opponents of commercial surrogacy. This was in line with the principle that morality and prevailing legal convictions of the society have an influence on the law. More so, this helped evaluate whether or not South Africa is ready for the legalisation of commercial surrogacy. It was therefore important in this regard to go beyond the black letter approach in a bid to give a contextual analysis on why the South African legal system has opted to protect morality and, in a way, curb human trafficking over the recognition and protection of other human rights relating to commercial surrogacy. This is supplementary material and was in no way used at the expense of the legal context and the law.

This dissertation adopted a pros and cons analysis to evaluate how the current legal position in South Africa — where commercial surrogacy is criminalized — is more beneficial to all parties concerned as opposed to the alternative in relation to human trafficking. A feminist methodology was momentarily explored as the purpose of this dissertation was also aimed at cementing the current status quo as the best way of safeguarding the societal position of women before the law. The feminist methodology covers the importance of women's rights to reproductive autonomy and right to trade, occupation and profession and how that amounts to the commodification of women's reproductive capabilities in commercial surrogacy agreements. The legal, moral and ethical concerns against surrogacy were thus critiqued.

1.8 Structure of the dissertation

The following chapter (Chapter 2) is largely descriptive. It covers Chapter 19 of the Children's Act and the Law Commission Report. It is a chapter on the current status quo, what led to it, the history of the promulgation of the Children's Act and Chapter 19 of the Children's Act and why we have it. It provides the history of surrogacy in South Africa. The reports and recommendations of committees, commissions and parliament during the long process that led to the formulation of the Children's Act were used to form the basis for the argument that the current legal position to prohibit commercial surrogacy is not yet due for change, although the legislation governing surrogacy is now inadequate to properly regulate the practice. The rights informing the provisions in Chapter 19 are discussed and an analysis of whether that provision is constitutional, made. The recorded surrogacy agreements decided in terms of Chapter 19 of the Children's Act are discussed in a bid to show how difficult it has been for the courts to interpret the current legislation. This will also form the basis that our legal system is also not ready for something as complex as commercial surrogacy. The conclusion of this chapter emphasises that the current legal position is not yet due for change but that Chapter 19 of the Children's Act needs to be developed to eliminate ambiguity and to create legal certainty.

Chapter Three involves a rights-based analysis of the rights at play in commercial surrogacy. The pros and cons of commercial surrogacy are laid out. The legal, ethical and moral arguments against commercial surrogacy are briefly discussed at the onset. This chapter makes an indepth analysis

of each right involved and the parties affected by such rights. Some rights are used in support of and against the legalisation of commercial surrogacy in South Africa. This chapter also establishes how commercial surrogacy is a crime from a rights-based perspective. The limitation clause analysis of these rights was conducted in a bid to show that the rights that are infringed by the prohibition of commercial surrogacy are being justifiably infringed.

Chapter Four is a comparative chapter that sets out the legal position in foreign jurisdictions and explores surrogacy and commercial surrogacy prohibiting legislation in India and the Netherlands. This chapter also looks at the Netherlands and their stance on criminalising commercial surrogacy and why they have taken this stance. This chapter also looks at India as India legalised commercial surrogacy and then reevaluated that position and outlawed commercial surrogacy. This chapter analyses why India has adopted its current position. Recommendations on how best to proceed in South Africa will be made based on a discussion of foreign legislation.

Chapter Five sums up the discussion and makes proposals for legislative intervention based on the discussion above. The ultimate conclusion being that in light of the conflicting rights involved in the commercial surrogacy debate, South Africa needs to maintain its stance on the prohibition of commercial surrogacy.

CHAPTER TWO

DEVELOPMENT OF SURROGACY REGULATING LEGISLATION AND THE REGULATION OF SURROGACY IN SOUTH AFRICA.

2.1 Introduction

The realm of surrogacy in South Africa is currently regulated by statutory provisions in Chapter 19 of the Children's Act.[1] There is no other statute directly regulating surrogacy. The Prevention and Combating of Trafficking in Persons Act[2] and Chapter 18 of the Children's Act are aimed at preventing trafficking of women and children and can be said to indirectly regulate surrogacy in so far as the sale of children and women's reproductive capabilities are concerned.

There are arguments to the effect that the prohibition of commercial surrogacy amounts to a moral outrage dictating a legal response and is unconstitutional. There are also counter arguments to the effect that the criminalisation of commercial surrogacy serves to protect certain rights and is constitutional. To ascertain the validity of these arguments, it is important to assess how and why the legislature arrived at the current legal position, whether or not the legislature erred in arriving at their conclusion, how effectively the courts are interpreting and applying the current legislation and whether or not the prohibition on commercial surrogacy is still warranted.

Section 301 of the Children's Act expressly prohibits commercial surrogacy and provides that "*No person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind.*
(2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for-

[1] Children's Act 38 of 2005.
[2] Prevention and Combating of Trafficking in Persons Act 7 of 2013.

(a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;

(b) Loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or

(c) Insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

(3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefore."[3]Section 303(2) prohibits the advertisement of commercial surrogacy services and provides that "*No person may in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement."*[4]

2.2 Surrogacy in African Customary Law

Surrogacy is not a foreign concept to South Africa. In African customary tradition, surrogacy is practiced though an 'ancillary marriage' called a sororate union.[5] Children are very important in the African culture and the wife has a duty to bear children for her husband. If a woman is barren, then her family has a duty to provide the sororate to bear children for the husband. The wife's family can enlist the help of her unmarried sister or female relative[6]. This female relative then bears children for the husband as a surrogate would bear children for the commissioning parents under a sororate union. No extra *lobola* for the surrogate or substitute is required. The children born out of the sororate marriage belong to the commissioning couple and are raised as their own. The surrogate is absorbed into the house to which she is a seed raiser and becomes a part of that household.[7] This practice is also referred to as informal surrogacy.[8]

[3] Section 301 of the Children's Act.
[4] Section 303(2).
[5] Frans M Mahlobongwane 'Surrogate motherhood agreements in South Africa: Changing societal norms?' (2013) 2 S*PECULUM JURIS* 45 at 45
[6] Jan C Bekker & Mariana Buchner-Everleigh 'The legal character of customary marriages' (2017) *DE JURE* 80 at 88
[7] Winston C Maqutu *Contemporary Family Law of Lesotho: A Historical and Critical Commentary* (1992) at 156.
[8] "Informal surrogacy means the insemination of the surrogate mother with the gametes of the commissioning parent.

Surrogacy in African customary law does not require any of the parties to undergo any health checks or tests to ensure that the pregnancy will be viable as there are no artificial techniques required. The surrogate in question has to have intercourse with the commissioning father to facilitate the pregnancy. The agreement takes a verbal form of consent and becomes valid the moment the surrogate's family and the husband's family agree.[9] The sororate cannot, after the finalisation of the agreement, terminate the agreement. Abortion is an emotive issue which is considered a taboo in African custom, therefore the sororate/surrogate may not terminate the resulting pregnancy.[10]

It is important to note that culture and customs are valuable and may be affirming in some aspects. Cultural rules do not always constitute another form of inequality and discrimination.[11] The Constitution provides that everyone has a right to enjoy and practice a cultural life of their choosing.[12] It is important to measure customary law by the extent to which it affirms a woman's personhood.[13]The customary practice of sororate unions sheds light on the traditional practice of surrogacy in South Africa. However, this practice of surrogacy is patriarchal and patrilineal as it infringes upon women's rights to make decisions relating to reproduction.

Sororate unions infringe women's reproductive rights. Reproductive rights imply that women have the freedom to reproduce if, how and when they wish to do so.[14] This means that women also have the right to information to regulate their fertility and to control their bodies. It is difficult for women

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This is performed privately by the parties according to accepted customary practices without the interference of medical doctors or clinics."- SALRC Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood (1999) (hereinafter referred to as the 1999 Report) para 7.

[9] Frans M Mahlobongwane (note 5 above at 50).

[10] Father Bonaventure Turyomumazina 'No place for abortion in African traditional life-some reflections' (2002) available at https://www.consciencelaws.org/background/procedures/abortion019.aspx accessed on 23 May 2019.

[11] Jan C Bekker 'How compatible is African Customary Law with human rights: Some preliminary observation' (1994) THRHR 440 at 442.

[12] Section 31(1)(a) of the Constitution of the Republic of South Africa Act 108 of 1996. See also David McQuoid-Mason 'Termination of pregnancy: Cultural practices, the choice on termination of Pregnancy Act and the constitutional rights of children' (2018) 108 (9) *SAMJ* 721 at 721.

[13] K Robinson 'The minority and subordinate status of African women under customary law' (1995) 11(3) *SAJHR* 457 at 469.

[14] Ames Dhai & David McQuoid-Mason *Bioethics, Human Rights and Health Law: Principles and Practice* (2011) at 22.

in patriarchal societies and male–dominated development models like South Africa to balance their reproductive rights against those of men.[15]

Surrogacy in the traditional African context fails to recognise reproductive rights of women. The surrogate and the commissioning mother have no freedom of choice in the matter. The wife is considered to have failed in her duty to sire offspring for her husband and her family provides the husband with a sororate to satisfy the husband's need to procreate. The sororate is not given a chance to assess her own reproductive health to ascertain if any resulting pregnancy may be detrimental to her own health. Her mental health is not taken into account. The wife and the sororate are basically merged into one unit for the sole purpose of childbearing. The sororate does not have the equal rights of a wife as this agreement does not give rise to a polygamous marriage, she becomes the extension of the wife.

Termination of the pregnancy is taboo in the African culture. The fact that the sororate has no right to decide to terminate the pregnancy is unconstitutional and a violation of the Choice on Termination of Pregnancy Act 92 of 1996[16] which gives women the right to terminate their pregnancies within certain parameters of the law. Reproductive rights are an extension of other fundamental constitutional rights such as the right to freedom, privacy, dignity, access to healthcare and information and freedom and security of the person. Women's reproductive rights must be respected and protected in an environment free from intimidation, coercion, violence and abuse.

Surrogacy in the form of sororate unions discriminates against women as it places the infertility blame solely on the wife. Infertile women are heavily stigmatised in Africa and the rest of the world and this often leads to divorce.[17] Married women who are childless endure ostracism, economic deprivation and personalised grief. Surrogacy as a form of assisted reproduction is a welcome development in the achievement of family goals if practiced in a way that is beneficial to all the parties involved, eliminating exploitative practices such as commercialisation of children

[15] Pieter Carsters & Debbie Pearmain *Foundational Principles of South African Medical Law* (2007) at 176.
[16] Choice on Termination of Pregnancy Act 92 of 1996.
[17] Marida Hollos et al ‘The problem of infertility in high fertility populations: Meanings, consequences and coping mechanisms in two Nigerian communities’ (2009) 68(11) *Social Science and Medicine* 2061 at 2062.

and wombs and violation of reproductive rights while taking into account the rights of the commissioning parent, the surrogate and the best interests of the resultant child.

The customary practice of surrogacy through sororate unions helps in understanding that the regulation of surrogacy in South Africa is not a form of legal transplantation. Surrogacy is not a purely European or American concept. Surrogacy in the African tradition poses a plethora of problems. It fails to recognise women's rights; it is a patriarchal agreement where the male elders make and confirm decisions on behalf of the women and the women have little freedom of choice in the matter; there is no independent party or guidelines to ascertain the suitability of the commissioning parents or the surrogate mother; the reproductive and mental health of the surrogate is not taken into account and the surrogate may not terminate the agreement or the pregnancy. These problems pose constitutional questions and have since been remedied by Chapter 19 of the Children's Act as will be discussed in detail below.

The customary practice of surrogacy includes in it some of the underlying principles in Chapter 19 of the Children's Act. Both the wife and the husband (commissioning parents) have to consent to the sororate union; the resultant child is genetically related to one of the commissioning parties and in this case, the father; the commissioning parents are the parents of the resultant child and the sororate may not lay claim to that child and most importantly, the surrogate agreement in this case entails great sacrifice and is purely altruistic. The sororate does not receive any payment for her services, she does not even get to be a wife. Such unions promote social cohesion, *ubuntu* and unity on the understanding that one can never put a price on childbirth.

The Recognition of Customary Marriages Act 120 of 1998[18] (hereinafter referred to as the RCMA) does not expressly recognise sororate unions as customary marriages. This may be due to the fact that RCMA provides that for a customary marriage to qualify as a marriage, "the prospective spouses must be above the age of 18, must both consent to the marriage and the marriage must be negotiated (payment of *lobola*) and entered into or celebrated in accordance with customary law."[19] Sororate unions do not require payment of extra *lobola* for the sororate; the sororate consents to

[18] Recognition of Customary Marriages Act 120 of 1998.
[19] Section 3(1) of the Recognition of Customary Marriages Act

bearing children for the commissioning parents. Sororate unions do not fall within the purview of the RCMA. Therefore, the Children's Act is the only piece of statutory law which directly regulates surrogacy in South Africa.

2.3 History and Development of Surrogacy Legislation in South Africa

Traditional surrogacy agreements are undocumented and unrecorded. The first recognised surrogacy case in South Africa was in 1987.[20] In this case Karen Ferreira-Jorge of Tzaneen had her mother Pat Anthony carry her triplets to term as Karen was unable to have more children due to a hysterectomy.[21] According to the principle of legality and the maxim *nullem crimen sine lege*[22], this arrangement entered into by the Ferreira-Jorges of Tzaneen and Pat Anthony was not a crime. There was no law regulating or criminalising surrogacy agreements, hence there was a gap in the law.[23]

At the time, there was a pending Children's Status Bill before Parliament. That legislation intended on removing any uncertainty about the legal guardianship of children born out of artificial insemination. One of the aims of that Bill was to make the surrogate mother the legal parent of the child born to her. That bill became the operative Children's Status Act[24] a week after the birth of the Ferreira-Jorges triplets.[25]

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[20] John D Battersby 'South African woman gave birth to three grandchildren, and history' *The New York Times* 2 October 1987 at 9 available at *https://www.nytimes.com/1997/10/02/world/south-africa-woman-gives-birth-to-3-grandchildren-and-history.html*, accessed on 23 March 2019.

[21] David Crary 'Test-tube triplets born to their own grandmother' AP News 1 October 1987 available at https://www.apnews.com/b2e3427d97887848164fde105cf8ee ,accessed on 23 March 2019.

[22] C R Snyman *Criminal Law* 6ed (2014) at 36. The maxim means that there is no crime without a law. The principle of legality is an important mechanism to protect the freedom of the individual. It ensures that the state, its organs and officials do not consider themselves above the law but remain subject to it. See also Jonathan Burchell *Principles of Criminal Law* 4ed (2014) at 35.

[23] A S Pigolth *General Theory of Law* (1996) 276. A gap in the law when a certain social relation or norm is not regulated by a specific legal norm as a result of different reasons. A gap in law is best eliminated through law creation.

[24] Children's Status Act 82 of 1987.

[25] Diedenka Pretorius "Practical aspects of surrogate motherhood' 1991 *De Jure* 52 at 57.

Until the promulgation of the Children's Act, surrogacy was indirectly regulated by the Regulations Regarding the Artificial Insemination of Persons and Related Matters[26], the Human Tissue Act[27], the Child Care Act[28] and the Children's Status Act. None of these pieces of legislation made explicit reference to surrogacy agreements.

The definition of artificial insemination in Section 1 of the Children's Status Act was interpreted in an all-encompassing manner which could also include surrogacy agreements. Artificial insemination was defined as:

> "[T]he introduction by other than natural means of male gamete or gametes into the reproductive organs of a woman or by placing 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 that woman"[29]

According to the Children's Status Act, the gestational mother and her spouse were considered as the legal parents of a child conceived through artificial insemination. Therefore, a child born out of a surrogate motherhood agreement would be regarded as the legal child of the surrogate mother and her spouse. The surrogate's spouse would be unable to refute parentage. This attributed parenthood to a surrogate who had no intention of raising the child and to a father who was minimally involved in the surrogacy process.[30] The male gamete donor's rights were effectively terminated by legislation.[31] This outcome was untenable.[32]

The lack of surrogacy specific legislation led to the intensive investigation into implications of surrogacy by the South African Report Law Reform Commission (hereinafter referred to as the SALRC). In 1989, the Questionnaire on Surrogate Motherhood was circulated.[33] The questionnaire was an in-depth review of the South African population's views and understanding

[26] Regulations Regarding the Artificial Intermission of Persons and Related Matters Government Notice No. R. 1182 of 20 June 1986. Government Gazette 20 June 1986 Vol 252 No. 10283 pp 28-35.
[27] Human Tissue Act 65 of 1983.
[28] Child Care Act 74 of 1983.
[29] Section 1of the Children's Status Act 82 of 1987.
[30] Caroline Nicholson & Andrea Bauling 'Surrogate motherhood agreements and their confirmation: A new challenge for legal practitioners' 2013 *De Jure* 510 at 513.
[31] Human Tissue Act.
[32] Pieter Carsters & Debbie Pearmain (note 15 above at 58).
[33] SALRC *Questionnaire on Surrogate Motherhood* 1989.

of surrogacy. The overall view emanating from that questionnaire was that surrogacy should only be practiced within families. The SALRC conducted public hearings in predominantly black provinces because their traditional practices permitted surrogacy as a form of assisted reproduction through sororate unions. Clark[34] notes that since this questionnaire and the subsequent public hearings targeted predominantly black regions, the data collated cannot be said to be an accurate representation of the views of the South African populace at the time.[35]

The SALRC undertook to study and visit the USA and the United Kingdom as these jurisdictions were leading the discussion on surrogacy. The United Kingdom Warnock Committee[36] had published its findings on human tissue, surrogacy and artificial insemination. The committee was not in strong support of surrogacy although it acknowledged its need was based on necessity. The committee was completely against commercial surrogacy and noted that "it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child."[37]

The *Baby Cotton*[38] case also attracted enormous publicity and provoked great controversy as the 'baby for cash deal'. This was the first surrogacy case in the United Kingdom and there was no law regulating surrogacy. Although the commissioning parents were awarded wardship of the child, Parliament hastily promulgated the Surrogacy Arrangements Act of 1985[39] which made it an offense to enter into, negotiate, advertise or facilitate commercial surrogacy agreements. Section 1A inserted in 1990 stipulated that surrogacy agreements were unenforceable. The effect was that surrogacy agreements would be unregulated, leaving the court to decide each case based on its own merits. The Human Fertilisation and Embryology Act[40] addressed the parenthood of children born out of assisted reproduction. This Act concluded that the surrogate mother is the legal parent of the resultant child in surrogacy agreements.

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[34] Bridgette Clark 'Surrogate motherhood: Comment on the South African Law Commission Report on Surrogate Motherhood (Project 65)' (1993) 110 *SALJ 769*-784.
[35] Bridgette Clark (note 34 above at 769).
[36] Mary Warnock *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984).
[37] Ibid para 8.10.
[38] *In re C (A minor)* [1985] FLR 846.
[39] Surrogacy Agreements Act 1985.
[40] Human Fertilisation and Embryology Act 1990.

The USA set legal precedent with the *Baby M*[41] case. In this case, William and Elizabeth Stern, a biochemist and a pediatrician, respectively, were unable to have biological children of their own as Elizabeth had multiple sclerosis. They contacted a centre that arranged for surrogate mothers for a monetary payment. Mary Beth, the wife of a sanitation worker, responded to the centre's advertisement. The parties entered into a commercial surrogacy agreement in which Mary Beth would receive US$10 000 for bearing the Sterns' child. She also agreed to hand the child to William at birth and to terminate her maternal rights to enable Elizabeth to adopt the child. The Sterns also paid US$7 500 to the centre for arranging the surrogacy agreement.

Mary Beth refused to give up the child upon birth in 1986 and that action sparked legal debate on surrogacy and commercial surrogacy in the USA and all over the world. Similarly to the case of the Ferreira-Jorges and Baby Cotton, New Jersey had no law regulating surrogacy contracts at the time. The court evaluated the best interests of the child and awarded custody of Baby M to the Sterns.

Tackling the subject of surrogacy was no easy feat then for the SALRC. The USA and the UK who were at the time considered to be legally futuristic, were also struggling with promulgating definitive laws on surrogacy. The only other source of information was African customary law which was characterised by various legal deficiencies and violation of women's rights discussed above. The Working Paper on Surrogate Motherhood[42] and the Report on Surrogate Motherhood[43] (hereinafter referred to as the 1993 Report) were published.

The 1993 Report acknowledged that it was probably safe to say that many surrogacy agreements had been concluded and fulfilled without problems and publicity. The report noted that "surrogacy agreements only caused public outcry when something went wrong and the parties involved came before a court to contest custody, determine guardianship or establish parentage of a child."[44] The Child Care Act criminalised commercialised surrogacy.[45] It was debatable whether the Child Care

[41] *In re Baby M* 217 N.J. Super 313 525 A 2d 1128 1132 Ch Div (1987) and *In re Baby M* 537 A.2d 1277, 109 N.J 396 (1988).
[42] SALRC Working Paper 38: Surrogate Motherhood Project 65 (1991).
[43] SALRC Report on Surrogate Motherhood (1993).
[44] Pieter Carsters & Debbie Pearmain (note 15 above at 183)
[45] Section 24 of the Child Care Act 74 of 1983.

Act would be applicable to surrogacy agreements seeing as there are considerable differences between commercial aspects of surrogacy and commercial surrogacy.[46] The SALRC recognised that the laws governing parentage at the time were inadequate, uncertain and open to judicial interpretation.[47] If these existing laws were to be applied to surrogate motherhood agreements, the court would be effectively intervening *ex post facto* when problems arise and when it could be too late to find an amicable solution.

The 1993 Report was published before the current constitutional era and contained some unconstitutional provisions.[48] The SALRC was also inappropriately constituted in terms of race and gender.[49] However, the 1993 Report laid the foundation for surrogacy regulation in South Africa. The SALRC recommended that surrogacy should be regulated and recognised by legislation. The SALRC anticipated that there would be an increased use of surrogacy as a form of assisted reproduction due to the increase in infertility and the diminishing number of children available for adoption due to the widespread use of contraceptives and the legalisation of abortion.[50] The challenge with surrogacy would be on deciding how best to regulate surrogacy and not whether or not commercial surrogacy should be legalised. The SALRC considered the outright ban of surrogacy to be shortsighted and self-defeating.[51]

The SALRC adopted a regulatory approach instead of a prohibitory approach and recommended the criminalisation of commercial surrogacy.[52] The SALRC was of the view that the surrogate mother should only be compensated for actual expenses related to the confirmation of the surrogacy agreements only. The SALRC noted that it would seem that in most cases, the major motivation for potential surrogate mothers is the prospect of financial reward.[53] The restriction of commercial surrogacy was justified on the basis that it was not for purely moralistic or paternalistic basis in order to pass moral scrutiny. The SALRC reasoned that commercial surrogacy amounts to

[46] PQR Boberg (ed) *Boberg's Law of Persons and the Family* (1999) 2ed. Surrogacy relates to a child to be born and adoption relates to an already existing child.
[47] SALRC Report on Surrogate Motherhood (1993) para 7.2.1.
[48] SALRC Report of the Ad Hoc Committee on the Report (note 17 above para 4.2)
[49] *Ibid* para 4.1.
[50] SALRC Report on Surrogate Motherhood (1993) para 2.1.1, 4.6.2 and 4.6.3.
[51] Ibid para 7.4.1.
[52] SALRC Report on Surrogate Motherhood (1993) para 8.2.8.
[53] Clark 'South African Law Commission Report on Surrogate Motherhood Project 65' (1993) 110 SALJ 769 at 770.

a form of prostitution. It is equivalent to baby selling, commodifies children, dehumanises and degrades the surrogate mother and is a form of human trafficking. The commission argued that turning childbirth into something that is used and controlled by men contributed to the insubordination of women in society and leads to the perpetuation of gender stereotypes.[54]

The 1993 Report recommended that surrogate motherhood agreements should be permitted for married, heterosexual couples only. This recommendation was unconstitutional as it discriminated against childless couples on the basis of sexuality and marital status.[55] It effectively impaired the right to reproductive autonomy. The SALRC recommended that the commissioning mother had to be incapable of giving birth for medical reasons and her condition had to be permanent and irreversible.

The SALRC was of the opinion that the law should only allow full and not partial surrogacy.[56] The SALRC's argument was that it is unreasonable to force a mother to part with her genetically related child, however, this argument is unsubstantiated. This approach was heavily criticised because it suggests that genes are the sole factor governing parenthood. The Commission failed to take into account that gestational surrogacy may be just as exploitative of poor women.[57] Clark[58] is of the view that gestational surrogacy is more exploitative of the surrogate mother than partial surrogacy.[59] She argues that "gestational surrogacy is more attractive to wealthy couples who want a child that is genetically and biologically their own and thus have no interest in the socio-economic or cultural background of the surrogate." [60]

The SALRC had adopted a partial approach to human reproduction. This approach amounted to "unbundling of the supply chain by removing the traditional link between the egg, the womb and

[54] Denise Meyerson 'Surrogacy Agreements' in Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 121 at 123.
[55] Ibid at 126.
[56] SALRC Report on Surrogate Motherhood (1993) para 8.2.7.
[57] Ibid at 347
[58] Bridgette Clark 'Surrogate motherhood: Comment on the South African Law Commission Report on Surrogate Motherhood (Project 65)' (1993) 110 *SALJ* 769.
[59] Bridgette Clark (note 58 above at 773).
[60] *Ibid.*

the mother."[61] Even if the surrogacy agreement is altruistic, this approach would amount to commodification of women's reproductive capabilities by attempting to emotionally alienate women from their reproductive labour.

The SALRC submitted that there should be a genetic link between the resultant child and the commissioning parents.[62] The Commission's aim in this assertion was to promote a bond between the commissioning parents and the resultant child and to prevent the shopping around for specific genetic qualities in babies. This approach may be criticised on the grounds that it fails to take into account situations where both the commissioning parents are unable to have genetic children of their own.

The Commission recommended that before the agreement can be executed, a written surrogate motherhood agreement has to be confirmed by the Supreme Court (now the High Court). The court must be provided with "conclusive evidence with regard to the psychological suitability of the surrogate mother to act as such, the psychological suitability of the commissioning parents to accept parenthood of the child, the family circumstances of the parties in question and the interests of any of the descendants or adopted children of the commissioning parents."[63] On the suitability of the surrogate, the SALRC was of the view that only married, divorced or widowed women who had at least one naturally conceived living child could become surrogates.[64]

The justification for this provision was that a married surrogate with children of her own has a better understanding of the physical and emotional process of childbearing. Having undergone the process of pregnancy, she would be better suited to assess whether or not she would cope with surrogacy. This provision can be used to justify the criminilisation of commercial surrogacy in that if childless women were to be allowed to become surrogates as part of enforcing their right to 'freedom of trade, occupation and profession'[65] then childbirth would be turned into a mere trade thus commercialising women's reproductive labour.

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[61] Michael J Sandel *Justice: What's the right thing to do?* (2010) at 99.
[62] SALRC Report on Surrogate Motherhood (1993) para 8.2.6.
[63] SALRC Report on Surrogate Motherhood (1993) para 8.2.2-8.2.5. The confirmation by a court requirement was driven from the Ontario Law Commission *Report on Human Artificial Reproduction and Related Matters* (1985).
[64] SALRC Report on Surrogate Motherhood (1993) para 8.2.9-8.2.10.
[65] Section 22 of the Constitution.

The 1993 Report discussed the parentage of the resultant child. The SALRC noted that surrogacy gives rise to questions like: what is the legal status of the resultant child, must the commissioning parents adopt the child even after birth even if the gametes used belong to them, can the surrogate mother consent to adoption, whose consent is required for a surrogate motherhood agreement, is a commercial surrogacy agreement a valid agreement and whether the maxims *mater semper certa est* (the identity of the mother is always certain) or *pater est quem nuptiae demonstrat* (the father is whom the marriage points out) would apply to the surrogate mother and her husband in determining parentage.

The Commission recommended that the resultant child born out of a valid surrogacy agreement would be the legal child of the commissioning parents.[66] Upon birth, the surrogate would relinquish all legal and parental rights over that child.

