Global Campus Europe

Uppsala University
European Master's Programme in Human Rights and Democratisation
A.Y. 2023/2024

The Living-Womb Industry:

a Feminist Exploration of the Bioethical and Legal Implications of Cross-Border Gestational Surrogacy

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Word Count Declaration: 27, 234

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Abstract

This thesis investigates the legal and bioethical implications of gestational surrogacy, with a focus on cross-border arrangements. Despite the growing legislation around the topic, there are many gaps in the laws surrounding gestational surrogacy; namely, laws regarding the wellbeing of the mother during the gestational period. These gaps in legislation create a grey area where many human rights violations, such as coercion and human trafficking, have appeared to occur. Moreover, due to the recent, increased demand of surrogate mothers to take part in surrogacy arrangements, it is crucial now more than ever that the legislation is built to protect both parties.

Therefore, this thesis aims to challenge the position of current legislation surrounding cross-border surrogacy by suggesting a change in the law's focus would be beneficial to all parties involved from a human rights perspective. To do this, two overarching questions are addressed in this paper, with the first being how do international and national legal frameworks currently address the legal, ethical, and social challenges posed by cross-border gestational surrogacy? This question looks at international bodies and national policies engagement in the discussion around the regulation of the practice. Secondly, what are the ethical considerations surrounding the commodification and exploitation of women's bodies in the context of cross-border gestational surrogacy, and how can human rights principles provide guidance for addressing these concerns? This question enquires into the bioethical implications of surrogacy and how human rights principles may aid in shaping the future of the industry. Thus, this thesis identifies which issues are currently being addressed in legislation in addition the areas that are being neglected; suggesting that areas which are neglected or left open to interpretation are the most relevant from a human rights perspective, as these areas of ambiguity leave room for serious violations, therefore it is important that they are addressed in future legislation.

This investigation will be approached through a feminist and human rights lens to ensure that the focus lies on the protection and well-being of the individual most at risk to exploitation in a surrogacy agreement, the surrogate mother. Hence, allowing the research to take into consideration an ongoing, cross-cultural, feminist debate surrounding a woman's autonomy of their own body, in order to better understand why legislation is the way it currently is, and perhaps why this may not be the best form of protecting the surrogate mother.

This thesis consists of three chapters each devoted to a different angle investigating the practice. The first will describe the legal landscape on gestational surrogacy to identify how legislation currently attempts to keep the practice in line with international human rights standards. The focus then zooms into a case study between the practice in the US and in India, to better examine the differences in legislation and opinions on gestational surrogacy between the Global North and the Global South; and consequently, to contrast the regulation of the practice from the side of the commissioning parents in comparison to the side of the surrogate mother. Finally, the last chapter will investigate into the bioethical implications of cross-border gestational surrogacy. A woman's rights lens will be used to frame the discussion throughout the paper, but particularly in this chapter, to identify what are the most relevant issues that legislation should be combatting when creating future policies.

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Introduction

Surrogacy has long been practiced throughout the world as a way for parents, who are unable to conceive a child without intervention, to have a baby who is genetically related to them. It has been defined by scholars such as Patel et al. (2018) as a type of assisted reproductive technology whereby another woman carries out the gestational period for a couple, who would otherwise not have been able to have a child. In this way, a surrogate mother refers to a woman who consents to carrying a baby for another couple. Within the term surrogacy, it is understood that there are two main types: traditional, also referred to as altruistic surrogacy, and gestational, also referred to as commercial surrogacy. The former was used across many cultures throughout history whereby the surrogate mother would be inseminated by the sperm of the commissioning father, either through artificial insemination or on very rare occasions through sexual intercourse (Blyth 261); additionally altruistic or traditional surrogacy agreements imply that no financial compensation is given. The latter, gestational surrogacy, is the modern development of the practice whereby the embryos created through the fusion of the commissioning parents' gametes are inserted into the surrogate mother's womb through In Vitro Fertilisation (Blyth 261). In this type of arrangement, which is more commonly referred to as commercial surrogacy, a monetary transaction is involved where the surrogate is paid for her service. Furthermore, gestational surrogacy has become a practice which, with the rapid advancement of technology, is most commonly opted for due to its success rates; and from a legal perspective due to the clarity it provides in identifying who are the legal parents and hence guardians of the child born through the gestational surrogacy process (Scott 122).

In today's landscape of ever-evolving artificial reproductive technologies, this method of surrogacy thus presents a glimmer of hope for childless parents to conceive a child who is genetically related to them, and further allows for a transaction between commissioning parent and surrogate mother; providing the surrogate mother with financial relief in exchange for her services. However, in times of crisis such as war and extreme poverty, some women feel forced to turn to surrogate motherhood as a way of making 'quick' money without needing any prior qualifications or experience, creating a difficult choice for women to make (Margaret Jane Radin [1987] - NeJaime and Siegel 25; Fenton-Glynn). In this way, vulnerable women are ever-increasingly becoming involved in gestational surrogacy arrangements to provide for themselves by providing for the parents who commission them.

Although gestational surrogacy seems to propose many benefits, in reality the experiences of mothers undergoing commercial surrogacy transactions are not always considered as positive. Lack of regulation and effective legislation leaves the practice in a grey area where the rights of the mother are often neglected or overlooked so long as the paying parents are satisfied.

In addition, although many countries have developed legislation which prohibits or regulates gestational surrogacy, there are still gross human rights violations which occur due to these types of arrangements (Fenton-Glynn; Das). This is the case especially when it comes to cross-border surrogate agreements due to the sometimes conflicting regulations surrounding the practice. For example, although gestational surrogacy may be forbidden in a country such as France, hopeful parents wanting to engage in the procedure of 'employing' a gestational surrogate may look abroad to countries with little to no legislation on the topic in order to more easily obtain a child (González 917). Therefore, due to the disparity in legislation, the practice has sometimes led to unethical solutions for wealthy parents whilst ignoring the human rights owed to the surrogate mothers (Fenton-Glynn; ENoMW and ICASM [2022] 28).

Framing the Research

The Aim

For this reason, this thesis aims to challenge the position of current legislation surrounding cross-border surrogacy by suggesting a change in the law's focus would be beneficial to all parties involved from a human rights perspective. Additionally, research surrounding cross-border gestational surrogacy and the gaps within the legislation surrounding it will be reviewed, to better understand the real-life implications for women who are participating in this age old industry with little to no protection. By investigating the legal, bioethical and social challenges involved in the process of gestational surrogacy, this thesis will identify the issues that are currently being addressed in legislation in addition to which areas are being neglected. Furthermore, it will suggest that the areas which are being neglected are perhaps more ethically ambiguous, making them difficult to govern; However, this paper argues that

these issues are the most important from a women's and human rights perspective, as these areas of ambiguity leave room for serious violations, and thus it is imperative that they are addressed.

Research Questions

Two overarching questions will be addressed in this paper, with the first being how do international and national legal frameworks address the legal, bioethical, and social challenges posed by cross-border gestational surrogacy? This question enquires into the current legal landscape surrounding gestational surrogacy on an international level, in addition to how varying states policies on surrogacy regulate the practice. Here, this paper will describe the way in which legislation has developed up until the present day, in order to protect the best interest of everyone involved in a surrogacy arrangement, before also highlighting any gaps which may have prevailed somewhere throughout the process of an arrangement. Moreover, a comparison will be made between state regulation to closer identify the legal, bioethical and social challenges that come with gestational surrogacy arrangements from differing cultural perspectives. This thesis will investigate the legal situation in the US and in India (and surrounding regions in Bangladesh) to compare the perspective of a country whose citizens mostly engage in becoming commissioning parents against that of a region which is home to a large number of surrogate mothers taking part in cross-border arrangements.

Secondly, what are the bioethical considerations surrounding the commodification and exploitation of women's bodies in the context of cross-border gestational surrogacy, and how can human rights principles provide guidance for addressing these concerns? This question brings forward the ethical side of the discussion around gestational surrogacy, particularly those which are across borders, asking what of the moral implications of a woman offering her womb and services to a couple who otherwise may not be able to conceive a child? And subsequently, is an economic compensation enough to make up for the trauma and biological damage which may occur through the process of becoming a surrogate mother? Furthermore, this question will explore the topic of women's autonomy and how it's perception may differ between states; moreover, it will touch upon how differing views in regards to women's

autonomy may be problematic, as it prevents an international consensus from being formed, which may hinder the establishment of international policies in line with international human rights standards in the future.

Looking Through a Lens

This investigation into the legal and bioethical implications of gestational surrogacy will be approached through a feminist and human rights lens to ensure that the focus of the research surrounding the laws on cross-border gestational surrogacy will be on the protection and best interest of the individual who is most at risk from being harmed in such an arrangement, the surrogate mother. Through this lens, this thesis will look at the bioethical and moral grey area which looms over the term 'surrogacy' from a perspective centred around the safety and wellbeing of the mother who is often taken advantage of, in order to identify which bioethical issues are not addressed within international and national legislation. Furthermore, this perspective will also allow the research to take into consideration an ongoing, cross-cultural, feminist debate surrounding a woman's autonomy of their own body, to better understand why legislation is the way it currently is, and perhaps why this may not be the best form of protecting the surrogate mother.

Terminology

Some specific terminology used in discussions around gestational surrogacy will be referred to in this thesis, the first being the difference between countries of demand versus countries of supply within the industry. Within any cross-border gestational surrogacy arrangement, there are two parties involved; the intending parents who create the *demand* within the industry, and the surrogate mother who is in most cases employed by an agency, the combination of the two together thus creating and facilitating the *suppl*y within the market. Thus, countries which contain individuals mostly interested in becoming commissioning parents are deemed *countries of demand* whereas countries which are home to most of the globe's surrogate mothers are coined *countries of supply. C*ountries of demand may also have

surrogate mothers, similarly in countries of supply, there may also be commissioning parents who are nationals, however scholars and human rights academics have commented on the divide between countries, usually in the Global North, which are home to commissioning parents and hence countries of supply, and countries in the Global South where many surrogate mothers in cross-border arrangements are from, and thus these countries become those of supply.

This thesis will look at two forms of surrogacy arrangements when considering the practice's legal and bioethical implications. The first is legitimate surrogacy, which connotes an arrangement which is complicit with national legislation and is thus facilitated by a registered agency. The other is illegitimate surrogacy, which refers to forced surrogacy or surrogacy through human trafficking, where no legal protection nor human rights standards are in place to protect the surrogate mother.

Methodological Considerations

Despite the growing use of the procedure of gestational surrogacy, the practice still remains largely undiscussed in the public sphere. Success stories from the side of the commissioning parents are more likely publicised rather than the difficult realities faced by some women who undergo the procedure. This is especially the case when the surrogate mother comes from a culture which looks down upon such practices, for example in extremely religious states, or in the case of pregnancies which don't go 'as planned'; referring to instances where the transaction between intending parents and the surrogate mother isn't completed due to the diagnosis of disability during the pregnancy, or other medical complications which may even disrupt the gestational period leading to a termination of pregnancy.

Initially, the hope was to conduct my research by interviewing and engaging with woman's organisations, shelters and other groups to better understand the reality of gestational surrogates without putting them in any risk of exposure or psychological discomfort. However, after contacting dozens of agencies and women's groups, I received little to no responses; the only emails which were received refused to comment on the cross-border

elements of the practice or surrounding legal issues they may have faced. Thus, although the inclusion of real-life experiences of women engaging in the procedure of gestational surrogacy in a cross-border scenario would provide important insights into the industry, collecting data from the women themselves is not possible due to the vulnerable positions these women find themselves in, and due to clinics unwillingness to discuss issues surrounding surrogacy. Thus, in light of this situation, my research has turned to looking at a culmination of second-hand accounts through media and special reports, in addition to reviewing national legislation, international engagement with the practice and some high-profile court cases which shifted national laws on the practice in their respective state. Additionally, whilst this paper addresses the gaps in legislation on an international scale, I will conduct in depth research into the legislative practices of two specific countries in order to develop a consistent comparative analysis of legislation form very different parts of the world, as this will give me insight into the issue on a more global scale.

Of the 20,000 babies born through surrogacy in the last 10 years of its growth into a booming industry, as estimated by the International Surrogacy Service (ISS) NGO (Bandelli 21), it has been said that the majority of the market is consists of a form of global trade between wealthy commissioning parents and vulnerable, less financially stable, surrogate mothers (Ullah&Nawaz 158). Thus, in order to better investigate the legal and ethical implications stemming from cross-border gestational surrogacy arrangements, the legislation and bioethical framing of gestational surrogacy could be viewed from the perspective of the wealthy country who is creating the demand in addition to the position of the economically vulnerable country supplying the surrogate mothers. Therefore, this paper will closely examine the practice from the world's leading country of demand in comparison with the country with the world's most popular regional supply hub; in this case the US representing the demand country and India (with neighbouring villages in Bangladesh) as the supplying region; this will provide a real life case study between two countries to address the question how do international and national legal frameworks address the legal, bioethical, and social challenges posed by cross-border gestational surrogacy?

I will conduct this comparative study on the situation in the United States and in India (and surrounding areas of Bangladesh) countries with a large amount of information available to ensure that the research is well informed and investigates the situation in countries with varying legislative practices, as well as cultural perspectives surrounding gestational

surrogacy, to see how much of a role cultural factors and economic standing play in the establishment of regulations surrounding surrogacy. Furthermore, I am interested in engaging with surrounding theories exploring the bioethical issues which arise from the practice of surrogacy, and more specifically gestational surrogacy, to investigate to what extent the process actually benefits the surrogate mother; especially if she is in a vulnerable situation which may force her to compromise her physical integrity in exchange for monetary stability. Hence, this will lead to a broader discussion on the bioethical implications of predominantly cross-border gestational surrogacy arrangements which investigates the physical and psychological impacts of the practice on the surrogate mother, whilst also incorporating feminist theory and intersection with other human rights issues.

The Outline

This examination of the intersection of reproductive tourism and policies is relevant in this time in history as cases of gestational surrogacy among vulnerable women have been increasing since the practice was first conducted in the 1980s (González 916). Therefore, in order to carry out a comprehensive analysis of gestational surrogacy in cross-border arrangements, this thesis will look at the legal landscape of surrogacy to highlight the bioethical issues which arise from the practice, before commenting on how these issues could influence the development of future legislation. Thus, the ways in which different states approach and regulate gestational surrogacy will be addressed to highlight gaps in national and perhaps more importantly international legislation surrounding gestational surrogacy. In this way, the first chapter will start by providing a broad overview of current legislative and regulatory frameworks in an array of countries and regions and how they govern surrogacy practices. This will include reviewing national laws, court decisions impacting surrogacy and cross-border surrogacy cases as well as researching perspectives from international bodies surrounding the topic.

Then in Chapter 2, a more in-depth study will be carried out on the US and India, where extensive research regarding the legal and social dynamics within these countries will be explored. This chapter will also collate information surrounding gestational surrogacy in

these specific countries through a consensus of real-life recounts within these areas. I would then like to address the policy implications on women who become surrogate mothers; I will analyse and assess whether in practice the legislation is effective, trying to define certain gaps within the legal infrastructure in comparison to the real-life risks which emerge from legislator's loop holes. That chapter will end with a comparative analysis of the regulatory processes, in legislation and in practice in the US and India; countries which have been chosen to conduct more in-depth research to highlight variations in surrogacy laws and their impact on women's rights and experiences.