The SALRC applied a rights-based approach in arriving at the various conclusions that shaped Chapter 19 of the Children's Act. The SALRC noted that the issue of parentage brings into question certain ethical issues like; reproductive autonomy, the right to a family, the rights of the surrogate mother[67], the potential exploitation of the surrogate mother and the best interests of the child who is not conceived in his own interest but to satisfy the needs of others.[68] The 1993 Report noted that it would seem from a constitutional perspective, as though the surrogate mother is waiving her right to freedom and security over one's own body. The surrogate mother may give up some rights to make decisions concerning her pregnancy depending on the terms of the surrogacy agreement. This view fails to take into account that surrogacy agreements can be empowering instead of exploitative if regulated properly. The surrogate mother gives up one right to assert another right-the right to reproductive autonomy. It is simply a choice not to exercise a particular right.

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[66] SALRC Report on Surrogate Motherhood (1993) para2.8 and 8.2.12.

[67] The question is whether the surrogate, as the hostess mother has a right and responsibility to raise the resultant child due to her biological and psychological involvement in the birth of the child. It is however submitted that biology does not make one a mother, it only makes them a parent.

[68] Lori B Andrews 'Surrogate motherhood: The challenge for feminists' (1988) 16(1-2) *Journal of Law, Medicine and Ethics* 72 at 76. Andrews noted that all children are born out of a human desire to have a child. Every step along the way from sperm donation to IVF to surrogacy to embryo research, humans have gradually moved closer towards engineering human life to fulfill individual desires.

The 1993 Report's various recommendations were mostly aimed at preventing any legal loopholes that would potentially permit commercial surrogacy. The Commission was not well equipped on the subject of surrogacy but clearly understood the exploitative nature of commercial surrogacy and how the legalisation of commercial surrogacy might violate some rights while upholding other rights. The common theme in the reports and discussions and *ad hoc* committee recommendations that followed the 1993 Report leading up to the Children's Act was that: surrogacy should not be completely banned or criminalized in South Africa but should be recognized and regulated through legislation; commercial surrogacy should be criminalised and that in all situations of surrogacy, the best interests of the child must be the paramount principle of consideration as intended in Section 28 (2) of the Constitution.

The SALRC continued to interrogate the subject of commercial surrogacy and published an Interim Report and the Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood[69] (hereinafter referred to as the 1999 Report) were published. The Ad Hoc Committee report and the draft legislation was then referred to the Minister of Justice for finalisation. The Ad Hoc Committee reviewed the 1993 Report and for the most part, agreed with the submissions put forward in that report although it did not accept the 1993 Report in its current form at the time. The Committee made various recommendations that were adopted into the Children's Act.

The 1999 Report reiterated that commercial surrogacy should be prohibited as there are things in life like reproductive labour and children that money cannot buy. The Committee noted from various discussions conducted by the SALRC that society is divided on the legalisation of commercial surrogacy. There were arguments put forward that reproductive autonomy extends to the right of poor women to use their reproductive capabilities to gain financial freedom, thus recognising women's agency. This argument remains popular to date but it fails to take into account that only poor women would be open to being commercial surrogates. A woman's decision

[69] SALRC Interim Report and the Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood (1999).

to give up her child for money mostly speaks volumes about the extreme polarization of society than it does about her supposed emancipation and freedom

The Ad Hoc Committee concurred with the SALRC's recommendation that commercial surrogacy should not be permitted. The Committee recommended that the prohibition of commercial surrogacy should be extended to brokers and agents

The 1999 Report recommended that suitability of a surrogate mother should include her financial security in order to make sure that she is not using the surrogacy agreement as a source of income. The Committee recommended that any competent women should be allowed to act as a surrogate mother, regardless of her marital status or sexual orientation. A surrogate mother should be a South African citizen or domiciled in the Republic. The Committee was of the view that surrogate motherhood agreements should be regulated through the law of contract in a way that minimises the risks inherent to surrogate motherhood agreements and ensure the best interests of all the parties involved with the best interests of the resultant child being paramount.

The SALRC then published the 2001 Review of the Child Care Act[70] and the 2002 Review of the Child Care Act[71]. Both reviews essentially agreed with the 1993 Report and the 1999 Report and were focused on parental rights. It was acknowledged that surrogacy raises legal, moral, religious and philosophical concerns. Commercial surrogacy agreements are *contra bonos mores* hence unenforceable as they constitute a devaluation or disdain of childbirth. The SALRC noted that it is unconstitutional to have a category of acceptable commissioning parents and same-sex couples and single parents should be allowed to utilise surrogacy.

The discussion papers recommended that the distinction between partial and full surrogacy be maintained and that partial surrogacy should not be practiced. It was noted that although partial surrogacy is not ideal, it is a practical and financially feasible option. If partial surrogacy is used, the surrogate mother must be awarded a reasonable 'cooling off period' in which she can decide whether or not to hand over the child. In the case of full surrogacy, the surrogate mother must hand

[70] SALRC Review of the Child Care Act Project 103 (2001).
[71] SALRC Review of the Child Care Act Project 110 (2002)

over the child to the commissioning parents at birth and the commissioning parents are immediately entitled to register the child as their own child at birth.

The National Assembly accepted the Children's Bill in 2005 in line with South Africa's obligations ratified in 1995 at the United Nations Convention on the Rights a Child (UNCRC)[72] and the African Charter on the Rights and Welfare of the Child (ACRWC)[73]. It is important to note from the onset that the UNCRC overlooked important social, cultural and economic realities particular to Africa. The ACRWC fared better in comparison as it emphasised the need to include African cultural experiences and values when dealing with the rights of the child. The Children's Act through Chapter 19 was the first legislation to openly regulate surrogate motherhood agreements and establish surrogacy as a legally recognised form of assisted reproduction. There was a proposal for a Surrogacy Act which mirrored the provisions in the Children's Act and it was proposed by the SALRC and accepted by Parliament that the issue of surrogacy should be included in the draft Children's Bill.

2.4 The Current legal regulation of surrogacy in South Africa

The contents, recommendations, objections and conclusions of the SALRC's 1993 Report and the Ad Hoc Committee's 1999 Report on commercial surrogacy are echoed throughout the various provisions of the Children's Act and the courts' interpretation and application of the provisions of the Children's Act.. The surrogacy legislation and the courts are aimed at preventing exploitation and commercialisation of altruistic surrogacy agreements whilst giving effect to the contractual freedom of the parties. The provisions of the Children's Act are premised on ensuring and protecting the interests of the resultant child in clarifying the parental responsibilities of the parties to the agreements.

[72] UN General Assembly Convention on the Rights of the Child 20 November 1989 United Nations Treaty Series Vol 1577 pg3.
[73] Organisation of the African Union (OAU) African Charter on the Rights and Welfare of the Child 11 July 1990 CAB/LEG/24.9/49 (1990)

The current legal system which prohibits commercial surrogacy is aimed at protecting the rights of women and children. However, the current legislation is not well equipped to regulate the permitted altruistic surrogacy and effectively enforce the prohibition of commercial surrogacy. There are a host of difficulties and discrepancies associated with that legislation that trigger constitutional scrutiny and these will be discussed in detail below.

Further legal development in the form of comprehensive surrogacy regulations and clear penalties for contravening the prohibition of commercial surrogacy is required to ensure the effective regulation of surrogacy that does not leave room for contrary interpretation or loopholes. Courts are still battling with the interpretation and application of the provisions of the Children's Act in the confirmation of surrogate motherhood agreements. There is lack of consistency and uniformity in the judgments. It is appreciated that surrogacy is a complicated field and seeing as our courts are still settling in on the interpretation and application of the current legislative provisions, it is hereby submitted that the South African legal system is not yet ready to further complicate an already complicated field by legalising commercial surrogacy.

According to the 1999 Report, surrogate motherhood agreements are regulated through the law of contract but due to the intrinsic nature of surrogacy, there was need for legislation regulating surrogacy. Criminal law becomes applicable to surrogacy agreements in so far as such agreements are in contravention of the provisions in the Children's Act. The High Court has to confirm a surrogate motherhood agreement for the agreement to be valid. In the confirmation of surrogacy agreements, the court acts as the facilitator of the surrogacy agreements and gatekeeper and protector of the rights of the intending parents, surrogates and the resultant children.[74] This dual role emanates from the landmark case on surrogacy of *Ex parte WH*[75] where the court held that "While on the one hand it is enjoined to advance the spirit and objectives of the Act without creating or placing any additional obstacle in the path of the litigants who seek relief, on the other as upper guardian of all minor children it cannot simply be a rubber stamp validating the private arrangements between contracting parties."[76] The court will evaluate if all substantive and

[74] Anne Louw 'Surrogacy in South Africa: Should we reconsider the current approach' (2013) 76 *THRHR* 564 at 567.
[75] *Ex Parte WH and Others* 2011 (6) SA 514 (GNP).
[76] *Ex Parte WH s*upra at 74.

procedural requirements set out in the Children's Act have been met before confirming a surrogate motherhood agreement.

2.4.1 Procedural requirements for the confirmation of surrogate motherhood agreements

Surrogate motherhood agreements in South Africa adopt a pre-authorisation or pre-artificial fertilization model. This is to ensure the adequate protection of the best interests of the child to be born as a result of the surrogacy agreement. Procedural requirements of a surrogate motherhood agreement require for confirmation of surrogate agreements by the High Court before artificial insemination.[77] The artificial insemination of the surrogate must be effected no later than 18 months after the date of the confirmation of the surrogacy agreement.[78] The guidelines stipulated in the National Health Care Act 61 of 2003[79] must be adhered to during the artificial insemination of the surrogate.[80]

This pre-authorisation requirement is sometimes flouted due to complete disrespect, ignorance and desperation. In *Ex parte MS,*[81] the court had to determine whether or not the High Court would be competent to confirm a surrogacy agreement "in circumstances where the written agreement between the parties was only entered into, and confirmation of such agreement sought, after the artificial fertilisation and subsequent pregnancy of the surrogate mother."[82] In addition the court also had to decide" whether an unenforceable agreement to commit a lawful act (the artificial fertilisation of the surrogate mother without prior authorisation of the court), could be validated by retrospective confirmation of the agreement by the court thereby confirming the agreement post-fertilisation."[83]

The parties had entered into a verbal agreement as the intending parents were desperate to have a child. They had previously entered into two surrogate motherhood agreements and both had been

[77] Section 296(1)(a) and Section 303(1) of the Children's Act 38 of 2005.
[78] Section 296(1)(b).
[79] National Health Care Act 61 of 2003.
[80] Section 296(2) of the Children's Act
[81] *Ex Parte M S & Others* (48856/2010) [2014] ZAGPPHC 457 (2 December 2013).
[82] Ex Parte MS supra at 4.
[83] Ex Parte MS supra at 32.

confirmed by the court. In one of the agreements, the surrogate mother changed her mind and terminated the agreement. In the other agreement, artificial fertilisation was effected and had failed. The confirmation of surrogate motherhood agreements does not always require a written judgment.[84] Keightley AJ noted that this case raised an issue that is not covered in the Children's Act and was compelled to put forward a written judgment to form a legal precedent to assist the court should this issue arise in future cases.

The court reiterated that the pre-authorisation requirement "is aimed largely at ensuring that there is certainty in the legal relationship between the parties involved before the prospect of a child becomes a reality and that the prohibition serves the interests of all the parties involved and it also advances the best interests of the child."[85] The Children's Act requires pre-authorisation by the High Court "to ensure sufficient protection of the parties' constitutional rights."[86] The court paradoxically noted "that this does not mean that the best interests of the child may not also be served by a subsequent confirmation of the surrogacy agreement."[87]

The court departed from constitutionally compliant statutory provisions and confirmed the surrogate motherhood agreement in question on the basis of an argument whose logic is unconvincing, if not outright misguided.[88] The court argued that it was not precluded from confirming the agreement post-fertilisation "because neither section 292 nor section 295 of the Children's Act required the court to be satisfied that the surrogate mother had not yet undergone the process of artificial fertilisation and that she was not already pregnant as a result."[89] The provisions requiring for confirmation of the surrogate motherhood agreement before artificial insemination are general and clear and comply with the section 28 of the Constitution by protecting the best interests of the resultant child. Louw is of the view that "the court should have refused confirmation unless it could prove possession of a residuary discretion to confirm the agreement,

[84] Ex Parte MS supra at 3.
[85] Ex Parte MS supra at 38.
[86] Ex Parte MS supra at 49.
[87] Ex Parte MS supra at 39.
[88] Anne Louw 'Ex parte MS 2014 JDR 0102 Case No 48856/2010 (GNP): Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child' (2014) *De Jure* 110 at 113.
[89] *Ex Parte MS (*note 81 above at 43).

notwithstanding the fact that the agreement did not comply with the requirements in terms of the Children's Act."[90]

Surrogacy is multifaceted and attracts dire legal consequences. It is for this reason that the Legislature embarked on extensive research, evaluation and investigation to formulate and implement legislation that protects the best interests of the resultant child and the rights of all the parties involved. Courts should interpret such legislation in a way that does not create legal uncertainty and loopholes that would lead to exploitation in surrogacy agreements, which is the very eventuality that the surrogacy provisions in the Children's Act are aimed at preventing.

The court correctly arrived at a conclusion that the confirmation was in the best interests of the resultant child considering that the surrogate mother had no intention of assuming parental rights and responsibilities of the resultant child. She had "four children of her own and was in no financial position to take care of a fifth one."[91] The formula taken to arrive at this correct conclusion was a miscarriage of justice as the interpretation of the provisions of the Children's Act was incorrect. Louw correctly points out that "this case should not serve as a guideline for future applicants but the judgment should be used as another example of hard cases making bad law."[92] The provisions requiring pre-authorisation or pre-artificial fertilization of surrogate motherhood agreements must be interpreted literally as they are constitutionally compliant.

When seeking pre-authorisation of the surrogacy agreement, the parties to the agreement need to take note of certain provisions. The "surrogate agreement must be in writing and by all the parties thereto,"[93] "the agreement is entered into in the Republic,"[94] "at least one of the commissioning parents must be domiciled in the Republic,"[95] "the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic"[96] and "the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or

[90] Anne Louw (note 88 above at 114).
[91] *Ex Parte MS (*note 81 above at 17).
[92] Anne Louw (note 88 above at 118).
[93] Section 292(1)(a) of the Children's Act
[94] Section 292(1)(b).
[95] Section 292(1)(c).
[96] Section 292(1)(d).

parents are domiciled or habitually resident."[97] The court may, on show of good cause, dispose with the domicile requirement for the surrogate mother and her husband or partner must be domiciled in the Republic at the time of entering into the agreement.[98]

Although foreign or transnational surrogacy agreements fall out of the ambit of this discussion, it is important to note that the intention of the legislature in laying down the domicile requirement was to eliminate the legal possibility of South Africa turning into a "reproductive tourism destination and to eliminate the risk of commissioning parents shopping for preferred characteristics in the resultant child."[99] There is currently no recorded judgment relating to the confirmation of a foreign surrogate motherhood agreement in South Africa. Apart from the question of the extent to which such agreements might be extremely exploitative, the question of parentage also arises. If the agreement is not confirmed by the court due to the domicile requirement, then such an agreement would be invalid in South Africa.[100] Should a case of foreign surrogacy come before our courts, then our courts would draw conclusions from foreign jurisdictions. The courts would have the burden to ensure that children born out of such agreements are not left stateless.

2.4.2 Substantive requirements for the confirmation of surrogate motherhood agreements

The confirmation of the surrogate motherhood agreement by the court is a procedural requirement. That requirement has certain substantive requirements attached to it and the court will confirm a surrogate motherhood agreement "after evaluating the personal circumstances of all the parties concerned and, above all, the best interests of the child that is to be born."[101] This is the constitutional "best interests" of the child principle.

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[97] Section 292(1)(e).
[98] Section 292(2).
[99] M Nothling-Slabbert 'Legal issues relating to the use of surrogate mothers in the practice of assisted conception' (2012) 5 *SABJL* 27 at 31.
[100] Marita Carnelley '*Ex parte WH* 2011 6 SA 514 (GNP): Discussion of genetic links and monetary payments in South African and foreign surrogate mother agreements with particular reference to the English experience' (2012) *De Jure* 179 at 186. Carnelley gives a detailed analysis of foreign/transnational surrogacy agreements.
[101] Section 295(e) of the Children's Act.

The court requires the written consent of the husband, wife or partner of the commissioning parent in order to confirm the surrogate motherhood agreement.[102] This applies *mutatis mutandis* for the surrogate mother.[103] The court has the authority to confirm the surrogate motherhood agreement "where the partner or husband of a surrogate mother who is not the genetic parent of the child unreasonably withholds consent."[104] This is in line with enforcing the right to contractual freedom.

Advertising of commercial surrogacy services by agencies or potential surrogate mothers is prohibited.[105] It is submitted that agencies might be useful in linking the surrogate mothers with the intending parents as South Africa does not have a database for surrogate mothers that intending parents can select surrogate mothers from. If an agency is involved, the court must be furnished with full particulars of the agency. The affidavit by the agency should contain information relating to the business of the agency, whether any form of payment was made to the agency, the exact details of the agency's involvement in the introduction of the surrogate mother, how the agency obtained information regarding the surrogate mother and whether the surrogate mother received any compensation at all from the commissioning parents or the agency.[106]

Before the surrogate motherhood agreement can be confirmed, the courts must be satisfied, based on the facts presented before them, that the agreement was entered into on altruistic terms and that if an agency was used, the agency's involvement does not commercialise the agreement. South African courts have interpreted and applied the provisions relating to the use of surrogacy agencies differently. The case of *Ex parte WH*[107] was decided upon to provide guidance for future applications relating to confirmation of surrogate motherhood agreements and to develop a uniform practice of the law. The court deemed the guidance necessary due to the novelty of the surrogacy provisions in the Children's Act, the growing number of confirmation applications and the plethora of problems associated with such applications.

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[102] Section 293(1).
[103] Section 293(2).
[104] Section 293 (3).
[105] Section 302(2).
[106] Julia Sloth-Nielsen 'Surrogacy, South African style' 2013 *Family Newsletter 19* at 20.
[107] *Ex parte WH*) (note 75 above).

The commissioning parents were a male same-sex couple.[108] The applicants were introduced to the potential surrogate mother with two children from her previous marriage through an agency called Baby-2-Mom. The application was supplemented by consenting affidavits of the surrogate mother and her spouse and reports by a clinical psychologist on the suitability of the commissioning parents and the surrogate mother.

The applicants failed to prove that the agreement was entirely altruistic. The surrogacy agency claimed that the amounts they received were for the egg donation business and were the sole source of income for the owner of the agency.[109] The court noted that surrogacy agencies play a vital role in facilitating the introduction of surrogate mothers to commissioning parents although this role can easily be abused.[110] However the court eagerly accepted the *bona fides* of the agency and this counteracted against the court's concerns about the abuse that can be attached to surrogacy agencies. It remains unclear whether or not surrogacy agents can be classified as persons rendering *bona fide* professional or legal medical services with a view to the confirmation of surrogate motherhood agreements and thus entitled to a reasonable compensation thereof. This classification would be problematic as it would most likely contravene the prohibition against advertising for surrogate agreements with a view to compensation.

In *Ex Parte HPP and Others; Ex Parte DME and Others*[111] the court had to decide on the validity of two surrogate motherhood agreements where a surrogacy agent had been used. The two applications were merged and decided upon simultaneously because they had the same facts and the same surrogacy coordinator (Ms Strydom) had been used. In both applications, the surrogacy coordinator had been paid a sum of R5 000 to facilitate each surrogate motherhood agreement by linking the intending parents with the potential surrogate mothers and to provide 'general support' for the surrogate mother.

The surrogacy coordinator argued that in providing these services, she was exercising her constitutional right to freedom of trade, occupation and profession. In her affidavit, she testified

[108] *Ex Parte WH* (note 75 above at 16).
[109] *Ex Parte WH* (note 75 above at 18).
[110] *Ex parte WH* (note 75 above at 64).
[111] *Ex Parte HPP and Others; Ex Parte DME and Others* 2017 (4) SA 528 (GP).

that she had been a surrogate mother before and had the relevant experience to understand the intricacies of a surrogate motherhood agreement. The court held that surrogacy facilitators open the floodgates of commercialisation of surrogate motherhood agreements thus opening up the parties to abuse.[112] The court held that the potential for abuse in commercial surrogacy outweighs any possible advantages.[113] This is recognised in many countries and consequently legal surrogacy is the exception and not the norm.[114] The court was of the view that commercial surrogacy involved more than mere direct payments to surrogate mothers as there could be third parties involved who could benefit financially from the process in contravention of the law.[115]

The court correctly appreciated that looking for a surrogate is difficult and recommended that a database for surrogate mothers be set up to "make it easier for commissioning parents to find potential surrogate mothers."[116] This would be a welcome development as it would remove the uncertainty surrounding the payments made to surrogacy agencies by removing the need to use surrogacy agencies in the first place. The court held that section 39(2) of the Constitution requires the court to interpret legislation in a manner that would promote the spirit, purports and objectives of the Bill of Rights. The court interpreted the provisions of the Children's Act and concluded that "facilitation of surrogate motherhood agreements is not directly linked to fertilisation of the surrogate mother, cost of pregnancy, and birth of the child and confirmation of the surrogate motherhood agreement through the use of lawyers, psychologists and social workers."[117]

The court evaluated the surrogacy coordinator's argument that in facilitating the surrogate motherhood agreements, she was exercising her right to freedom of trade, occupation and profession. The court held that the right to freedom of trade must be enforced in line with what the prohibition of commercial surrogacy in section 301 of the Children's Act while keeping in mind the limitation provisions contained in section 22 and the limitation clause in section 36 of the Constitution. The limitation of commercial surrogacy is a regulatory framework that exists to

[112] *Ex Parte HPP* supra at 52.
[113] *Ex Parte HPP* supra at 26.
[114] *Ex Parte HPP* supra at 26.
[115] *Ex Parte HPP* supra at 38.
[116] *Ex Parte HPP* supra at 39.
[117] *Ex Parte HPP* supra at 45.

protect the public against unscrupulous people who may abuse vulnerable people.[118] The restriction to the exercise of the right to trade was necessary in order to protect the rights of the public in general by preventing the commercialisation of surrogate motherhood agreements.

After laying down such excellent legal principles on the need to scrutinize the use of surrogacy agencies, the court confirmed the surrogate motherhood agreements. The court applied the test for severability outlined in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[119] which stipulates that the court has to determine what is reasonable not only between the parties but what will also consider public interests at the time of the action. The court opted to be the protector of the right to contractual freedom and severed parts of the surrogate motherhood agreements that were not in line with the law. The court concluded that the surrogacy facilitation agreement was unlawful and unenforceable. The commissioning parents and the surrogate mothers in either application were suitable to carry out their roles.

The Children's Act requires for the surrogate motherhood agreement to "include adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child."[120] Applying the best interests of the child principle to surrogate motherhood agreements can be somewhat problematic as it requires the court to protect the interests of a child who is yet to be conceived and many not be conceived for another 18months. More so, legal personality begins at birth and a fetus, embryo or gamete is not a child,[121] and "a child is a person under the age of 18 years."[122]

The SALRC in the 1993 Report accepted the best interests of the child to be born on the premise that it was necessary to regulate surrogacy. The laws governing surrogacy before the Children's Act were uncertain, inadequate and subject to judiciary interpretation. Uniform, clear and certain

[118] *Ex Parte HPP* supra at 51.
[119] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).
[120] Section 295(d) of the Children's Act.
[121] *Christian Lawyers Association SA v Minister of Health* 1998 4 SA 1113 (T) 1121.
[122] Section 1 of the Children's Act.

legislation was needed to restrict the abuses associated with commercial surrogacy.[123] The best interest principle allows courts to preemptively protect the child to be born instead of waiting for a problem that necessitates the courts intervention to arise.

It is submitted that the consideration of the best interests of the child to be born is a beneficial provision. Since artificial insemination is not effected until the court confirms the surrogate motherhood agreement, the court has the ability to decide whether or not the agreement in question is actually a commercial surrogacy agreement masked as an altruistic agreement. The court can also decide on the suitability of the commissioning parents to be parents and the suitability of the surrogate mother to gestate and subsequently give up the resultant child to the commissioning parents The court can refuse to confirm the surrogate motherhood agreement if it violates the non-commercialisation provisions and is not in the best interests of the child

It has been argued that "a child's best interests cannot be determined in advance or in abstract."[124] The best interests of the child to be born are not determined in a vacuum. They can be best determined by ensuring that the surrogate mother and the commissioning parents are suitable to assume their respective roles and all reasonably foreseeable eventualities have been provided for in the surrogate motherhood agreement.[125] The best interest principle is not to be used as a smokescreen to impose further unnecessary restrictions on people's rights to make decisions about procreation.[126]

1. The 1999 Report under the heading 'Counseling and Screening' proposed that "the commissioning parents and the surrogate mother must be subjected to a strict screening process before the surrogate motherhood agreement is implemented and that continuous counseling should be provided before and after the conclusion of the surrogacy agreements."[127] The Ad Hoc Committee was of the view that "it was of cardinal importance that the parties' social and psychological backgrounds be compatible and to determine their

[123] SALRC Report on Surrogate Motherhood (1993) para 7.2.2.
[124] *P v P* 2007 SA (SCA) 99D-E.
[125] Marita Carnelley & Sheetal Soni 'Surrogate Motherhood Agreements' (2011) *De Rebus* 30 at 33.
[126] *Ex Parte WH* (note 75 above at 72)
[127] SALRC Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood (1999) para 6(1).

suitability for a surrogacy agreement."[128] The Committee recommended that this screening must be "done by a state body or private bodies approved by legislation and that members of this body could include a lawyer, a psychiatrist, a social worker, a psychologist and a minister of religion."[129]

The introduction of an independent multi-disciplinary committee to evaluate the suitability of commissioning parents and surrogate mothers may prove to be financially convenient and surrogacy would become a less costly procedure. However the use of this body could introduce new difficulties in surrogacy regulation and dispense with the use of the pre-authorisation model and replace it with post–birth parental orders. This body would also substitute the judiciary as the gatekeeper of surrogate motherhood agreements.[130] This would defeat the purpose of the requirement for confirmation by the High Court before artificial insemination in order to prevent potential legal hurdles and jeopardise the interests of the parties involved and the best interests of the resultant child.

The Ad Hoc Committee provided a detailed but open–ended checklist of evidence in relation to the suitability of the surrogate mother and the commissioning parents[131] and this checklist has been incorporated into section 295 of the Children's Act. When exercising their discretionary powers to decide on the suitability of the commissioning parents or surrogate mothers, courts should consciously guard that their personal perspectives should not operate to influence any decision.[132]

The Children's Act provides that "the commissioning parent or parents must be competent to enter into the surrogate motherhood agreement, must be suitable persons to accept the parenthood of the child that is to be conceived in all respects and must understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof."[133] Surrogacy in South Africa is a form of assisted reproduction and the court will not confirm surrogate

[128] Ibid para 6(1).
[129] Ibid para 6(3).
[130] Anne Louw (note 74 above at 579).
[131] SALRC Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood (1999) para 6(5) and 6(6).
[132] Ex Parte WH (note 75 above at 69)
[133] Section 295(b)(i)-(iii) of the Children's Act.

motherhood agreements "unless the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible."[134]

The legislative intent of this provision was to exclude surrogacy for convenience and make surrogacy a remedy of last resort. This requirement raises the question of what would happen in the case of a commissioning mother who suffers from a permanent illness that does not cause infertility but renders pregnancy a significant health risk to herself and the prospective child. There is currently no answer in case law. The Children's Act is silent on what the law would be in the case where both the commissioning parents are infertile and unable to provide the gametes. This would mean that such couples would be excluded from making use of surrogacy. In light of this, the genetic link requirement has been deemed harsh and discriminatory.[135] The silence on this important question raises constitutional issues on equality and discrimination based on disability. Currently, the inferred legal position is that, "if none of the commissioning parents are genetically related to the child to be born, this is considered as a commissioned adoption and is prohibited."[136] Jordaan[137] is of the view that "this threshold requirement should not be interpreted narrowly as referring only to a commissioning parent's inherent inability to give birth to a child due to infertility but should be interpreted broadly as referring to a commissioning parent's effective inability in order to allow for the consideration of other medical issues that may render a pregnancy significantly risky for the commissioning parent and the prospective child." [138] This interpretation would allow for disabled couples to also commission surrogate mothers. Such an interpretation would entail that section 295(a) is constitutionally compliant while upholding the right to equal treatment before the law. The provision will not be found to be discriminatory of those with permanent and irreversible conditions unrelated to fertility that may cause them to be unable to have children.

[134] Section 295(a).
[135] Melodie Nothling-Slabbert 'Legal issues relating to the use of surrogate mothers in the practice of assisted reproduction' 2012 SAJBL 27 at 31.
[136] Denise Meyerson 'Surrogacy Agreements' in Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 121 at 123.
[137] Donrich W Jordaan 'Surrogate motherhood in illness that does not cause infertility' (2016) 106 (7) *SAMJ*.
[138] Ibid at 684.

The Children's Act emphasises that the genetic roots of children matter and stresses on the importance of the genetic link between the commissioning parents and the resultant child. This is intricately linked to the requirement in section 295(a) of the Children's Act. Courts will not validate surrogate motherhood agreements "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."[139] The purpose of this requirement is to "prevent surrogacy from being a form of trade"[140] and to prevent the commodification of babies. This requirement has also been justified on the basis that "a genetic link promotes a bond between the parents and the child and this will be in the best interests of the child and this requirement is also aimed at deterring prospective parents from shopping around for donors with the specific aim of creating children with particular characteristics or traits."[141]

The court in *Ex Parte WH* inadequately attempted to consider what the approach would be where the genetic material used is not one of the commissioning parents'. Such agreements would obviously be unlawful and in contravention of section 294 of the Children's Act which calls for a genetic link between the commissioning parent and the resultant child. Carnelley notes that "the lack of clarity on this very important point is unsatisfactory and regrettable. At best it is an unfortunate omission in the judgment itself; at worst a contravention of legislation."[142] There is an argument to the effect that this genetic link requirement is unconstitutional and families should not be valued because of the physical attributes envisaged by the genetic link but should be based on the intention of the parties to become parents.[143] This is the intent-based approach to surrogacy.

[139] Section 294 of the Children's Act.
[140] Caroline Nicholson 'When moral outrage determines a legal response: Surrogacy as labour' 2013 *SAJHR* 496 at 500.
[141] Anne Louw 'Chapter 19: Surrogate motherhood' in Davel CJ and Skelton AM (eds) *Commentary on the Children's Act 38 of 2005* (2012).
[142] Marita Carnelley (note 100 above at 183).
[143] Godfrey Kalisto Kangaude (ed) Legal Grounds III: reproductive and Sexual Rights in Sub-Saharan African Courts (2017) 110.

In *AB and Another v Minister of Social Development 2016*[144] the applicant was a single woman who could neither biologically give birth to a child nor donate viable gamete. She challenged the constitutional validity of section 294 of the Children's Act on the grounds that the genetic link requirement violated her right to equality, dignity, reproductive healthcare, autonomy and privacy. She argued that family should not be defined with reference to genetic links between parents and children. The second applicant who was representing a class of persons whose rights are infringed by the application of section 294 of the Children's Act argued that this limitation was irrational and unjustifiable in an open and democratic society. The respondent argued that the genetic link requirement was for rational purposes including the best interests of the child, preventing the commodification and trafficking of children, preventing commercial surrogacy, preventing the exploitation of surrogate mothers and preventing the circumvention of adoption law. The court held that the genetic link requirement was inconsistent with the constitutional provisions as it violated the rights to equality, dignity, bodily and psychological integrity and to right to health care for parents who are unable to contribute a gamete or gametes in the surrogacy agreement.

This decision was overturned by the Constitutional Court in *AB and Another v Minister of Social Development 2017*[145] . The court noted that "referring to Section 294 as the genetic link requirement is a misnomer because the Section does not merely require a genetic link, it requires a gamete from at least one of the commissioning parents."[146] The court held that "the regulatory scheme in Chapter 19 must be considered in the context of the Children's Act as a whole."[147] The requirement for a genetic link serves a rational purpose as chosen by the Legislature "of creating a bond between the child and the commissioning parents. The creation of this bond is designed to protect the interests of the child to be born so that the child has a genetic link with the commissioning parents."[148] The court was of the view that roots matter and stated that "the clarity of origin is important for self-identity and self-respect of the child."[149]

[144] *AB and Another v Minister of Social Development* 2016 (2) SA 27 (GP).
[145] *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC).
[146] *AB and Another v Minister of Social Development* supra at 46.
[147] *AB and Another v Minister of Social Development* supra at 279
[148] *AB and Another v Minister of Social Development* supra at 287.
[149] *AB and Another v Minister of Social Development* supra at 294.

The purpose of surrogacy is to assist infertile couples in their efforts to have their own children, and not just to have genetic children of their own, while safeguarding the rights of the surrogate mother and the best interests of the resultant child. It is therefore submitted that the genetic link requirement should be dispensed with and replaced with the intent-based approach to surrogacy. If there is medical evidence that the intending parents are unable to give birth to a child due to a permanent or irreversible condition and that neither of them can provide their own gamete for artificial insemination, the intention of such individuals to be parents should be taken into account and they should be allowed to use surrogacy as a mean of assisted reproduction.

There is no guarantee that parents who are genetically related to their babies will make good parents. Parents who can procreate without reproductive assistance do not always make for good parents either. Meyerson[150] is of the view that "parents who commission a surrogacy are desperate to conceive a child and are no more likely to abuse or exploit that child than those who can conceive naturally." A genetic link between the commissioning parents and the resultant child does not guarantee that the best interests of the child will be safeguarded at all times.[151] Excluding parents who cannot provide their own genetic material for artificial insemination and asking them to utilise adoption is unjust.

Roots do matter as they form one's identity. However, it has also been suggested that "the absence of a genetic link may provide a better guarantee of the child's welfare."[152] The main beneficiaries of a surrogate motherhood agreement are the commissioning parents. The stringent requirement of a genetic link does not assist individuals who cannot produce their own gametes and they are rendered helpless. There are other rights at play in surrogate motherhood agreements apart from the best interests of the child. In *S v M*[153] the court held that "although the best interests of the child are vitally important, they are not the only consideration."[154]

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[150] Denise Meyerson 'Surrogacy agreements' 1994 Acta Juridica 121 at 127.
[151] Carmel van Niekerk 'Section 294 of the Children's Act: Do roots really matter?' (2015) 18 (2) *PER/PELJ* 397 at 418.
[152] Robin Fretwell Wilson 'Uncovering the rationale for requiring infertility in surrogacy agreements' (2003) 29 *AJLM* 337 at 348.
[153] *S v M 2007* 2 SACR 539 (CC).
[154] *S v M 2007* supra at 107.

It is therefore submitted that the genetic link requirement is a necessarily stringent requirement for the regulation of surrogacy. Admittedly, section 295(a) which requires that the commissioning parents must be unable to give birth to a child is broad, adequate and sufficient to cover the goals intended by section 294. Section 295(a) can also prevent abuse and exploitation of women, human trafficking and the sale of babies. Dispensing with this requirement will turn surrogate motherhood agreements entered into by commissioning parents that have no genetic link with the resultant children into commissioned adoptions because adoption and surrogacy are very different processes. In adoption, the issue is how best the adoptive parents will care for the adoptive child now that the birth family cannot versus the issue in surrogacy - which is how best the intending parents will bring a child they desire into the world and care for that child.[155] Thus the notion that adoption is the alternative for surrogacy or vice versa is a huge misconception.[156]

Courts always attempt to ensure that they do not make it unnecessarily difficult for intending parents to become parents through surrogacy when assessing the suitability of commissioning parents. In *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements*[157] the court held that "the court as the upper guardian of the children expects to know in detail who the commissioning parents are, their financial position, their support system, their living conditions and how the child will be taken care of."[158] It is in the best interests of the child to be born that the court is furnished with full details regarding the commissioning parents in order to consider an application for the confirmation of a surrogate motherhood agreement.[159]

The issue of the suitability of commissioning parents was discussed in *Ex Parte CJD*[160] in an application brought forward by a male same–sex couple. The court had to consider how the fact that the parties do not live together and the fact that one of the partners did not want his sexual orientation to be made public would impact on the interests of the unborn child.[161] The psychologist report also raised a point of concern where one of the partners had averred that "he

[155] Robin Fretwell Wilson (note 142 above at 342).
[156] Carmel van Niekerk (note 141 above at 415).
[157] *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements* 2011 (6) SA 22 GSJ.
[158] *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements* supra at 17.
[159] *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements* supra at 24.
[160] *Ex Parte CJD and Others* 2018 (3) SA 197 (GP).
[161] *Ex Parte CJD* supra at 4

was not really given a choice about being a parent" although he was now "totally on board with the idea".[162]

The court was concerned that if one of the intending parents wanted to be discreet about his sexuality, this would mean that he would also have to be discreet about the fact that he has a child born from surrogacy. It was found on the facts to be difficult to comprehend how one could be discreet about being a parent and the impact that would have on the best interests of the resultant child. The application had failed to deal with what the effects on the child would be where one of the parents needed to hide the very essence of who he is. The court was not questioning the intending parents' love for each other but as the gatekeeper and protector of children's rights and the upper guardian of the children, the court had to consider if and how the applicants would function as a family unit and whether they were comfortable with society regarding them as such and how the state of them not living together would impact on the interests of the child and them functioning together as a family unit.[163]

The application was dismissed because the court was not satisfied that the commissioning parents would provide a suitable family home that would be in the best interests of the resultant child. The court held that the rights of children and their interests must be placed first, even in circumstances where the rights of the prospective parents may be compromised.[164] The court emphasised the need for applicants to act with the utmost good faith in surrogacy applications and to set out all relevant information in the affidavit itself as the interests of children are at stake.[165]The court reiterated the position and vulnerability of children as set out in *Ex Parte WH*:

> "Children occupy a special place in the social, cultural and legal arrangements of most societies. That this is so is understandable in recognition of both the vulnerability of children and the almost instinctive need to advance their well-being and ensure their protection, as well as the compelling human and social imperative to pursue and further their best interests as they are set out in the path of developing their full potential and taking their rightful place as full and responsible citizens of society. The preamble to the United

[162] *Ex Parte CJD supra at* 5.
[163] *Ex Parte CJD* supra at 9.
[164] *Ex Parte CJD* supra at 10.
[165] *Ex Parte CJD* supra at 11.

> Nations convention on the Rights of the Child provides that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."[166]

The Children's Act states that "the surrogate mother must be a competent and suitable person to act as a surrogate mother and must understand and accept the legal consequences of the agreement and this Act and her rights and obligations in terms thereof."[167] Courts have evaluated the suitability of the surrogate mother and have arrived at differing conclusions. The word suitable has no legal construct, it is a subjective determination of appropriateness. The Children's Act lists some of the factors that can assist the court in determining the suitability of the surrogate mother and that list is not extensive. Courts have to be careful to not interpret the word suitability in a way that could potentially discriminate against some surrogate mothers to the extent that it violates their rights to equal treatment before the law and to the detriment of intending parents.

To prevent the commercialisation of surrogacy agreements, the legislation requires that "the surrogate mother must enter the agreement for altruistic reasons and not for commercial reasons"[168] and the court must satisfy itself that "the surrogate mother is not using surrogacy as a source of income."[169] The recommendation by the SALRC in the 1993 Report that "the surrogate mother must have a living child of her own"[170] through "a documented history of at least one pregnancy and viable delivery"[171] was incorporated into the Children's Act.

In *Ex Parte WH* the court held that in determining the suitability of the surrogate mother the court must take the following into account "The surrogate mother's background as well as her financial position should be investigated and set out in the affidavit. Furthermore a comprehensive report by a psychologist is essential to assess the suitability of the surrogate mother. This should deal in particular with her background, psychological profile and the effect that the surrogacy and the giving up of the baby will have on her. Full medical reports should also be obtained regarding her

[166] Ex parte WH (note 75 above on 517 para 4)
[167] Section 295(c)(i)-(iii).
[168] Section 295(c)(v).
[169] Section 295(c)(iv).
[170] Section 295(c)(vii).
[171] Section 295(c)(vi).

physical condition to indicate whether surrogacy poses any dangers for her and/or the child. In our view the medical report should deal with the HIV status of the mother, as well as any disease that could be transferred from her to the child in order to protect the child and to allow the court to exercise its discretion properly in confirming the agreement."[172] Therefore, the role of the court is to scrutinize the surrogate motherhood agreement for all factors which would compromise the health of the child to be born, jeopardize the surrogate agreement through mal-performance or breach, including factors which would cast the lawfulness or consent to the surrogate agreement in doubt and prevent the potential commercial exploitation of the commissioning parents and the surrogate mother in equal measure.

In *Ex parte KAF and Others 2017*[173], Madiba J refused to confirm the surrogate motherhood application in question because the surrogate mother was unsuitable to be a surrogate. The surrogate mother had experienced a difficult life as a teenager and the court was of the view that she had a limited perspective of life and did not fully understand and appreciate the consequences of her decision. There had been an insufficient disclosure of the surrogate mother's financial position and the surrogate mother and her husband were in debt and the court was of the view that she was using the surrogate motherhood agreement as a source of income. The court was concerned that "the surrogate mother would not have the ability to deal with the psychological consequences that may follow upon the birth of the child, the handing over of the child to the commissioning parents and the termination of the surrogacy financial allowance." [174] The psychology report on the suitability of the surrogate mother had been prepared by the surrogacy agency that had linked the surrogate mother to the intending parents. The court felt that this report was impartial and unsupported by the disclosed facts.

In *Ex Parte WH*[175] it was found on the facts that the surrogate mother had experienced an "ostensibly difficult childhood and was far less privileged than the commissioning parents." [176] Despite this, the court still confirmed the surrogate motherhood agreement. This should have been

[172] *Ex Parte WH* (note 75 above at 67).
[173] *Ex Parte KAF and Others* (14341/17) [2017] ZAGPJHC 227.
[174] *Ex Parte KAF (2017)* supra at 21.
[175] *Ex Parte WH* (note 75 above at 16).
[176] *Ex Parte WH* (note 75 above at 21).

a factor to not confirm the surrogate motherhood agreement on the basis that such a confirmation would be a court sanctioned exploitation of the vulnerability of the surrogate mother.

The parties in *Ex parte KAF 2017* made a fresh application for the confirmation of the surrogate motherhood agreement in *Ex Parte KAF and Others 2019.*[177] Siwendu J noted that the requirements for the suitability of the surrogate mother are both qualitative and quantitative. The assessment for the suitability of the surrogate mother is an objective assessment that must be made in the subjective circumstances of the applicants and this will be assessed on a case by case basis.[178] The court outlined some factors that should be taken into account when ascertaining the suitability of the surrogate mother. The court held that "the personal clinical assessment of the prospective surrogate mother and her surrounding circumstances must be supported by other collateral information. This information must include information on whether the surrogate mother is physically and medically fit to carry the gamete and in turn the child to be born to full term, has an agreement with the commissioning parents regarding selective reduction and the risks pertaining thereto, is of sound mind and good mental health, or suffers from any personality disorder, severe psychiatric illness, or has a history of self-harming behavior, does not have a history of substance abuse and addiction."[179]

The court also noted that "the emotional welfare, emotional needs and resources available to the surrogate mother must be considered to determine the likely effects on the child to be born as a result of the agreement including whether the surrounding relationships are conducive for the fulfillment of the surrogacy agreement or if they may lead to the termination of the agreement after artificial insemination." [180] The cultural beliefs of the surrogate mother, the attitude of her spouse or community on surrogate motherhood agreements and any history of depression the surrogate mother has, count in the consideration of the emotional welfare of the surrogate mother.

[177] *Ex Parte KAF and Others* 2019 (2) SA 510 (GJ).
[178] *Ex Parte KAF (2019)* supra at 26.
[179] *Ex Parte KAF (2019)* supra at 27.
[180] *Ex Parte KAF (2019)* supra at 28.

The court also held that the surrogate mother "must understand the nature of the surrogacy relationship, and she must understand the nature of surrogate motherhood, that the child to be born will legally not be her child, but the child of the commissioning parents. To satisfy the court that the surrogate mother understands the effects of the surrogate agreement on the parentage of the child, there must be a report on the psycho-social support structure of the surrogate mother, the understanding and influence of the spouse, partner, relatives or extended family in the decision, the understanding that the child to be born will belong to the commissioning parents, how handing the baby over to the commissioning parents will affect her, that the psycho-social support structure is not likely to result in the termination of the agreement after fertilization or in a breach and whether the surrogate mother is emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension."[181]

2.4.3 Effects of the confirmation of the surrogate motherhood agreement

The court will confirm a surrogate motherhood agreement if it subscribes with all the formal and substantive requirements. It is in the best interest of the resultant child that his or her identity or facts relating to his or her identity be not revealed[182] and that "the identity of the parties to the court proceedings be not published without the written consent of the parties concerned."[183]

If a surrogate motherhood agreement complies with all the procedural and substantive requirements set out in the Children's Act and is confirmed by the High Court, "the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth."[184] This allows for a cooling off period recommended in the 1993 Report and the 1999 Report. The sixty day period after the birth of the child in which the genetic surrogate mother is allowed to terminate the surrogate motherhood[185] implies that the surrogate mother is allowed a 60 day cooling off period. The surrogate mother or her husband,

[181] *Ex Parte KAF (2019)* supra at 29
[182] Section 302(2) of the Children's Act.
[183] Section 302(1).
[184] Section 297(1)(b).
[185] Section 298(1).

partner or relatives have "no rights of parenthood or care of the child"[186] or contact with the child unless provided for in the agreement between the parties.[187] The resultant child has "no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives."[188]

The commissioning parents are entitled to paid maternity leave. In *MIA v State Information Technology Agency*[189] a judgment hailed for being a small step in the direction of paternity leave, the court held that in applying maternity leave policies, the employer must recognise the status of parties to a civil union and recognise the rights of commissioning parents in a surrogacy agreement including male parents in same–sex unions. The right to maternity leave in the Basic Conditions of Employment Act[190] is a right that is "not solely linked to the welfare and health of the child's mother but which must be interpreted to take into account the best interests of the child."[191] It is envisioned that the surrogate mother will hand over the resultant child to the commissioning parents at birth. The newborn will need a parent. The employer's refusal to grant the applicant paid maternity leave on the grounds that he was not the biological mother of his child was found to constitute unfair discrimination on the grounds of gender and sexual orientation. [192]

The major problem with surrogate motherhood agreements apart from commercialisation and exploitation is the ensuing disagreements on the parentage or legal status of the resultant child. The surrogate mother may decide after artificial insemination has been effected, that she no longer wants to give up the child she has gestated. In this case, the commissioning parents' hopes of being parents are crushed. The commissioning parents may decide that they no longer want to assume any parental and legal responsibilities in relation to the resultant child. In such instances, the surrogate mother may be left in the care of a child she had no intention of raising.

[186] Section 297(1)(c).
[187] Section 297(1)(d).
[188] Section 297(1)(f).
[189] *MIA v State Information Technology Agency* 2015 (6) SA 250 (LC).
[190] Section 25 of the Basic Conditions of Employment Act 75 of 1997.
[191] *MIA v State Information Technology Agency* (note 189 above at 13).
[192] *MIA v State Information Technology Agency* (note 189 above at 20).

Section 297 of the Children's Act seeks to protect all parties by stipulating the effect of surrogate motherhood agreements on the status of the resultant child. Any child born of a surrogate in accordance with the surrogacy agreement is "for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned."[193] However, "any surrogate motherhood agreement that does not comply with the provisions of the Children's Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the surrogate mother."[194]

Courts are reluctant to decide on the validity or severability of defective surrogate motherhood agreements.[195] If the Children's Act is followed to the letter, in some instances this would mean that the surrogate mother has to assume the rights and responsibility of a child she had no intention of giving up. The court can adopt one of the four approaches to the determination of parentage. The first approach is the intent-based approach as applied in J*ohnson v Calvert*[196] where the court was swayed by the commissioning parents' intention to be parents. The court held that when one woman is genetically the mother of a child and different woman is its gestational mother, the issue of who is the natural mother at law is resolved by inquiring into the parties' intentions as manifested in the surrogacy agreement. The woman who intended to procreate, bring about the birth and raise the child as her own is the natural mother. The test is to determine the intent of the parties at the time of entering into the contract.

The second approach is the gestational birth mother preference guideline as stipulated in section 297(2) of the Children's Act and applied in *In re Baby M.*[197] This approach is a partial view to surrogacy that focuses on the gestational link between the mother and the resultant child. In this case, when the surrogate mother in a commercial surrogacy agreement decided not to give up the resultant child to the commissioning parents, the court invalidated the contract but still awarded the commissioning father custody of the child because this was in the best interests of the child.

[193] Section 297(1)(a) of the Children' Act.
[194] Section 297(2).
[195] *Ex Parte KAF and Others* 2019 (2) SA 510 (GJ) - The court did not confirm the application and postponed the matter sine die.
[196] J*ohnson v Calver*t 852 P 2d 766 (1993).
[197] *In re Baby M* 109 NJ 396 (1988).

The third approach is similar to the gestational birth mother preference and is referred to as the genetic-contribution theory outlined in *Belsito v Clark*[198] where the court was of the view that the biological link between the mother and the child is the most important and definitive factor in deciding parentage. The approach is formulated on the basis that the gestating surrogate mother plays a major significant role than the commissioning mother regardless of whether or not she is genetically related to the child. This approach is even strengthened in cases where the surrogate mother is also the genetic mother of the resultant child.

The fourth and most popular approach is the best interests of the child principle. In South Africa, it is based on section 28(2) of the Constitution. The parentage of the child is not determined by the intention of the commissioning parents or the link between the resultant child and the surrogate mother but by ascertaining the best interests of the child. In *Chodree v Vally*[199] the court held that parental rights will only be enforced where it is in the best interests of the child. The principle has no fixed content and is open to judicial interpretation. It is even more difficult to pin point what the best interests of the child are in a multi-cultural and diverse society like South Africa.

2.4.4 Termination of the surrogate motherhood agreement

Currently, there is no recorded case in South African law on the termination of the surrogate motherhood agreements. The law is very confusing when it comes to the termination of surrogate motherhood agreements. The surrogacy agreement "may not be terminated after the artificial fertilisation of the surrogate mother has taken place if it complies will all procedural and substantive requirements."[200] This provision is in direct conflict with the provisions relating to termination of the surrogate motherhood agreements. The Children's Act also provides that "a surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court."[201]

[198] *Belsito v Clark* 644 NE 2d 760 (1994).
[199] *Chodree v Vally* 1996 (2) SA 28 (WLD).
[200] Section 297(1)(e) of the Children's Act.
[201] Section 298(1).

The court must then terminate the confirmation of the surrogate motherhood agreement, after "notifying the parties to the agreement and conducting a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order which is in the best interests of the child."[202] The surrogate mother incurs "no liability to the commissioning parents for exercising her rights to terminate the agreement except for compensation for any permitted payments made by the commissioning parents."[203]

The legislation opted to maintain the differences between partial and full surrogacy. This makes it unclear what the legal position is should the surrogate mother who is not genetically related to the resultant child decide to terminate the surrogate motherhood agreement. A literal interpretation of the legislation would lead to the conclusion that "once the surrogate motherhood agreement is confirmed, the surrogate mother who is not genetically related to the child cannot terminate the agreement and refuse to hand over the resultant child to the commissioning parents."[204]

The law becomes even more complicated when interpreting section 299 of the Children's Act on the effects of termination of the surrogate motherhood agreement. The Act provides that "where the agreement is terminated after the child is born, any parental rights established in section 297 are terminated and vested in the surrogate mother, her husband or partner, if any, or if none, the commissioning father."[205] The same is applicable if the agreement is terminated before the child is born, "the child becomes the child of the surrogate mother, her husband or partner, if any, or if none, the commissioning father, from the moment of the child's birth."[206] If the surrogate mother terminates the agreement, "she and her husband or partner, if any, or if none, the commissioning father, are obliged to accept the obligations and responsibilities of parenthood."[207] The commissioning parents have no rights of parenthood and can only obtain such rights through adoption[208] and the resultant child has "no claim for maintenance or of succession against the

[202] Section 298(2).
[203] Section 298(3).
[204] Anne Louw (note 74 above at 575).
[205] Section 299(a) of the Children's Act.
[206] Section 299(b).
[207] Section 299(c).
[208] Section 299(d).

commissioning parents or any of their relatives".[209] It can be inferred that the commissioning parents cannot terminate the surrogate motherhood agreement after artificial insemination because this would leave the surrogate mother responsible for a child she had no intention of raising.

The Children's Act recognises women's rights to reproductive autonomy by providing that the surrogate motherhood agreement may be terminated by termination of pregnancy. The surrogate is required to "inform the commissioning parents of her decision prior to the termination and consult with the commissioning parents before the termination is carried out"[210] The surrogate incurs "no liability to the commissioning parents for exercising her right to terminate a pregnancy except for compensation for any payments made by the commissioning parents in terms of section 301 where the decision to terminate is taken for any reason other than on medical grounds."[211]

The preamble of the Choice on Termination of Pregnancy Act notes that the constitution protects the rights of persons to make decisions concerning reproduction and to security in and control over their bodies. This Act recognises that the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy as well as sexuality education and counseling programs and services. Asking a surrogate mother to continue gestating for the commissioning parents against her will amounts to a forced pregnancy.

On paper, the legislation did a fine job of protecting the surrogate mother from any exploitation in altruistic surrogacy agreements. There is limited protection of the rights of the commissioning parents who can also be open to abuse. The surrogate mother effectively controls the outcome of the surrogate motherhood agreement and the commissioning parents have to hope that the surrogate mother follows through on the agreement. Given the statistics of abuse of surrogates in commercial surrogacy agreements, the legislature did an excellent job in trying to balance the bargaining powers of the commissioning parents and surrogates by prohibiting commercial surrogacy agreements.

[209] Section 299(e).
[210] Section 300(2).
[211] Section 300(3).

2.5 Conclusion

Surrogacy is not a foreign concept in South Africa as it has always been practiced in African customary tradition through sororate unions. The exclusion of sororate unions in the RCMA and the Children's Act, thereby leaving the realm of customary surrogate motherhood agreements unregulated can be said to be unconstitutional. This exclusion fails to recognise that surrogate mothers in African customary surrogate motherhood agreements (sororate unions) are also entitled to the protection afforded to other surrogate mothers by the Children's Act. This exclusion is unconstitutional as it amounts to discrimination on the basis of belief and culture. That noteworthy discussion is not the focus of this dissertation except to the extent that the current surrogacy provisions must be developed to include and regulate customary surrogacy agreements.

It is a possible reality that commercial surrogacy is happening in South Africa without legislative intervention and that commercial agreements are being masked as altruistic agreements before our courts. Unfortunately such illegal agreements have managed to escape legal attention and may only attract legal scrutiny when a dispute arises between the parties. In *Ex Parte WH*, the court acknowledged that commercial surrogacy agreements can be camouflaged as altruistic agreements[212] and discouraged the payment of generic payments without specificity as such payments may lead to commercialisation of surrogate motherhood agreements.[213] Chapter 19 of the Children's Act for all its inadequacies, is a welcome development in the prohibition of commercial surrogacy because its interpretation and application gives a firsthand glimpse into the difficulties of regulating surrogacy and even worse, commercial surrogacy.

It is appreciated that it is difficult to balance the rights of all parties concerned in surrogacy agreements and our courts are doing the best they can considering the novelty of the realm of surrogacy. Chapter 19 of the Children's Act attempts to balance the rights of the commissioning parents, the surrogate and the resultant child. The Children's Act recognises the right to procreation, right to equality, right to reproductive autonomy, right to freedom and security of the person and

[212] *Ex parte WH* (note 75 above at 64).
[213] Ibid at 29.

right to dignity and protects these rights by permitting altruistic surrogacy agreements. The legislature, through all the examinations, discussions and evaluations it conducted prior to the promulgation of the Children's Act always appreciated that there are conflicting and competing rights at play in commercial surrogacy. For all its inadequacies, Chapter 19 of the Children's Act is constitutionally compliant. It manages to strike a harmonious balance between the rights being violated by the prohibition of commercial surrogacy and the rights being protected by the prohibition of commercial surrogacy. The purpose of this harmonious balance will be examined through a rights–based analysis in the next chapter

The legal uncertainty and lack of uniformity in the application of surrogacy regulating provisions is further exacerbated by the lack of surrogacy specific penalties to ensure the enforcement of the prohibition of commercial surrogacy. It is clear from the discussion outlines above on sororate unions, the history of the promulgation of surrogacy in South Africa and the current regulation of surrogacy that the prohibition of commercial surrogacy serves to protect certain constitutionally protected interests.

It would be imprudent and unwise for the South African legislation to legalise or permit commercial surrogacy when the current legal climate is yet to grasp and uniformly apply the provisions regulating commercial surrogacy.