The following chapter will discuss literature and reports to provide a holistic understanding of the bioethical issues which stem from gestational surrogacy, whilst also considering cultural and economic factors that influence a women's decisions to become a surrogate. The final chapter will extend the research in a theoretical and interdisciplinary way by addressing the challenges from a human rights and importantly feminist perspective, exploring legal challenges and violations faced by vulnerable women in surrogacy. This final chapter will also involve an analysis of bioethical considerations related to consent, autonomy and exploitation among surrogate women who take part in cross-border agreements or transactions; here I will also take into count various perspectives on the bioethical issues which arise from gestational surrogacy agreements, namely from a feminist perspective.

Chapter 1: Legislation and Policy Making

International Bodies and Opinions

This chapter focuses on the laws which have been developed in the international sphere and in national legislation up until the present to regulate the practice of gestational surrogacy. Due to the lack of universal consensus on the practice of surrogacy owing to the cultural and religious differences between member states, international organisations, such as the United Nations (UN) or the Council of Europe (CoE), have struggled to directly address the topic of surrogacy in any of their conventions or protocols (Bandelli 23). To be frank, there is not a single universally recognised international declaration or convention which directly mentions, nor addresses, the issues stemming from cross-border gestational surrogacy practices. Nevertheless, various international documents could be considered to touch upon the issue of gestational surrogacy through their acknowledgement of other rights, such as the right to private and family life and the right to be cared for by one's parents under children's rights. For example, the United Nations Convention on the Rights of the Child (CRC) mentions that a child has the right to know and to be cared for by their parents. This could be framed in the context of surrogacy to promote transparency between commissioning parents and surrogate mother after the child is born, to ensure that the decision the child's parents made to conceive through surrogacy does not unethically deprive them, the child, of their right to know their birth mother; something which is often forbidden in cross-border surrogacy arrangements. The Universal Declaration of Human Rights (UDHR) also includes principles which can be adopted in discussions around gestational surrogacy and reproductive rights; those principles are highlighted in Article 16 (the right to found a family) and Article 12 (the right to protection against arbitrary interference with privacy, family, home and correspondence). Furthermore, one could interpret that when examining the violations which could occur due to unsafe cross-border gestational surrogacy arrangements, other absolute rights should also be attached to the safeguarding of parties involved in an arrangement; such as Article 5 of the UDHR which states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. As was previously mentioned, although these aforementioned articles could be used to help guide a better method of regulating surrogacy on a global scale, as they come from the two very influential human rights declarations, the

lack of global consensus makes it impossible to create concrete decisions surrounding gestational surrogacy that would apply to every nation state.

In Europe, despite their being a considerable amount of cases brought before the European Court of Human Rights (ECtHR) on the topic of surrogacy (see cases Labassée v. France no.65941/11 [2014]; Laborie and Others v. France no.44024/13 [2017] ; Menesson v. France no.65192/11 [2014]) the continent specific conventions such as the European Convention of Human Rights (ECHR) and other human rights convention's do not address surrogacy in any form. The main Court within Europe, the ECtHR, does however apply principles such as Article 8, the right to private and family life, when confronted with cases related to gestational surrogacy. These cases have challenged the national legislation in their own countries by bringing issues such as dealing with the legal recognition of parental rights before the ECtHR. Another international convention which contains principles that could be used to interpret cases involving violations in surrogacy arrangements is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Here, principles of equality, non-discrimination and women's rights are outlined to improve women's rights in many spheres of their lives, from civil and politic to economic, social and cultural aspects. However, there is no direct article addressing surrogacy, nor is there a single mention of the word throughout the convention. This demonstrates the difficulty in forming policies to regulate surrogacy as even with the best interest of the woman being paramount to the CEDAW convention and committee, serious women's rights issues which stem from practices such as surrogacy or even abortion are meekly dealt with in front of the international community.

Although this is the case today, one must also bear in mind that these conventions and human rights instruments were drafted at a time in the past when the practice had not yet come into existence due to the procedure making it possible, IVF, being developed later in the century. Thus, it would be impossible for the original declarations and conventions to have mentioned gestational surrogacy as a point of concern from a human rights perspective at that time. Nevertheless, due to the sometimes complicated legal and bioethical attributes which can be attached to the gestational surrogacy practice, one might suggest that its place in future legislation would be beneficial to protect all parties involved. Moreover, due to the current severe lack in international guidelines governing and regulating gestation surrogacy, particularly in cross-border arrangements, the responsibility lies on the nations states to

formulate their own surrogacy laws in accordance with the countries cultural and societal values, but also in regards to the position each nation frequently finds their citizens in within a surrogacy arrangement; that of the commissioning parents' side or that of the surrogate mothers.

Despite the vacancy which exists in international treaties concerning the human rights issues which may occur during the practice of cross-border gestational surrogacy, there have been several reports from various international organisations, such as the UNESCO's key advisory body, the International Bioethics Committee (IBC), which declared that gestational surrogacy should be prohibited due to the high risk of exploitation of the surrogate mother (Bandelli 27; IBC-UNESCO 33 [2019]). In 2019, the IBC published a report addressing parenthood and assisted reproductive technologies (ARTs) to understand the ways in which societal and technological advancements have distinguished a new form of parenthood, in addition to influencing the change in cross-border practices and reproductive justice (IBC-UNESCO 1 [2019]). The report identifies, that whilst there are some compelling reasons which support surrogacy, such as the ability to offer one last opportunity to couples who would not be able to conceive a genetically related child without the practice, the overall ethical problems which arise from surrogacy, in addition to numerous legal concerns which manifest during cross-border arrangements, mean that the risk of exploiting the surrogate mother is too great to outweigh the benefits of the practice. It is stated that this is due to the situation in which the surrogate mothers of cross-border arrangements usually find themselves. The Committee notes that surrogate mothers often decide to become surrogates under a state of duress as they are often already vulnerable members of society. Furthermore, surrogate mothers are usually women who find themselves in a place of financial instability, leaving them with very few options of how to provide for themselves and sometimes their family (IBC-UNESCO 30 [2019]). In many cases, this vulnerability is then exploited by an agency acting as an intermediary for the surrogate and their commissioning parents coming from a wealthier country where the practice is likely legally complicated or prohibited (IBC-UNESCO 30 [2019]). On the other side of the agreement, the report also mentions that the future repercussions for the child regarding psychological issues which may come from not knowing their origins may be considered an argument against gestational surrogacy practices. Due to the differing laws between states surrounding the appointment of legal guardianship in a surrogacy arrangement, there are many cases where the child is permitted no contact whatsoever after they are born; this includes the surrogate mother being prohibited to

even see the baby she has carried, in accordance with the wishes of the intended parents (Suryanarayanan). Because of this, many children of surrogacy arrangements desire to know their origins later in life, a notion which is also addressed in the IBC report, which suggests that this may be problematic as the child's right to knowing their birth mother is sometimes favoured over the wishes of the surrogate mother to be kept anonymous (IBC-UNESCO 23 [2019]). Thus, the report concludes that commercial surrogacy is "incompatible with the protection and respect of the human dignity of surrogates, calling an urgent plead for improved regulation of the practice and protection of the surrogate mother and of the surrogate child (IBC-UNESCO 33 [2019]).

This notion is also supported by the European Parliament who released a statement in 2015 which undeniably condemns the financial transaction which is attributed to most gestational surrogacy arrangements, explaining that such a practice does the following:

> "Undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments." (European Parliament [2015] 29)

Additionally, the Model Law against Trafficking in Persons published by the United Nations Office on Drugs and Crime (UNODC) iterates that the use of women as surrogate mothers in cross border arrangements should be included as a form of exploitation, and thus also recognises the need for a review of the practice in international law (Working Group on Trafficking in Persons, 2013). Moreover, another branch of the UN, the Office of the High Commissioner for Human Rights, also addressed the issue in its 37th session of the Human Rights Council (Bandelli 27). In this meeting, Special Rapporteur Maud de Boer-Buquicchio presented the Council with the first ever thematic report concerning gestational surrogacy and the selling of children under the UN Human Rights system. The Special Rapporteur stated that by enforcing a non-reimbursable payment for the 'services' provided through gestational surrogacy and by giving the surrogate mother parental status after the birth, the practice of commercial surrogacy "could be conducted in a way that does not constitute the sale of children if it were clear that the surrogate mother was only being paid for gestational services

and not for the transfer of the child", thus defining it as more of a "gratuitous act" rather than an economic transaction (Special Rapporteur [2018] 17). Thus, it is apparent that despite the lack of formal international regulation on surrogacy practices, there are numerous institutions which recognise the legal and bioethical issues which arise form surrogacy, especially in the case of cross-border arrangements. Nevertheless, the differences between national regulatory frameworks continue to prevent the formation of an international consensus, further hindering the international community's ability to create binding legislation to monitor the practice.

National Legislation by Continent

In this way, it is crucial to understand the disparity within the national legal landscape in regards to gestational surrogacy to highlight what aspects of surrogacy are being addressed in binding legislation; and consequently, to uncover which issues are being neglected. As the legal and ethical issues arising from the practice occur due to economic, cultural and religious differences between commissioning parent and surrogate mother, the types of national laws surrounding surrogacy in legislation will be addressed by continent, to highlight any trends among neighbouring countries.

Europe

Starting in Europe where the role of supply and demand of surrogate mothers is very inconsistent across nation states (McLatchie&Lea 40); with some countries, mostly those struggling economically, being used as reproductive tourism hotspots due to their relaxed laws, such as Ukraine; and others which are home to the ever-expanding numbers of commissioning parents looking to take part in the practice across borders to evade complicated national laws or prohibition (McLatchie&Lea 40; Fenton-Glynn). There are twenty-one countries in Europe that explicitly prohibit surrogacy, they are: Austria, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Germany, Italy, Iceland, Latvia, Lithuania, Malta, Norway, Poland, Slovakia, Slovenia, Spain, Sweden, Serbia and Switzerland (McLatchie&Lea 40). Germany and Spain have both brought into force statute 14/2006 on Human Assisted Reproduction Techniques, used to regulate the prohibition of surrogacy (González 916). Additionally, France has a similar piece of legislation in Article 227-13 of the French Penal Code which identifies surrogacy as a crime (Gónzalez 916). Some countries

do not prohibit surrogacy, however they deem the practice void or unenforceable, as is the case in Belgium, the Czech Republic, and the Netherlands. Furthermore, there are many countries which do not have any definitive laws on the matter of surrogacy, thus leaving the status of the practice as ambiguous; these nation states are Albania, Andorra, Bosnia-Herzegovina, Hungary, Monaco, Romania and San-Marino. In the UK and Greece, surrogacy is permitted but on the condition that the payment to the surrogate is on an "expenses-only" basis (McLatchie&Lea 40); this therefore implies the prohibition of commercial surrogacy, only allowing forms of the altruistic or traditional models of surrogacy. In order to regulate this, both nations enforce their own respective legal Acts; in the UK the Surrogacy Agreements Act of 1985 and in Greece the Act 3089/2002 on Medically Assisted Human Reproduction (McLatchie&Lea 40). Finally, there are a few countries which authorise both forms of surrogacy, traditional (altruistic) and gestational (commercial), are allowed; such as in the Russian Federation, Ukraine, and Georgia where the practice goes largely unregulated (McLatchie&Lea 41).

In recent years, there has been increased attention on Ukraine's participation in the surrogacy industry; as due to Ukraine's financial crisis and legal permissibility, the country has become a hub for commissioning parents to approach commercial surrogacy agencies there, allowing for the migration and movement of Ukrainian surrogates to other countries; this was the case previously, but the situation has accelerated in the past year due to Russia's war against Ukraine (ENoMW and ICASM [2022] 17). Many agencies, both Ukrainian and foreign, have set up centres in the country where they charge their commissioning clients from anywhere between €30,000 to €55,000 which is significantly lower than in their home countries. From this budget, the surrogate mothers are payed about a mere €15,000, which is around five times more than the average salary, however it can be over 50% less of the agency's overall take for the surrogacy procedure (ENoMW and ICASM [2022] 17). This explicitly demonstrates how the disparity between national legislation regarding the legality and the cost of engaging in surrogacy practices can lead to the inevitable exploitation of the surrogate mother, both economically and perhaps ethically, though this will be explored further in the final chapter.

Asia

Although Asia also contains some countries which are often more involved with the demand side of surrogacy, the majority of Asian countries find themselves in the position of the supplier within a surrogacy arrangement. Due to Asia's initial attraction within the surrogacy markets, and subsequent exploitation, scholars such as McLatchie and Lea (2002) suggest that the "evolution of surrogacy laws in Asia stands as a testament to the failure of uncoordinated action against the practice" (37). Furthermore, they state that in the Arab region the practice was quickly made forbidden due to its illegality according to Sharia Law and its prohibition in Islam, however other neighbouring states were slower to implement laws against the practice, leading to the industry's evasion of prohibitory legislation simply by moving from state to state (McLatchie&Lea 38). The speed at which countries in Asia closed their doors to legitimate surrogacy arrangements increased from 2015 after an earthquake in Nepal (McLatchie&Lea 39). The exploitation and inconsideration of the Nepalese surrogate mothers came to the media's attention when there were reports of Israel rescuing around thirty surrogate born babies, many just under six weeks old and at least nine of which who were born prematurely. The state of Israel rescued these babies for their intending parents, whilst leaving the surrogate mothers behind, a case which caused widespread controversy on the ethical implications of surrogacy (McLatchie&Lea 39). This happened the same year in which Thailand introduced their Protection of Children Born Through Assisted Reproduction Technologies Act (B.E. 2558), shutting their border to commercial surrogacy after receiving increased media coverage in response to the case of Baby Gammy, which will be revised later in this chapter (McLatchie&Lea 39). One year later, Cambodia saw a concerning surge in the number of "high-risk, low-cost fertility services" (McLatchie&Lea 39) causing the 2016 Health Ministry to announce the Law on the Regulation of Donation and Adaption of Human Cells, Tissues and Organs would be applied to the practice of gestational surrogacy, thus consequently banning the practice. The following year the Ministry of Women's affairs in Cambodia issued a permanent prohibition which was put in place from 2020 (McLatchie&Lea 39). Moreover, after India was consistently used as one of the top destinations for hopeful western commissioning parents, the government started passing a series of laws from 2012 onwards containing the practice by only allowing Indian nationals to engage in altruistic practices (Bandelli 24). This was followed by the introduction of the Surrogacy Act in 2021 which put even harsher restrictions on the eligibility of commissioning parents and laws surrounding the protection of the

surrogate mother and child (Bandelli 24). In recent years, Laos has emerged as a new favourite for commissioning couples to partake in legitimate surrogacy arrangements, and thus it is likely to see restrictions being imposed in the near future (Bandelli 24).

Other forms of regulation have also been enforced in the countries which do allow gestational surrogacy, such as in Russia and Vietnam, where the commissioning mother must provide proof of her medical issues which would pose a risk to her health and/or the health of her baby in order to apply for a baby to be carried by a surrogate (Bandelli 23). Whilst this does not prevent the possible exploitation of the surrogate mother during the gestational period, it does prevent couples from choosing surrogacy based on personal preference rather than on necessity, which one could interpret is one of the many bioethical dilemmas which stem from the practice.

Africa

Unlike Asia, many African states have no laws explicitly addressing the practice of surrogacy. Only South Africa explicitly states that they permit the 'expenses-only' form of surrogacy, also known as altruistic surrogacy, in the South Africa's Children's Act of 2005 (Gónzalez 916). Other states such as Ghana, Kenya and Nigeria have become recently popular destinations for the practice, deemed 'maternity tourism', amidst the closure of many typical surrogacy locations in Asia (McLatchie&Lea 45). The lack of legislation or recognition for the practice among African states causes alarm within the international community due to the region's history of exploitation and abuse in regards to surrogacy which may be deemed a form of human trafficking in its wider form (McLatchie&Lea 45). This is highlighted in the 2006 report from UNESCO which states that in Nigeria, a country known to have a very poor record on human trafficking, there have been various cases where women are impregnated and then confined until the birth of the surrogate child, who is then sold in the international adoption market for sexual exploitation or slave labour; this phenomenon has been uncannily coined "baby harvesting" (McLatchie&Lea 45), a term which conjures images of complete dystopia, and rightly so.

South America

Similarly to Africa, South America has also experienced an increased surge in popularity within the surrogacy industry, due to the legal barriers which have been put up in Asia. However, this interest is somewhat new to the continent and thus there are very few countries which have clear legislation surrounding gestational surrogacy, which may be "dangerously interpreted as a free-for-all" (McLatchie&Lea 44). This is especially the case in Mexico where there is no national legislation on the practice, instead each federative state decides its own legislation (ENoMW and ICASM [2022] 23). In regional states such as San Luis Potosí and Querétaro, surrogacy is prohibited in all forms and in the case a surrogate child is born, the surrogate mother gains legal guardianship. However, in other states such as Coahuila and Mexico City, legislation which had previously banned or regulated the practice has now been lifted or was never officially published, causing a chasm in which human rights violations may occur because of the lack of enforced regulation or monitoring of the practice (ENoMW and ICASM [2022] 23). One area which has certain regulations on surrogacy in Mexico is Tabasco, where an increased activity of surrogacy took place; Here there is the highest rate of unemployment in the country, which prompted the region to introduce provisions in 2017 stating that intended parents must be heterosexual, Mexican couples. Thus effectively revoking its status as a 'supply' hot-spot within the global industry (McLatchie&Lea 44). However, these laws have been found to be quite ineffective owing to a lack of monitoring system, verification of the identity of the commissioning parents and lack of any way of ensuring that the practice is not being coerced for trafficking or exploitation (ENoMW and ICASM [2022] 23). As was the case in Asia, one regions closure to the international surrogacy industry simply instigates the opening of another fertility tourism hub, in this case in Colombia. Eager to usher in this new found source of income provided through reproductive tourism, an organisation called Global Star Surrogacy boasted in an advertisement online that if commissioning parents choose to find a surrogate through their clinic, they would pay $80,000 to $100,000 less than they would pay in the United States (McLatchie&Lea 44). The advertisement continues to say that choosing Colombia for one's surrogacy arrangement is a good choice because it is the most "economical, low-cost gay-friendly surrogacy country" (McLatchie&Lea 44).

North America

The US has arguably the largest demand for surrogate mothers in the world, being home to a large percentage of commissioning parents who seek to avoid the sky-high costs of surrogacy in their own country, and would rather find cheaper and easier options elsewhere. This is also due to the varying legislation from state to state, which makes inter-state arrangements difficult, thus tempting hopeful couples in engaging with surrogacy arrangement abroad where the legislation is far more relaxed (Fenton-Glynn). States such as California, Washington and New Hampshire have legislation to allow all parents access to surrogacy arrangements whereas states such as Michigan and Louisiana completely forbid any commercial surrogacy arrangements, with the latter viewing the practice as a crime (The US Surrogacy Law Map). Due to the variation of laws between states (all of which will be explored in the next chapter), a form of internal reproductive tourism has been cultivated within the US, however this does not stop commissioning parents from searching for a surrogate abroad (McLatchie&Lea 36). Unlike the US, Canada has one official piece of stature called the Assisted Human Reproduction Act (S.C. 2004) which regulates all forms of surrogacy, both traditional and commercial arrangements; thus, meaning that both forms of surrogacy are legal within the country.

Oceania

In the Pacific Islands such as Fiji and Papa New Guinea, there is no legal framework addressing surrogacy in any of its forms, thus leaving the practice unregulated; however, there is little evidence that these countries have citizens who engage in the practice or who are forced into the system due to economic disparity. New Zealand only permits altruistic surrogacy, which it tightly regulates after the introduction of the Human Assisted Reproduction Act (2004) which requires surrogacy arrangements to be approved by the Ethics Committee on Assisted Reproductive Technology (ECART New Zealand). Australia is an interesting case, some regions such as New South Wales, Queensland and the Australian Capital Territory deem the act of surrogacy a crime in their respective statutes (the Surrogacy Act, 2010 and the Parentage Act, 2004) even when “commercial surrogacy occurs with extraterritorial effect in those specified states” (González 916). Despite this harsh legislation, other parts of the country have a different approach to the practice, making Australia home to a large percentage of intending parents in the global industry.

Due to the lack of consistent regulation of surrogacy, especially gestational surrogacy, among nation states, women who choose to become surrogates are vulnerable to exploitation when entering cross-border arrangements because during these transactions, potential surrogate mothers may find themselves in a grey area within the law where their rights may not be protected to the standard they should be (Ullah&Nawaz 165). Countries in the parts of Global South, namely in Asia, Africa and South America, first saw a rapid surge in surrogacy cases due to Western commissioning parents demands for lower surrogacy prices (ENoMW and ICASM [2022] 28); this in tail led to groups of countries enforcing strict laws prohibiting international couples from having access to surrogacy facilities in their region, with the hopes of preventing surrogates from being exploited by agencies backed by foreign intending parents. For this reason, there are many countries in the Global South which in recent years have started constructing legal framework on the topic of surrogacy to protect their resident surrogate mothers from exploitation, as we've seen is the case in Nepal, Thailand, Cambodia and India. Europe similarly has a large number of countries which prohibit the practice, however the situation there is quite different. Whilst most European countries have never been exploited by the surrogacy industry, it is likely that this is due to the continent banning the commercial form of the practice before there was a chance for the industry to settle in. This, however, was not the case in Ukraine which is still experiencing a heavy influx of surrogacy arrangements requested by parents from abroad who are attracted by the low costs and open laws (McLatchie&Lea 11; NeJaime and Siegel 10).

In the United States, the legal framework surrounding surrogacy varies significantly from state to state. States like California have well-established laws that support and regulate commercial surrogacy agreements, providing protections for all parties involved. However, other states have restrictive or unclear laws, leading to potential legal ambiguities and risks for surrogate mothers (IVF Conceptions); the complex legal landscape of the US's approach to regulating gestational surrogacy will be covered in the next chapter. Finally, as the prevalence of international surrogacy arrangements rises, so does the potential for human rights violations in the absence of cohesive regulatory frameworks. Addressing these issues requires coordinated international efforts to establish clear, enforceable standards that protect the rights and well-being of surrogate mothers across borders.

A Question of Autonomy

A factor which may affect nation state's approach to the regulation of surrogacy is their position in relation to the practice and how it represents women's autonomy. Whilst some states such as Russia and Ukraine, and some federation states, namely California in the US, view commercial surrogacy as an "expression of a woman's autonomy to engage in surrogacy of their own free will" (Fenton-Glynn [2019]) this may lead to vulnerable women taking part in commercial transactions with very little regulation and thus in the event of a violation of their rights, for example carrying out the gestational period just for the commissioning parents to reject the baby resulting in a lack of payment, they have weak or no international guidelines protecting them. Furthermore, the absence of international legislation surrounding surrogacy is likely due to widely varying attitudes towards the practice in each state across the world as a result of cultural, societal and religious factors which influence state approaches to women's rights and states attitudes towards artificial reproductive technologies. For this reason, the study of legislation around surrogacy and real-life experiences of surrogate mothers in cross-border arrangements is becoming more and more relevant, as the surge in cross-border surrogacy cases means that there are more types of violations which could occur under international human rights law void of surrogacy practice regulations.

An Issue of Guardianship Status

As aforementioned, due to the variation in legislation surrounding gestational surrogacy, many legal challenges come up, especially in the context of cross-border arrangements where conflicting interests between the country of origin of the commissioning parents and that of the surrogate mother cause for legal disputes regarding the treatment of the surrogate mother, legal guardianship of the surrogate child, and the legitimacy in which the surrogate mother may have been recruited to take part in a surrogacy arrangement. One of the most prominent issues which has emerged from a lack of international consensus surrounding gestational surrogacy in cross-border arrangements is that of legal guardianship. This is due to the disparity between countries legislation; in some countries the surrogate mother is instantly given guardianship status whereas in other countries, the intending parents are owed

guardianship status. Thus, in the event of the laws between the country of the surrogate mother and the legislation coming from the country of the commissioning parents, a child could be rejected citizenship status in both countries, leaving them stateless (Fenton-Glynn). Furthermore, policy and law makers are concerned with the issue of guardianship status due to the confusing rights and obligations towards the surrogate child which may face the participants of a surrogacy arrangement, especially in cases where the commissioning parents decline to accept the child or divorce, which can result in costly repercussions (Scott 123); for example the surrogate mother may be left with a child she does not want and cannot look after, as we will see is the case later when discussing the case of Baby Gammy.

A table taken from *Surrogacy-led migration: reflections on the policy dilemmas,* by Akm Ahsan Ullah and Farah Nawaz clearly displays the legality of both altruistic and commercial surrogacy by nation state, along with who receives legal guardianship of the child from the moment they are born. Although this table does not include the position of all countries in the world, it nevertheless provides an insight into which countries automatically give legal guardianship status to the intending parents which could perhaps be problematic if the parents decide to reject the child (Fenton-Glynn). The study shows that whilst in some countries, such as Georgia, Greece, Kazakhstan, Portugal, Thailand, Ukraine and the US, the legal guardianship of the surrogate child is automatically transferred to the intending commissioning parents once the baby is born, other nation states such as Denmark, Japan, Malaysia, Pakistan, Poland, South Korea, Sweden and Switzerland, leave the legal guardianship of the surrogate child in the hands of the surrogate mother, regardless of their possible lack of genetic relation. This could be considered interesting as it shows that countries which have a higher engagement with the surrogacy industry, such as Georgia, Thailand, Ukraine and the US, give instant custody to the intending parents. This could suggest that countries where there are higher rates of surrogacy agreements taking place may wish to ensure that their paying customers, the commissioning parents, are given legal guardianship to prevent the agencies themselves from being liable to legal scrutiny. BBC writer Fenton-Glynn describes this class of laws as problematic due to the possibility of a child being left stateless, with neither country recognising the surrogate baby as a citizen. This inconsistency can prove to be very problematic in cross-border arrangements, for example in the case of the commissioning parents withdrawing from an arrangement after finding out their surrogate baby has a serious health condition or disability, in this case if the law declares that the surrogate child is under the legal guardianship of their mother directly

after being born, the intended parents can slip away without having to deal with any legal repercussions.

Country	Altruistic surrogacy	Commercial surrogacy	Legal guardian of the surrogate child
Armenia	Legal	Legal	Intending parent(s) (surrogate may not have a biological link to the child and there has to be a biological link to at least one of the intended parents).
Australia	Legal (except Northern Territory)	Illegal	
Austria	Illegal	Illegal	
Belgium	Legal	Illegal	Surrogate (transfer of guardianship through adoption)
Brazil	Legal - restricted	Illegal	
Canada	Legal (except Quebec)	Illegal	
Chile	Unregulated	Unregulated	
Colombia	Unregulated	Unregulated	
Czech Republic	Unregulated	Unregulated	
Denmark	Legal	Illegal	Surrogate
Estonia	Legal	Legal	
Finland	Legal (traditional surrogacy only)	Legal (traditional surrogacy only)	
France	Illegal	Illegal	
Germany	Illegal	Illegal	
Georgia	Legal	Legal	Intending parent(s)
Greece	Legal - restricted	Legal	Intending parent(s)
Hungary	Legal	Illegal	
India	Legal	Legal (only for Indian citizens)	
Iran	Unregulated	Unregulated	
Ireland	Legal	Illegal	Surrogate (transfer of guardianship through adoption)
Israel	Legal - restricted	Legal - restricted	Surrogate (transfer of guardianship through court order)
Italy	Illegal	Illegal	
Japan	Unregulated	Unregulated	Surrogate
Kazakhstan	Legal	Legal	Intending parent(s)
Latvia	Legal	Illegal	
Malaysia	Legal	Illegal	Surrogate
Netherland	Illegal	Illegal	Surrogate (transfer of guardianship through adoption)
New Zealand	Legal	Illegal	
Nigeria	Unregulated	Unregulated	
Norway	Illegal	Illegal	
Pakistan	Illegal	Illegal	Surrogate
Peru	Unregulated	Unregulated	
Poland	Unregulated	Unregulated	Surrogate
Portugal	Legal	Illegal	Intending parent(s)
Romania	Unregulated	Unregulated	
Russia	Legal	Legal	Surrogate if it is her egg Intending parent(s) otherwise
Serbia	Illegal	Illegal	
South Africa	Legal	Illegal	Intending parent(s) (if surrogate has a biological link to the child she has 60 days to change her mind)

(*continued*)

Country	Altruistic surrogacy	Commercial surrogacy	Legal guardian of the surrogate child
South Korea	Unregulated	Unregulated	Surrogate
Spain	Illegal	Illegal	
Sweden	Unregulated	Unregulated	Surrogate
Switzerland	Illegal	Illegal	Surrogate
Thailand	Legal - restricted	Illegal	Intending parent(s)
Ukraine	Legal	Legal	Intending parent(s)
United Kingdom	Legal	Illegal	Surrogate (transfer of guardianship through adoption or order)
Uruguay	Legal	Illegal	
USA	Legal in most states	Illegal	Intending parent(s)
Venezuela	Unregulated	Unregulated	
Vietnam	Legal - restricted	Illegal	

Source: Adapted from Cuddy (2018)

Table 1: *"Surrogacy Laws By Country." Taken from Akm Ehsan Ullah and Farah Nawaz's article, "Surrogacy-led migration: reflections on the policy dilemmas," published by Emerald Publishing Limited, 2020, p. 159-160. https://www.emerald.com/insight/content/doi/10.1108/PAP-03-2020-0014/full/html*

Through looking at the varying national legislation on surrogacy in its altruistic and commercial forms, one can identify which aspects of the practice are being addressed legally. As previously mentioned, there are a number of countries which impose a blanket ban on all forms of surrogacy, or some that only ban commercial surrogacy, demonstrating governments attempts to eliminate the legal and ethical risks posed by surrogacy arrangements through prohibition, and in some circumstances criminalisation, as is the case in France (Gónzalez 916). Despite the notion that prohibiting surrogacy will lead to a decrease in the practice altogether, lawmakers and scholar such as Scott (2009) suggest that arrangements will continue with or without the facilitating legislation, and in this way, the appropriate legal response would be to clearly establish the rules in which parental status, and other ambiguities in the arrangement, are clearly prescribed (123). Other countries limit the access of surrogacy only to couples who are nationals, and some even go as far as limiting surrogacy services to heterosexual couples, such as in the state of Tabasco, Mexico (McLatchie&Lea 44). Although this may simplify issues of national identity of the surrogate child and act as a deterrent for international couples seeking to employ a surrogate mother abroad, it does not

tackle issues regarding the treatment of the surrogate mother, nor does it prevent intended parents from simply looking elsewhere. Another aspect of surrogacy which has been seen to be crucial in states regulation of surrogacy is the appointment of legal guardianship, as by setting out clear guardianship laws, states can avoid disputes surrounding custody in the case one party wants to withdraw from the agreement, thus preventing serious ethical dilemmas if the child has the possibility of becoming stateless (Fenton-Glynn). One state, New Zealand, implements regulations on the treatment of all parties involved through its implementation of the Ethics Committee on Assisted Reproductive Technology which must approve the arrangements within a surrogacy in order for it to go ahead (ECART New Zealand); a policy which ensures compliance with international human rights standards, and whose progressive implementation could be used as an example for other state's approaches to surrogacy across the globe. In a BBC Health news article, Fenton-Glynn highlights one of the major issues which arises from the current legal landscape in regards to surrogacy, which is the nature in which the industry moves from country to country to constantly evade the legal traps being set by appropriate closure of borders to surrogacy tourism. She states that "as one surrogacy hotspot gets shut down, another pops up in its place", creating a never-ending cycle of surrogacy agencies imposition and inevitable banishment after they have exploited the women they are commissioning. Furthermore, one may infer that due to the national legislations focus on decreasing instances of commercial surrogacy through narrowing the eligibility of commissioning parents, some of the more serious issues caused by gestational surrogacy arrangements are hardly touched upon, such as ensuring the well-being of the surrogate mother or preventing illegitimate organisations from using surrogacy as a cover-up for what is actually closer to human trafficking than a form of reproductive assistance.