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CHAPTER 3

APPLICATION OF HUMAN RIGHTS

3.1 Introduction

The debate on commercial surrogacy is an analysis of human, moral, legal and ethical issues and it usually boils down to a rights–based debate. This chapter considers the human rights arguments that form the basis of supporting and opposing arguments on commercial surrogacy. The meaning, extent and application of the rights pertaining to commercial surrogacy as they relate to the surrogate, the child and the commissioning parents are discussed. An analysis of these rights provides a solid basis for the argument that commercial surrogacy amounts to a gross violation of human rights and its continued prohibition is warranted.

Commercial surrogacy is prohibited in South Africa.[1] The contravention of this prohibition is a prosecutable offence. Section 305(1)(a) of the Children's Act provides that a person will be guilty of an offence if that person commits an act in contravention with the provisions set out in sections 301,302 and 303 of the Children's Act. These are the sections which establish the crime of commercial surrogacy. If a person is found guilty of contravening the prohibitions against commercial surrogacy, sections 305(6) and 305(7) of the Children's Act provide that "such person will be liable to a fine of imprisonment for a period not exceeding ten years or to both a fine and imprisonment."[2] Such person may also be liable to "a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment if convicted of the offence of commercial surrogacy more than once."[3] Section 276 of the Criminal Procedure Act also provides that if a person is convicted of contravening any other law (the Children's Act included), the Criminal Procedure Act or the common law, that person may be sentenced to imprisonment.[4] This Chapter will evaluate why the interests being protected by the prohibition of commercial surrogacy in South Africa are worthy of protection from a rights-based perspective and why commercial surrogacy is a prosecutable offence/crime and why it should remain a crime.

[1] Section 301 of the Children's Act 38 of 2005.
[2] Section 305(6).
[3] Section 305(7).
[4] Section 276 of the Criminal Procedure Act 51 0f 1977.

It is undeniable that the further development of artificial reproductive techniques and the establishment of real businesses through commercial surrogacy has opened the topic of commercial surrogacy to more criticism and widespread debate. In as much as the conversation on commercial surrogacy is widespread, the acceptance of the practice has been met with legal skepticism in various jurisdictions. As a result, only Armenia, Georgia, Israel, Kazakhstan, Russia, Ukraine and only 8 states in the USA (Illinois, Arkansas, Maryland, Washington DC, Oregon, New Hampshire, New Jersey and California) out of 195 countries in the world expressly permit and regulate commercial surrogacy. The rest of the world either prohibits the practice or the practice remains unregulated, therefore commercial surrogacy is the exception and not the norm. In some of these states, the failure to regulate the practice or the explicit prohibition has led to the importation of the phenomenon through surrogacy tourism or international surrogacy. Human rights violations arise from international surrogacy agreements, especially the exploitation of poor women by wealthy western citizens for the benefit of various intermediaries such as lawyers, clinics, agencies and brokers.

3.2 Legal, moral and ethical concerns on commercial surrogacy

Legal, moral and ethical debates about the harm caused by commercial surrogacy to women, family structures and children are usually swept away under the guise that commercial surrogacy is a medical feat in addressing the problems caused by infertility or that commercial surrogacy sees to the emancipation of women and financial freedom for women. Arguments in favour of the prohibition or continued prohibition of commercial surrogacy in South Africa are viewed as moral outrages determining legal responses. Such that instead of evaluating the dire social implications and consequences and how permitting the practice may incubate human trafficking in the hubris of this medical feat or its supposed economic freedom for women, the debate becomes one about morality and paternalism. The argument is that it is moralistic to argue that one woman cannot carry a child for another woman especially in circumstances where such an arrangement is further complicated by the exchange of payment.[5]

Objections to commercial surrogacy based on ethical grounds are often brushed aside as uninformed, moralistic, paternalistic,[6] harmful to helpless infertile intending parents who would be able to achieve

[5] Caroline Nicholson ‘When moral outrage determines a legal response: Surrogacy as labour’ (2013) 29(3) *South African Journal on Human Rights* 496 at 496.

[6] Paternalism is when the legal system overrides the autonomy and right of self-determination of a person for the good of that

their dreams of being parents and detrimental to women's abilities and rights to gain economic freedom from the use of their bodies. Liberalism tends to treat all scrutiny that borders on moral judgment as moralism and gross invasion of privacy. The attempt to achieve a balance between the rights and interests of all the parties to a commercial surrogacy agreement is a delicate one.[7] The inquiry into commercial surrogacy is necessary in the South African age of rights-based arguments, bearing in mind the fact that some rights tend to support claims by some individuals that they have been wronged by a certain practice or the prohibition thereof does not automatically vindicate the practice, especially where there are competing rights in question.

3.3.1 Arguments in favour of commercial surrogacy

Proponents of commercial surrogacy have argued that, the current prohibition on commercial surrogacy is unconstitutional because it violates the right to privacy, right to freedom of trade, occupation and profession, right to equality, right to dignity, right to freedom and security of the person, and the right to reproductive autonomy of the surrogate mother and the commissioning parents. Proponents of commercial surrogacy focus on the autonomy and agency of the surrogate mother and the intending parents' right to a family. Little emphasis is placed on the resultant child who is actually at the centre of the commercial surrogacy agreements. Meyerson[8] is of the view that the prohibition of commercial surrogacy is an unjustifiable limitation on the surrogate mother's constitutional rights to freedom and amounts to an enforced moralistic belief that poses no real harm to children.[9] Further arguments that flow from a rights-based approach in support of commercial surrogacy are that commercial surrogacy recognizes women's rights to reproductive autonomy. It gives women an option to hire out their reproductive roles if need be and gives surrogate mothers a chance to make a living through their reproductive capabilities hence commercial surrogacy falls under the realm of section 22 of the Constitution- Freedom of Trade, Occupation and Profession.

Proponents of commercial surrogacy also argue that commercial surrogacy affords couples a chance to have their own biological children and is a far better alternative to other forms of infertility treatment or adoption. It has also been argued that commercial surrogacy is a fast growing industry that is best

person. Paternalism contradicts the ethical principle of autonomy.

[7] *Ex Parte KAF and Others* 2019 (2) SA 510 (GJ) at 7.

[8] Denise Meyerson 'Surrogacy Agreements' in Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 121.

[9] Denise Meyerson (note 8 above at 143).

regulated in law and failure to regulate it will lead to the emergence of an unregulated black market. Proponents of commercial surrogacy argue that if commercial surrogacy is regulated properly, if the practice is routinized, if screening of the surrogate mothers and commissioning parents is done properly, if parties are better made to understand their decisions for all intents and purposes and if the prices are fixed using a uniform scale, then in the end, even the commercial surrogacy agencies might promote human dignity and the commercial surrogacy agreements might prove to be more beneficial to all the parties concerned.[10]

3.2.2 Arguments against commercial surrogacy

Opponents of commercial surrogacy also rely on human rights as basis for their legal, ethical and moral concerns arguments against the legalisation of commercial surrogacy. They argue that commercial surrogacy is unconstitutional as it violates the right to life, dignity, freedom and security of the person not to be treated in a cruel, inhuman or degrading way; the right to be free from slavery, servitude or forced labour; the right to citizenship and nationality as it may apply to the resultant child; the right to a dignified trade, profession or occupation and the rights of children to be protected from maltreatment, neglect, abuse or degradation. Opponents also argue that any conflicting and competing rights that may be used in support of commercial surrogacy can be reasonably and justifiably limited by section 36 of the Constitution in an open and democratic society based on human dignity, equality and freedom.

Opponents of commercial surrogacy are more focused on the rights of the resultant child and those of the surrogate mother and little attention is paid to the rights of the commissioning parents. Van der Akker[11] is of the view that commercial surrogacy focuses on the needs of commissioning parents and not on the needs of the surrogate mother and not at all on the needs of the children resulting from these arrangements.[12] This gives rise to two mainstream objections to commercial surrogacy. There is the baby selling objection which focuses on the transfer of the resultant child from the surrogate mother to the commissioning parents and the womb renting objection which focuses on the use of the surrogate mother's gestational services. Opponents of commercial surrogacy are of the view that the need to procreate should not conceal the fact that commercial surrogacy raises crucial human rights issues that

[10] June Carbon & Jody Lynee Madeira 'The role of agency: Compensated surrogacy and the institutionalization of assisted reproduction practices' (2015) 90(7) Washington Law Review Journal 7 at 8.
[11] Olga B A van der Akker *Surrogate Motherhood Families* (2017).
[12] Ibid at 31.

must be addressed before states simply give the green light to such a practice.[13] Commodification of women and children and rampant exploitation are major areas of concern in commercial surrogacy agreements. These concerns form the basis for the argument that commercial surrogacy amounts to human trafficking. Commercial surrogacy involves the selling and purchasing of a human being and this is not only immoral but it is against basic human rights.[14]

Further arguments that flow from a rights-based approach against commercial surrogacy are that commercial surrogacy is a form of alienated labour and thus it is demeaning and exploitative. The 1993 Law Commission Report viewed commercial surrogacy as a form of slavery.[15] The surrogate mothers are seen more as walking incubators, baby–making machines or wombs-for-rent. It is most likely that women in dire economic situations might be forced, through poverty, to offer themselves as surrogate mothers. Therefore commercial surrogacy amounts to exploitation of surrogate mothers. Commercial surrogacy has been denounced as "a form of medicalisation, commodification and technological colonisation of the female body and also as prostitution and slavery resulting from economic and patriarchal exploitation of women."[16]

Opponents of commercial surrogacy also argue that commercial surrogacy arrangements commodify children and treat them as goods or possessions that can be bought and sold. In essence they amount to human trafficking of the resultant children and baby selling. Therefore, commercial surrogacy agreements are not in the best interests of the child. The arrangements may potentially psychologically harm the child as the resultant child may feel confused or rejected.[17] More so, it is not prudent for a child to be born in circumstances where adults might argue over the child. The resultant child might be rejected by both the surrogate mother and the commissioning parents after birth especially if that child is disabled. The surrogate mother might refuse to hand over the resultant child to the commissioning parents.[18]

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[13] Claire de la Hougue 'Surrogate motherhood and Human Rights: Analysis of human, legal and ethical issues' (2015).
[14] Upma Gautam & Anandita Yadav 'The Surrogacy (Regulation) Bill 2016: Pitfalls and challenges ahead' (2016) 11(2) *Journal of Legal Awareness*.
[15] Bridgette Clark 'Surrogate motherhood: Comment on the South African Law Commission Report on Surrogate Motherhood (Project 65)' (1993) 110 *SALJ* 769 at 774.
[16] Amrita Pande '"At least I am not sleeping with anyone": Resisting the stigma of commercial surrogacy in India' (2010) 36(2) Journal for Feminist Studies 292 at 293.
[17] Jane Cottingham 'Babies, borders and big business, (2016) 25 (49) *Reproductive Health Matters Journal* 17 at 19.
[18] *Cook v Harding* 190 F. Supp.3d 921 (2016) and *Cook v Harding* 879 F.3d 1035 (2018) – The surrogate mother, Melissa Cook had been paid by an anonymous intending parent. Three embryos were implanted into her and she became pregnant with triplets. She then found out that the intending parent was a deaf 50 year old postal worker who lived with his parents. The commissioning parent asked her throughout her pregnancy to abort one of the fetuses because he would not be able to afford all three children. Cook decided to go back on the terms of the agreement and argued that the law in the state of

It has also been argued that commercial surrogacy does not challenge society's attitude to infertility. Resources are not directed at the causes of infertility. The enforceability of commercial surrogacy agreements is a major cause of concern. Treating commercial surrogacy agreements as contracts gives rise to the question of remedies for breach of contract. It has been argued that the decision to give up a child is too intimate and complex to be regulated by a contract and cannot be validly made until after the birth of the child. Therefore pre-birth orders should not be regarded as informed consent. This argument is usually treated as paternalistic in that surrogate mothers should not be treated as victims but as equal members of society who are capable of making valid choices about having children and giving up such children. The legal,[19] economic, social and political conditions in South Africa have not evolved to an extent where commercial surrogacy can be regulated in a way that ensures that all parties to the commercial surrogacy agreements are adequately and equally protected. This stems from the fact that courts have at this point failed to uniformly apply surrogacy regulating provisions to the handful of recorded altruistic surrogate motherhood agreement confirmation matters that have appeared before our courts as discussed in Chapter Two.

3.3 Analysis of Rights

Section 2 of the Constitution[20] provides that the Constitution and the Bill of Rights enshrined therein is the supreme law of the land and should be given utmost consideration in every matter.[21] Section 7 of the Constitution affirms and emphasises the democratic principles of dignity, equality and freedom and

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California that authorized private commercial surrogacy contracts reduced children to commodities and surrogates like her to breeding animals or incubators. The court enforced in 2016 and 2018 enforced the initial contract and reiterated the unfairness in simply allowing surrogate mothers to change their minds after entering into surrogacy agreements and crushing the hopes of intending parents.

[19] The South African Courts have interpreted the surrogacy regulating provisions in Chapter 19 of the Children's Act differently. This gives a clear indication that our courts are still struggling to understand and uniformly apply surrogacy provisions to altruistic agreements. The South African legal system is not yet ready to regulate something as complex as commercial surrogacy while safeguarding the surrogate mothers and resultant children from exploitation, promoting and protecting the rights of women and children and in the same breath combat human trafficking. see *Ex parte: WH and Others* 2011 (6) SA 514 (GNP), *Ex parte Applications for the Confirmation of three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ), *Ex parte: M S & Others* (48856/2010) [2014] ZAGPPHC 457 (2 December 2013), *AB and Another v Minister of Social Development As Amicus Curiae: Center for Child Law* 2016 (2) SA 27 (GP), *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC)□, *Ex parte HPP and Others; Ex Parte DME and Others* 2017 (4) SA 528 (GP), *Ex parte CJD and Others* 2018 (3) SA 197 (GP),*Ex parte KAF and Others* (14341/17) [2017] ZAGPJHC 227 (10 August 2017) and *Ex parte KAF and Others* 2019 (2) SA 510 (GJ).

[20] The Constitution of the Republic of South Africa Act 108 of 1996.

[21] Section 2.

places a duty on the state to protect, respect, promote and fulfill the rights enshrined in the Bill of Rights. This section makes it clear that the rights in the Bill of Rights are not absolute as they are subject to the limitations contained in themselves or referred to in the weasel clause in section 36 of the Constitution.

Below, each of the rights pertaining to surrogacy will be discussed in relation to the parties such rights apply to. This will also show how some rights can simultaneously be used in support of the continued prohibition of commercial surrogacy as well as the decriminalisation of the practice. That discussion will assist in ascertaining whether the rights that support the decriminalisation of commercial surrogacy are being justifiably infringed. The discussion below will show that such conflicting and competing rights are being justifiably infringed and that decriminalisation and legalising commercial surrogacy would be a gross violation of the other competing rights in question.

3.3.1 The surrogate mother

3.3.1.1 Right to dignity and the right to not be treated in a cruel, inhuman or degrading way

Article 5 of the African Charter on Human and Peoples Rights (Banjul Charter)[22] states that "every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[23] Article 4 of the Banjul Charter provides that humans are inviolable. Article 1 of the Universal Declaration of Human Rights provides that "all human beings are born free and equal in dignity and in rights."[24] Article 4 of the Universal Declaration of Human Rights provides that no one should be subjected to torture, cruel, inhuman or degrading treatment and punishment.[25] Section 1 of the Constitution provides that everyone has the inherent right to dignity and the right to have that right respected and protected.[26] The right to dignity is the cornerstone of the Constitution and is of fundamental importance to our legal system. The

[22] African Union (AU) African Charter on Human and People's Rights (Banjul Charter) 27 June 1981 CAB/LEG/6/7/3 rev 5, 21 I.L.M. 58 (1982).
[23] Article 3 of the African Union (AU) African Charter on Human and People's Rights (Banjul Charter) 27 June 1981 CAB/LEG/6/7/3 rev 5, 21 I.L.M. 58 (1982).
[24] Article 1 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).
[25] Article 4 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).
[26] Section 1 of the Constitution of the Republic of South Africa Act 108 of 1996.

right to dignity is closely linked with the right to life[27] (to live a dignified life) and the section 12(1)(e) "right to not be treated or punished in a cruel, inhuman or degrading way."[28]

In *S v Makwanyane*[29] the court held that "recognising human dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights."[30] The right to dignity also includes the right to live a dignified life. It is inconsistent with the core of human dignity to allow another human being to be used as a means to an end — to satisfy the desire of another to have children.

It can be argued that the right to dignity is a subjective right and the right to bodily autonomy entails that every person can decide what they consider to be a dignified life. A woman who is unemployed and languishing in poverty can decide that living such a life of economic disadvantage is undignified and opt to sell her gestational services for financial compensation in order to live a dignified life. However, it can also be argued that substituting one violation of dignity for another is hardly justifiable.

Pregnancy is risky and is associated with various complications like death during childbirth, high blood pressure, gestational diabetes, infections, iron deficiency and anemia, depression and anxiety, miscarriage, placenta previa, pre-eclampsia, preterm labour, placenta abruption, hyperemesis graviarum and fetal problems. Classifying commercial surrogacy as a trade is a violation of human rights.[31]Raymond is of the view that "it is a violation of core human rights to hire a woman's body for breeding of a child so that someone else's genes may be perpetuated."[32] There is no humane way to quantify the value of human life of the surrogate mother or of the resultant child, and the greatest offense to human dignity is to be bought and sold.[33]

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[27] Section 11.
[28] Section 12(1)(e).
[29] S v Makwanyane 1995 (3) SA 391 (CC).
[30] S v Makwanyane 1995 (3) SA 391 (CC) at 328.
[31] European Centre for Law and Justice *'Surrogate motherhood: A violation of Human Rights'* (2012) Report presented at the Council of Europe, Strasbourg on 26 April 2012.
[32] Janice G Raymond 'Testimony before the House Judiciary Committee, State of Michigan' in H Patricia Hynes (ed) *Reconstructing Babylon: Women and technology* (1990) 163 at 186.
[33] Michael J Meyer 'The idea of selling in surrogate motherhood' (1990) 4 (2) P*ublic Affairs Quarterly (PAQ)* 175-188 at 175.

The commodity or goods being bought and sold in commercial surrogacy agreements are the womb and the resultant child. This amounts to commodification. Similar to sex work, commodification in commercial surrogacy agreements is founded on the unequal relationship of economic and social exchange between men and women and such commodification is classist, racist, ageist and sexist.[34] Commercial surrogacy is exorbitantly expensive to an extent that only the rich and affluent will be able to purchase the goods being sold and become commissioning parents while the poor bear the burden of being surrogate mothers.[35]

The surrogate is treated as a means to an end and this is a violation of her dignity. The integrity of the surrogate is discussed in market terms of gestational service and womb rental and this ignores the inherent right to human dignity. This practice of turning the womb into a commodity once again places women's value on their reproductive capabilities and not on their person.[36]

The surrogate is treated as a means to an end. She is treated as a reproductive machine. In the 1998 case of *Baby M* [37], the child psychologist, Doctor Lee Stalk who was called to testify in the matter admitted that the intending parents in this case had not turned to a surrogate mother but to a surrogate uterus. This evaluation entails that the surrogate is considered only for her reproductive capabilities and then becomes the forgotten member of the surrogacy triangle. This is incompatible with human dignity even in circumstances where the surrogate mother gives her true informed consent. The right to dignity is a positive right which encompasses the right to be free from slavery, servitude and forced labour and this right will be discussed further below.

3.3.1.2 Right to reproductive autonomy

Section 12 of the Constitution provides for the right to autonomy. This includes the right to control one's body and the right to make decisions about reproduction (reproductive autonomy). Article 6 of the Banjul Charter and Article 3 of the Universal Declaration of Human Rights also entrench the right to freedom

[34] Commission for Gender Equality 'Decriminalising sex work in South Africa: Official position of the Commission for Gender Equality' (2013) at 3.
[35] *Ex parte DME and Others* 2017 (4) SA 528 (GP). The court held that the cost of surrogacy is high (R200 000) which makes it an option for the affluent. An attempt to achieve a balance between rights and interests of all parties to a surrogate agreement is a delicate one.
[36] Katherine B Lieber 'Selling the womb: Can the feminist critique of surrogacy be answered?' (1992) 68(1) *Indiana Law Journal* 205 at 213.
[37] I*n re Baby M* 537 A.2d 1227, 109 N.J 396 (1988).

and security of the person. This right means that everyone has the right to have control over their own bodies, what is done to that body and what they willingly do to their bodies, and that the state should limit its interference in the voluntary decisions that people make with their own bodies.

Everyone has a universal right to health care and the "right to the highest attainable standard of health"[38] encompasses the right to reproductive health care.[39] Commercial surrogacy is a reproductive health issue. There are three types of reproductive rights: the right to have information and means to regulate one's fertility, the freedom to decide how many children to have, when to have them and how to have them and the right to control one's body. In its preamble, the Choice on Termination of Pregnancy Act 92 of 1996[40] notes that "reproductive rights are derivative of other fundamental constitutional rights such as the right to privacy, freedom and security of the person, right to dignity and the right to access health care services and information."[41]

Commercial surrogacy in constitutional terms can be viewed as an active exercise of the section 12 right to freedom of security and control over one's body and the section 12(2)(a) right to reproductive autonomy which is the right to make decisions concerning reproduction. From this perspective, it can be argued that South Africa's current prohibition of commercial surrogacy is a violation of the right to reproductive autonomy. The prohibition by law of commercial surrogacy needs to be in line with the limitation clause in section 36 of the Constitution[42], bearing in mind that health-related policies that protect some basic human rights may also violate some fundamental rights. The inquiry becomes whether or not the limitation of this right on the grounds that it is in conflict with other competing rights is justifiable in an open and democratic society.

In *Ferreira v Levins*[43] the court held that the state ought not to interfere with a person's choices in respect of their own body but must create conditions in which such choices may be made.[44] The right to

[38] Article 25 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III) and Article 16(1) of the African Union (AU) African Charter on Human and People's Rights (Banjul Charter) 27 June 1981 CAB/LEG/6/7/3 rev 5,21 I.L.M. 58 (1982).
[39] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights 16 December 1966 Treaty Series Vol. 993 pg 3.
[40] Choice on Termination of Pregnancy Act 92 of 1996.
[41] Preamble of the Choice on Termination of Pregnancy Act.
[42] Section 36 of the Constitution.
[43] *Ferreira v Levin and Others* 1996 (1) SA 984 (CC).
[44] *Ferreira v Levin and Others* 1996 (1) SA 984 (CC) at 251.

reproductive autonomy is closely linked to the right to privacy in section 14 of the Constitution. In the *National Coalition for Gay and Lesbian Equality*[45] case, the court held that the right to privacy includes "the right to a sphere of private intimacy and autonomy."[46] It can be argued that, if surrogates so choose to enter into commercial surrogacy agreements, thereby exercising their right to contractual freedom, any interference by the state in prohibiting such agreements is a violation of the right to privacy and autonomy.

There is a strong feminist argument that women have the right to make informed decisions about their bodies and have a right to choose to make a living off their bodies to better their lives and this extends to deciding whether or not to carry someone's child for compensation.[47] The use of artificial reproductive technologies is multilayered. It gives women the opportunity to move from being victims into conscious agents who are in control of their bodies. Feminist opponents of commercial surrogacy argue that women are more than reproductive machines to churn children for the satisfaction of men and commercial surrogacy perpetrates further degradation of women.

However, it is submitted that it is regressive feminist theory to emphasise liberation from traditional roles of childbirth by plunging women into a practice that pays them little for a huge sacrifice while still capitalising on female virtues of self-sacrifice. Surrogates are not paid nearly enough for the strain pregnancy has on the physical and emotional being. Only women in dire financial situations can regard the meager payments they receive in surrogacy agreements as life changing due to their harsh economic backgrounds.

The Law Commission in its 1993 Report on Surrogate Motherhood[48] noted that it could be safe to assume that there are many surrogate motherhood agreements that are concluded and fulfilled without problems and publicity. Commercial surrogacy agreements usually cause public outcry when the parties fail to adhere to the terms of the agreement and a dispute comes before the court especially with regards to the custody of the resultant child. However, the simple fact that some commercial surrogacy agreements might have been completed smoothly does not automatically vindicate the practice. The practice still

[45] *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* [1998] ZACC 1 5; 1999 (1) SA 6 (CC).
[46] *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* [1998] ZACC 1 5; 1999 (1) SA 6 (CC) at 32.
[47] Denise Meyerson 'Surrogacy Agreements' (1994) *Acta Juridica* 121 at 125.
[48] SALRC Report on Surrogate Motherhood (1993).

opens up women to the possibility of violence, trafficking, exploitation and also violates certain fundamental human rights.

It can also be argued from a constitutional perspective that commercial surrogacy also violates the surrogate's right to freedom and security and control over her body. Depending on the terms of the agreement, the surrogacy may give up her right to make decisions concerning her pregnancy. The commissioning parents have an interest in protecting the best interests of their intended child. In a bid to do so, the commissioning parents may restrict the surrogate's diet, movements, choice of music, or request her to listen to certain music, take language classes or exercise more.

This view can be said to fail to take into account the fact that surrogacy agreements can be empowering rather than exploitative. South African women, like many other African women, live in male dominated societies where historically, women have an uphill battle when it comes to balancing their reproductive rights against those of their male counterparts. Male–dominated institutions (legislature), religion and health professionals seem to always manage to justify their intervention in women's reproductive self-determination by involving their principles of morality, public order and public policy.[49] Women generally lack control over their sexual and reproductive capabilities and this has led to the interconnection between poverty, lack of reproductive rights and women's morality.[50]

It is valid to argue that in commercial surrogacy, the surrogate is waives certain rights to assert equally competing rights. The surrogate is then no different from any employee who signs a restraint of trade which inhibits that employee's right to freedom of movement or the right to choose their trade, profession or occupation. However, the right to autonomy also provides for the right to not be treated or punished in a cruel, inhuman or degrading way. Therefore, if a person is exposing themselves to treatment in a cruel, inhuman or degrading way in the exercise of their right to autonomy, then the state has a legal paternalistic duty to intervene and protect that person from a violation of their dignity and autonomy. As discussed above, commercial surrogacy amounts to a violation of the dignity of the surrogate and the limitation of the right to reproductive autonomy is justifiable on the grounds that if exercised in commercial surrogacy, it degrades the dignity of the surrogate.

[49] Pieter Caesters & Debbie Pearman Foundational Principles of South African Medical Law (2007) 176.
[50] *Ibid.*

Commercial surrogacy involves pitting one right against other rights. The limitation of the right to reproductive autonomy is justifiably limited in so far as it competes with other rights. Reproductive autonomy demands respect for women's dignity. Focusing on the power to make decisions while completely ignoring the setting in which such decisions are made or the potential harm caused by that decision is a failure to properly protect, promote and fulfill women's rights to reproductive autonomy.

3.3.1.3 Right to freedom of trade, occupation and profession

Section 22 of the Constitution provides that "every citizen has the right to choose their trade, occupation or profession freely.[51] The practice of trade, occupation or profession may be regulated by law"[52]. In the matter, *Affordable Medicines Trust and Others v Minister of Health and Others*[53], the court held that a person's work is closely related to their dignity. The court noted that "there is a relationship between work and human personality as a whole."[54] The provision in section 22 contains a limitation clause in itself, that the practice of such trade may be regulated by law. It is important to determine whether or not commercial surrogacy can be constitutionally regarded as a trade, profession or occupation and whether it falls in the ambit of section 22. The 1997 Convention on Human Rights and Biomedicine[55] prohibits the sale of the human body or its parts for financial gain.[56]

Proponents of commercial surrogacy often rely on reproductive autonomy and more specifically on the right to freedom of trade, occupation and profession. From a feminist perspective, it can be argued that commercial surrogacy is akin to any work or profession and women must be allowed to use their bodies in order to gain financial freedom. It has been argued that surrogates are workers and not wombs and should be treated like labourers in a labour market and not as abused entities whose rights are in need of protection.[57]

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[51] This right is also entrenched in Article 23 of UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).
[52] Section 22 Constitution of the Republic of South Africa Act 108 of 1996.
[53] *Affordable Medicines Trust and Others v Minister of Heath and Others* 2006 (3) SA 247 (CC).
[54] *Ibid* at 59-60
[55] Council of Europe European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) 04 April 1997.
[56] Article 21 of the Oviedo Convention.
[57] Amrita Pande 'Surrogates are workers not wombs' The Hindu 29 August 2016, available at https://www.thehindu.com/opinion/op-ed/Surrogates-are-workers-not-wombs/article14594820.ece ,accessed on 21 September 2019.

Given the economic situation in South Africa, the question we should ask is whether or not commercial surrogacy should be permitted as a trade, occupation or profession in a bid to offer economic benefits for the poverty stricken. The current South African economy has been very unaccommodating, more so for women. Women living in poverty, who are marginalised from labour and job markets due to low education levels and live in patriarchal social and family structures might find the potential gain in commercial surrogacy as a motivating factor to participate in commercial surrogacy. Their economic, social and educational background opens them up to exploitation and abuse from agents and commissioning parents. They can also be exploited if trafficked into surrogacy by their spouses or family members.

It is difficult to assess the pool of commercial surrogate mothers as the practice is prohibited. Lessons from other countries provide an insight into the calibre of women who typically opt to become surrogates. In India, general reading of literature shows that the typical surrogate falls "within the lower economic strata of society, is a slum dweller, illiterate with no form of steady income while carrying heavy debt and a multitude of family responsibilities."[58] Nicholson notes that "the prevailing poverty in South Africa makes for an environment that would compromise the ability of poverty stricken women to forego an opportunity to make money, hence exposing them to exploitation by the wealthy."[59] Meyerson offers an opposing view and argues that criminalising commercial surrogacy prejudices women of the right to agency and detrimentally affects their ability to alleviate their impoverished and dire economic situations.[60]

Trade is "the action of buying and selling of goods and services."[61] An occupation is "a job or a profession."[62] A profession is a "paid occupation especially one that involves prolonged training and formal qualification."[63] Commercial surrogacy does not, for obvious reasons, fall within the ambit of a profession or an occupation.[64] The question therefore remains as to whether commercial surrogacy can

[58] Smitha Sasidharan Nair & Rajesh Kalarivayil 'Has India's Surrogacy Bill failed women who become surrogates?' (2018) 3(1) *Indian Journal of Women and Social Change* 1 at 7. See also Amrita Pande '" At least I am not sleeping with anyone": Resisting the stigma of commercial surrogacy in India' (2010) 36(2) Journal for Feminist Studies 292-312.
[59] Caroline Nicholson 'When moral outrage determines a legal response: Surrogacy as labour' (2013) 29(3) S*outh African Journal on Human Rights* 496 at 504.
[60] Denise Meyerson 'Surrogacy agreements' (1994) *Acta Juridica* 121 at 131.
[61] https://www.collinsdictionary.com/dictionary/english/trade ,accessed on 22 May 2019.
[62] https://www.collinsdictionary.com/dictionary/english/occupation ,accessed on 22 May 2019.
[63] https://www.collinsdictionary.com/dictionary/english/profession ,accessed on 22 May 2019.
[64] Commercial surrogacy does not require any specialised training. Section 295(c)(vi) and (vii) of the Children's Act 38 of 2005 only provides that the surrogate mother must have a documented history of at least one pregnancy and viable delivery

be classified as a trade in a constitutional and democratic society. If commercial surrogacy falls within the ambit of section 22 of the Constitution, then commercial surrogates would have labour rights. They would be able to form trade unions, challenge unfair labour conditions, be free from discrimination and enter into collective bargaining agreements. This classification would promote the right to bodily and psychological integrity and the right to reproductive autonomy while recognising that carrying a child for someone else for pay is a trade.

It can be argued that commercial surrogacy agreements amount to an alienation of labour. Such agreements require the surrogate to treat child–bearing as an emotionless exercise. The surrogate is devoid of the right to bond with the resultant child and is tasked with the job of viewing the pregnancy as a job and merely a way to earn a livelihood. The payment for the pregnancy dehumanises the surrogate and exploits her reproductive capabilities for wealth.

Nussbaum[65] disagrees with this alienation of labour argument and notes that: "Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators- we all do things with parts of our bodies for which we receive a wage in return. Some people get good wages and some do not, some have a relatively high degree of control over their working conditions and some have little, and some have many employment options and some have few. And some are socially stigmatised and some are not."[66] Therefore, arguing that commercial surrogacy is a form of alienated labour might not seem like reason enough to prohibit the practice when a lot of the work women do has no consideration for their human dignity and does not provide mutual pleasure.[67]

However, pregnancy cannot be treated like an office job or a factory job. Pregnancy, birth and the post-partum period includes risks such as preclampsia, eclampsia, diabetes, hemorrhaging, high blood pressure, pulmonary embolism, urinary tract infections, depression, hypertension, stroke and death among others.[68] It is true that woman all across the world carry pregnancies every day and for free and that might be taken to mean that pregnancies are not that dangerous. However, it can be appreciated that having to undertake such a complicated, physically and emotionally draining activity like pregnancy for

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and must have a living child of her own.

[65] Martha Nussbaum 'Whether from reason or prejudice: Taking money for bodily services' (1998) 27(2) *Journal of Legal Studies* 693-724.

[66] Martha Nussbaum (note 58 above at 694).

[67] Christine Overall *What's wrong with prostitution? Evaluating sex work* (1992) at 707.

[68] Anu et al 'Surrogacy and women's rights to health in India: Issues and perspectives' (2013) 57(2) India Journal of Public Health 65 at 67.

compensation reeks of economic desperation. Even when surrogates testify about the joys of assisting infertile couples and their new found earnings, this does not obscure their vulnerability to exploitation and the underlying injustices accompanying commercial surrogacy.[69] It just speaks of their impoverishment and lack of opportunities to gain financial and economic freedom in a dignified manner.[70]

Often, surrogates are the forgotten members of the commercial surrogacy agreements, they are faceless pregnant women whose stomachs are visible. Accepting commercial surrogacy as a profession reduces women to a body part (their wombs) while treating them like baby–making machines. Allen[71] is of the view that would-be commercial surrogate mothers should be deemed not to have strong constitutional privacy rights that limit their capacities to alienate their procreative and traditional parental prerogatives for financial compensation.[72]

It has been argued that commercial surrogacy is the result of a polarised society, hence "if we cannot save people from poverty, then we should not stop them from making sacrifices to alleviate their financial situations merely because we find such sacrifices morally appalling."[73] However, for work to become a trade, there must be goods or commodities to be sold or exchanged and there must be the exchange of these goods and commodities for monetary compensation. Such an exchange must be for money or anything that has a market value and for the purposes of a profit. The goods on sale bring about ethical and human rights questions. Classifying commercial surrogacy as work means sanctioning the sale of children or women's reproductive capabilities. It may become acceptable for a woman to alienate her reproductive capabilities but it can never be acceptable to trade in children. This degrades women and children and violates their right to dignity.

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[69] Olinda Timms 'Ending commercial surrogacy in India: Significance of the Surrogacy (Regulation) Bill, 2016' (2018) 3 (2) *Indian Journal of Medical Ethics* 99 at 100.

[70] Evangelise Elsa 'India: Surrogate's death leads to concern over exploitation' Gulf News 2 October 2019, available at https://gulfnews.com/world/asia/india/india-surrogates-death-leads-to-concern-over-exploitation-1.1570016221013 , accessed on 10 October 2019. See also Padma Kumar Reddy 'Surrogate's death leads to concern over exploitation in Hyderabad' Hyderabad News 3 October 2019, available at http://www.hydnews.net/surrogates-death-leads-to-concern-over-exploitation-in-hyderabad/ , accessed on 10 October 2019.

[71] Anita L Allen 'Surrogacy, slavery and ownership of life' (1990) 13 (1) *Harvard Journal of Law and Public Policy* 139-149.

[72] Anita L Allen (note 64 above at 47).

[73] M Lupton 'Surrogate parenting: The advantages and disadvantages' (1986) 11(2) *Journal of Juridical Science* 148 at 151.

3.3.1.4 Right to not be subjected to slavery, servitude or forced labour

Article 4 of the Universal Declaration of Human Rights prohibits slavery, servitude and forced labour.[74] Section 13 of the Constitution provides that "no one may be subjected to slavery, servitude or forced labour."[75] The right to be free from all slavery, servitude and forced labour as it applies to commercial surrogacy is intricately linked with the exploitation argument against commercial surrogacy. Exploitation focuses on the relationship between the parties to an agreement, where one party is at an unfair advantage and the other is in a vulnerable position. The case for slavery and servitude in commercial surrogacy agreements focuses on the surrogate mother and the resultant child as victims of trafficking. Special emphasis is placed on determining how the consent of the surrogate mother to sell off her child and her reproductive services was obtained.

It has been widely argued that commercial surrogacy is akin to slavery[76] and violates section 13 of the Constitution. Slavery is "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[77] The phrase 'attaching to the right of ownership' is not clearly defined. Reference is made to such acts of "purchasing, selling, lending or bartering a person or persons."[78] The 1956 United Nations Supplementary Slavery Convention[79] incorporates the practice of sale of children into the concept of exploitation and slavery.

There is a belief that labeling commercial surrogacy as slavery is a moral and policy condemnation that implies that well-meaning surrogates, commissioning parents and facilitators are immoral or complicit in immorality.[80] Condemning commercial surrogacy on the policy basis of preventing harm and exploitation can be completely divorced from moral superiority. The condemnation is primarily based on protecting the basic human rights of the child and the surrogate mother.

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[74] Article 4 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).
[75] Section 13 of the Constitution of South Africa.
[76] Anita L Allen 'Surrogacy, slavery and ownership of life' (1990) 13 (1) *Harvard Journal of Law and Public Policy* 139 at 145.
[77] Article 1 United Nations Convention to Suppress the Slave Trade and Slavery 60 LTNS 253, 25 September 1926. (The Slavery Convention)
[78] United Nations Office of Drug and Crime *The Concept of Exploitation in the Trafficking in Persons Protocol* (2015).
[79] United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and the Practices Similar to Slavery, 226 UNTS, 1 April 1957.
[80] Anita L Allen 'Surrogacy, slavery and ownership of life' (1990) 13(1) *Harvard Journal of Law and Public Policy* 139 at 142.

Forced labour invokes the element of involuntariness. Such labour can be obtained through threats or perceived threats of harm, use of force, intimidation, abuse of vulnerability or other forms of coercion or physical restraint of that person. For labour to be voluntary, the person must have engaged in the activity out of their own free will and with informed consent while understanding the consequences of their engagement.[81] Commercial surrogacy is reliant upon abusing the economic and social vulnerability of surrogate mothers who are desperate to alleviate their state of poverty so much that they would consider pregnancy for pay.

Servitude is linked to slavery although it takes a broader form. It has been described as human exploitation that falls short of slavery.[82] It refers to "all forms of domination and degradation of human beings by human beings."[83] Commercial surrogacy agreements are degrading, dehumanising and alienating. A surrogate is devoid of the right to bond with the resultant child and is tasked with the job of viewing the pregnancy as a job and merely a way to earn a livelihood. That amounts to subjecting the surrogate to cruel, inhumane torture. The payment for the pregnancy dehumanises the surrogate and exploits her reproductive capabilities for wealth. The resultant child's inherent dignity as a human person is also ignored as the child is traded like a commodity.

3.3.2 The resultant child

The Convention on the Rights of the Child[84] provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[85] This rights is also entrenched in the Constitution of South Africa and it provides that: "A child's best interests are of paramount importance in every matter concerning the child."[86] The best interest principle entails that states have a positive duty to ensure that promulgated legislation and regulated practices protect the rights of children and do not violate them at the expense of the adults.

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[81] International Labour Organisation *The Cost of Coercion* (2009) at 6.
[82] Jean Allain 'On the curious disappearance of human servitude from General international law' (2009) 11 *Journal of the History of international Law*. 299 at 304. See also European Trafficking Convention Explanatory Report para 95.
[83] Marc Bossuyt Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights *(1987)* at 167.
[84] UN General Assembly Convention on the Rights of the Child 20 November 1989 United Nations Treaty Series Vol. 1577 pg 3.
[85] Article 3 of the UN General Assembly Convention on the Rights of the Child 20 November 1989 United Nations Treaty Series Vol. 1577 pg 3. See also Article 20 of the African Union (AU) African Charter on the Rights and Welfare of the Child 11 July 1990 CAB/LEG/24.9/49 (1990)
[86] Section 28(2) of the Constitution. See also Section 9 of the Children's Act 38 of 2005.

In the *Bhe*[87] case, the court held that "the children's rights that are expressly mentioned in Section 28 of the Constitution are also implicit of and extend to other rights in terms of children like the right to privacy, equality, dignity, bodily integrity, and the right to not be treated in a cruel, inhuman or degrading way."[88] In addition to the rights that are not specifically limited to adults, children also have a right "to a name and nationality from birth; to a healthy family life; to basic nutrition, shelter, basic health care and social services and a right to be protected from maltreatment, neglect, abuse or degradation, and to be protected from exploitative labour practices."[89]

3.3.2.1 Child selling

Commercial surrogacy involves the selling and purchasing of a human being and this is not only immoral but is against basic human rights. It is the worst possible violation of human dignity to be bought and sold.[90] The Convention on the Rights of the Child prohibits improper financial gain in intercountry adoptions.[91] This Convention does not make explicit reference to commercial surrogacy. The 2002 Optional Convention to the Rights of the Child defines child selling as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or consideration."[92] Gallagher is of the view that this broader definition can be extended to "include the sale of children for adoption and commercial surrogacy agreements."[93]

Commercial surrogacy involves putting a price tag on the commodity or object (the child) and selling that commodity to a person willing to pay for that child and that is baby selling. The practice applies a means test to parental suitability.[94] In *Jan Balaz v Anand Municipality*[95] the court held that its decision to grant passports for travel to the country of origin of the commissioning parents to the resultant children

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[87] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of South Africa* 2005 (1) SA 580 (CC).
[88] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of South Africa* 2005 (1) SA 580 (CC) at 57.
[89] Section 28(1) of the Constitution.
[90] Upma Gautam & Anandita Yadav 'The Surrogacy (Regulation) Bill 2016: Pitfalls and challenged ahead' (2016) 11(2) Journal of legal Awareness.
[91] Article 21(b) UN General Assembly Convention on the Rights of the Child 20 November 1989 United Nations Treaty Series Vol. 1577 pg 3.
[92] Article 2 of the UN General Assembly Optional Protocol to the Child Convention of the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227 25 May 2000. Entered into force 18 January 2002.
[93] Anne Gallagher 'Article 35' in Phillip Alston and John Tobin (eds) *Commentary to the Convention on the Rights of the Child* (2015) 81-124 at 93.
[94] M Lupton 'Surrogate parenting: The advantages and disadvantages' (1986) 11(2) *Journal of Juridical Science* 148 at 151.
[95] *Jan Balaz v Anand Municipality and Others* [2010] AIR Guj 21.

(two twin boys) in the commercial surrogacy agreement in this case was because such a ruling was in the best interests of the children and not because it was in the best interests of the commissioning parents, the surrogate mother or the ovum donor. A deeper analysis of that judgment shows that the court had to grant those passports because the commissioning parents were better equipped and prepared to parent the children. Even when disputes of parentage occur, the courts tend to award the 'goods' to the buyer.

Commercial surrogacy does not challenge the way women and children are valued. It treats children as entities that are meant to be seen and not heard, whose human dignity and rights are of no consequence. There is no quantitative or qualitative data to argue against the notion that paying a woman to bear a child does not turn that child into a commercial product. In altruistic surrogacy agreements, the surrogate is compensated for medical costs, loss of wages and some value remains uncompensated as the agreement recognises that money is not a substitute for the child[96].

It is often argued that the commodity on sale in commercial surrogacy agreements is the womb service or gestational services[97] and not the child. Concerns that the surrogate is selling the child are often alleviated by the fact that if the child is genetically related to the commissioning parents, then the commissioning parents cannot be said to be purchasing their own child. The surrogate is not the genetic parent of the resultant child and the intending parents assume legal responsibility at birth.[98] In that case, the monies paid are for the termination of the surrogate mothers' parental rights in relation to the resultant child. However, such an argument equates commercial surrogacy to a paid adoption and paid adoptions are also unlawful.[99]

In *re Baby M*[100] the court held that the birth father was not purchasing the child since the child was genetically related to him and the money paid under the commercial surrogacy agreement was for the services (gestational or womb rental) and not for the product (resultant child).[101] This argument equates commercial surrogacy to paid sperm donation and this is misconception. The emotional and physical labour involved in surrogacy can never be the same as sperm donation. These objections to the child

[96] Glenn Cohen 'The price of everything, the value of nothing: Reforming the commodification debate' (2003) 117 *Harvard Law Review* 689 at 707.
[97] Denise Meyerson 'Surrogacy agreements' (1994) *Acta Juridica* 121 at 126.
[98] Cornell International Human Rights: Policy Advocacy Clinic & National Law University of Delhi 'Should compensated surrogacy be permitted or prohibited?' (2017) *Cornell Law Faculty Publications* 19.
[99] Denise Meyerson 'Surrogacy agreements' (1994) *Acta Juridica* 121 at 127.
[100] *In re Baby M* 217 N.J Super 313 525 A.2d 1128 1138 Ch Div (1987).
[101] *In re Baby M* 217 N.J Super 313 525 A.2d 1128 1138 Ch Div (1987) at 372.

selling argument reiterate the position of the surrogate as a forgotten member of the surrogate agreement equation. She merely provides labour and is soon forgotten.

Conditions that stipulate that the surrogate will be paid much less if the child is stillborn or that the surrogate may be required to refund the commissioning parents of all financial compensation received if she decides to keep the child raise concerns of child selling. These conditions are usually built into commercial surrogacy agreements as guarantees for the commissioning parents that they will receive the child they are willing to enter into a surrogacy agreement for. Such guarantees, assurances and terms of service are not unique to commercial surrogacy agreements but it can be appreciated that they appear problematic in the context where another human being is the object of the contract. The juxtaposition of rights and goods in this context is unsettling as it supports the womb renting and baby selling narrative, which in itself is human trafficking.

3.3.2.2 Best interests principle

As discussed in Chapter Two, the best interests of the child are not determined in a vacuum. It has been argued that a child's best interests cannot be determined in advance or in abstract.[102] Carnelley and Soni note that the best interests of the child "can be best determined by ensuring that the surrogate mother and the commissioning parents are suitable to assume their respective roles and all reasonably foreseeable eventualities have been provided for in the surrogate motherhood agreement."[103] The best interest principle is not to be used as a smokescreen to impose further unnecessary restrictions on people's rights to make decisions about procreation[104] but must be used to ensure the protection of the rights of children. The best interest principle has no fixed content. South Africa is a diverse society and this makes it even more difficult to determine the best interests of the child in each scenario.[105]

The Children's Act gives a list of factors that may be of assistance in determining the best interests of the child. These are: "the nature of personal relationship between the child and the relevant persons; the attitude of such persons towards the child; capacity of relevant persons to provide for the child; likely effect on the child of any change in circumstances; practical difficulty and expense of the child having

[102] *P v P* 2007 SA (SCA) 99D-E.
[103] Marita Carnelley & Sheetal Soni 'Surrogate Motherhood Agreements' (2011) *De Rebus* 30 at 33.
[104] *Ex parte WH (*note 75 above at 72).
[105] Nazeem Goolman 'Constitutional Interpretation of the 'best interest' principle in South Africa in relation to custody. (1997) Paper delivered at the Ninth World Conference of International Society of Family Law, Durban 28-31 July 1997.

contact with the relevant persons; the need for the child to remain in the care of or maintain a connection with the relevant persons; the child's age, maturity and stage of development, gender, background and other relevant characteristics; the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; any disability that the child may have; any chronic illnesses the child may suffer from; the need for the child to be brought up in a stable environment; the need to protect the child from physical or psychological harm and any family violence involving the child or a family member."[106] The Children's Act also encourages courts to avoid further legal and administrative proceedings in the determination of the best interests of the child

The most important question to ask is whether or not commercial surrogacy agreements are in the best interests of the resultant child. In commercial surrogacy agreements, the child is internationally conceived, gestated according to certain terms and conditions, delivered and handed over in exchange of an agreed sum of money. The resultant child is the object of the contract. The court in *Baby M*[107] was of the strong opinion that commercial surrogacy is child selling and held that "there are things in a civilised society that money should not buy."[108] The surrogate mother's desire to earn money is satisfied and the intending parents' desire to have their own child is also satisfied. The contract serves the best interests of the bargaining adults in question and places little regard and respect on the resultant child's dignity and interests.

Commercial surrogacy requires courts to stray away from the best interests of the child principle. Courts will be guided by the terms of the contract and the commissioning parents will get the child. Although most children would be better off with the commissioning parents, a system where custody decisions are made on the strengths of commercial contracts must be rejected. The best interest principle should be utilised in the adjudication of conflicts among those with parental rights. It should not be utilised to award custody of the child to whoever would best meet the child's best interests.

The identity and emotional well-being of the resultant child may be harmed as commercial surrogacy agreements "fracture parenting into genetic, gestational and rearing components and further commercialises such agreements."[109] As discussed in Chapter One, there are eight ways in which a

[106] Section 7(1) of the Children's Act 38 of 2005.
[107] I*n re Baby M* 537 A.2d 1227, 109 N.J 396 (1988).
[108] I*n re Baby M* 537 A.2d 1227, 109 N.J 396 (1988) at 1249.
[109] New York Task Force on Life and Health *Surrogate Parenting: Analysis and Recommendations for Public Policy* (1998) 77.

woman can fall pregnant through surrogacy.[110] This means that the resultant child can have up to six parents fighting over custody depending on the means used, the genetic mother (egg donor), the genetic father (sperm donor), the surrogate mother, the surrogate mother's partner (through presumption of paternity), and the commissioning parents. Soon, in the Netherlands, it will be legal for Dutch children to have up to four parents.[111] It is not in the best interests of the child to have so many adults claiming rights over him or her.

Anderson[112] is of the view that commercial surrogacy requires us to treat parental rights as "property rights where rights of use and disposal over things are owned."[113] A parent does not own his or her child and cannot therefore use that child for whatever purposes he or she sees fit. In *S v M*[114] the court held that children are individual rights bearers and should not be treated as mere extensions of their parents. The commissioning parents acquire the obligations to protect the interests of the resultant child, the commercial surrogacy contract does not give them the right to treat that child as they please.[115] It is often argued that the child is not sold if all the parties and the legal system recognise that the parental rights acquired by the commissioning parents will be exercised in the best interests of the resultant child. However, the acquisition of parental rights entails a sale of such rights.

It is not in the best interests of children to know that they were merely created to satisfy selfish needs and were then treated like objects by the adults who were supposed to protect them. The law in most countries requires that the surrogate mother must have surviving children of her own. Commercial surrogacy agreements may also prove not to be in the best interests of the surrogate's other children. These children might develop survivor's guilt, insecurity and anxiety upon the realisation that they too could have been gestated and traded for money.

The most common problem in commercial surrogacy is of litigation and enforcement which usually arises when the surrogate refuses to hand over the child to the commissioning parents after birth. This

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[110] A surrogate can fall pregnant through:(a)through the use of her own ovum and the sperm of her partner (b)through the use of her ovum and the sperm of a donor and (c)through the use of her ovum and the sperm of the commissioning father (d)through the use of the commissioning mother's ovum and donor sperm (e)through the use of a donor's ovum and the sperm of the commissioning father (f)through the use of donor ovum and sperm (the resultant child will not be genetically related to the commissioning parents) (g)through the use of donor ovum and the sperm of the commissioning father (h)through the ovum and sperm of both the commissioning parents

[111] https://bioethics.com/archives/47476 accessed on 4 August 2019.

[112] Elizabeth Anderson 'Is women's labour a commodity?' (1990) 19 *Journal of Philosophy and Public Affairs* 71-92

[113] Elizabeth Anderson (note 112 above at 76).

[114] *S v M 2008* (3) SA 232 (CC).

[115] R J Kornegay 'Is commercial surrogacy baby-selling?' (1990) 7 *Journal of Applied Philosophy* 45-50.

ends in a custody battle that is detrimental to the resultant child and not in the best interests of the child. The commissioning parents might be left at a loss when the surrogate refuses to hand over the resultant child at birth. In *re TT*[116] the surrogate mother refused to hand over the resultant child because she had developed an emotional bond with the child during the gestational period. The court held that the agreement was not enforceable as commercial surrogacy agreements were invalid in the United Kingdom.[117] The surrogate mother was allowed to keep the resultant child and all payments she had received because the court said that any terms of that agreements were invalid and unenforceable.[118] Prior to the conclusion of that case, the parentage of the child was in limbo. Such litigation is not in the best interests of the child.

Commercial surrogacy can have dire consequences on the child that are usually regarded as 'worst case scenarios'. These problems may also arise in altruistic surrogacy agreements but statistics have shown that such problems are more prevalent in commercial surrogacy agreements. The commissioning parent may reject the child if the child is disabled. In *Baby Gammy*[119] one of the twins was born with a disability and reports spread that the commissioning parents had abandoned the disabled child and left her in the care of a surrogate who had no intention of assuming parental responsibility. At face value, it did seem like the commissioning parents had abandoned the child until the court ruled that they had not.[120]

The commissioning parents might divorce, die or separate before the birth of that child thus leaving the child in the care of the surrogate who had no intention of parenting the child. In the *Baby Manji*[121] case, the commissioning parents were divorced after the finalisation of the commercial surrogacy agreement but before the birth of Baby Manji. The commissioning mother no longer wanted to parent the child but the commissioning father still wanted to assume parental responsibility of the child. Indian laws

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[116] *In re TT* [2011] EWHC Civ 33.
[117] I*n re P (A Child)* [2007] EWCA Civ 1053, the court granted the commissioning parents a parenting order as the surrogate mother had fraudulently used the surrogacy agreement for the sole purpose of acquiring a second child for herself although surrogacy agreements are illegal in the United Kingdom.
[118] In the case of *Mr and Mrs M*, the surrogate also kept all the monies she had been paid and the commissioning parents were ordered to pay maintenance in favour of the resultant child. See Antony Starza-Allen 'High Court allows surrogate mother to keep baby' *Bionews* 31 January 2011 available at https://www.bionews.org.uk/page_92802 accessed on 1 August 2019 and also Ayesha Ahmad 'Surrogate who kept baby wins claim for support' *Bionews* 18 April 2011 available at https://www.bionews.org.uk/page_92930 accessed on 1 August 2019.
[119] Fanwell v Chanbua [2016] FCWA 17.
[120] Jonathan Pearlman ''Baby Gammy' was not abandoned in Thailand, court rules' *The Telegraph* 14 April 2016, available at https://www.telegraph.co.uk/news/2016/04/14/baby-gammy-was-not-abandoned-in-thailand-court-rules/ , accessed on 21May 2019.
[121] *Baby Manji v Union of India and Another* (2008) 13 SCC 518.

prevented him as a single father to adopt the baby until three months after the baby was born. It is not in the child's best interests for parents to simply abandon the resultant child in case of a divorce.

In international surrogacy cases, the legal system might make it difficult for the commissioning parents to leave the country with that child or to enter their country of origin with that child. Such children become known as stateless, nationless or borderless children. In *Jan Balaz v Anand Municipality*[122] twin boys were born in a commercial surrogacy agreement. The commissioning parents were of German origin. Initially, the Indian government had refused to grant passports for the children to travel and since they had not yet been legally adopted by the commissioning parents, they could not be classified as German citizens or Indian citizens either. The court held that its decision to grant passports for travel to the country of origin of the commissioning parents to the resultant children in this case was because such a ruling was in the best interests of the child and not because it was in the best interests of the commissioning parents, the surrogate mother or the ovum donor. Prior to the finalisation of that case, the children were stateless[123] yet children have a right to a name and nationality from birth.

Limiting the rights of children to satisfy the needs of the adults is unjustifiable in an open and democratic society. It is a violation of children's right to dignity to degrade them and reduce them into mere commodities that can be bought and sold. It is justifiable to limit the rights to autonomy, privacy, procreation, trade, occupation and profession and contractual freedom if the practice of such rights is not in the best interests of the children that will result from such agreements.

3.3.3 The commissioning parents

3.3.3.1 Right to make decisions concerning reproduction (the right to procreate)

The right to found a family and to procreate is entrenched in the Universal Declaration of Human Rights which provides that: "Men and women of full age have a right to marry and to found a family and that the family is the natural and fundamental group unit of society and that this right is entitled to protection by society and the State."[124] The meaning of this right in relation to surrogacy is unclear. The UN Report

[122] *Jan Balaz v Anand Municipality and Others* [2010] AIR Guj 21.
[123] See also *Makai Twins* case Mariki Sanchanta 'A debate arrives with Japan politician's baby' The Wall Street Journal 6 January 2011, available at https://www.wsj.com/articles/SB10001424052748704415104576065253692270070 , accessed on 13 November 2019.
[124] Article 16 of the UN General Assembly, Universal Declaration of Human Rights 10 December 1948 217 A (III).

of the International Conference on Population and Development[125] and the ANC National Health Plan of 1994[126] support the right to freedom of procreative choice.