In addition, there are thousands of bioethical and moral questions which arise from the legal frameworks, for example should partaking in a gestational surrogacy arrangement be considered an act of autonomy? Is the surrogate mother truly consenting, or are economic disadvantages at play? Is financial compensation considered a right of the surrogate mother for providing her womb as a service? The list is endless, however one notion is clear, the unevenness across national legislation and the void left by the lack of an international legislation has allowed for exploitation of surrogate mothers who are already vulnerable. Studies have shown that countries which are economically stable and in the global north are mostly home to commissioning parents in cross-border arrangements, whereas the majority of surrogate mothers come from countries which are less economically stable and often in the

global south (Ullah&Nawaz 158). Perhaps this calls for a shift on legislative focus from that of the commissioning side onto that of the surrogate mother, in order to put in effective frameworks which actually enforces the protection of the surrogate mother and her child, whilst also satisfying and complying with the wishes of the intended parents, so that nobody is being disadvantaged and so the arrangement can be seen as mutually beneficial, as it is always advertised to be.

In order to highlight the complicated bioethical and legal implications fostered through inconsistencies in national legislation around cross-border gestational surrogacy, two cases which have received global media attention will be outlined. These cases put forward many bioethical and human rights concerns which have influenced legislation and may be useful in analysing future cases surrounding gestational surrogacy. Furthermore, these cases have been chosen due to their extensive media coverage and international public interest, which aided plaintiffs in in prompting a change in national legislation surrounding surrogacy within their respective countries, India and Thailand (McLatchie&Lea 39); hence making them interesting when addressing the question: how do national legal frameworks address the legal, bioethical, and social challenges posed by cross-border gestational surrogacy, especially in light of a case being brought forward which demonstrates a violation of the surrogate mother's rights. One of the few landmark court cases which puts a spotlight on one of the major gaps in legislation regarding the surrogate child's welfare is Baby Manji Yamada vs. The Union of India (2008) brought infant of the Indian Supreme Court (Pasayat). This case concerns the child of a surrogate mother born in India, who was commissioned by Japanese parents, Dr Yuki and Dr Ikufumi Yamada, in a cross-border arrangement. They decided upon a fertility clinic in Anand, Gujarat in India which was well-known for its commercial surrogacy services, where their chosen surrogate mother, 'Manji' would undergo an IVF treatment with embryos created by Mr. Yamada's sperm and an Indian donor egg (Pravin 1). However, following matrimonial disputes, the couple decided to separate whilst the surrogate mother had already begun the pregnancy; and at this stage it was only the to be father who was willing to take custody of the baby (Bommareddy 31). Due to complications with his visa, Mr. Yamada had to return home, leaving Baby Manji in Arya Hospital in Jaipur where he was being treated in intensive care for viral infections (Pravin 1). At this point, the child had been rejected by her surrogate mother and her intended parents, and due to India's lack of laws surrounding surrogacy at the time, the baby was essentially without parents and stateless. The predicament of the baby's lack of guardianship urged the baby's grandmother in Japan to

bring a case before the Supreme Court of India, pleading that she should become the baby's legal guardian and be able to bring her back to Japan. The judgement ruled in the grandmother's favour and she was able to bring Baby Manji with her back home.

This case highlights issues in regards to cross-border gestational surrogacy which may occur and how an absence of legislation to regulate such a practice could prove very harmful towards those involved. In this case, a lack of laws surrounding the immediate nationality or legal parenthood meant that when commissioning parents retract from an arrangement, the mother could be left with a baby she has no intention in keeping; furthermore in the case where both commissioning and surrogate parties withdraw from an arrangement, the surrogate child is left as an orphan with often no clear nationality, and thus is not protected by any national jurisdiction nor are they protected by international law because such laws pertaining to what should, in accordance with universal human rights standards, happen in case of abandonment in surrogacy arrangements simply do not exist. Moreover, the case proposes the question of what happens in such a situation if there is nobody who wants to claim guardianship, what happens to these children? Or in some cases where the mother feels forced to then look after the child, should there be laws to prevent this? Does the act of the commissioning parents retracting from a gestational surrogate agreement constitute a violation of the surrogate mother's rights? These questions arise from the gaps within national legislation which allows for grey areas to appear, where individuals, often on the side of the commissioning parents, can sometimes get away with seemingly serious violations due to the mental and social impact on the surrogate mother and child.

Another case which provides glimpse into the murky waters of legislation surrounding cross-border gestational surrogacy arrangements concerns a child named Baby Gammy. Baby Gammy, and his twin sister Pipah, were born in Thailand to their surrogate mother, Ms Pattaramon Chanbua who had been commissioned by an Australian couple in December 2013 through an unknown surrogacy agency (ABC news). Ms Chanbua, who already two children of her own and was struggling to pay off debts, was offered 350,00 baht to become a surrogate for the Australian couple, Mr and Mrs Farnell (The Conversation). Late in the pregnancy, doctors found out that one of the two babies had down syndrome and a congenital heart condition (The Conversation), furthermore after informing the Farnells of Baby Gammy's condition, the commissioning parents requested Ms Chanbua to abort the child with down syndrome as Mr Farnell commented on the difficulty of having a child with down

syndrome, and that whilst it would not be impossible, it was not a situation him or his wife wanted to take on. Despite their request, Ms Chanbua refused to abort the baby on cultural and religious grounds. Thus, after both babies were born, the Australian couple returned home with only the healthy girl, leaving Baby Gammy behind in Thailand with his mother (ibid). This caused an uproar in the public eye as people were outraged by the parents' ability to pick and choose whether they wanted to deal with a child with down syndrome, with no regard for the reality which faced Ms Chanbua who would then have no choice but to look after a baby who she is not even genetically related to. Concerned with both of the children's rights and the impact their separation would have in the future, Ms Chanbua thus went to the Western Australian Family Court to request that the other baby, Pipah, be returned to her custody. Justice Thackray of the Western Australian Family Court decided against the reallocation of Pipah due to the fact that both children seemed to be 'thriving' alone in each of their respective home countries. Multiple newspapers covered the international case, such as the Guardian and ABC, and whilst the case was made public, there are some unclear facts about the case which should be brought to one's attention, especially surrounding the Farnell's knowledge of the second baby having down syndrome.

Regardless of these media coverage trivialities, the core of the case remained, the parents had left Baby Gammy behind due to his disability and thus his surrogate mother's despite having two children of her own, facing financial instability and having no genetic relation to him, would have to bring up the baby alone in Thailand. In this way, this case underlines the importance of international rules which should be in place to govern the practice to avoid such exploitation of the surrogate mothers. Furthermore, this case prompted Thailand's introduction of a ban on surrogacy for foreign commissioning parents (McLatchie&Lea 39) which demonstrates the need for legislation to constantly review the situation in its actuality and act accordingly to prevent future gross human rights violations.

The cases of Baby Manji Yamada vs. The Union of India (2008) and the case of Baby Gammy vs the Family Court in Western Australia (2014) highlight critical human rights issues in international surrogacy arrangements through their impact on legislation after a contract which involved the abandonment of children born through surrogacy. Thus, these cases underscore the vulnerabilities of surrogate-born children and surrogate mothers in the absence of comprehensive international and national legal frameworks. The importance of these cases lies in their exposure of the ethical, legal, and human rights challenges inherent in

cross-border surrogacy, prompting calls for stronger regulations to protect all parties involved, especially children, from exploitation and abandonment (Davies 44; Saravanan 77). These high-profile cases have been pivotal in sparking international debate and legislative scrutiny aimed at ensuring the rights and welfare of surrogate children and surrogate mothers are upheld in global surrogacy practices, whilst also having direct effect within their home legislation.

This chapter has reviewed the attempt from the international community to address the issues coming from cross-border gestational surrogacy through its discussion of other articles and their relevance to the practice, and further through the comments made in light of specialised investigations which assess the bioethical and legal implications of the practice and thus deem it unacceptable. Furthermore, it has been seen that the large disparity in regards to nations state regulation of surrogacy has led to un-even laws within regions, permitting and facilitating the industry's ignorance and defiance towards international human rights standards. Although some may think that the states which prohibit gestational surrogacy have the best chance at avoiding becoming exploited, this is not the case as prohibition outlaws some aspects of the practice however does not account for illegitimate forms of surrogacy, described as trafficking, 'baby-selling' or even 'baby harvesting' (McLatchie&Lea 45) which seem to operate within the shadowy gaps left by incomplete regulatory and enforcement laws. Moreover, even with legislation in place excluding foreign clients, or ensuring that all expenses are payed when a cross-border arrangement does go ahead, there is little to nothing written in national policies about the rights, biological and mental well-being of the mother. The fact that legislation is so concerned with the administrative elements of surrogacy, such as that of guardianship and nationality, is problematic as it steers away from identifying what is actually most important which is the well-being, mental and physical, of all parties involved. However, whilst these issues are considered as the most important dilemmas surrounding gestational surrogacy from a human rights point of view, it is clear that from the industry's perspective, namely the agencies and companies which provide the service, these issues are most likely seen as inconveniences. Moreover, due to the agencies power within the industry (made up of agencies, policy makers, commissioning parents and surrogate mothers), and the monetary capital the practice brings in, laws are consistently seen to be more concerned with regulating the logistics of the transaction rather than the well-being of all parties. This lack of legislation thus deprives surrogate mothers of protection from the

state which they so desperately need when being subjected to a capitalist industry more concerned with profits than people's rights and happiness, such as today's commercial surrogacy industry.

Chapter 2: Comparative Study: The United States and India

In this chapter, an in-depth case study will be put forward which focuses on surrogacy in the US in comparison with India, and surrounding regions, to better examine the differences in legislation and regional opinions on gestational surrogacy between the Global North and the Global South. Furthermore, this will provide an analysis of the contrasting ways in which the practice is regulated from the side of the commissioning parents in comparison to the side of the surrogate mother. As we've seen, issues arising from cross-border gestational surrogacy arrangements often lie within the differences in legal and ethical considerations between the commissioning parents and the surrogate mother. Thus, this chapter investigates the gestational surrogacy practice and industry in the US and India (in addition to Bangladesh) to highlight how two countries which are in very different positions in the surrogacy market address the legal, bioethical, and social challenges posed by cross-border gestational surrogacy within their national legislative frameworks.

The intricate landscape of US surrogacy legislation makes it an interesting case to study, as whilst it is the world's leading country of demand, in recent years the controversy surrounding the practice's legalisation has sparked debates among feminists and activists around the development of its regulation (Bandelli 67). On the other side of the case study, the neighbouring villages, mostly in Northern Bangladesh, will be taken into consideration when discussing gestational surrogacy in India to reflect upon the risk of trafficking in the area; which has been said to be a common occurrence in the shady areas between legitimate and illegitimate arrangements in a place where the borders are almost blurred (due to the number of Bengali territories surrounded by Indian land along the borders). Furthermore, by looking at cases in India, this chapter aims to analyse legislation up until the present day to clearly identify the following questions: what issues have faced the largest supply country of the past? how have they combated this? and finally, which issues are still occurring in spite of the legislation? This will aid in addressing one of the overarching questions which this thesis in interested in answering, which is how do the national legal frameworks of two of the largest players of the surrogacy industry address the legal, bioethical, and social challenges posed by cross-border gestational surrogacy? In addition, by looking at these two case

studies, this chapter hopes to highlight the differences in the ways in which the practice is addressed.

Surrogacy in the US

Gestational Surrogacy in the US, referring to its laws, advertisement and the myriads of ethical debates that come with it, is quite complex. The US started as pioneers and leaders of the global surrogacy market with the first surrogacy agencies (at that time only practicing traditional surrogacy methods) opening in the late 1970s and by the mid-80s, 20 independent agencies sprouted up across the country (Bandelli 67). Furthermore, in the last few decades the USA has seen a shift from adoption to surrogacy, causing organisations such as the Center for Disease Control and Prevention (CDCP) to estimate that there are around 6.7 million American woman who have made that transition (Ullah&Nawaz 158). This shift is likely due to the technological improvements of ARTs in the United States, which has made it increasingly safe to have a genetically related baby, despite any biological complications commissioning parents may experience. The high success rates and range of agencies instigated a flow of international parents who would come to the US as their first destination to find an agency that would suit their needs, even if the surrogate mother they would be hiring is taken from a third-party country (Bandelli 67). Thus, with the industry booming, most states put legislation in place to improve ethical standards of the practice, but one could suggest this was also done to invest money into a market which would make millions for the capitalist economy. Not only is there variation from state to state on whether the practice of gestational surrogacy is legal, but each state is responsible for its own legislation, regulation and enforcement of the law when dealing with surrogacy arrangements. This means that when discussing the US as a country, which largely fulfils the demand position in the cross-border surrogacy industry, it is important to take into count the issues which may be caused by confusions between state laws and also federal law, before even considering the legal and bioethical issues of hiring a vulnerable surrogate abroad, who is almost always from a poorer country. This portion of the chapter will thus be dedicated to understanding state legislation within the US and how through the laws focus on the legalities of the financial aspect of gestational surrogacy, it is possible that the human rights standards which are imperative in

the protection of all parties in a gestational surrogacy arrangement, especially across borders, are forgotten.

Legislation by State

When it comes to surrogacy laws in the USA, each state has its own law in regulating the practice, making the legal landscape vast and very complex. Whilst some states completely allow both traditional and commercial surrogacy, there are others, such as Michigan and Louisiana which completely forbid any commercial surrogacy arrangements, with the latter viewing the practice as a crime (The US Surrogacy Law Map). These differences in legislation cause foreign couples to choose states in order to complete the surrogacy process within the country, however it also allows American couples to travel across to another state in order to hire an agency to commission a surrogate abroad. For example, if a couple were from or travelled to any of the following states, they would be able to be part of a surrogacy arrangement where "pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate" (The US Surrogacy Law Map): California, Colorado, Connecticut, District of Colombia, Delaware, Idaho, Maine, Michigan, New Hampshire, New Jersey, Nevada, Pennsylvania, Vermont and Washington. In addition to these states, 31 of the 52 states in the US permit surrogacy, however the process depends on various factors or laws specific to the state, for example in some states there may be additional post-birth legal procedures which are required; this is the case in the following states: Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Minnesota, Missouri, Mississippi, Montana, New York (however the statute only applies in the state of New York if one parent *and* the surrogate mother are NY residents), North Carolina, North Dakota, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island (The RI statute is only applicable on the condition that one parent is a US resident), South Carolina, South Dakota, Texas, Utah, Wisconsin, West Virginia and Wyoming (here the statute only applies if both commissioning parents reside in WY) (The US Surrogacy Law Map). Of the remaining six states, two are considered "Yellow Light" states, these are Tennessee and Virginia, meaning that intending parents should proceed with caution as there may be legal hurdles which they will have to overcome and their request for a surrogate may not be accepted due to inconsistencies in the results of the practice's regulation (The US Surrogacy

Law Map). In three states, Arizona, Indiana and Nebraska, surrogacy is practiced and courts have the authority to issue parentage orders, however surrogacy contracts are considered to be void and unenforceable by the statute (The US Surrogacy Law Map). Finally, there is only one state, Louisiana, which is considered a "Red Light" state where the enforced statute and published case law prohibit commercial or compensated surrogacy agreements, or in the case that a surrogacy contract is carried out, a birth certificate containing the names of both of the commissioning parents cannot be obtained (The US Surrogacy Law Map).