The South African Constitution does not expressly protect the right to procreate.[127] This right may be indirectly protected by the constitutional right to equality, right to freedom of belief and opinion, right to contractual freedom, right to privacy, right to dignity (taking into account the effects that childlessness may have on individuals) and the right to make decisions concerning reproduction. In *Bernstein v Bester*[128], the court held that "the right to privacy entails the inner sanctum of personhood and includes the right to family life, sexual preference, home environment and this is shielded from conflicting rights of the community."[129] Childlessness can have negative impacts on a person and it usually places a huge burden on women. The South African government takes the problem of childlessness and infertility seriously. The Regulations of Medical Schemes Act 131 of 1998[130] make provision for "the treatment of infertility as part of the mandatory services that medical aid schemes are required to provide as part of their benefit plans."

One of the major challenges for commissioning parents is whether or not there can be said to be any right to enlist a surrogate. Maybe that right exists as an extension of the right to form a family and entails the right to contractual freedom to enter into a commercial surrogacy agreement, the right to privacy and to be free from state interference and the right to equal treatment under the law by seeking assistance and protection from the state to enforce that right.[131] Robertson[132] argues that the right to bear and rear children extends to artificial reproductive techniques and to surrogacy.

It has been argued that the right to privacy and equality in procreation limits state regulation of assisted reproduction to cases of serious harm.[133] It is hereby submitted that commercial surrogacy is a matter

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[125] UN Population Fund (UNFPA) *Report of the International Conference on Population and Development*, Cairo 5-13 September 1994 1995 A/CONF.171/13/Rev.1, available at: https://www.refworld.org/docid/4a54bc080.html ,accessed on 13 November 2019.

[126] African National Congress *A National Health Plan for South Africa* (1994), available at, https://www.sahistory.org.za/sites/default/files/a_national_health_plan_for_south_africa.pdf , accessed on 12 November 2019.

[127] Unlike the US case of *Skinner v Oklahoma* 316 U.S 535 (1942) where the court held that there was a right to procreate.

[128] *Bernstein and Others v Bester and Others* NNO 1996 (4) BCLR 449

[129] *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 at 67.

[130] Code 902M of the Prescribes Minimum Benefits Package in the Regulations of the Medical Schemes Act 131 of 1998.

[131] Kate Galloway 'Surrogacy and dignity: Rights and relationships' (2016) 4(1) *Griffith Journal of Law and Human Dignity* 35 at 43.

[132] John A Robertson 'Liberalism and the limits of procreative liberty: A response to my critics' (1995) 52 *Washington and Lee Law Review* 233. See also John A Robertson 'Embryos, families and procreative liberty: The legal structure of the new reproduction' (1988) 59 *Southern California Law Review* 939.

[133] John A Roberts 'Procreative liberty and the state's burden of proof in regulating noncoital reproduction' (1980) 18 Journal of Law Medicine and health Care 16 at 19-20.

involving serious harm warranting state regulation. The argument that the prohibition of commercial surrogacy violates the right to privacy and the right to equality are unconvincing. The decision to have a child is private, but the decision to utilise assisted reproductive technologies regulated by the state in the quest to have a child is less so. There is a right to enter into private contracts, however that contractual freedom ceases to be private where the best interests of the child are to be adjudicated. The New Jersey Supreme Court in *Baby M*[134] rejected the argument that infertile couples have the right to privacy which in turn demands state validation and enforcement of commercial surrogacy agreements.

Commercial surrogacy agreements may indeed provide an alternative method for people who are otherwise unable to have children.[135] However, the discussion on the right to freedom of trade, occupation and profession has shed light on the most common profile of the surrogate mother. Sacrificing one disadvantaged group of women in a bid to assist another hardly seems just. A prohibition on a hypothetical basis that the practice might be harmful is a drastic and unjustifiable solution. However, the modalities of exercising one's rights to find a family must surely be legally, socially and ethically acceptable. The emotional quest for parenthood and in particular the social burden infertility places on women is understandable and the quest for parenthood must be pursued within limits.

The right to procreative choice is a negative right like property rights. The law protects the right to property and enforces that right once such property has been acquired. It can be argued that the right to a family exists once one actually has a family and the state has no positive duty to ensure that everyone has a family. Using that analogy, it can be concluded that there is no inherent right to enter into surrogacy agreements. The right to procreate may be justifiably limited in so far as it relates to commercial surrogacy because the exercise of this right by commissioning parents violates the rights of children and the rights of the surrogate.

3.3.3.2 Right to protect the interests of the intended child

If the commissioning parents have a right to procreate and if that right encompasses the right to enter into commercial surrogacy agreements for the purposes of reproduction, the inquiry becomes whether or

[134] *In re Baby M* 109 N.J 396 537 A.2d 1227 (1988).
[135] R Pretorius 'A comparative overview and analysis of a proposed surrogate mother agreement model' (1987) *CILSA* 275.

not the limitation of that right is justifiable. The commissioning parents have an interest in protecting the health, life and interests of their own child and this usually violates some of the surrogates' fundamental rights including the right to privacy, right to freedom of movement, right to make decisions concerning reproduction, right to security and control over her body and the right to dignity in extreme cases.

It is difficult to strike a harmonious balance between the denial of the surrogate mother's decision-making capacity during the pregnancy and the need to protect the intended child. The commissioning parents usually dictate the method of delivery. There have been cases of coerced caesarean sections for no legitimate medical reasons[136] in order for the birth to fit into the commissioning parent's schedule or to prevent the surrogate mother from bonding with the child during childbirth. In some instances, the surrogate mother is denied crucial medical treatment due to fears that such treatment may be harmful to the child. People are not forced to donate organs to save other people's lives. Pregnant women should not be forced to risk their lives in order to save the life of a foetus.[137] In commercial surrogacy agreements, the product is more important than the service deliverer. The child's life is more important than the surrogate mother's due to the sole reason that there is financial compensation.

3.3.4 Human trafficking and exploitation

Exploitation and human trafficking and commercial surrogacy are intricately linked. It is difficult to discuss one without making reference to the other. According to the International Labour Organisation[138], 20,9 million people are trafficked every year, 11,4 million are women and girls and 5,5 million are children. Human trafficking is also referred to as "people trafficking, modern slavery or trafficking in persons and it is an egregious atrocity at par with war crimes, crimes against humanity and genocide."[139] There is an inextricable connection between human trafficking and other forms of human rights violations such as prostitution, pornography, forced marriage, servitude, and forced labour, begging and criminal activity, drug trafficking and commercial surrogacy.[140] Human trafficking amounts to the dehumanisation

[136] Nicole F Bromfield & Karen Smith Rotabi 'Global surrogacy, exploitation, human rights and international private law: A pragmatic stance on policy recommendations' (2014)1 *Journal for Global Social Welfare* 123 at 127.
[137] J L Waters 'In whose interest? *New Jersey Division of Youth and Family Services v V.M and B.G* and the next wave of court-controlled pregnancies' (2010) 34 *Harvard Journal of Law and Gender* 81 at 87.
[138] Navi Pillay 'Foreword to the Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2013) *United Nations Commission for Human Rights-Office of the Commissioner* at 1.
[139] Phillip Frankel 'We need to pay attention to human trafficking problem in Southern Africa' *Sunday News* 28 August 2019 available at https://www.iol.co.za/sundayindependent/analysis/we-need-to-pay-attention-to-human-trafficking-problem-in-southern-africa-31422468 , accessed on 13 September 2019.
[140] Yoliswa Tswanya 'Indaba highlights SA as human trafficking destination' *Cape Times* 28 November 2018, available at

and ultimate commodification of men, women, children and even babies who are bought or fraudulently recruited, or enticed into commodifying themselves or those they have control over.

South Africa ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women[141] (also known as the Palermo Protocols) and the protocol is annexed to the Children's Act. Chapter 18 of the Children's Act is aimed at giving effect to this protocol and combating trafficking in children. The South African government also promulgated the Prevention and Combating of Trafficking in Persons Act[142] since South African common law and statutory law did not deal with the problem of trafficking adequately. The Act is aimed at providing for the offence of trafficking in persons and other offences associated with trafficking in persons. This Act is a direct response to the continuously rising high rates of human trafficking in South Africa and the need to implement legislative measures to combat and eradicate human trafficking.

There is sufficient legal documentation to apply human trafficking to trafficking of surrogate mothers and resultant children in commercial surrogacy agreements.[143] The research and ongoing debates on whether or not illegal and fraudulent adoptions amount to child trafficking assist in the evaluation of whether or not commercial surrogacy agreements amount to child trafficking. It is appreciated that commercial surrogacy and adoption are different and thus the notion that adoption is the alternative for surrogacy or vice versa is a huge misconception.[144] In adoption the issue is how best the adoptive parents will care for the adoptive child now that the birth family cannot versus the issue in surrogacy which is

https://www.iol.co.za/capetimes/news/indaba-highlights-sa-as-human-trafficking-destination-18288388 , accessed on 13 September 2019.

[141] UN General Assembly Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime 15 November 2000

[142] Prevention and Combating of Trafficking in Persons Act 7 of 2013.

[143] Fatma Mohamed Abdullah 'Legal and ethical aspects beyond commercial surrogacy: Modern form of human trafficking' (2019) 22 (S1) *Journal of Legal, Ethical and Regulatory Issues,* Pyali Chatterjee 'Human trafficking and commercialisation of surrogacy in India' (2014) 85 (10-2) *European Researcher* 1835-1835, Sheila Jeffreys 'Reject commercial surrogacy as another form of human trafficking' *The Conversation*11 August 2014 available at https://theconversation.com/reject-commercial-surrogacy-as-another-form-of-human-trafficking-30314 accessed on 21 June 2019, Melanie Krause 'Pregnant Cambodian surrogates charged with human trafficking' *Bionews* 16 July 2018 available at https://www.bionews.org.uk/page_137194 accessed on 21 June 2019, K Blaine 'The dangerous effects of surrogacy: A review of a transnational feminist view of surrogacy bio markets in India' *Public discourse* 29 October 2018 available at https://www.thepublicdiscourse.com/2018/10/42720/ accessed on 21 June 2019, Madeline Fry 'Where Gloria Steinem and conservatives can agree: Commercial surrogacy is harmful to women' *Washington Examiner* 14 June 2019 available at https://www.washingtonexaminer.com/opinion/where-gloria-steinem-and-conservatives-can-agree-commercial-surrogacy-is-harmful-to-women accessed on 2 July 2019, Bronwyn Parry 'Surrogate labour: Exceptional for whom?' (2018) 47 (2) *Economy and Society Journal* 214-233 available at https://www.tandfonline.com/doi/full/10.1080/03085147.2018.1487180 accessed on 27 April 2019 and John Pascoe 'Sleepwalking through the minefield: Legal and ethical issues in surrogacy' (2018) 30 *Singapore Academy of Law Journal (SAcLJ)* 455-483.

[144] Carmel van Niekerk 'Section 294 of the Children's Act: Do roots really matter?' (2015) 18 (2) *PER/PELJ* 398 at 415.

how best the intending parents will bring a child they desire into the world and care for that child.[145] Adoption deals with the rights of an existing child and commercial surrogacy deals with the rights in relation to a child that is yet to be born.

Smolin[146] is of the view that abducting, buying and selling of a child for purposes of adoption is a form of child trafficking. Roby and Brown[147] use the model of paid inter-country adoption to sufficiently illustrate that birth mothers in such agreements are also trafficked. These arguments are applicable to commercial surrogacy in a bid to prove that commercial surrogacy amounts to human trafficking. Van der Akker[148] is of the view that: "Commercial surrogacy is one of the more unused forms of human reproduction. The focus to overcome involuntary childlessness for this myriad of potential commissioning couples and individuals is primarily centred on their needs, less so on the needs of the surrogate mother and not at all that of the children resulting from these arrangements."[149]

Birth mothers in international adoption cases are dehumanised poor women as they are forgotten members of the adoption equation[150] and this is also the case in commercial surrogacy agreements. There is little research and discussion conducted on the experiences of the birth mothers[151]. The surrogate mothers against whom the force, abuse of vulnerability, fraud or coercion is used during the adoption process are hardly recognised as possible victims of human trafficking. Surrogates are the forgotten members of the commercial surrogacy agreements, they are faceless pregnant women whose stomachs are visible.

The offence of human trafficking is comprised of three definition elements: "the action (recruitment, transportation, sell, exchange, lease or receipt of persons, harboring), the means (use of or threats of force, coercion, abduction, fraud, deception, abuse of power, abuse of vulnerability, giving or receiving payments or benefits to achieve the consent of a person having control over another person) and purpose (sexual exploitation, forced labour, slavery, servitude, organ removal, or any form of exploitation)."[152] All three elements need not be satisfied for an act to qualify as human trafficking.

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[145] Robin Fretwell Wilson 'Uncovering the rationale for requiring infertility in surrogacy agreements' 2003 *AJLM* 337 at 342.
[146] D Smolin 'Child laundering: How the inter-country adoption system legitimises and incentives the practices of buying, trafficking, kidnapping and stealing children' (2006) *The Wayne Law Review* 113 at 119.
[147] Jin L Roby & Taylor W Brown 'Birth parents as victims of trafficking in intercountry adoption' in Robert L Ballard et al *The Intercountry Adoption Debate: Dialogue Across Disciplines* (2015) 303 at 310
[148] Olga B A van der Akker *Surrogate Motherhood Families* (2017) 31.
[149] Olga B A van der Akker *Surrogate Motherhood Families* (2017) 31.
[150] K Manly 'Birth parents: The forgotten members of the international adoption triad' (2006) 2 *Capital University law Review* 627 at 630.
[151] Jane Cottingham 'Babies, borders and big business, (2016) 25 (49) *Reproductive Health Matters Journal* 17 at 18.
[152] Section 4 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013. This section must be read with section

The action element is the *actus reus* of trafficking. Activities of recruitment, transportation, transfer, harboring or receipt of persons may be neutral in themselves. They assume the character of human trafficking when undertaken in a particular means and for a particular purpose. It is important to note that human trafficking is not just the moving of persons from one geographical or political location to another. Human trafficking can occur within a country or transnationally.

Three main schools of thought or ideologies are applied in assessing whether or not human trafficking has occurred. These are the purpose or exploitation–based school, the rights–based school and the purpose–based school. The means–based school is directly linked to the surrogate mother in commercial surrogacy agreements. This school focuses on the means used to obtain the child or the services of the surrogate (use of threats, force, fraud or coercion).

The purpose–based school focuses on the purpose or intention for which the child or surrogate mother was trafficked; begging, sexual exploitation, forced labour, or any form of exploitation. The purpose typically provides the basis for identifying the *mens rea* of the offence of human trafficking. Trafficking is an offence of specific or special intent.[153] Human trafficking is said to have occurred if the trafficker intended that the action through one of the stipulated means would lead to exploitation. The elements of the crime are met if the element of act and purpose are met.[154]

The human rights–based approach puts the victims of trafficking at the center of anti-trafficking policies by prioritizing their rights. This approach eliminates the inquiry into the purpose or exploitation element of the trafficking.[155] If the act element and the means element are met, then the crime of human trafficking can be said to have occurred. The rights–based approach is aimed at ensuring equal protection for all victims of trafficking and focuses on the rights that have been violated as a result of the act element and the means element. This approach tackles human trafficking as a human rights issue rather than an issue of forced labour, illegal immigration, prostitution or organised crime. The means–based school uses

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13 of the same Act which stipulates the penalties for contravening this Act. Anyone who traffics another person will be liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life or such imprisonment without the option of a fine or both.

[153] United Nations Office of Drug and Crime Anti-Human Trafficking Manual for Criminal Justice Practitioners (2009) at 4, The UNODC also notes that *mens rea* can be established on a lesser standard that direct intent such as recklessness, criminal negligence or willful blindness.

[154] United Nations Office of Drug and Crime Legislative *Guides for the Implementation of the United nations Convention Against Transnational Organised Crime and Protocols Thereto* (2004) para 33.

[155] Janina Pescinski 'A human rights approach to human trafficking' Our World: United Nations University, available at https://ourwolrd.unu.edu/en/a-human-rights-approach-to-human-trafficking , accessed on 21 October 2019.

elements in the means–based school and the purpose–based school to the extent to which these schools focus on the victims of human trafficking. There is no requirement to prove that exploitation occurred.

Child trafficking can be said to occur within the dynamics of force, fraud or coercion during the process of adoption.[156] The term child trafficking is loosely applied for a variety of situations including "profiteering and fraud in the consent process, kidnapping of children for adoption and the use of bribery to obtain approval from government officials and many other activities without explicit reference to exploitation."[157] The means–based school of thought focuses on the commodification of children in commercial surrogacy agreements through the payment and receipt of payment or benefits to achieve the consent of a person having control over another person and the abuse of vulnerability of the surrogates involved in such agreements.

Vulnerability (as it would relate to commercial surrogacy) can be defined as "any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from pregnancy, social and economic circumstances."[158] Commercial surrogacy is prohibited in South Africa, hence it is difficult to assess the pool of South African commercial surrogate mothers and their economic and social circumstances to ascertain their vulnerability. Lessons from other countries and India in particular, provide an insight into the calibre of women who typically opt to become surrogates. In India, general reading of literature shows that the typical surrogate falls within the lower economic strata of society, is a slum dweller, illiterate with no form of steady income while carrying heavy debt and a multitude of family responsibilities.[159]

Commercial surrogacy agreements are usually a result of abuse of power and position of vulnerability. Illicit practices are often built upon power disparities based on gender, social class, economic status, political standing and other cultural classifications.[160] It is rich women hiring the services of poor women who are already vulnerable due to their economic and social standing. Commercial surrogacy agreements are not a voluntary contract as the commissioning parents, agents and government officials are essentially

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[156] V Groza and D. P Lauer 'International adoption and child protection in Guatemala: A case of the tail wagging the dog' (2009) 52 I*nternational Social Work* 649.
[157] E J Graff 'The lie we love' *Foreign Policy* 6 October 2009 available at: https://foreignpolicy.com/2009/10/06/the-lie-we-love/ , accessed on 17 April 2019.
[158] Section 1 of the Prevention and Combatting of Trafficking in Persons Act.
[159] Smitha Sasidharan Nair & Rajesh Kalarivayil 'Has India's Surrogacy Bill failed women who become surrogates?' (2018) 3(1) *Indian Journal of Women and Social Change* 1 at 7. See also Amrita Pande '"At least I am not sleeping with anyone": Resisting the stigma of commercial surrogacy in India' (2010) 36(2) *Journal for Feminist Studies* 292-312.
[160] Jin L Roby & Taylor W Brown 'Birth parents as victims of trafficking in intercountry adoption' in Robert L Ballard et al *The Intercountry Adoption Debate: Dialogue Across Disciplines* (2015) 303 at 318.

abusing women's positions of vulnerability due to unemployment, poverty, corruption and low income.[161]

The Prevention and Combating of Trafficking in Persons Act in its preamble recognises that "the search for improved socio-economic circumstances and the demand for services of victims of trafficking contributes to making persons vulnerable to becoming victims of trafficking."[162] The current South African economy has been very unaccommodating, more so for women. Women living in poverty, who are marginalised from labour and job markets due to low education levels and live in patriarchal social and family structures might find the potential gain in commercial surrogacy as a motivating factor to participle in commercial surrogacy. Their economic, social and educational background opens them up to exploitation and abuse from agents and commissioning parents. They can also be exploited or trafficked into surrogacy by their spouses or family members.

A person cannot give informed consent to an agreement that requires them to give up their child in exchange for monetary compensation. A person has informed consent when that person has the ability to understand and appreciate their decision, that decision is voluntary and free from coercion and that person possess sufficient information to make that decision. It is no defense to a charge of child trafficking that "the person having control over that child has consented to the intended exploitation, or the adoption of the child facilitated or secured through illegal means."[163] Parents cannot sell their children. Likewise, it is not a defense that the surrogate mother consented to the sale and subsequent trafficking of the child because it is not in the best interests of the resultant child to be sold, bought and traded like a commodity. Child trafficking is an abhorrent practice that is not in the best interests of the resultant child.

The human trafficking debate mostly hinges on the exploitation or the purpose element. Through the purpose–based school, if the investigation is conducted while focusing on the resultant child, then it is often difficult to classify illegal paid adoptions or commercial surrogacy agreements as child trafficking as the child is not always exploited.[164] There is often a justification in illegal child adoption cases that

[161] Karen Smith Rotabi & Nicole F Bromfield *From Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers* (2017) 129.
[162] Preamble of the Prevention and Combating of Trafficking in Persons Act.
[163] Section 284 of the Children's Act 38 of 2005.
[164] V Garrard 'Sad stories: Trafficking in Children- Unique situations requiring new solutions' (2006-2007) 35 (1) *Georgia Journal of International Comparative Law* 145 and *United States v Galindo* 161 Fed. Appx 735 (2006) Lauryn Galindo was an adoption agent working in Cambodia who facilitated hundreds of fraudulent adoption cases. She admitted to paying off government officials and having fake paper trails to expedite her adoption cases. Poor families in Cambodia were made to

the illegal selling of a child for adoption does not constitute trafficking where the adopted children are not exploited by their adoptive families.[165]

There are also arguments in this camp to the effect that adoption is inherently exploitative. Children are uprooted from their original families, languages and cultures to satisfy the needs of their well to do buyers and owners. Inter–country paid adoptions have been viewed as another mode of economic, political and reproductive exploitation similar to trafficking in women and children.[166] These arguments against inter–country adoption due to its exploitative and inherently human trafficking nature can also be directly applied to commercial surrogacy bearing in mind that the child being uprooted from its family in paid adoptions already exists and the child being commodified in commercial surrogacy agreements is yet to exist.

The surrogate mothers are also victims of human trafficking and focusing on the surrogate mothers gives a clearer picture of the exploitation that occurs in commercial surrogacy agreements thus amounting to human trafficking. The Prevention and Combatting of Trafficking in Persons Act and the Palermo Protocols do not offer a concise definition for exploitation but recognise that exploitation includes but is not limited to, sexual exploitation, servitude, forced labour, child labour, removal of body parts and the impregnation of a female person against her will for the purposes of selling her child when the child is born. The words: 'at a minimum' as used in the Palermo Protocols or 'not limited to' as used in the Prevention and Combating of Trafficking in Persons Act confirm that forms of exploitation like commercial surrogacy not explicitly mentioned in the definition can also fall under the definition of human trafficking.

Commercial surrogacy is extremely exploitative.[167] Exploitation does not always mean that the exploited party is worse off or harmed as a result of the transaction. The concept of exploitation usually implies

believe various things by Galindo's recruiters including that their children were only going to the USA for an education and would come home to visit and would also return after having completed their studies. The adopting families were asked to donate money to her foundation to assist more children left behind in Cambodia. Despite this being a clear case of human trafficking, the law at the time did not have a provision for Galindo to be charged with human trafficking since the children were not being exploited but were getting sent to good homes.

[165] E Bartholet 'International adoption: Thoughts on the human rights issue' (2007) 13 *Buffalo Human Rights Law Review* 152 at 161.

[166] J G Raymond *Women as wombs: Reproductive technologies and the battle over women's freedom* (1993).

[167] Julie Bindel 'Commercial surrogacy breeds exploitation, abuse and misery' *International Business Times* 14 March 2018 available at https://www.ibtimes.co.uk/commercial-surrogacy-breeds-exploitation-abuse-misery-1611279 accessed on 24 May 2019.

that the exploited party is offered some advantage by the transaction that may put them in a better position than before. Commercial surrogacy is not a win-win situation because it exploits societal inequities.

Feldman argues that "financial inequality does not necessarily equate to financial exploitation unless the surrogates agree to serve out of financial desperation and thus lack bargaining power when entering into the commercial surrogacy agreement."[168] The court in *Ex Parte KAF 2019*[169] noted that most surrogate mothers lack bargaining power due to financial desperation. They have weak legal protections that make them vulnerable to harsh contractual clauses that limit their freedom and security. In India, they are usually housed in dehumanising communal shelters. The payment for surrogacy services is usually very low as the lawyers, surrogacy clinics, brokers and corrupt officials all take their cut from the money the commissioning parents pay.

In addition to the economic pressures, exploitation of surrogates may also occur due to societal pressures. Commercial surrogacy incubates a social, economic and political situation in which the sale of a woman's reproductive capacity becomes necessary for the survival of that woman. Society generally places greater importance on a woman's childbearing capabilities than it does on a woman's employment prospects. Turning women's reproductive labour into labour that is controlled and used by men contributes to the insubordination of women and leads to the perpetuation of gender stereotypes.[170]

It would be a gross miscarriage of justice and a great misuse of legislative power for South Africa to legalise commercial surrogacy when the practice is strewn with the potential of human trafficking and exploitation. The political, social, cultural and economic scene in South Africa has not yet developed enough to the extent where commercial surrogacy could be practiced without exploiting women, violating several human rights or leading to human trafficking. Cultural and traditional views of women are still changing — and placing women in situations where their only value is attached to their reproductive capabilities is regressive and might undo all the work women's rights movements have achieved in the emancipation of women.

3.3.5 Limitation of rights

The Constitution contains an all-encompassing limitation clause (the weasel clause) which states that:

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[168] Eric A Feldman 'Baby M turns 30: The law and policy of surrogate motherhood' (2018) 44 *American Journal of Law and Medicine* 7 at 13.
[169] *Ex Parte KAF and Others* 2019 (2) SA 510 (GJ) at 7.
[170] PQR Boberg (ed) *Boberg's Law of Persons and the Family* (1999) 2ed pg 348.

"*36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."[171]

The African Charter on Human and People's Rights states that "Rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective scrutiny, morality and common interest."[172] The Universal Declaration of Human Rights provides that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[173]

All laws in South Africa must be subjected to constitutional scrutiny. The legal structure can easily be manipulated to accommodate the commercialisation of life and caution must be taken in applying such principles to South Africa. Rights can be malleable to the point where anything can have a right, yet rights are not absolute. The rights in the constitution are not without limitation. Fundamental rights are like empty vessels and do not in themselves have a fixed content and when they are interpreted, they must be in line with the limitation clause.[174] The notion that a person owns themselves and their labour and should therefore do as they please with their person is not always applicable especially when such application may violate the rights of the parties involved. Legal paternalism is important as it protects humans from being self-destructive.

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[171] Section 36 of the Constitution of the Republic of South Africa Act 108 of 1996.
[172] Article 27(1) of the African Union (AU) African Charter on Human and People's Rights (Banjul Charter) 27 June 1981 CAB/LEG/6/7/3 rev 5,21 I.L.M. 58 (1982)
[173] Article 29(2) of the UN General Assembly International Covenant on Civil and Political Rights 16 December 1966 United Nations Treaty Series Vol. 999 pg 171.
[174] *Chandra Bhowan v State Mysore* (1990) 2 SCR para 1714.

The purpose the weasel clause is to strike a balance between competing and conflicting rights as it allows for certain rights to be limited to a specified extent and for certain democratically justifiable purposes. In the case of commercial surrogacy, the right to procreate, the right to freedom of trade, occupation and profession and the right to bodily and psychological integrity, freedom of autonomy and reproductive autonomy are in conflict with and compete with the right to dignity, the right to life in so far as living a fulfilling life is concerned, the right to not be treated in a cruel, inhumane and degrading manner, the right to freedom from slavery, servitude of forced labour and the paramount best interests of the child.

The limitation clause contains a two-step test to ascertain whether a limitation is justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation must be reasonable and proportional. Proportionality relates to the impact and extent of the limitation. The limitation must match the importance of the aim served by the limitation. It would be unreasonable to prohibit commercial surrogacy in an effort to keep in view the susceptibilities and moral sentiments of a community as moral concerns are an insufficient justification for such a prohibition. Moral arguments are characterised in reference to highly speculative harms and a failure to evaluate any benefit that permitting a practice might have.[175]

Siwendu J in *Ex parte KAF and Others* held that "the regulatory intent behind commercial surrogacy is not one-sided. It is to prevent the potential exploitation of commissioning parents from unlikely financial damage that could result on one hand, as well as the potential exploitation and commodification of would-be surrogates as well as the rights of the child to be born. It is also likely that surrogate mothers despite the Act limiting payment of reasonable expenses only, may be desperate enough to enter into these contracts for the limited financial benefit that they may receive."[176]

The limitation in relation to commercial surrogacy is reasonable as it seeks to maintain public order, public safety, public peace and tranquility, public health, the *boni mores* of the society, prevent exploitation of women, prevent human trafficking of women and children, uphold human dignity, prevent slavery, servitude and forced labour and the treatment of women and children in a cruel, inhuman and

[175] Denise Meyerson 'Surrogacy Agreements' in Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 121 at 123.