Opposite Responses to Handle Demand

Let's have a closer look at Louisiana's extremely restrictive laws which prohibit gestational surrogacy versus the very open and ambiguous laws in California, in addition to their socio-economic background, to see the extremes of surrogacy in the US. On American Surrogacy's page titled *What You Need To Know About Surrogacy In Louisiana: Louisiana Surrogacy Laws and Information,* it states that "surrogacy in Louisiana is a highly regulated and restricted family-building process for intended parents and surrogates in this state" and that the service is only available to intending parents and local surrogates intending on going through altruistic surrogacy together. Furthermore, it clarifies that due to the many restrictions, national surrogacy professionals would "encourage intended parents to work in a state other than Louisiana to build their family" (American Surrogacy); alternatively, if they wish to go through the process in Louisiana, they should be sure to work with an experienced surrogacy attorney. A new bill passed in 2016 states that surrogacy compensation is illegal in the state of Louisiana, furthermore traditional surrogacy contracts involving one of the parents' gametes and a donor gamete which has been secured through financial mean are forbidden per the 2016 law which holds that "a contract for a genetic gestational carrier shall be absolutely null" (American Surrogacy). Due to the strict laws which regulate surrogacy, contracts which are enforceable in a court of law must fulfil the following criteria:

- The surrogacy must be signed by all involved parties which pertains to the intended parents, the intended surrogate, and her spouse (if applicable)
- The agreement must be approved by the court before any medical processes can begin
- Any surrogacy agreement *must* be altruistic in nature

- The contract must not require the surrogate mother to terminate her pregnancy, at the wishes of the intending parents, for any of the following reasons: “an actual or potential disability, impairment, genetic variation, or any other health condition or a discrimination based on gender, or for the purposes of the reduction of multiple foetuses” (American Surrogacy)

Furthermore, surrogate mothers must have undergone two sessions of counselling from a mental health professional prior to starting the contract, and they must agree to attend a “minimum of one post-birth counselling session” (American Surrogacy). The surrogacy laws in this state forbid surrogacy arrangements which do not use the gametes of the intended parents, thus same-sex couples and individuals, in addition to heterosexual individuals who require a donor gamete, will not be granted in the state; additionally, surrogacy contracts of this nature are considered unlawful and thus parties involved may be subjected to fines and imprisonment. Thus, making the practice quite selective in regards to who is able to access the service. In this way, although the state has a very comprehensive framework in order to ensure the well-being and rights are respected by all parties involved, it does omit a large percentage of couples who are seeking to conceive a child through surrogacy. Nevertheless, Louisiana’s strict regulation of surrogacy and steps to ensure the protection of the surrogate mother could be considered a step in the right direction for US legislation on gestational surrogacy arrangements that could be applied to laws in other states regarding cross-border arrangements.

In California, the situation couldn’t be more different. The website IVF Conceptions goes through a detailed guide to navigating surrogacy in the state of California, including information on any arrangements confined by national or state borders in addition to information for international intending parents. Since the gestational surrogacy statute went into effect in 2013, California has some of the most favourable (for the commissioning parents) surrogacy regulations and has thus become “one of the most popular third-party reproduction options for all intended parents”, likely referring to their international customers (IVF Conceptions). It states proudly that due to the regulations which are enforced, and the subsequent extra expenses which come in tow, the process can cost between $90,000 and $210,000 (IVF Conceptions) - note that the surrogate mother would get about half of that if

she's from the states, however if she's from abroad, particularly from a country in the global south she is likely to earn just a fraction, around 5 to 10 percent. Despite the high costs, California offers comprehensive support services for all parties involved, including counselling, support groups, and legal advice, in order to ensure the "well-being and peace of mind" of those involved in the process; it further reiterates that both parties will be legally represented to better protect everyone involved (IVF Conceptions). Moreover, the page confirms that "international intended parents are not exempt from any of the regulations governing gestational surrogacy for domestic intended parents" and that should the surrogate baby be born in the US, the commissioning parents can obtain travel and immigration documents which they may require with the aid of a local attorney (IVF Conceptions). Although the legislation shows evidence of concern for the well-being of the surrogate mother in addition to satisfying the request of the commissioning parents, this may not be the case when parents choose a California based clinic to embark on a cross-border surrogacy arrangement. Countries in the Global South which are void of such regulations, do not offer legal protection for the hired surrogate, or where authorities are unlikely to assist the surrogate in the case where she is subjected to exploitation, will therefore not be able to comply with the standards set out by California's state legislation; this is where the grey area lies.

In States where the laws are so relaxed to the point where medical grounds are not necessarily needed for wanting to hire a surrogate mother, such as in California, some intending parents choose to go through surrogacy in order to have a child without disrupting their established careers. This phenomenon, coined 'social surrogacy', has recently become more apparent when looking at surrogacy arrangement between extremely wealth intending parents and economically unstable surrogates, whereby celebrities and professional women choose to focus on their career but still want to start a family (Bandelli 22). In these cases, women choose to hire a surrogate, not because of a medical necessity as in the case with infertile or homosexual couples, but rather because they know how challenging and damaging pregnancy can be, hence they would prefer to delegate their pregnancy to a surrogate mother. Thus, now women in the spot light can continue their career, without the risk of suffering any of the emotional and physical complications which may come with pregnancy. Furthermore, as more and more celebrities are choosing this form of conception (Nicole Kidman, Kim Kardashian, Sarah Jessica Parker, Cristiano Ronaldo, Elton John and Ricky Martin to name a

few - Bandelli 22) the more it is seen as a normalised practice in the eyes of the public, which may contribute to the growth of the industry in the future.

Finally, when researching the legislation in each federal state, another characteristic stood out which could be considered a contributing factor to the widely varying state legislation in Louisiana and in California; the average income in each respective federation state. According to the Forbes Advisor, the average annual wage in Louisiana is $50,940, compared to that of California which is $73,220. When looking at the average hourly wage, in Louisiana is is $24.49, over ten dollars less than California's $35.20 minimum hourly wage (Forbes Advisor). Hence demonstrating that the economic standing of each country is vastly different, something which may contribute to more laws being put in place in Louisiana due to the findings which suggest that women from lower-income areas are more likely to turn to surrogacy as a way of making money (Fenton-Glynn). In this way, it could be suggested that whilst the US as a whole is mostly seen as a country of demand, economic disparity between federation states demonstrates that some areas may enforce strict regulations to combat being used as regions of supply. Subsequently, in a region such as Louisiana where the average wage is one of the lowest among US states (Forbes Advisor), regulations have been put in place, perhaps with the intention of protecting their citizens from the surrogacy industry's exploitation.

Feminist Demand for Change

In addition to the complex legal landscape of the US in regards to the prohibition of surrogacy, through her field-work, scholar Daniela Bandelli (2021) explains that there are two main approaches, or perspectives, on surrogacy within the US: The *prohibitionist* front (or the abolitionist front) and the *regulatory* front (also known as the reformists front). To gather information from each perspective, Bandelli interacted with some of the key US organisations which uphold prohibitionist and regulatory opinions. On the side of prohibition, she spoke with members of the Stop Surrogacy now campaign and Coalition for Anti Trafficking of Women (CATW); and for the regulatory front she engages with the Center for Genetics (CGS), working in partnership with the Pro-Choice Alliance for Responsible Research (PCARR) and Our Bodies Ourselves (OBOS), along with the Center for

Reproductive Rights (CRR) (Bandelli 72). Her research demonstrates that whilst there are many differences among the views of prohibitionists and reformists, some conclusions are shared by both parties; for example both perspectives view the practice of gestational surrogacy as a "consumerist practice in which the health of women (surrogates and egg donors) and children as well as the freedom and dignity of surrogates are at risk due to the unregulated and unethical legal and medical procedures put in place by clinics and agencies" (Bandelli 76). Moreover, she states that both parties feel the need for more investigation to be made into the topic, including better research on the well-being of surrogate mothers and children after birth in addition to more transparent information being made available to the public when considering whether to enter into a surrogacy arrangement (Bandelli 76). Below is a table constructed with the findings of her field-work, displaying the 'diagnostic' and 'prognostic' frames which apply to either the abolitionists or the reformists agenda, in order to better identify what the key issues of gestational surrogacy in the US as a whole are, according to its citizens. The 'diagnostic' frames refer to issues each group has identified when looking at the current surrogacy practice, and 'prognostic' frames are suggestions for ways to address these issues in the future.

	Prohibitionist/Abolitionist	Regulatory/ Reformist
Diagnostic Frames	surrogacy is a system of exploitation (unethical, profit-driven, unregulated, and unethical industry) of vulnerable women, it implies a reduction of women's autonomy and freedom during pregnancy as in slavery; surrogacy is a form of commodification of women (disposable) and children (baby-buy), and a human rights violation; surrogacy is a product of liberalism and capitalism applied to life; surrogacy implies hazards for women and children's health and lack of information; surrogacy implies deprivation of mother–foetal bond; in surrogacy there is an inequality of the power between the surrogates and intended parents; surrogacy is a result of gender inequality and patriarchy; surrogacy is supported by a spreading culture of the "right to have babies" and by a conservative pro-family mindset.	in surrogacy, women's health is at risks because of medical and industry prac- tices, such as multiple embryos implantation, hindered contacts between the surrogates and intended parents, denied disclosure of information on the risks and rights; intended parents and surrogates are not adequately informed on the health risks and rights; in developing countries, surrogates' freedom is restricted, they are exploited because vulnerable; world-wide heterogeneous regulations make intended parents, surrogates, and children's rights less achievable and more uncertain; surrogacy is the result of liberalism and consumerism; surrogacy is hostage of a polarized debate.
Prognostic Frames	surrogacy should be outlawed through national and international laws; there is need for cultural change and for more diffusion of information about the details of surrogacy, medical literature and surrogacy cases that have gone wrong; follow-up studies on surrogates and children should be conducted by clinics and independent researchers; social movement of surrogate children will come forward in the future and will show the wrongdoing of surrogacy on children; restrictive regulations should be promoted to discourage the practice.	medical regulations, such as the prohibition of multiple embryo implantation and mandatory testing for all gamete donors, should be introduced; for starting surrogacy agencies stricter requirements should be required; mechanism of supervision and control on surrogacy industry actors should be created; legal and medical counselling for intended parents and surrogates and mecha- nisms to ensure fully informed and free consent (contracts in surrogate's mother language, for example) should be guaranteed; more research on health and well-being of children and surrogates should be conducted.

Table 2: *Graph created using data from Daniela Bandelli's book,* "*Sociological Debates on Gestational Surrogacy: Between Legitimation and International Abolition.", p. 76-77, (2021)*

From this information one can clearly see that there are many aspects of the practice of surrogacy that both prohibitionists and reformists deem problematic. The majority of the diagnostic issues that they identify are concerned with the exploitation of the mother; whether it be through slavery like conditions, as detailed by the prohibitionists, or through being subjected to harmful medical interventions, as stated by the reformists. Furthermore, the prohibitionist front puts an emphasis on surrogacy being the product of gender inequality and the patriarchy's influence, also highlighting injustices caused by power inequalities between commissioning parents and surrogate mothers; this will be revisited in the following chapter. The reformist approach focuses on some of the more practical issues such as the surrogate mothers right to information or the uncertainty that comes with "world-wide heterogeneous regulations" (Bandelli 72). Both, interestingly, believe that surrogacy is a consumerist and capitalist industry that threatens the physical and psychological integrity of parties involved, particularly the surrogate mother and her baby. Moreover, although both are concerned with diffusion of information and furthering research surrounding the topic of surrogacy in their prognostic frameworks, there are some fundamental differences. The prohibitionist approach aims to, as one would guess, prohibit the practice of surrogacy altogether; no exceptions. The reformist framework attempts to give ways in which the most pressing issues in the practice can be better regulated to prevent further violations, whilst still allowing the industry to go on. When looking at both of these prognostic frameworks in the context of the ways in which international legislation has shifted in the past (adequately, albeit rather slowly), one could infer that whilst the prohibitionist suggestion for the future of surrogacy does seem ideal from a feminist perspective, in reality the proposals of the reformists organisations is more likely to be achievable. In addition, before we move on to the case study on India, it is important to say that these are the views of feminist organisations from the biggest country of demand, the US.

In addition, whilst commissioning parents often prefer to search abroad for an arrangement which suits them, some also hire surrogate mothers living in the US; however unlike in the more economically vulnerable countries where the surrogate mother has little to no protection, in the US there is mandatory testing which includes both psychological and physical health (Sethi 2020). Furthermore, surrogate mothers in the US are usually paid in

instalments at different stages of the pregnancy, agreed upon with the commissioning parents, and they are able to earn 'rewards' or extras based on the number of foetuses they produce (Bandelli 19); in total a surrogate could earn between $20,000 and $60,000 for each pregnancy (Bandelli 19). This demonstrates that the treatment of surrogate mothers is usually far better than the treatment of surrogates from countries of supply which are most often in the Global South; this will be explore in the second half of this chapter. Thus, although the exploitation of surrogates is perhaps not felt as deeply in the States, feminists, along with scholars and activists, are nevertheless adamant of the need for a reform on the country's approach to surrogacy, in addition to within the international sphere. That is to say that the exploitation women face during surrogacy may not be felt as close to home, as most surrogate mothers from the US are reported to have their physical and psychological integrity monitored throughout the pregnancy and be paid far more for their services; nevertheless, feminists and academics in the US are aware of the violations which occur across borders in addition to the part some citizens of the US play in condoning such a practice, and thus they demand a change in legislators framework when looking towards the future of the industry.

Surrogacy in India and Bangladesh

Now, this paper will shift its focus onto the legal and ethical situation in a country of supply to investigate the differences in the surrogacy practice in India and some of its neighbouring regions in Bangladesh. In order to better understand the relationship between the demand and suppliers within the industry, and thus identify how national laws and a lack of international laws influence the reality which is faced by the people involved in a cross-border arrangement. This section will address two countries to highlight a situation in a country with national legislation and one without; India being the former, and Bangladesh the latter. In this way, the aim is to see whether the implementation of national laws limiting access of surrogacy facilities to foreign couples decreases the risk of the surrogate mother and her surrogate child being subjected to violations of their rights. Therefore, the national legislation in India and Bangladesh will be discussed, as with the US, in addition to reports from various articles detailing some of the experiences of surrogate mothers in India and North Bengal to

reflect upon which issues have been addressed in regards to cross-border gestational surrogacy in the country of supply, and which bioethical issues still remain.

Legislation development

To better understand the legal and bioethical implications of cross-border gestational surrogacy arrangements in India, one must first look to the development of national legislation in order to identify what the leading supply country does to regulate and monitor the practice; this will place the bioethical issues which arise within a legal landscape. Looking at the development of legislation rather than analysing it as it currently stands allows us to see how policies change in response to the ever-increasing human rights concerns, which crop up through the industry's profit driven attempt to evade the law each time new legislation is put in place. In this way, scholars such as Bandelli (2021) have described the developments of surrogacy law in countries like India as a "regulatory patchwork" (24), one which is constantly subject to change, and perhaps not always the most secure.