[176] *Ex Parte KAF and Others* (2018/5329) [2018] ZAGPJHC 529; 2019 (2) SA 510 (GJ) at 7.

degrading way and to protect the rights of the children while upholding, promoting and fulfilling the best interests of children.

There is no dignity in commercial surrogacy.[177] It is immoral, degrading and expresses an inferior conception of human flourishing. There are some forms of work and trade that are acceptable in human society that lawfully subscribe to agency and autonomy. Commercial surrogacy cannot meet the standards for acceptable work without treating children as *res in commercio* and commodifying childbirth and turning the experience into human trafficking. It does not satisfy the need to procreate without turning the intended children and gestation into goods and objects.

The concepts is driven by a complex intersection of social and economic factors in which poverty, unemployment, inequality and human trafficking are the points of entry. It is reasonable for the legislature to refuse to recognise commercial surrogacy as a trade as it cannot be recognised as freely chosen work. Nicholson notes that "the expansive poverty prevailing in South Africa compromises the ability of desperate women to forego an opportunity to make money thus exposing them to exploitation by the wealthy."[178]

A radical shift in legislative framework should not cause a cultural shift which would make women more vulnerable. Legalising commercial surrogacy does not necessarily address the ethical and moral concerns associated with it. It also does not address other problems like "increasing reports of exploitation, baby farming, buying of specific babies and targeted breeding opportunities circulating in the media and research reports."[179] Commercial surrogacy treats the poor women as if they are providing cheap labour and not assisting in the creation of a human life.[180]

Commercial surrogacy agreements are difficult to enforce without bringing to light their inherently exploitative nature or how they commodify children and childbirth. Commercial surrogacy contracts are *contra bonos mores,* thus they are unenforceable. A contract is only valid if "it does not contravene an

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[177] Madeline Roache 'Ukraine's 'baby factories': The human cost of surrogacy' *Aljazeera* 13 September 2018 available at https://www.aljazeera.com/indepth/features/ukraine-baby-factories-human-cost-surrogacy-180912201251153.html accessed on 22 May 2019- The surrogates were made to share beds with each other and one of the surrogates interviewed for the article reported that they were treated like cattle and the doctors mocked them. They were threatened and told they would not get paid if they complained about the poor service they were receiving at the hospital they were sent to deliver at.

[178] Caroline Nicholson 'When moral outrage determines a legal response: Surrogacy as labour' (2013) 29 (3) *South African Journal on Human Rights* 496 at 504.

[179] Olga B A van den Akker *Surrogate Motherhood Families* (2017) 18.

[180] Surekha Nelavala 'Surrogate mothers in India-Are they empowered or exploited? A discussion from a feminist perspective' (2015) 15 (6) *Journal of Lutheran Ethics* para 9.

act of Parliament or other statutory provision and is not considered immoral or against public policy."[181] Contracts that are injurious to man or contracts that allow unlawful acts are invalid. A commercial surrogacy agreement provides for permanent transfer of parental rights and compensates a person for terminating their parental rights. It is therefore a *contra bonos mores* agreement.

The problem with trying to enforce commercial surrogacy contracts is twofold, how the compensation is determined and how to quantify the remedies for breach of contract. It is difficult to decide on a uniform scale for compensation that decides the value of a child or the appropriate amount to pay a woman to undergo something as dangerous and risky as pregnancy.

Remedies for breach of contract are damages, restitution, rescission, reformation and specific performance. There is no way of achieving restitution, rescission and reformation in commercial surrogacy agreements. However, the question of specific performance in terms of commercial surrogacy agreements is also difficult to answer. It is difficult to award damages for breach of contract without agreeing that commercial surrogacy commodifies childbirth and is therefore human trafficking. The New Jersey case of *Baby M*[182] brought to light how absurd it is to even illustrate a hypothetical case related to the imposition of damages on surrogate mothers for any defect or deficiency in health of a newly born baby as this amounts to commodifying the child and equally making women's reproductive labour or gestational capacity as a mechanical service available for hire. It amounts to commercialisation and sale of human life.

Decrees of specific performance will not be made where it is impossible for the defendant to comply with them.[183] In commercial surrogacy agreements, an order for specific performance will likely cause undue hardship.[184] The commodity of the contract is the resultant child. For example, the specific performance order that the commissioning parents would most likely seek before the court would be to have the resultant child handed over to them. If a surrogate decides to pull out of the commercial surrogacy agreement and not gestate for the intending couple, an order for specific performance would be forced labour and a violation of her dignity, bodily autonomy and bodily integrity. Courts are reluctant

[181] Diedenka Pretorius 'Surrogate Motherhood: A worldview of the issues' (1992) 81.
[182] I*n re Baby M* 537 A.2d 1277, 109 N.J 396 (1988).
[183] *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350.
[184] *In re P (Surrogacy Residence)* [2008] 1 FLR 177 the court pointed out that in most cases than not, it causes an undue hardship to impose liability on the surrogate mother.

to grant orders for specific performance for contracts of personal service because it is difficult to supervise performance or to ascertain the quantum of equitable damages.[185]

In terms of damages, the problems arise in calculating the value of the child. If the commissioning parents refuse to take the child, the value of the child, maintenance, special needs, education amongst others would all need to be calculated. Courts are generally reluctant to pronounce on the validity of surrogacy agreements.[186] Courts will generally enforce parental rights where it is in the best interests of the resultant child.[187]

Legalisation of commercial surrogacy does not address the power imbalance between the parties involved or reduce infertility. In fact, it is just a rights-based argument for legalising human trafficking.[188] The purpose of section 22 of the Constitution is to protect livelihoods while ensuring that individuals live fulfilling and dignified lives. There is no dignity in seemingly exercising one right while violating other rights. The expandability of women would increase as the demand for commercial surrogacy services increases internationally and locally. The law should not permit women and children to be alienable property or to sanction a gross violation of human dignity under the guise that a practice may prove to be beneficial in alleviating poverty or upholding the right to autonomy. The *boni mores* and human rights of those parties must be taken into consideration with the understanding that not all legal paternalism is bad. Some of it serves legitimate purposes.

Therefore, the limitation of some rights that support commercial surrogacy is justifiable as those same rights also support the prohibition thereof. There is a link between the prohibition of commercial surrogacy and the purpose for that prohibition. Surrogacy entails the development of existing technologies in a manner which impacts on social values and public policy. It should not be commercialised to a point where it turns into the utilisation of technologies to artificially create a human being on demand. The criticisms and usefulness of this method of reproduction lies in its legal and ethical concerns thereof.

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[185] Richard Hunter Christie *Law of Contract in South Africa* 7ed (2016) 85.
[186] *In re C* (1985) F.L. R 846 see also In re Baby M 217 N.J. Super 313 525 A 2d 1128 1132 Ch Div (1987) and also *In re Baby M* 537 A.2d 1277, 109 N.J 396 (1988). And *Ex Parte KAF and Others* (2018/5329) (2018) ZAGPJHC 529, 2019 (2) SA 510 (GJ) – the court did not enforce the surrogacy agreement in question. The court only decided on the matter of whether or not the surrogate mother was suitable to be a surrogate mother.
[187] *Chodree v Vally* 1996 (2) SA (WLD).
[188] M Brazier et al 'Surrogacy review for health ministers for current arrangements for payments and regulation: Report on the Review Team' (1998).

3.4 Conclusion

Arguments in support of commercial surrogacy are individualistic in that they focus on the desires of the parties to the commercial surrogacy agreement without paying attention to the ripple effect of such agreements. Legislation cannot legalise a gross violation of human rights simply because legalising such a crime protects the rights of certain select individuals to dignity, equality, reproductive autonomy, trade, occupation and employment. The law cannot be used as a tool to protect criminals from the law in their criminality no matter how many human rights arguments such wrongdoers can employ in their defense. An offence is an offence and legalising commercial surrogacy is a backdoor to legalising human trafficking — legally-sanctioned exploitation of women and violation of constitutionally protected human rights.

Commercial surrogacy is the exception, not the norm. Arguments in support of commercial surrogacy are noteworthy, however they fail to understand that legalising commercial surrogacy is akin to legalising court-sanctioned gross violation of human rights. There is no way in which the commercialisation of surrogate motherhood agreements can be cultured without the exchange of monetary compensation for the parentage of a human being because the exchange of monetary compensation is the very essence of such agreements. There is no other way of divorcing commercial surrogate agreements from their true nature, which is the sale of children and women's reproductive capabilities. The fact that poor women are recruited (invited, contacted, enticed or contacted) to become commercial surrogates and their economic situation is exploited to an extent where compensation is paid to them so they can consent to giving up their parental rights over another human being is a violation of several human rights as discussed above.

It is objectionable to buy and sell babies or to rent the reproductive capacity of women, even if the commercial surrogate genuinely believes that she is exercising her right to reproductive autonomy, contractual freedom or to freedom of trade, occupation and profession and is entering into such an agreement 'freely' and on her own terms. The surrogate mother's decision is not free if there is a financial motive. The need for money will make poor women 'choose' to become surrogates and it is highly

unlikely that infertile couples in the low-income bracket will find upper income surrogates.[189] There are things in a civilized society that money cannot buy.[190]

Justice and the right to bodily and reproductive autonomy requires respect for the choices people make, provided such choices do not violate anyone else's rights, Commercial surrogacy agreements violate the resultant child's rights and the surrogate mother's several inherent human rights including the right to not be trafficked or exploited. Classifying commercial surrogacy as trade amounts to converting gestational labour into a form of alienated labour. This amounts to treating the resultant child and the surrogate mother as objects and not as humans with human rights deserving of respect and dignity.

There is argument that the compensation in surrogacy agreements is for the service and not for the child. That argument is flawed because the true nature of a commercial surrogacy agreement is the sale and trafficking of a child, the sale of the surrogate mother's right to her child and her gestational services. The only mitigating factor is that in the case of South Africa the gamete of at least one of the commissioning parents must be used.[191] However whatever idealism may have motivated any of the participants, the profit motive and the exchange of compensation predominates and permeates commercial surrogacy. This ultimately turns such agreements into human trafficking agreements and one cannot legally and validly consent to an activity that is injurious to their person.

In *Ex parte HPP and others; Ex parte DME and Others*[192] the court held that the right to trade, occupation and profession must be looked at in line with what a prohibition on commercial surrogacy is trying to accomplish while keeping in mind the provisions of section 36 of the Constitution and the limitation in section 22 of the Constitution itself.[193] Surrogacy is not completely outlawed as the legislature evaluated its benefit and took the constitutionally sound route of legalizing and regulating altruistic surrogacy. The limitation is on commercial surrogacy and this limitation exists to protect public interest. The regulatory framework exists to protect the public against unscrupulous people who may abuse vulnerable people. The limitation exists in order to protect the rights of women and children. There is definitely a nexus between the restriction and its object thus the limitation is proportional.

[189] *In re Baby M* supra note 95 at 1249.
[190] *Ibid.*
[191] Section 294 of the Children's Act.
[192] *Ex Parte HPP and Others; Ex Parte DME and Others* 2017 (4) SA 528 (GP).
[193] *Ibid* at 48.

The current legal framework regulating surrogacy is insufficient to properly regulate altruistic surrogacy or to adequately guard against human trafficking. It would be a great miscarriage of justice to lift the current prohibition on commercial surrogacy when our courts are still trying to get a grasp of the tenets of altruistic surrogacy. The current political, legal, social, economic and cultural climate in South Africa is an indicator that South Africa is not ready for the legalisation and regulation of commercial surrogacy. The current prohibition of commercial surrogacy must be maintained. The existing legislation must be developed in order to lay down clear penalties for contravening the prohibition against commercial surrogacy. Before South Africa even considers legalising commercial surrogacy, the legislature needs to reassess the current surrogacy regulating provisions in Chapter 19 of the Children's Act to address and eliminate the various inconsistencies noted in Chapter 2 of this dissertation. These include the lack of clarity on the powers of the High Court, the lack of sanctions and penalties for violating the prohibition against commercial surrogacy and the inconsistent application and interpretation of certain provisions of the Chapter 19 of the Children's Act.

From the discussion above, it is clear that the practice of commercial surrogacy is a prosecutable offence. Entering into a commercial surrogacy agreement would amount to contravening sections 301, 302 and 303 of the Children's Act. The prohibition of commercial surrogacy serves the legitimate purpose of protecting the rights and interests of the surrogate, the resultant child as well as those of the commissioning parents. Commercial surrogacy should remain a crime because these rights are worthy of constitutional protection. The penalties laid down in section 305 of the Children's Act and section 276 of the Criminal Procedure Act are not commercial surrogacy specific. Commercial surrogacy specific sentencing guidelines are required in order to give effect to the prohibition of commercial surrogacy. Guidance on such sentencing guidelines can be sought from the Netherlands and India and these will be discussed in the following chapter.

CHAPTER FOUR

DISCUSSION OF FOREIGN LEGISLATION TO FORMULATE THE SOUTH AFRICAN PROPOSAL

4.1 Introduction

Chapter 2 and Chapter 3 have discussed why commercial surrogacy is prohibited in South Africa and why it should continue to be prohibited as well as how the legislature arrived at this position. In these chapters, it was identified that there is inadequate enforcement of the prohibition against commercial surrogacy in South Africa. It has also been noted that the current legislation regulating commercial surrogacy needs to be developed to ensure uniformity and certainty in the adjudication of commercial surrogacy cases. At present, the blanket sentencing provisions stipulated in section 305 of the Children's Act[1] and section 276 of the Criminal Procedure Act[2] are not specific enough to ensure the adequate regulation and enforcement of the prohibition against commercial surrogacy.

This chapter will discuss the regulation of surrogacy in India and the Netherlands. These jurisdictions have been chosen because they are more medically advanced than South Africa. Assisted reproductive technologies in these jurisdictions are way more developed and more used in practice thus they provide better guidelines on the medical feat of surrogacy. Similar to South Africa, these jurisdictions prohibit commercial surrogacy, for similar reasons, for the most part. India has been chosen because it is one of the few countries that permitted commercial surrogacy and then reconsidered its approach on the subject due to a myriad of problems associated with human rights violations, baby selling, womb trafficking, human trafficking, surrogacy tourism and rampant exploitation of surrogate mothers. India provides a lesson on what not to do.

Dutch Law is an important comparator because the hybrid legal system of South Africa finds its basis in Roman-Dutch Law. Dutch Law has strict penalties for contravening the prohibition of commercial surrogacy and South Africa needs to lay down similar penalties in relation to surrogacy. The conclusion that will be drawn from these jurisdictions is that the prohibition of commercial surrogacy is still

[1] Children's Act 38 of 2005.
[2] Criminal Procedure Act 51 of 1977.

warranted in South Africa and across the globe as such prohibition is the best way of regulating surrogacy while balancing the rights and interests of the commissioning parents, the surrogate and the resultant child.

4.2 The Netherlands

4.2.1 Introduction

Prior to 1994, there was a blanket prohibition of surrogacy under Dutch Law. This prohibitory approach was changed into a regulatory approach where altruistic surrogacy is permitted under law and commercial surrogacy is criminalised. The Dutch Civil Code provides for legislative reference for offences and penalties because it excellently lays down offences relating to commercial surrogacy and their penalties.

4.2.2 Legislative framework

Article 151(b) and Article 151(c) of the Dutch Civil Code criminalises commercial surrogacy as an offence punishable by up to one year imprisonment or a fine or both.[3] These articles also prevent the advertisement of surrogate services or advertisement of the need for surrogacy services.[4] It has been argued that the aim of this legislation is to prevent the exploitation and abuse that comes with surrogacy agencies and brokers and not specifically aimed at making surrogates or commissioning parents liable to criminal prosecution. Whatever the supposed aim of the provisions might be, the literal interpretation of these provisions is to the effect that commercial surrogacy agreements are illegal in the Netherlands and paying someone for their gestational services or for the transfer of their parental rights is a punishable offence. Parliamentary debates surrounding the promulgation of the Legal Marital Relations Act[5] noted that the prohibition is "aimed at avoiding a situation where women would offer themselves as surrogate mothers for payment as this might lead to a form of trade in children."[6]

[3] Article 151(b0 and Article 151(c) of the Dutch Civil Code.
[4] Slyvia Dermount et al 'Non-commercial surrogacy: An account of patient management in the first Dutch Centre for IVF surrogacy from 1997 to 2004' (2010) 35 (2) *Human Reproduction* 443-449.
[5] Legal Marital Relations Act of 16 September 1993, Stb 486.
[6] Machteld Vonk 'Maternity for another: A double Dutch approach' (2010) 14(3) *Electronic Journal for Comparative Law.*

Dutch Law recognises that both altruistic surrogacy agreements and commercial surrogacy agreements involve some payment. The prohibition of commercial surrogacy is on the basis that commercial surrogacy agreements are concerned with profit whilst altruistic surrogacy agreements are primarily concerned with helping another couple to have a child.[7] Even the Dutch who have found a way to calculate the value of human life when deciding how much the government should pay for the medical treatment of terminally ill patients[8] find it degrading and offensive to buy and sell a human being.

The Dutch government conducted a study on commercial surrogacy between 1997 and 2004 and the study showed that altruistic surrogacy is very feasible and more beneficial to the parties concerned than a commercialised agreement.[9] The study also showed that if parentage of the child is clarified, then more intending parents would utilise surrogacy in the Netherlands rather than trying to obtain surrogacy services out of the county. This study forms the surrogacy and child-oriented approach to surrogacy in the Netherlands where the best interests of the child are of paramount importance and ensuring that the surrogate and her reproductive capabilities are not commercialised to the point of degradation is a limiting factor to surrogacy.

There is only one hospital that offers IVF-surrogacy treatment in the Netherlands, the VU Medical Centre in Amsterdam. IVF treatments are governed by the Guidelines on IVF-surrogacy.[10] Only the genetic material of the commissioning parents may be used. The negative effect of this requirement is that only infertile heterosexual couples can utilise surrogacy as a form of assisted reproduction. Egg donation in combination with surrogacy is prohibited.

The regulations provides for screening and counseling of the surrogate mother and the intending parents. The parties are required to be informed of the legal consequences of their decision and the legal position of the child after birth.[11] This screening and counseling requirement is done to ascertain the informed consent of the parties.

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[7] Ian Curry-Sumner & Matchteld Vonk 'National and International Surrogacy: An odyssey' in B Atkins (ed) *International Survey of Family Law* (2011) 259 at 260. 259-280.
[8] Henk, ten Have & Jos Welie *Death and Medical Power: An Ethical Analysis of Dutch Medical Euthanasia Practice* (2005) at 29.
[9] Slyvia Dermount et al 'Non-commercial surrogacy: An account of patient management in the first Dutch Centre for IVF surrogacy from 1997 to 2004' (2010) 35 (2) *Human Reproduction* 443 at 448.
[10] Dutch Society for Obstetrics and Gynecology Guidelines on IVF-surrogacy 18 January 1999.
[11] Ian Curry-Sumner & Matchteld Vonk 'Surrogacy in the Netherlands' in Katarina Trimmings and Paul Beaumont (eds) I*nternational Surrogacy Agreements: Legal regulations at the International Level* (2013) Chapter 17.

The surrogate and her partner must be domiciled in the Netherlands, must be fluent in Dutch and must be Dutch nationals. She must have had one or more uncomplicated live births and, at the time of entering the surrogacy agreement, she must consider her family as complete. She must be in good health, younger than 44 years of age, have a strong personality, have a strong desire to assist the commissioning parents in their desire to have their own children and be willing to surrender the child to the commissioning parents after birth. The intending mother must be incapable of carrying a pregnancy to term owing to a life–threatening medical condition. She may not be older than 40 at the time of the IVF treatment. The Dutch Child Care and Protection Board requires proof that the intending parents do not have a criminal record.

The main issue surrounding surrogacy in Dutch Law is the determination of parentage of the resultant child. Contracts that violate mandatory statutory provisions or contracts that are *contra boni mores* are regarded as null and void and contracts concerning the surrender of children after birth are considered as *contra boni mores*.[12] Parties to a surrogacy agreement are encouraged to enter into a contract and this contract is to be used to determine the intention of the parties involved at the time of entering the contract in facilitating the adoption process.[13] The surrogacy contract is not the deciding factor for parental rights, it is a mere toll used in the adjudication process.

The Dutch do not follow a pre-authorisation model for surrogate motherhood agreements. There are no pre-birth orders or post birth orders in Dutch Law. Normal adoption procedures apply. The major requirement for adoption is that the adoption must be in the best interests of the child and Dutch courts will not adjudicate an adoption case where the surrogate mother and her partner object to the adoption. Before the birth of the child, the parties to the surrogacy contact are required to involve the Child Protection Board to register their agreement and to ensure better adjudication of the adoption case.

At birth, the surrogate mother is the legal parent of the resultant child[14] and transfer of guardianship and parental rights is effected through adoption. Whether the pregnancy was effected through partial or full

[12] Article 3:40(2) of the Dutch Civil Code.
[13] Machteld Vonk 'The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law' (2008) 4(2) *Utretch Law Review*.
[14] Article 198 of the Dutch Civil Code.

surrogacy is of no consequence. The legal father of the child is determined based on the marital status of the surrogate.[15] If the surrogate is married, her partner will be the legal father of the resultant child[16] and will automatically assume parental responsibility.[17] He may challenge his paternity in the unlikely situation that he did not consent to the surrogacy agreement before conception.[18] For the commissioning parent to adopt the resultant child, the surrogate and her partner have to be divested of their parental responsibility.

If the surrogate is unmarried, she will be the sole legal parent of the resultant child. If the sperm of the commissioning father was used, he may apply to acquire parental legal status of the child and may then apply for sole parental responsibility to the exclusion of the surrogate.[19] The commissioning mother may then adopt the child after a year of living with that child and if she meets the criteria for adoption.

4.2.3 Criminal Sanctions

The Dutch Criminal Code lays down clear and concise criminal provisions and criminal sanctions in the context of surrogacy. The illegal mediation for placement of a child attracts a minimum sentence of six months and a maximum fine of 7 600 Euros.[20] The illegal mediation for placement of a child younger than six months attracts a minimum sentence of three weeks and a maximum fine of 3 800 Euros.[21] The advertising for surrogacy attracts a minimum sentence of one year and a maximum fine of 19 00 Euros.[22] The mediation and promotion of abandoning of a child attracts a minimum sentence of six months and a maximum fine of 7 600 Euros.[23] Fraud in relation to status attracts a minimum sentence of five years and a maximum fine of 19 000 Euros.[24] Misrepresentation of any facts in the surrogacy agreements attracts a minimum sentence of five years and a maximum fine of 76 000 Euros.[25] The false declaration of birth by a midwife or doctor attracts a minimum sentence of three years and a maximum fine of 19 00 Euros.[26]

[15] Article 199.
[16] Article 198.
[17] Article 251(1).
[18] Article 200(3).
[19] Article 253(c).
[20] Article 151(a).
[21] Article 442(a).
[22] Article 151(b).
[23] Article 151(c).
[24] Article 236.
[25] Article 225.
[26] Article 228.

Dutch Law heavily penalises human trafficking with a minimum sentence of twelve years and a maximum fine of 76 000 Euros.[27] The removal of a minor from parental authority attracts a minimum sentence of six years and a maximum fine of 19 000 Euros.[28]

Since commercial surrogacy is prohibited by Dutch Law, commissioning parents who fail to find a surrogate tend to resort to cross-border surrogacy. This phenomenon complicates the transfer of parental responsibilities by an exponential factor. Obtaining legal documentation for the child is no easy feat. This dissertation is limited to a discussion of commercial surrogacy in South Africa, therefore the discussion on the regulation of transnational surrogacy in the Netherlands falls out of the scope and ambit of this dissertation.

4.3 India

4.3.1 Introduction

Commercial surrogacy was a long-standing unregulated practice in India up until the Indian government prohibited the practice in 2018[29] and sought to promulgate the Surrogacy (Regulation) Bill[30] (hereinafter referred to as the Surrogacy Bill) which criminalises commercial surrogacy in India. Prior to this bill, India had responded to several criticisms against commercial surrogacy and had banned surrogacy agreements between Indians and foreigners.[31] The legislation was promulgated as an urgent response to the continued criticism against the unregulated commercial surrogacy and the exploitative nature of the practice. The Bill is aimed at protecting the rights of women and children from the risks of commodification and exploitation in surrogacy agreements while balancing the rights of commissioning parents to procreate. The Bill recognises that commercial surrogacy cannot be permissible in a country

[27] Article 278.
[28] Article 279.
[29] Vaibhav Tiwari 'Surrogacy Regulation Bill passed in Lok Sabha: 10 points' *NDTV* 19 December 2018 available at https://www.ndtv.com/india-news/surrogacy-regulation-bill-passed-in-lok-sabha-10-points-1965215 accessed on 1 August 2019. The Indian Parliament (Lok Sabha) gazette the Surrogacy (Regulation Act) 257 of 2016 in 2018.
30 Surrogacy (Regulation) Bill 156 of 2019.
31'India bans foreigners from hiring surrogate mothers' The Guardian 28 October 2015, available at https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers, accessed on 19 August 2019.

where injustices, inequality and poor implementation and interpretation of laws has the vast potential of placing vulnerable women and children at risk of being trafficked.[32]

4.3.2 Prior to the commercial surrogacy ban

The Surrogacy Bill did not emerge out of a vacuum. Commercial surrogacy was legalised in 2002 and since then, India had been marked as a baby outsourcing destination and was notoriously popular for commercial surrogacy tourism. Commercial surrogacy was permitted for foreign couples if they could provide written proof that their countries of origin permitted surrogacy and that the resultant child would be permitted entry into the intending parents' country of origin. India is always in the lead when it comes to medical conquests, with contemporary technology and skilled medical professionals and this facilitated for a largely booming assisted reproduction industry.

When this industry boomed in response to the market demand, the surrogates and the resultant children became the focus of concern and prime victims of exploitation. The medical field remained untainted and free from harm. Unregulated commercialisation in a country characterised by social inequality eventually led to exploitation of poor women as the wealthy (mostly foreigners) and infertility clinics were better positioned to drive up bargains in commercial surrogacy agreements.[33]

As is always the case in most commercial surrogacy agreements, the parties to a commercial surrogacy agreements in India were vastly polarised. The intending parents were usually wealthy and foreign. The surrogates were usually desperate, under-educated, unemployed slum dwellers in dire economic situations and in need of financial assistance. The surrogacy contracts lacked transparency or any form of oversight. The commissioning parents and the surrogacy agencies always had the better bargaining power compared to that of the surrogates.

There were reports of abandoned children, arguments over contractual agreements for handing over the resultant children, womb trafficking, trafficking of children in, around and out of India. Although foreign commissioning parents were required to furnish proof that their countries permitted surrogacy, the phenomenon of stateless children remained on the rise. Many commissioning parents incurred a lot of

[32] Olinda Timms 'Ending commercial surrogacy in India: Significance of the Surrogacy (Regulation) Bill, 2016' (2018) 3 (2) Indian Journal of Medical Ethics 99 at 99.
[33] Olinda Timms 'Ending commercial surrogacy in India: Significance of the Surrogacy (Regulation) Bill, 2016' (2018) 3 (2) *Indian Journal of Medical Ethics* 99 at 100.

red tape in acquiring passports for their intended children or could not expeditiously adopt the children. Such concerns around parenthood and the best interests of the child demanded for the prohibition of commercial surrogacy.

Baby farms where the women were kept away from their families for long periods of time while all the while being expected to conduct themselves in a certain way became the norm of many surrogacy clinics. It became difficult to ascertain whether these women were intentionally exercising their rights to autonomy by voluntarily choosing to be commercial surrogates or whether they were being coerced, forced, manipulated, exploited and trafficked into being commercial surrogates due to the desire to fulfill material or financial needs.[34]

From a rights based perspective, the Indian government had to evaluate whether or not commercial surrogacy was in the best interests of the commissioning parents, the surrogate and the resultant child. The considerable and apparent risks and human rights violations eventually drove the legislature to reevaluate its liberal position on commercial surrogacy to provide for more stringent laws that prohibited the practice.