India started as the world leader in the global surrogacy industry after the commercial version of the practice was legalised in 2002 (McLatchie&Lea 38). Commercial surrogacy in India, often informally referred to as the 'rent a womb' practice, was legalised and promoted to increase levels of medical tourism in the country with the hopes of generating income for national cross-border agencies (Jus Corpus). With a $400 million annual turnover and 3,000 fertility clinics up and running around the country (Bandelli 24; Jus Corpus), it is said that an estimated 25,000 surrogate children were born through surrogacy arrangements in India since 2002 (McLatchie&Lea 38). Furthermore, it is estimated that at least 50% of the surrogate babies born were being delivered to commissioning parents from the West (McLatchie&Lea 38; Ullah&Nawaz 162). At this point in the market's growth, the cost of surrogacy services or the organisation of the arrangement in the US was between $80,000-$100,000, which was significantly higher than the price to hire a surrogate through an Indian agency which was about $35,000-45,000 (McLatchie&Lea 38; Jus Corpus). Thus, the attraction to carry out a surrogacy arrangement in India, a country where couples would pay a fraction of the costs, they would face little to no legal complications, and would have complete control of the

gestational period, was more than ideal; hence, the industry boomed. This led to restrictions being imposed in 2012 as the government attempted to contain the phenomenon from getting out of control (Bandelli 24). First the change of law established that only heterosexual couples who had been married for 2 years could have access to gestational surrogacy services; they later added that surrogacy would actually only be permitted in the altruistic form and only to Indian couples, thus effectively banning foreign couples from coming to India to commission an Indian surrogate (Bandelli 24). This was later revised by the Home Ministry who in 2012 also announced that a medical visa for surrogacy would be granted to intended parents from abroad on the condition that they had been married for two or more years and if the practice was also legal in their home country. This drastically impacted India's appeal to same-sex couples and singles who were trying to navigate bans in their own countries by looking for easier surrogacy agreements abroad (Bandelli 24). The laws were solidified in 2015 when the Department of Health announced that surrogacy was to be a practice limited only to national, heterosexual, married couples; moreover, they indicated that there was an intent in the future to ban commercial surrogacy altogether (Bandelli 24).

Despite the new legislation which had been put in place, misuse of its provisions and the continuing exploitation of Indian women meant that in 2021, the Indian Parliament passed the Surrogacy Regulation Bill (2021) to tighten the laws around the practice and to put an end to the countries involvement as a supplier within the industry. The most important provisions brought forward by the act describe the proposed creation of the National Assisted Reproductive Technology and Surrogacy Board at a national level in order to advise the government on the issue of surrogacy in addition to setting up proper infrastructure such as clinics and hospitals to provide safe, regulated surrogacy facilities. The second was a reiteration of the core message of the previous legislation which only allowed ethical, altruistic surrogacy and strictly forbid forms of commercial surrogacy (Jus Corpus). Furthermore, the Bill put forward criteria which couples much fulfil in order to be able to apply to commission a surrogacy for their pregnancy. These criterion state that: 1. The couple must be married for at least five years; 2. The couple must provide proof of the essentiality of having a child through surrogacy in addition to a certificate proving their inability to conceive naturally; 3. They are not permitted to abandon their child born through surrogacy; 4. They have obtained a Certificate of Essentiality and a Certificate of Eligibility issued by the authorities (Jus Corpus). The Act also outlines the conditions which must be met in order to

be a surrogate mother which are: 1. The women who is asked to become a surrogate mother must be a close relative to the intending parents of the child born through surrogacy; 2. The surrogate mother must be a married woman with at least one child of her own; 3. The surrogate mother must be between the ages of 25-35 years; 4. She can become a surrogate mother only once and must possess a certificate of mental and physical fitness for surrogacy prior to agreeing to an arrangement; 5. There should be some form of insurance in place to care for the surrogate during and after the pregnancy (Jus Corpus). The Act also outlines directions regarding the regulation and functioning of surrogacy clinics within the country, stating explicitly that all surrogacy clinics must be registered (Jus Corpus). In addition, it clarifies that not the intending parents nor the surrogate mother are permitted to carry out a sex selection in the surrogacy arrangement; meaning preference for a male which is often the case within Indian cultural traditions, which often leads to the futile termination of female pregnancies, is strictly forbidden (Jus Corpus). In regards to legal guardianship, the Bill states that legal parentage will be awarded to the parents who have 'hired' the surrogate mother (Jus Corpus). Moreover, on the topic of consent, the act describes that the surrogate mother will be able to withdraw her consent only before the implantation of embryos in her womb, once that has occurred, she will not be able to stop the pregnancy (Jus Corpus). Finally, it touches upon the issue of abortion, writing that abortion will only be possible after the obtainment of written consent of the surrogate mother which must be authorised by the surrogacy board established on a national and state level (Jus Corpus).

Unlike India, Bangladesh does not have any type of formal legislative material addressing gestational surrogacy. When searching for surrogacy law in Bangladesh, there is no evidence to show that this has been documented alongside the growing collection of legislation coming from its neighbouring countries in South and South East Asia. Furthermore, within academic research, there is seldom reference to Bangladesh despite the country's consistent engagement with the practice over the last two decades. This may be due to the government's focus on improving some other aspects of the country, including strengthen infrastructure and addressing other human rights issues, such as decreasing poverty or the acceptance of Rohingya refugees from neighbouring Myanmar; however it is imperative for the country to implement gestational surrogacy regulations, thus continuing with the trend set by the rest of Asia, in order to avoid becoming the primary target for exploitation from international surrogacy agencies. In addition to being exploited by agencies due to the lack of laws, an

absence of any form of regulation makes Bengali women who seek to take part in a surrogacy agreement extremely vulnerable, because without ensuring the legitimacy of an agency, she might instead be walking into a trap crafted and carried out by human traffickers. Thus, to understand what the implications of weak legislative regulation on the surrogacy practice in supply countries are, this section will now turn to stories prior to and during the introduction of India's robust regulatory Bill.

Truth of Supply

Stories from surrogate mothers in India were collected by researcher Sheela Suryanarayanan (2022) through her study of women from Gujarat, in her article *Surrogacy Biomarkets in India: Troubling Stories from before the 2021 Act.* In her study, Suryanarayanan spoke with surrogate mothers, potential parents, and medical practitioners in 2009 and then again in a follow-up study in 2019, to understand the development of the international surrogacy market in India before the practice had been limited to Indian nationals. In her article, she outlines some of the key issues which had been occurring in regards to Westerners coming to India demanding surrogate mothers. She explains that within the market there was a preference for surrogate mothers from "a high caste, a specific religion, with attributes such as fair skin and higher body weight were preferred by the intended parents" and thus couples were willing to pay more to ensure they had a surrogate that fit with their standards, especially if the surrogate's egg were to be used in the process. Furthermore, attributes such as sex, weight and skin colour of the surrogate child were checked before determining the financial compensation the surrogate mother would receive; twins therefore constituted a higher financial gain. From her research, Suryanarayanan reveals that the distribution of money is usually very uneven, with the surrogate mother sometimes earning as little as 15% to 25% of the clinic's intake per arrangement. The industry had established such a strong footing in cities such as Gujarat that a small clinic was able to expand into a thriving surrogacy unit, complete with an IVF clinic, boarding facility for foreign parents, shopping area, neonatal intensive care unit and surrogate hostel all in one building. In addition, her research demonstrates the degrading treatment surrogate mothers would go through in the selection process, let alone the gestational period. One interviewee expressed to her that surrogate mothers were made to stand one by one in a row in front of the commissioning parents so that

they could select their preference, which usually swayed towards those considered "beautiful" and subsequently "fair skinned" in accordance with Western beauty standards. Moreover, parents from abroad would often request Christian women who would be forced to undergo sex selective abortions in the womb, in accordance with the commissioning parents' wishes, and frequently suffered from severe depression.

Additionally, after the negative experiences surrogate mothers face prior to implantation of the embryo, the exploitation may be considered to be worse during the gestational process. Firstly, multiple embryos are implanted into the surrogate mother's womb to "enhance the success rate", despite the legal maximum of only three embryos being transferred. Because of this, surrogate mothers are then left with multiple zygotes, however if more than two survive, the remaining foetuses are terminated through selective abortion which invariably favours male foetuses to female. Furthermore, the story of one girl, named Ujwala, illustrates a common experience among vulnerable girls going through with a surrogacy arrangement. She explains how after her first surrogacy arrangement, Ujwala fell short of RS. 50,000 to buy a house, so she was asked by the clinic to become a surrogate mother once again. She agreed and was impregnated using IVF which led her to carry three healthy foetuses, two females and one male. The intended parents did not want the second female baby; thus, Ujwala underwent an in-utero selective abortion, causing her to bleed profusely before finally being admitted to an intensive care unit (ICU). Due to the abortion procedure, she lost all of the foetuses, and although she was payed the Rs. 50,000, she could no longer buy the house owing to her costly post-surrogacy medical treatment. She exclaimed that she felt exploited and betrayed and that the surrogate pregnancies would make it impossible for her to work again like before. In addition, Ujwala had her own son who watched his mother go through such a process, and now he must provide for the family. This experience is tragic and sadly very common, as Suryanarayanan suggests that "several surrogate mothers have had near-death experiences, which have included haemorrhages and having their uteruses removed". These recounts of the reality of the supply of surrogacy demonstrate the serious bioethical and implications on the surrogate mother's health; furthermore, it suggests that although these women are receiving money to help themselves economically, which makes the procedures that they endure whilst being a surrogate acceptable as long as its legal, the psychological and health impacts of a procedure done so carelessly, and without regulation, are simply unjustifiable. Lastly, when asking her participants to describe the experience of

being a surrogate mother in an international clinic, one of the surrogates said that she was "treated like a machine" and that she wasn't even allowed to see the faces of her children; this is unfortunately common as although some women's entire delivery is recorded for the intending parents, they are refused permission to see the baby they have hosted for 9 months. Another woman, Gracy, described it as 'an endless saga of medicines and injections' which pushed her to the point of feeling as though "[her] body exists only on the outside; inside it has become hollow". This is a common feeling among surrogate mothers in India who feel exploited and abused, being commodified like animals to produce a product which is acceptable for a mostly Western market; as she states that in her follow-up study, 41% of the intended parents came from abroad, 10% were non-resident Indians (NRIs), and the remaining were well-off Indians, thus representing both post-colonialism and "neo-colonisation of women's bodies" (Suryanarayanan).

Human Trafficking

A harrowing article called *Bade Ki Kokh: How traffickers from North Bengal earn lakhs from illegal surrogacy* written by Madhuparna Das (2022) published on The Print India Outlines stories from young women and girls who had been taken by traffickers from the North of Bengal after being promised payment for becoming a surrogate mother. She writes that in the last years there have been increasing cases of girls being taken or going missing from tea garden areas, namely in the districts of Darjeeling, Jalpaiguri and Alipurduar and surrounding areas, to meet the immense demand posed by commissioning parents (Das). Since there has been little regulation in these areas, even despite the improving laws in India, many illegitimate or shady clinics have sprouted up around the country, leading to a murky part of the industry where many lines are crossed without repercussion. Das explains that these areas in North Bengal are no stranger to the crimes of human trafficking, which have existed for decades in the region in the form of girls being sold into the flesh trade or servitude, however in recent years they are being taken to serve a new purpose - they are being trafficked to be used to produce babies. The Siliguri Police Commissionate told Das that 249 minor girls had been kidnapped in 2019, the number went down in 2020 to 180 cases (likely due to the COVID-19 pandemic and restriction of movement) but went up again in 2021 to 223 cases. Thus, although some women were volunteering to become a surrogate on altruistic grounds

or in exchange for financial compensation, surrogacy in these areas which are often attached to high rates of trafficking, saw an increase in trafficked girls who were mostly minors, being forced to bear a child through traditional surrogacy, or sometimes even sexual assault. Furthermore, the “sense of shame and acute fear of stigma” (Das) meant that survivors are very reluctant to speak up about their abuse, demonstrated through the fact that Das found no cases recorded with the police.

One story concerns an 18-year-old girl who contacted anti-trafficking expert, Amos Tsering, after she had run away from the house of the commissioning parents as she had essentially been held captive for the gestation of the pregnancy. The girl had been working in a local beauty parlour when a man promised her a job with a far better salary. She was then taken to an undisclosed location and a month later she was subsequently subjected to artificial insemination. She was then “handed over” to the house of the commissioning couple where she was confined to a room and subjected to mental torture. Six months later she finally escaped and was rescued by a local NGO. Despite being subjected to this traumatic ordeal, the agent and couple are still absconding and thus she will never receive true justice. In this case, the girl was able to eventually lead a normal life with her husband and the surrogate baby, thanks to the immense support from those around her, however there are countless cases where the damage is permanent or where the abuse and exploitation tragically leads in loss of life. In a severe case reported in 2019, the surrogate mother was a 17-year-old girl from a rural tea garden in the Malbazar, located in the Jalpaiguri district. Here, an acquaintance promised the girl she would receive good money for moving to Delhi to become a domestic helper. However, of course, this was not the case. She was first transported to Bihar and later to villages in the Haryana area. In this time, she was tortured and forced to birth a child through traditional surrogacy (artificial insemination). After she had delivered the baby, she was transported on to Jharkhand and then on to Bihar, where she was cruelly sold into the flesh trade. She was luckily rescued by a group of activists from Siliguri-based anti-trafficking NGOs who took her in in 2021, meaning she endured around 2 years of this inhumane treatment. Due to the length and severity of her trauma, she revealed to the journalist that she will not be able to join school for fear that her traffickers will return (Das). Sometimes girls as young as 13 have been reported to have been taken and raped before being forced to deliver multiple times so that her traffickers can make the maximum profit (Suryanarayanan). These heinous crimes against girls and women demonstrate how

dangerous and void of human dignity the surrogacy can be when left in the hands of those driven solely by profits. Although not all surrogacy arrangements are as cruel and dystopian as the stories which have been recounted, this is the reality for many women and girls in poorer countries where they are already vulnerable and trapped; furthermore, these are the victims who are least likely to speak up against their perpetrators, as they have little money to spend on legal proceedings and in many cases these women have had no education, making them the most vulnerable to exploitation in cross-border gestational surrogacy arrangements (Das).

The stories which are reported in North Bengal are primarily given by Indian surrogate mothers, however being so close to the border, and with Bangladesh's history of human trafficking cases, outdated attitudes towards women, and complete lack of surrogacy laws, the Bengali surrogate is at serious risk of being relentlessly exploited. In a November 2022 UN special procedure press release titled *Bangladesh: Protect victims of trafficking* [….], Mullally, a UN expert, stated that authorities in Bangladesh should increase their efforts to prevent trafficking, especially of children, those with diverse gender identities, sex workers and migrant women. She explained how more effort must be made to prevent trafficking of migrant women within the country, perhaps through better regulation and accountability of agencies offering "high recruitment fees and deceptive job offers" which can lead to women being trafficked for domestic servitude or suffering worse abuses (United Nations). In addition, unlike in other Asian countries where the growth in industry lead to inevitable policies being imposed, Bangladesh has no legislation whatsoever addressing surrogacy; there is also very little research done on gestational surrogacy in Bangladesh, despite the numerous clinics which one can find, particularly in the capital city Dhaka, by simply searching "Bangladesh Surrogacy". Bangladesh is a predominantly muslim country, where muslim women are subjected to Sharia Law rather than statutory law when married, but prior to that she is technically under the guardianship of her father where similar restrictive norms are expected, limiting her ability to enjoy her statutory rights (London College of Legal Studies). For this reason, it is clear that the risk of Bengali surrogate mothers being exploited by external commissioning parties is high; furthermore, the is a high chance she will be unprotected by the law if she chose to speak up against her violations.

This research has displayed how different the US's approach to the regulation of surrogacy is in comparison to that of India and neighbouring regions. In addition, it highlights the reality of the industry's presence in both countries, which in India can still be seen to be quite dangerous towards the surrogate mother even after legislation has been put in place (Das, Suryanarayanan). Whilst the US allows for each federation state to be in charge of the regulatory system which is put in place, there has been seen to be great disparity even within this one country, which may be due to socio-economic factors such as family's income. This, along with the high prices for hiring a surrogate mother who is a US national, has caused couples to look elsewhere when considering the best option for their surrogacy arrangement (Fenton-Glynn). On the other side of the world in India, the country's biggest concern in legislation is deterring potentially exploitative agencies payed for by foreign commissioning parents from coming and setting up hubs which, as we've seen, often results in violations of the surrogate mother's rights. However, despite the regulations India has put in place, the exploitative effects of the industry are still being felt by surrogate mothers entering a range of forms of surrogacy arrangements (Das, Suryanarayanan). This is because international surrogacy agencies are able to work between the confines of each nations laws on the practice, allowing them to find gaps which are not addressed in legislation and thus they are able to thrive through illegitimate contracts (Suryanarayanan). Furthermore, both countries which have been studied recognise the necessity for a change in the way the practice works. In the US debates among reformists and abolitionists suggest that practice is in desperate need for a change, whether that be through complete prohibition or through better regulations influenced by the notion that the well-being of the surrogate is paramount in such arrangements (Bandelli 76). Similarly, activists and academics on the topic from India have commented on the need for an adaptation on laws which combat the real issues which are occurring due to surrogacy, such as human trafficking and the inhumane treatment of surrogate mothers, rather than the establishment of laws which are concerned about who is eligible to become a commissioning parent or on the subject of guardianship, as is the focus of the newest legislation in India, in order to create a water tight framework which would be more effective (Das).

In conclusion, some sort of reform in specific countries is needed, especially to protect surrogate mothers in the countries of supply, however with irregularities between states, large gaps in the industry open up where agencies can quickly and thus one might suggest that a

more effective solution would be international prohibition. This is due to the fact that countries of supply are in a difficult position without international support, as no matter the number of laws on this end, the continuing flow of demand means that rather than the industry halting each time it meets prohibition, it simply moulds itself in order to sneakily get past the law. To illustrate the issue, writer and researcher Madhuparna Das explains that:

> "Experts feel that the complete ban on commercial surrogacy may pave the way for more such illegal practices, because the desperate demand for babies from childless couples is not going to abate. Lower income groups who cannot afford to go through the long-drawn process of adoption or altruistic surrogacy, as mandated by the law, would increasingly break it to get babies." (Das)

It seems like a never-ending game of prohibition and reallocation which is driven by the constant demand for surrogate born babies. Introducing new, restrictive regulations detailing the requirements a couple must fulfil to hire a surrogate mother may sound promising on paper, however in practice this just leads to the industry creating more innovative and dangerous ways of getting past the policies, as the goal of making money remains paramount to every surrogacy agency. Therefore, in order to effectively combat the human rights violations which are stemming from the practice of surrogacy, an adaptive approach which educates the side of demand and better informs and protects the side of supply could be used to improve the future of the surrogacy industry.

Chapter 3: Bioethics and the Future of Legislation

Human Rights are founded upon ethical and moral values which have been universally agreed upon and respected internationally. After looking at the legislative landscape across the globe, in addition to closely reviewing the industry from the side of a demand country versus that of a supply country, countless numbers of bioethical and moral dilemmas have been unveiled. Additionally, legislation is often primarily focused on matters of guardianship and financial agreements during surrogacy contracts rather than on the protection of the rights and well-being of the surrogate mother. Therefore, this chapter addresses the bioethical implications of cross-border surrogacy arrangements, focusing on those which affect the surrogate mother, from a human rights feminist lens, in order to identify which rights are being abused and what could be done to prevent this. The aim of this is to highlight which issues in regards to the exploitation of the surrogate mother's rights occurs in a surrogacy transaction; this will aid in highlighting which rights of the surrogate mother are most urgently in need of being protected when discussing the 'right' rights later in the chapter, which could be considered the most relevant rights in a surrogacy arrangement from a human rights perspective.

In addition to approaching the bioethical implications from a human rights perspective, a feminist lens will be employed to set the focus on the rights of the surrogate mothers who are most at risk of being exploited. Thus, firstly the obvious ethical debates around cross-border surrogacy as a form of human trafficking will be outlined, followed by the bioethical issues surrounding the surrogate mother's treatment whilst taking part in commercial surrogacy, which will lead onto a discussion regarding the psychological impacts of surrogacy which may deem the practice unethical, by looking into the notion of surrogacy as an expression of women's autonomy. Doing this will allow for the most pressing issues facing the surrogate mothers to be identified. Women's autonomy will be discussed to present perhaps the most notable feminist debate among scholars in regards to why women become surrogate mothers; and whether or not they consider the act of surrogacy as empowering or disempowering. Later in the chapter, there will also be a part which addresses which other human rights issues which are relevant when talking about the gestational surrogacy practice; these human rights issues have been selected in light of the most pressing dilemmas surrounding the practice which has been highlighted by various academics.

It can be said that different rights are relevant for each actor within a gestational surrogacy agreement, such as the commissioning parents right to found a family or the surrogate mother's right to effective remedy in the event she is harmed through an arrangement. As this thesis is concerned with the rights of the most vulnerable party within a surrogacy arrangement, who is also the individual who usually receives the least protection throughout her employment, this chapter is concerned which rights could be considered as the most relevant in improving the standard of treatment the surrogate mother receives. Hence, this chapter will describe what this paper highlights as the rights within a surrogacy transaction could be seen as most relevant from a human rights perspective when considering the future of legislation, to ensure the well-being of all parties involved in a surrogacy arrangement, especially those most vulnerable to exploitation. Finally, through identifying which rights should be protected in surrogacy agreements, and thus written into surrogacy legislation, this chapter will propose a solution to the ever-increasing exploitation inflicted by the surrogacy market.

Bioethical Implications

Bioethics is a branch of ethics which deals with the moral dilemmas proposed by biological treatments, and the intersection of health and technology, such as cloning, abortion, and of course surrogacy (Berman Institute of Bioethics). In regards to legitimate surrogacy, it deals with issues which the surrogate mother is faced with, for example concerning her consent and whether her compensation is sufficient for the ordeal she will go through, even in the safest and most ethical of arrangements. In gestational surrogacy arrangements, particularly those which are cross-border where the gestational carrier is from a less economically stable country, the bioethical issues which may arise could be in relation to the physical treatment she receives or they could be related to the psychological or mental implications of the process. The bioethical issues which arrive in regards to forced surrogacy, however, are far more grave.

As detailed in the previous chapters, in various parts of the world there have been reports of surrogacy driven trafficking of women and girls in countries of supply in response to the

growing demand for surrogate babies. This issue connotes moral injustice, as being forcefully transported across borders and away from their homes is one of the most minor issues. An investigation lead by the Coalition for the Abolition of Surrogate Motherhood and the European Network of Migrant Women (2022), two NGOs dedicated to advocacy and policy work related to surrogacy and other women's rights issues, identified the key issues surrounding forced cross-border surrogacy, focusing on surrogacy among migrant women. The illegal and unethical practices involved in illegitimate cross-border surrogacy which they highlighted include:

- "Exploiting migrant women for reproductive purposes in a variety of ways, including egg harvesting, forced pregnancy and surrogacy.
- Organising a network of trafficking in women with the aim of making them "surrogate mothers" against their will (forced migration of women from their country of origin to another to force them to carry pregnancies (cases of forced pregnancy)).
- Moving "surrogate mothers" to organise their delivery in a country other than their country of origin for the convenience of the clients (purchasing parents) or to circumvent legislation (the infant is thus born in the country where the purchasing couple/individuals are based, thus simplifying the administrative procedures for recognising the filiation between the infant and the clients(s))" (ENoMW and CIAMS 5)

In forced or illegitimate surrogacy arrangements, surrogate mothers are often targeted due to financial struggles, or a desperation to improve their life and the lives of their families. In response, the traffickers who approach them sometimes offer them a hollow promise of substantial money or a stable job with a steady income before taking them against their will to bear a child through surrogacy (Das); moreover, although the mothers may agree to go with the trafficker at first, they are usually deceived and thus completely unaware of the reality of what will happen to them, as is the case with all forms of human trafficking. In addition, these girls and women are then forced to endure IVF in some cases, however in most cases surrogate mothers who are trafficked are subjected to traditional surrogacy, thus only using a sperm donor meaning they bear a child genetically related to them without any intention in doing so, or they conceive after being raped (Das, Suryanarayanan). The conditions trafficked women and girls find themselves in are close to that of torture; this is demonstrated through the numerous counts of women being continuously transported from

various locations, forced to undergo medical treatments without proper medical facilities (due to the pure illegality of the trafficking business which would prevent girls from being treated by registered, legitimate doctors), and reports of women being forced into the flesh or slave trade after they have completed their "service" (Das, Suryanarayanan). Furthermore, the notion that girls as young as 13 are being taken from rural areas and subjected to such treatment is a serious violation of international children's rights standards (Das, Suryanarayanan). Hence, it is explicit that any instances of illegitimate, forced surrogacy should be unquestionably prohibited; however, in addition to its prohibition, implementation of the removal of any such operations or gangs should be paramount in national and international legislation in regards to surrogacy, in order to effectively prevent these serious violations from taking place.

Physical Health

During the process of a gestational surrogacy arrangement, the surrogate mother is subjected to an array of medical procedures facilitated by their surrogacy agencies, at the will of the commissioning parents. This has been noted as a grave issue among scholars and health practitioners as through entering a surrogacy arrangement, the mother essentially waives the right and gives full consent to the commissioning parents to make decisions about her body and the future of their baby (McLatchie&Lea 12). Some of the treatments include the surrogate mother being prescribed to take hormonal or fertility drugs, followed by the actual IVF or similar procedure; this is before the plethora of screenings and medical interventions, in addition to the possibility of enforced changes in the surrogate mothers lifestyle at the will of the intending parents, and finally the birthing procedure, which is increasingly done by C-section to ensure a healthy delivery even without the surrogate mothers agreement (McLatchie&Lea 12). Although the surrogate mother seemingly consents to these treatments, when faced with so many invasive procedures, some of which have no health benefit but are only satisfying the commissioning parents' wishes, one could infer that they are being subjected to somewhat degrading treatment. This is reinforced by many accounts of poor surrogate mothers describing the gestational period as being treated like an animal (Suryanarayanan), being prodded and poked without real regard for what she might be feeling

despite agreeing to the procedure. A paper published by Birenbaum-Carmeli and Montebruno states that one of the most dangerous aspects of gestational surrogacy to a woman's physical health is the risk posed by being subjected to multiple pregnancies. During gestational surrogacy arrangements, clinics often opt to implant multiple embryos in the surrogate mother's uterus to increase the chances of a successful pregnancy (McLatchie&Lea 2). This is done in the hopes to "maximise the investment of the commissioning parties" (McLatchie&Lea 2), causing mothers to endure multiple pregnancies simultaneously, before the intending parents choose how many of the babies they want, meaning that the surrogate mother may have to go through multiple abortions in order to satisfy the agencies clients (Bandelli 18). This has numerous negative impacts on the surrogate mother's health. Multiple pregnancies increase the risk of various conditions such as; gestational diabetes, gestational hypertension, anaemia, preterm birth, preeclampsia, caesarean birth, miscarriage, and postpartum haemorrhaging, in addition to the psychological damage such as postpartum depression (Birenbaum-Carmeli&Montebruno). Moreover, some of these conditions have long-term effects, such as increased risk for diabetes mellitus, cardiovascular diseases, coronary heart disease, chronic hyper tension and stroke, signifying that the physical impacts of a surrogacy procedure can have a serious lasting affect (Birenbaum-Carmeli&Montebruno). In addition to the possible grave side effects which have been aforementioned, in extreme cases women are made to undergo irreversible operations without their full consent. For example, an investigation into the major surrogacy operator BioTexCom, conducted between 2018 and 2019, states that at least three surrogate mothers had gone to the police after unwillingly having their wombs removed after the birth of the surrogate child, as organised by the surrogacy agency (McLatchie&Lea 11). Furthermore, many women involved in cross-border arrangements have claimed that they were not fully informed of the risks before entering into the agreement; such as in arrangements where the surrogate mother comes from a country in Asia, it has been reported that the contracts provided in a language which the women are not able to understand, demonstrating the deception used by agencies to bypass the ethical complications which come with subjecting women to dangerous procedures for the sake of profit (McLatchie&Lea 17).

Thus, it is evident that regardless of the type of surrogacy arrangement, whether it occurs illegitimately or within a legitimate clinic, there are many very serious risks posed to the surrogate mothers physical health. This raises the question, if the surrogate mother must undergo so many invasive procedures which could be damaging to her body, is the

gratification from economic compensation or the feeling of altruism worth it? And more importantly, is this exchange ethical? Whilst it's true that there is no human rights framework which demands a right to financial compensation or healthcare for the surrogate mother, surely her right to personal security, stated in Article 3 of the UDHR as an absolute right, is being infringed upon whilst she undergoes the intense medical treatments connected to surrogacy at the will of her commissioners. One could further argue that she is consenting to this treatment, as in some/most legitimate cases, the surrogate mother is made aware of the risks prior to her engagement in a surrogacy arrangement, however her wavering of her right to consent during the gestational period is often prompted due to situations which have put her in duress and thus seek to find work as a surrogate in the first place (McLatchie&Lea 2); this will be revisited later in the chapter.

Psychological Health

In addition to the various adverse implications surrogacy poses to the mothers physical health, the process has also been found to have damaging effects on their mental health. Many specific aspects of the surrogacy treatment, such as the surrogate not being permitted to form a bond with the child she has carried for nine months, as is the case in almost all commercial surrogacy arrangements, have clear psychological effects on the mother's mental health (McLatchie&Lea 2). From the beginning of the mother's surrogacy journey, the commissioning parents have complete control over the mothers medical rights, as she has essentially consented to them not requiring her consent for each individual procedure. However, the control the commissioning parents have often extends further; for example, intending parents may decide upon certain conditions regarding the surrogate mothers housing, nutrition, activities she is permitted to engage in, and sometimes limiting the excursions she is allowed to attend (Bandelli 18). Furthermore, her surrogacy contract may require her to provide her medical records without any right to confidentiality, in addition to the records of her usual sexual partner (Bandelli 18). The psychological distress this puts on the surrogate mothers is paramount, as they essentially sign away their rights to personhood as they fulfil the role of a surrogate incubator, or essentially a 'living-womb', for the gestational period. This is the case where the surrogate mother is allowed to remain in their home during the pregnancy, however in some cases the surrogate is required to move away from their homes to spend the majority of the pregnancy between surrogacy clinics, surrogate

dormitories or small rented houses arranged by the clinics (Bandelli 19). The emotional upheaval of moving away from home and family, being surrounded with unfamiliar clinical procedures causes many surrogates to develop long term trauma, especially in cases where the treatment of surrogate mothers hardly meets the bare minimum, as is the case in many supply clinics among countries in the Global South (Suryanarayanan) (there are however some exceptions of economically unstable countries in the Global North which have been targeted as new surrogacy hubs due to changes in the civilians ability to work, such as in the case of Ukraine). A report carried out by Sheila Suryanarayanan in 2022, highlights how all surrogate mothers were emotionally affected by the process, however the worst psychological damage was left on the poorest mothers. She explains that women who reported missing their family due to being moved to a surrogate hostel, those who experienced or witnessed risky or sometimes near-death medical intrusions, and those who saw their financial situation worsen due to the medical complications they would have to endure after the gestational period were found to be the most depressed (Suryanarayanan). Furthermore, the poorest surrogate mothers would have to undergo a surrogacy pregnancy two or three times before they could alleviate their poverty, however this has seriously negative effects on the mother physical and mental health, reducing her quality of life after the pregnancies due to the physical damage she has endured (Suryanarayanan).