4.3.3 Legislative safeguards in the Bill

The 2019 Surrogacy Bill is a development of the 2016 Surrogacy Bill.[35] The Bill intends on regulating surrogacy and banning commercial surrogacy through various administrative safeguards. The Bill prohibits the practice of commercial surrogacy[36] and the advertisement of commercial surrogacy.[37] The penalty for contravening this prohibition is a minimum sentence of five years imprisonment or ten years imprisonment for a repeat offender.[38] The Bill also criminalises certain acts that are typically associated with commercial surrogacy. The Bill recognises that lack of legislation on surrogacy had caused excessive commercialisation of surrogacy agreements, leading to the emergence of unethical practices, exploitation of surrogates, abandonment of resultant children and importing of human embryos and gametes.[39] The Bill prohibits the abandonment, disownment and exploitation of children born out of

[34] Anu et al 'Surrogacy and women's rights to health in India: Issues and perspectives' (2013) 57(2) *India Journal of Public Health* 65 at 67. See also Andrew Kimbrell '*The Human Body Shop: The Engineering and Marketing of Life'* (1994) 101.
[35] Surrogacy (Regulation) Bill 257 of 2016.
[36] Clause 35(1)(a) of the Surrogacy (Regulation) Bill 156 of 2019.
[37] Clause 35(1)(b).
[38] Clause 37.
[39] Prasanna Mohanty 'The Surrogacy (Regulation) Bill 2019: A casual approach to a serious concern' Business Today 15

surrogacy;[40] exploitation of surrogate mothers or the resultant children in any form whatsoever;[41] the sale of and trade in gametes and embryos for the purpose of surrogacy;[42] the importation of human embryos or gametes for the purposes of surrogacy[43] and the conducting of sex selection of any form in surrogacy.[44]

Given the various problems associated with surrogacy clinics, the Bill purports to strictly regulate surrogacy clinics. Clause 4 of the Bill limits surrogacy to altruistic surrogacy only. The commissioning parents must obtain a certificate of proven infertility from the director in charge of the surrogacy clinic. The Bill follows a pre-authorisation model where an order of parentage and custody of the child must be passed by the Magistrate's Court prior to artificial insemination.

The Bill stipulates that the surrogate mother shall only be compensated for medical expenses and insurance coverage. She must be a citizen of India, married, have her own children, and be between 25 and 35 years of age at the time of implantation. The gametes of the surrogate may not be used and only a person who is closely related to the intending parents may serve as a surrogate. A woman can only serve as a surrogate once in her life and she must obtain a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a medical practitioner. The Bill prohibits the husband, intending parents or close relatives of the surrogate from pressuring a woman into offering herself as a surrogate.

The intending parents must obtain a certificate of eligibility from the relevant National and State Surrogacy Boards. To obtain this certificate, the commissioning parents must be Indian citizens, married for at least five years, with no biological surviving children, adopted children or children born through surrogacy earlier. The effect of the agreement is that the commissioning parents are the legal parents of the resultant child at birth and that child shall be entitled to all the rights and privileges available to a natural child under any law in force.

The Bill acknowledges that prior to the ban on commercial surrogacy, surrogates hardly gave their informed consent for the surrogacy procedures. To remedy this problem, the Bill requires that the surrogate must be made to understand the side effects and after effects of the surrogacy procedure and

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August 2019, available at https://www.businesstoday.in/current/policy/surrogacy-regulation-bill-2019-infertility-indian-council-of-medical-research-icmr-surrogate-mothers-in-vitro-fertilisation-ivf/story/372797.html , accessed on 21 August 2019.

[40] Clause 35(1)(c) and Clause 7 of the Surrogacy (Regulation) Bill 156 of 2019.

[41] Clause 35(1)(d).

[42] Clause 35(1)(e).

[43] Clause 35(1)(f).

[44] Clause 35(1)(g).

must give her written consent in the prescribed form to the effect that she understands what the process entails. The Surrogacy Bill still awards infertile intending parents the opportunity to utilise artificial reproductive technologies through surrogacy while protecting women from exploitation and children from commodification.

The Bill seeks to appoint an 'appropriate authority' to monitor the adherence of rules by surrogacy clinics, surrogates and commissioning parents and conduct inquiries if rules are violated. India is a federal state with 29 states and six unions hence the establishment of the appropriate authority will be done through the establishment of National and State Surrogacy Boards.[45] The Central Government will constitute a National Board comprised of the Minister of Health and Family Welfare, the Secretary to the Indian Government dealing with the department of surrogacy, three female Members of Parliament, the Director General of Health Services, two eminent medical geneticists or embryologists, two eminent gynaecologists and obstetricians, two eminent social scientists, two representatives of women's welfare organizations and two representatives from the civil society working on women's health and child issues and four Chairpersons from the State Boards.

The functions of the National Board are to advise the Central Government on policy matters relating to surrogacy; review and monitor the implementation of the Surrogacy Act and its Regulations; lay down the code of conduct to be observed by surrogacy clinics and persons working at surrogacy clinics and to supervise State Surrogacy Boards.[46] The State Surrogacy Boards have a similar constitution to that of the National Board. The functions of the State Boards are to grant, suspend or cancel registration of surrogacy clinics; enforce the standards to be fulfilled by the clinics; investigate complaints of breach of the Act; supervise the implementation of the provisions of the Act and its rules and regulations; take action after investigating complaints received against surrogacy clinics; consider, grant and reject applications for suitability by surrogates and commissioning parents.

[45] Chapter 5 of the Bill.
[46] Clause 22.

4.3.4 Criticisms of the Bill and counter–arguments

Various arguments have been put forward against the prohibition of commercial surrogacy and the Surrogacy Bill. The Surrogacy Bill bans commercial surrogacy but takes in an unjust stance by restricting surrogacy only to heterosexual couples. This is a clear violation of the right to equal treatment before the law. It is submitted that the Indian government needs to rectify this injustice before passing the Bill.

The Bill fails to take into account the surrogate's own agency and practice of the right to freedom of autonomy through the presumption that any woman found to be practicing commercial surrogacy will be presumed to have been coerced or compelled to do so by her husband, intending parents or any other relative. This presumption implies that adult women, although living in dire economic conditions, lack the autonomy and decision making capacity to voluntary elect to participate in commercial surrogacy agreements. In this regard, the Bill takes on a heavily unnecessary paternalistic view. In trying to protect women from exploitation and trafficking, the Bill robs women of their autonomy and decision making capabilities.

The close relative requirement makes it difficult for there to be anonymity between the surrogate and the resultant child. There could be negative psychological impact on the resultant child born out of a surrogate motherhood agreement and raised in the same family.[47]

The Bill requires the intending parents to procure a certificate of essentiality from the relevant authorities. The intending parents must produce a certificate of proven infertility, parenting order, certificate of eligibility and insurance coverage in order to obtain a certificate of essentiality. The Bill is silent on whether the intending parents can appeal if their application for the certificate is rejected or whether they can have that decision reviewed or whether or not they can lodge a fresh application.

Some human rights activists believe that both commercial surrogacy and altruistic surrogacy must be banned as they are of the opinion that altruistic surrogacy can be equally exploitative.[48] It is argued that permitting only altruistic surrogacy fails to take into account the patriarchal exploitation of women within the family. Therefore, presenting women as caring, sacrificing and loving will inadvertently result in their exploitation.[49] The limitation that surrogates can only come from a pool of close relatives could

[47] Upma Gautam & Anandita Yadav 'The Surrogacy (Regulation) Bill 2016: Pitfalls and challenges ahead' (2016) 11(2) *Journal of legal Awareness.*
[48] Bronwyn Parry & Rakhi Ghoshal 'Regulation of surrogacy in India: Whenceforth now?' (2018) 3(5) *BMJ Global Health* (2018) 1 at 1.
[49] Smitha Sasidharan Nair & Rajesh Kalarivayil 'Has India's Surrogacy Bill failed women who become surrogates?' (2018)

possibly mean that such close relatives may experience intense familial obligations to become surrogates as has been seen in African customary practice of sororate unions as discussed in Chapter Two. Hence, it has been argued that it is an error in judgment to assume that exploitation, trafficking and coercion are solely an economic problem.[50]

The Bill is also criticised on the basis that it puts in place a bureaucratic system to control and prohibit commercial surrogacy without factoring the social, political and economic factors for the growth of commercial surrogacy in India.[51] However, it would seem that the Bill assesses commercial surrogacy from the position of the surrogate and the economic situation that might expose her to be exploited and coerced into commercial surrogacy. The Bill did evaluate the socio, politico and economic factors that govern surrogacy and attempted to fashion a model for surrogacy that takes into account the Indian context in which commercial surrogacy occurs in.

Critics have condemned the legislation prohibiting commercial surrogacy as unmindful of the broader benefits of commercial surrogacy. Reproductive rights are mainly used in relation to the commissioning parents and not in relation to the surrogate. The prohibition of commercial surrogacy prevents poverty stricken women from exploring an opportunity to economic and financial freedom, and thus a better life. It can be argued that if a woman is only permitted to be a surrogate once, then it is highly unlikely that this one time will miraculously rescue her from poverty.

The Bill is aimed at protecting women and children from exploitation yet its substantive contents neglect to deal with the rights of the resultant child in detail. The Bill makes no provisions to ensure that the commissioning parents do not violate the rights of the child, thus there is a great possibility for child abuse and child trafficking.[52]

There is always the argument that criminalising commercial surrogacy will result in the emergence of an underground black market for commercial surrogacy and result in further exploitation of women. There is a belief that due to the likelihood of the development of a black market, commercial surrogacy should not be completely banned, but should rather be regulated in law. While it is true that the need for surrogacy will not automatically vanish with the passing of new legislative framework, the government

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3(1) *Indian Journal of Women and Social Change* 1 at 8.

[50] Bronwyn Parry & Rakhi Ghoshal 'Regulation of surrogacy in India: Whenceforth now?' (2018) 3(5) *BMJ Global Health* (2018) 1 at 2.

[51] Smitha Sasidharan Nair & Rajesh Kalarivayil 'Has India's Surrogacy Bill failed women who become surrogates?' (2018) 3(1) *Indian Journal of Women and Social Change* 1 at 7.

[52] Upma Gautam & Anandita Yadav 'The Surrogacy (Regulation) Bill 2016: Pitfalls and challenges ahead' (2016) 11(2) *Journal of legal Awareness*.

cannot simply stand by and watch while a catastrophe continues to unfold. India was in serious need of strictly regulated surrogacy.

The Bill however is aimed at addressing commercial exploitation. It is a purposeful and warranted response to the baby market business which was being conducted — neglecting the rights and interests of the children and surrogates and dismissing legal and ethical concerns. The legislation correctly remedies the absence of systematic evaluation and self–regulation in the medical field despite the criticism it received over commercial surrogacy agreements.

While the critics of the Bill consider it inadequate to regulate surrogacy in India and a violation of human rights, it is hereby submitted that the Bill is a step in the right direction in remedying the problem of commercial surrogacy in India — which clearly needed judicial and legislative discipline and innovation. The Bill seeks to balance the rights and interests of the commissioning parents, the best interests of the resultant child and the surrogate mother. The South African legislature can draw some inspiration from this Bill to effect better surrogacy regulation.

4.4 Conclusion

Commercial surrogacy is prohibited in India and in the Netherlands and both countries have attempted to lay down clear and strict penalties for contravening the provisions that prohibit commercial surrogacy. Altruistic surrogacy is permitted in these jurisdictions as a way to promote, protect and fulfill the right to procreation and the right to reproductive autonomy.

Legal literature shows that these jurisdictions acknowledge that certain rights like the right to reproductive autonomy, contractual freedom, trade, occupation and profession and by extension the right to privacy are infringed by the prohibition of commercial surrogacy. Both jurisdictions adopt a legal paternalistic view in relation to commercial surrogacy on the basis that it is possible for citizens, especially the surrogate mother, to violate their own fundamental rights with the view that they will be enforcing other rights when entering into contracts that require them to rent out their reproductive capabilities and give up their parental rights for monetary compensation. The Indian Surrogacy Bill goes as far as recognising the exploitative nature of commercial surrogacy agreements and how much consent can be distorted in commercial surrogacy agreements.

It is submitted that South Africa should maintain its stance on the prohibition of commercial surrogacy by taking lessons from India prior to the ban of commercial surrogacy. It is not in the best interests of the citizens for the state to legalise an injurious practice simply because certain parties claim to be minimally affected by the prohibition thereof. To ensure compliance with the prohibition of surrogacy, South Africa needs to adopt the framework laid down by India and the Netherlands by clearly laying down offences and corresponding penalties. The legislation regulating surrogacy falls short in some aspects as discussed in Chapter Two and the possible remedies for such shortfalls will be discussed in the following chapter.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Summary of the research

Chapter 19 of the Children's Act regulates surrogacy in South Africa and expressly prohibits commercial surrogacy or the advertisement of commercial surrogacy services. This stance has been a contentious topic and has led to the question of whether or not the legislature needs to reevaluate its stance on the prohibition for commercial surrogacy. This dissertation set out to evaluate that question on a rights basis given the fact proponents and opponents of commercial surrogacy base their arguments on the rights entrenched in the Bill of Rights of the Constitution.

This dissertation has discussed why it is necessary to evaluate the current prohibition of commercial surrogacy in South Africa and the current legislative provisions regulating commercial surrogacy in South Africa. The history of the enactment of this legislation and the goals the legislation was meant to achieve as well as the interests it was meant to protect, given that commercial surrogacy is a criminal offence have also been elucidated. This dissertation discussed why commercial surrogacy is a crime and what interests the criminalisation of commercial surrogacy seeks to protect from a rights–based analysis and why it should remain an offence.

The goal of Chapter 2 was to highlight that the legislation regulating surrogacy in South Africa holds up against constitutional scrutiny and to assert that the prohibition of commercial surrogacy is still warranted in South Africa. To achieve this, this research embarked on a discussion of the history of surrogacy in South Africa, the road taken to promulgate Chapter 19 of the Children's Act, the arguments made in support of the prohibition of commercial surrogacy and a discussion of the provisions regulating surrogacy themselves. To ensure that the rights of women are protected, the best interests of the children are upheld and to prevent the commercialisation of surrogacy agreements, South Africa follows a pre-authorisation model in the confirmation of surrogacy

agreements. In order for a surrogate motherhood agreement to be confirmed by the court, there are substantive and procedural requirements that must be met.

It was noted that the courts have had some difficulty in interpreting these substantive and procedural requirements thus resulting in ambiguity and uncertainty in legal precedents. Therefore, if courts are having difficulty in interpreting provisions relating to altruistic surrogacy, it would be imprudent and unwise for the legislature to legalise the novelty of commercial surrogacy when there is no guarantee that the court as the gatekeeper and protector of rights will be able to protect women and children from human trafficking, exploitation and human rights violations in such agreements. It would be imprudent and unwise for the South African legislature to legalise commercial surrogacy when the current legal climate is yet to grasp and uniformly apply the provisions regulating altruistic surrogacy. Thus the prohibition of commercial surrogacy is still warranted in South Africa and the surrogacy regulating provisions pass constitutional scrutiny in so far as they try to strike a harmonious balance between the rights of the commissioning parents, the surrogate and the resultant child.

This research evaluated whether or not, on a rights–based analysis, the pros of prohibiting commercial surrogacy outweigh the cons thereof. Chapter 3 of this dissertation evaluated the rights at play in commercial surrogacy as they related to the surrogate, the commissioning parents and the resultant child. These were: the right to privacy; right to equality; right to procreate and found a family; right to dignity; right to freedom and security over the person; right to reproductive autonomy; right to not be treated in a cruel, inhuman or degrading way; right to not be subjected to slavery, servitude or other forms of forced labour; right to choose a trade, occupation or profession; children's rights and the paramount best interests of the child. Simply stating rights is an inadequate basis for legislation but analysing those rights and the relationships they exist in is a compelling factor in supporting the prohibition of commercial surrogacy.

Commercial surrogacy entails a clash of competing and conflicting rights and when the rights that support the legalisation of commercial surrogacy were weighed against the rights that support the continued prohibition of commercial surrogacy, it was established that the limitation of the rights supporting commercial surrogacy was justifiable in an open and democratic state. Human dignity is inviolable. It is inconsistent with human dignity to trade human beings (children) like

commodities or to treat women's reproductive capabilities as a means to an end, and more so, the need to sire one's offspring and perpetuate one's genes. Commercial surrogacy might as well alleviate the dire state of economic poverty of some surrogate mothers if treated as a trade.

However, the most common profile of a surrogate in developing countries is that surrogates are usually poor, disenfranchised women and the discrimination and denial in the distribution of social and economic opportunities and rights plunge such women into poverty. This results in lack of genuine choices, resulting in poor choices and leading certain individuals into taking risks and decisions that they would never have made had their basic needs been met. When these women seemingly choose to participate in commercial surrogacy agreements, this decision cannot be viewed as a justified enforcement of the right to freedom of trade, occupation and profession because certain economic and social situations will be driving such women to participate in such agreements. There is no dignity in enforcing one right at the expense of several others.

Proponents of commercial surrogacy mainly base their arguments on the right to reproductive autonomy. The discussion in Chapter 3 showed that the right to freedom and security of the surrogate's person includes in it the right to have control over one's body and the right to not be treated in a cruel, inhuman and degrading way. Commercial surrogacy agreements often include clauses that limit the surrogate's control over their body for the duration of the contract pregnancy. The surrogate effectively suspends her rights to own her body and cedes that right to the commissioning parents.

The discussion in Chapter 3 also led to the conclusion that commercial surrogacy is a prosecutable offence. Entering into a commercial surrogacy agreement would amount to contravening sections 301, 302 and 303 of the Children's Act. The prohibition of commercial surrogacy serves the legitimate purpose of protecting the rights and interests of the surrogate, the resultant child as well as those of the commissioning parents. Commercial surrogacy should remain a crime because these rights are worthy of constitutional protection. The penalties laid down in Section 305 of the Children's Act and Section 276 of the Criminal Procedure Act are not commercial surrogacy specific. Commercial surrogacy specific sentencing guidelines are required in order to give effect to the prohibition of commercial surrogacy. Guidance on such sentencing guidelines can be sought from the Netherlands and India and these will be discussed in the next chapter.

Chapter 4 discussed the regulation in foreign jurisdictions (the Netherlands and India) to show the effects of legalising commercial surrogacy and to show how the surrogacy provisions in South Africa can be developed to ensure compliance and to prevent underhanded commercialisation of surrogate motherhood agreements. Chapter 4 also evaluated the sentencing guidelines in the Netherlands and India for committing the crime of commercial surrogacy.

5.2 Recommendations

The socio, cultural, legal, political and economic situation in South Africa does not warrant for the legalisation of commercial surrogacy. Exploitation, human trafficking, violation or rights, violence against women, womb trafficking and baby selling would thrive in a heavily polarised country like South Africa. South Africa is not yet ready to change its stance on the prohibition of commercial surrogacy. This discussion has noted some areas of concern from the constitutional critique through the discussion on Chapter 19 of the Children's Act, the rights–based analysis and the discussion on foreign jurisdictions that surrogacy regulating legislation needs to develop to ensure total constitutional compliance and better enforcement of the prohibition of commercial surrogacy.

(i) Commercial surrogacy as an offence

Commercial surrogacy violates several human rights and should not be legalised in South Africa. The status quo must be maintained and only altruistic surrogacy should be permitted. In altruistic agreements, the law must prescribe a uniform amount payable to the surrogate for medical expenses and insurance. A uniform scale for calculating loss of earnings must also be implemented based on the surrogates earnings prior to the pregnancy. The current domicile requirements must be strictly enforced and it must be made clear that foreign surrogacy agreements are prohibited in South Africa. A penalty must be attached if this domicile requirement is flouted.

(ii) Pre-authorisation

The pre-authorisation requirement for all surrogacy agreements must be maintained. This requirement is necessary because it sets out the parental responsibilities of the parties from the

onset and may assist the courts in ensuring that the surrogacy agreement is not commercialised. At present, the court serves in a dual capacity in the confrontation of surrogacy agreements, as gatekeeper and protector of rights and as the facilitator of the surrogacy agreement. This dual capacity has led to uncertainty in the interpretation of our law whereby the courts are tasked with protecting the rights of the surrogate and the child from any human rights violations while trying to enforce the wishes of the parties as set out in the surrogacy contract. This dissertation recommends that the court must be limited to the role of gatekeeper and protector of rights. In this role, the court will not be moved to sever certain offending provisions in the surrogacy agreement to ensure compliance with the law. This model would follow the Dutch Law whereby if a contract violates any legal sanctions or is c*ontra boni mores,* that contract will be null and void. The Surrogacy Board will be in charge of facilitating the surrogacy agreements.

(iii) The Surrogacy Regulating Board

An independent authority called the Surrogacy Regulation Board similar to the National and State Boards to be established by the Indian Surrogacy Bill must be established by the law. This board will serve as the facilitator of surrogacy agreements. This board must be comprised of the Minister of Health, MECs for Health who will serve on the board on rotation, two eminent medical geneticists or embryologists, two eminent gynaecologists and obstetricians, two eminent lawyers, two eminent social scientists, two representatives of women's welfare organizations, two representatives from the civil society working on women's health and child issues and ministers of religion. The board will assist the parties in setting out the obligations of the agreement, regulate IVF-surrogacy procedures, register surrogacy clinics, eliminate the need for surrogacy agencies and brokers, facilitate the introduction of commissioning parents to the surrogates and keep a register of potential surrogate mothers vetted by the board for psychological and physical fitness to become surrogate mothers. The board will also manage the surrogacy database.

(iv) Screening and Counselling

The SALRC Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood under the heading 'Counseling and Screening' proposed

that the commissioning parents and the surrogate mother must be subjected to a strict screening process before the surrogate motherhood agreement is implemented and that continuous counseling should be provided before and after the conclusion of the surrogacy agreement.[1] The surrogate and the commission parents must undergo counselling for six months prior to the artificial insemination. This should be done in order to ascertain that the commissioning parents and the surrogate understand the consequences of entering into a surrogacy agreement, they must be screened and attend mandatory counselling for six months before entering into the surrogacy agreement, during the pregnancy and after the birth of the resultant child. The screening and counselling will sit in ensuring that the best interests of the child will be met, that the intentions of the parties are purely altruistic and that the parties are suitable to assume their roles as surrogates or commissioning parents.

The Surrogacy Regulation Board must ascertain the informed consent of the parties and give their written consent to the surrogacy procedures in a prescribed format. The Indian Surrogacy Bill stipulates that the parties to the agreement must undergo counseling before the insemination, counseling during the pregnancy and counseling after the pregnancy. This is to safeguard their psychological health and to ensure that the parties are aware of the impacts of their decisions. The Dutch also follow this extensive counseling procedure.

(v) The Commissioning parents

The genetic link requirement and the requirement that the commissioning parents must be unable to give birth to a child and that the condition must be permanent and irreversible is usually criticised. However, it is submitted that these requirements must be maintained and this would be similar to Dutch Law and the Indian Surrogacy Bill. The main aim of surrogacy is to afford couples who are unable to conceive a chance at having their own biological children. Surrogacy is about the perpetuation of one's genetic material and not just about founding a family. Surrogacy agreements where the genetic material of the commissioned parents is not used amount to commissioned adoptions. Surrogacy is not to be used as a convenient method of having children

[1] SALRC Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood (1999) para 6(1).

but as a last resort and should be used in exceptional circumstances. The requirement that it must be impossible for the commissioning parents to conceive prevents the exploitation of other women's reproductive capabilities for the convenience of others. The requirement that the commissioning parents' inability to have children must be permanent and irreversible should not be limited to cases of infertility. It should be extended to other cases that might make it impossible for the intended parents to have bear children, for instance where pregnancy would cause serious medical harm. Following the Dutch model, the commissioning parents must submit a clean police report as a requirement for suitability.

(vi) The surrogate

The current requirements in respect of the surrogate mother must be maintained. In addition to the screening and counselling, the surrogate must be subjected to a comprehensive medical physical examination to ascertain her physical fitness. A maximum number of times which a surrogate can offer her services must be prescribed and a minimum and maximum age at which one can be a surrogate.

It is currently unclear if the surrogate can terminate the agreement when she is not the genetic parent of the child. The law only deals with the termination of the agreement by a surrogate mother who is also the genetic parent of the child. Bearing in mind that genetics are not the only important factor in determining parentage, it is proposed that South Africa should follow the Dutch model. Under Dutch Law, it is of no consequence that the surrogacy agreement was concluded on a full or partial basis, the surrogate mother cannot be compelled by legal sanction to give up her parental rights over the child if she decides to terminate the surrogacy agreement after the birth of the child.

The surrogate must be entitled to a 'cooling- off' period after the birth of the child. During this period, she can decide to not give up her parental rights over the resultant child. This 'cooling-off' period is important despite the surrogacy agreement because it ensures that the surrogate is of sound judgement and promotes the welfare of all the parties involved.

(vii) Sororate Unions

Surrogacy agreements concluded in terms of African Customary Law must be regulated in terms of the Children's Act. This will afford the surrogates in sororate unions the constitutional legal protections stipulated in Chapter 19 of the Children's Act.

(viii) Surrogacy database

In order to avoid the need for brokers and agencies, a surrogacy database which is managed by the Surrogacy Board must be set up. Potential surrogates can register with the Surrogacy Board after screening and counselling. Commissioning parents may also select potential surrogates from the database.

(ix) Termination of the surrogacy agreement

Surrogacy regulating legislation must make it clear on whether or not commissioning parents can terminate the surrogacy agreement after artificial insemination. It is recommended that the commissioning parents should not be permitted to terminate the agreement after artificial insemination and doing so would constitute the offence of disowning or abandoning the resultant child and a penalty must be attached to contravening this provision. The law must make it clear that the commissioning parents must unconditionally accept the resultant child after birth. It is not in the best interests of the child to be abandoned by the people that brought about that birth or to be raised by a surrogate who had no intention of assuming parental responsibility over that child and even unfair to impose parental responsibility on that surrogate.

(x) Sanctions and penalties

The Warnock Report[2] was of the opinion that criminal law was needed in the regulation of surrogacy because the risk of commercial exploitation in surrogacy is difficult to prevent without the assistance of criminal law. This is a justified sentiment and India and the Netherlands follow this model of attaching strict criminal penalties to commercial surrogacy. It is recommended that South Africa should follow this model. Severe penalties and sentences such as imprisonment and fines provide a deterrent factor that will be of assistance in the regulation of surrogacy and the enforcement of the prohibition of commercial surrogacy. These should be explicitly stipulated in the amended Children's Act or the new Surrogacy Act. There should be explicit sanctions relating to commercial surrogacy with regards to being a commercial surrogate, engaging the services of a commercial surrogate, advertising for and of commercial surrogacy services, payment of

[2] Mary Warnock *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) para 8.18.

compensation or monies in surrogacy agreements other than those specifically relating to altruistic surrogacy, the abandonment of children and the trafficking of women and children under the pretense of surrogacy. The Prevention and Combating of Trafficking in Persons Act[3] must be amended to recognise commercial surrogacy as a form of human trafficking.

5.3 Concluding remarks

The focus of this dissertation was on the rights pertaining to commercial surrogacy and the surrogacy regulating provisions in South Africa. The discussion was not extended to the exploitation that occurs in altruistic surrogacy agreements and neither did this dissertation discuss the regulation of transnational surrogacy agreements.

Legislation must aim to protect human dignity and ensure adequate protection of all the rights of the parties in question. It is usually difficult to balance rights and interests of all parties especially where there is a clash of competing and conflicting rights. To weigh up these rights against each other, some rights will be limited in order to fulfill, promote and protect the other rights. The limitation of those rights must be justifiable in an open and democratic society. It is submitted that the limitation of some rights by the prohibition of commercial surrogacy is justifiable and does more good than any protracted harm.

There is room to develop the surrogacy regulations in South Africa to lay down criminal sanctions for contravening certain provisions in the regulation of surrogacy and to ensure compliance. There are some sections of Chapter 19 of the Children's Act that need to be clarified in law to allow for uniform interpretation by the courts. Holistically, the prohibition of commercial surrogacy in South Africa is still constitutional, it is still warranted and it is justifiable on a rights–based analysis.

[3] Prevention and Combating of Trafficking in Persons Act 7 of 2013.

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Article 151(b)

Article 151(c)

Article 151(c)

Article 198

Article 199

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Article 228

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