The degrading treatment endured by surrogate mothers is no better in Europe where supply countries, such as Ukraine, have reported surrogates testifying that they were “treated like cattle and mocked by doctors” (McLatchie&Lea 11). One interview with a Ukrainian surrogate revealed that she had been kept under oppressive watch for more than 32 weeks where she had to share a bed with another surrogate she had never met, and was threatened with penalty fines being deducted from her pay if she stayed out after 4pm, publicly criticised the agency or tried to contact the commissioning parents (McLatchie&Lea 11). One could say that this forced confinement imposed upon the surrogate mother could be considered as inhumane and degrading treatment, and in some cases where serious physical damage occurred it amounts to torture, due to the immense psychological effects such controlling and invasive treatment would have on any individual. But in cases of gestational surrogacy, these women are often already vulnerable, thus by subjecting them to such degrading treatment, agencies and complicit commissioning parents are exploiting them in a way which in history has only ever been imagined in a distant dystopian future. However, testimonials recorded by the Center for Bioethics and Culture suggest that many affluential surrogate mothers in the

US have attested to being subjected to similar unexpected experiences of "coercion and commodification" (McLatchie&Lea 12). An instance which explicitly demonstrates the psychologically disturbing reality cross-border gestational surrogacy occurred in Ukraine in the April of 2020 at the start of the COVID-19 pandemic. As the world descended into chaos and many States began to impose bans on freedom of movement, the surrogacy clinic BioTexCom uploaded a video showing 40 surrogate babies who had just been born and were "crammed in the cradles of the Hotel Venezia in Kiev, waiting to be picked up by their parents from different areas in the world" (Bandelli 1). The video was published to reassure intending parents that their babies were in safe hands whilst couples from across the globe contacted their respective states to make arrangements with the Ukrainian Government to issue them special permits to enter the country amidst a growing global pandemic (Bandelli 1). Alongside the obvious ethical issues with parents defying laws during a pandemic to collect their newborn children, another issue has come to light. Whilst the surrogate babies are collected and taken to the safety of their commissioning parents' home country, surrogate mothers were still left in a country which was struggling to combat the constant waves of the pandemic. Furthermore, in recent months since the start of Russia's war on Ukraine, the notion that commissioning parents are able to visit the country to pick up their child, or in some cases fly the mother out of the country to give birth before sending her back to a war zone, sparks other moral dilemmas, such as; is it unethical to leave the mother behind if she is simply being payed for the duration of her 'employment'? Do the agencies or commissioning parents have any moral obligation to help her? Is the life of the baby more important in the eyes of the law than that of the well-being of the surrogate mother? In such an exploitative and capitalist industry such as surrogacy, these psychologically distressing scenarios for the surrogate mother are not considered when the goal is the completion of the transaction.

Women's Autonomy

As previously mentioned, many of the women who partake in gestational surrogacy arrangements are pushed towards becoming a surrogate mother due to some form of duress. Despite all of the potentially harmful risks the surrogate mother is likely to endure during her pregnancy, a strong case has also been made by states that attaches the act of engaging in

surrogacy as a demonstration of a woman's autonomy. Whilst there are a range of reasons why women choose to become surrogates, from viewing it as a gift from woman to woman, as the case in most altruistic models (Ullah&Nawaz 165), to being in desperate need of the large financial compensation which surrogacy arrangements promise to provide, as is usually the case in commercial arrangements, the discussion on surrogacy and its representation of women's autonomy has been widely debated. Various feminist scholars and researchers have commented on the ambiguous interpretation of states deeming the act of surrogacy as simply an altruistic act of a woman exercising her free will, and thus the hardships she may have to endure are acceptable as she has chosen surrogacy as something she wants to do, as is the case in Russia and Ukraine (Ullah&Nawaz 165). Contrastingly, some states view the act of surrogacy as fundamentally violating the rights and dignity of the women involved, as the procedure essentially uses them "as a means to someone else's end", as is the case in Germany and France (Fenton-Glynn).

Whether or not a woman enters a surrogacy arrangement on accordance of her own will is also highly dependent on the situation she find herself in prior to the arrangement. In all gestational surrogacy arrangements, the surrogate mother agrees to being 'hired' and thus agrees to the potential of suffering potential physical and psychological harm, on the one condition that she will receive a large sum of money, in the hopes of creating a more financially stable reality for herself and her family members. However, some surrogate mothers are not only motivated by the financial compensation, but also by the feeling of accomplishment and altruism they will receive from the act of giving life to a couple who would otherwise not be able to have genetically related children. In an accumulation of debates surrounding gestational surrogacy put together by NeJaime and Siegel, specialist Carolin Schurr (2018) discusses the potentially empowering effect of surrogacy arrangements for potentially to-be surrogate mothers. She suggests that women entering surrogacy contracts make their own personal and economic choices in light of the background conditions in their life, and thus in a way commissioning parents are giving surrogate women the opportunity to have a degree of control over their families economic standing, hence aiding in empowering the surrogate mother (5). Another scholar's extract from the same paper however proposes that "acting in ways that current gender ideology characterises as empowering might actually be disempowering" (Radin [1987]; NeJaime and Siegel 25). Surrogate mothers have been documented to feel a sense of accomplishment when taking part in surrogacy arrangements, with women in California deeming it as a "labour of love" and by some Indian surrogate

mothers engaging in legitimate arrangements in Karnataka who viewed surrogacy as an "immensely moral and life-affirming act" (Smietana et al. 389). This however poses the question, does fulfilling traditional ideals of a woman, such as the importance of creating life and how that fulfils her purpose, constitute her autonomy? Or does this further reinforce patriarchal expectations of women, thus reconfirming the surrogate mother's exploitation? In this way, although surrogates may think they are fulfilling their womanhood by producing a baby, even if not for themselves, they may in fact be pandering to and hence reinforcing outdated and oppressive gender roles (Radin [1987]; NeJaime and Siegel 25). Thus, we have seen that when the surrogate mother enters a surrogacy agreement on the grounds of altruism, there are varying feminist debates surrounding the legitimacy of her understanding of altruism, which suggest that she is merely a victim to the patriarchal projection of feminine fulfilment.

This may be the case for altruistically motivated gestational surrogacy, however in instances where the surrogate mother is financially vulnerable in comparison to the commissioning parents, such as during most cross-border surrogacy arrangements, the idea that a women can choose to put her body through such a procedure to simply afford to live, should not and cannot be seen as a woman excising her autonomy. In these situations, although the woman might be considered to be taking matters into her own hands, in reality her choice to become a surrogate is made under extreme duress, and hence one should reject the notion that she does this of her own free will. As aforementioned in the previous chapter, there are many cases among women in the Global South which demonstrate the desperation of surrogate mothers to engage in such an industry, and how throughout the procedure they are often uninformed of the realities of medical procedures or they simply do not understand (McLatchie&Lea 11). Therefore, the difficult situations these women find themselves in lead them to being coerced and maltreated in exchange for an amount of money, which as we've seen in countries such as India, is far below the standard amount surrogate mothers receive in the West. In this way, the predicament which drives many women to become a surrogate in the first place suggests that in entering a surrogacy contract, these women are not doing so as a flagrant act of exercising autonomy, but rather she is coerced to do so as an act of desperation disguised as agency.

Intersection with other Human Rights Issues

Here, surrogacy's intersection with other human rights issues shall be looked at to demonstrate the practice's rippling affect in other areas of human rights, namely children's rights and the right of prohibition from being trafficked (and subsequently subjected to inhumane or degrading treatment). Moreover, this section aims to highlight the complexity of human rights issues which stem from surrogacy, hence underlining the necessity for a change in legislation and guidelines regulating the practice. From this discussion, one can identify that surrogacy mainly concerns women's rights as the highest risk of being exploited falls upon the surrogate mother, but how does the practice intersect with other human rights issues? And what human rights issues does the practice concern? Many scholars have identified surrogacy's link to the protection of children's rights, claiming that surrogacy threatens children's right due to the deprivation of knowing where one came from, which is often the case as many surrogate mothers do not consent to their personal information being available to the child later in their life. Another main concern is the concept of 'baby-selling', which suggests that parents can obtain a child in a similar method to adoption without having to go through the extensive paperwork and lengthy process which is designed to ensure the parents are ready to adopt a child (Fenton-Glynn); instead, they just have to wave a large sum of cash and the baby's theirs. Due to the high profit agencies and traffickers can obtain from commissioning parents in exchange for providing them with the gift of a child, there have been concerns that this form of surrogacy, one where the mother is omitted from the contract entirely and is rather used as a baby-making machine, will gain popularity in the future of the industry. The topic of surrogacy is also affiliated with reproductive rights, as it concerns an individual's right to reproductive health services, the right to be protected from harmful medical practices involving reproduction, and the right to decide freely and responsibly on reproductive matters. However in the context of surrogacy, all of these rights which should belong to the surrogate mother are compromised. As mentioned, she essentially waivers her right to give consent during the gestational process, however surrogacy does allow another woman to have a child who may not have been able to otherwise, thus respecting her right to have a family. But one could ask, which right is more important? Whilst both merit importance, the surrogate mothers' reproductive rights are consistently violated through surrogacy arrangements, hence one may ask if the act of surrogacy can be seen as acceptable

from a human rights perspective at all. Finally, another area which overlaps when discussing surrogacy is gender equality and gender rights. Due to surrogates always being individuals with wombs, they are often people who identify as women. Thus, all of the issues which have been discussed are issues which may be considered exclusively women's rights issues, due to the inability to exploit a man through surrogacy. For this reason, surrogacy is innately integrated as a gender equality issue, with the very essence of the problem being that only women with wombs can be subjected to the exploitation which may come with surrogacy.

What are the most relevant rights (the *right* rights)?

Through observing what current legislation exists on cross-border gestational surrogacy from a national and international perspective, whilst also reviewing the testimonials and reports that have been made revealing the current dynamics of the surrogacy industry, one can identify what rights are being protected by legislation, and which areas are being neglected. Furthermore, as one can see, despite the ever-evolving body of national policies that exist on gestational surrogacy, there are still grave human rights violations taking place due to the presence of the surrogacy industry in various countries. This is often due to policy makers focus on the protection of the commissioning parents, as there is no doubt that the huge profit surrogacy agencies bring in from reproductive tourism also contributes to the economy of a state. Thus, laws and regulations are often oriented around making sure the commissioning parents' wishes are met, such as the intending parents receiving instant legal guardianship for their child, as is the case in most countries. Whilst laws also limit the access to surrogacy clinics in some countries as just for nationals, which helps to combat the issue of exploitation in economically unequal transnational arrangements (Jus Corpus), there are still hardly any provisions which are written with the intention of explicitly protecting the well-being of the surrogate mother. Therefore, one can see that there are some gaps in the law which prevent the most relevant rights owed to the surrogate mother, from a human rights perspective, from being protected. But what are the most relevant rights, or the *right* rights? Which rights should the surrogate mother be able to enjoy whilst working as a surrogate in accordance with international human rights standards? In light of this research, this paper thus puts forward the following rights as being the most relevant from a perspective centred around the

protection of human rights; meaning rights of the surrogate which should be unequivocally addressed and hence protected in the future of surrogacy legislation:

- All surrogate mothers should enjoy the right to dignity, respect, and a basic standard of treatment in accordance with international human rights standards
- The right not to be subjected to forced or coerced recruitment into surrogacy contracts; entailing the prohibition of all illegitimate arrangements
- The right to be fully aware of all possible medical and psychological side effects of entering a surrogacy agreement; meaning all information must be presented in a language which the surrogate mother understands, this may be enforced through the requirement of a translator and advocate in all surrogacy arrangements
- The right to receive safe and effective medical treatment throughout the surrogacy process; this spans from hormone treatment and implantation to any necessary after-care
- The right to receive psychological support if it is needed; all surrogates should have access to psychological care before, during, and for a period after the pregnancy
- The right to receive the agreed compensation for her services; in monetary terms this relates to agencies providing payment even in the event of an unexpected termination of pregnancy where there is no fault on the surrogate mother (for example in the event of an unexpected miscarriage)
- The right to not be subjected to arbitrary medical interventions or other discretional requests made by the agency or commissioning parents; this would include the prohibition of selective abortions on the basis of characteristics of the baby such as sex
- The right to be hired as a surrogate for the main purpose of providing a child to a family who otherwise would not be able to conceive, and not as a commodification; this would prohibit any surrogacy arrangements that occur without sufficient medical grounds (hence abolishing the recent trend of richer mothers who pay a poorer woman to carry her baby so that she can continue her career)
- Finally, the right to put forward allegations of misconduct or maltreatment; in order to protect and shape the well-being of future surrogate mothers

These *right* rights are based upon many parts of international human rights law, such as the Articles 3, 5 and 25 of the UDHR; the right to personal security, the right not to be subjected to cruel, inhuman or degrading treatment, a standard of living adequate for the health and well-being of himself and of his family (UDHR). These rights may therefore be considered as

the most relevant as they are based upon the protection of the surrogate mothers right to personal security through the elimination of degradation, exploitation, misinformation and coercion in all surrogacy arrangements is necessary for the industry to stop their cycle of careless profiteering. However, if these principles such as the mothers right to "the enjoyment of the highest attainable standard of health conducive to living a life in dignity" (International Convent on Economic Social and Cultural Rights; McLatchie&Lea 10) are fundamentally being infringed upon due to the very nature of gestational surrogacy agreements (such as due to various recounts across the globe of women being handled in a way which stripped away their dignity, reducing them to feeling like animals - Das, Suryanarayanan), one could suggest that it is imperative that the practice is changed as quickly as possible. Furthermore, the ICESCR is one of the most ratified human rights treaties with 170 ratifications among nation states, however in many of these countries where dangerous and illegitimate arrangements are more prone to occur, the need for reform is urgent to protect these basic international human rights standards. Another already established right states individuals should have the right to enjoy "a standard of living adequate for the health and well-being of himself and of his family" whereby the mother and child are entitled to special care and assistance, as enshrined in Article 25 of the UDHR (UDHR; McLatchie&Lea 13). This right, although not binding, could be interpreted in the context of surrogacy to mean that a commissioning mother is entitled to access surrogacy practices, however it further suggests clearly that the surrogate mother and her surrogate child are also entitled to special care to ensure both of their well-being; despite this often not being the case in cross-border gestational surrogacy arrangements. Thus, in principle, the foundations of the *right* rights which have been suggested coincide with many of the rights to personal security and right to care and autonomy of the mother.

But if this is the case, why are these rights being consistently violated in cross-border practices? Due to the non-binding nature of many human rights treaties, such as the UDHR, national states are usually unwilling to make major changes to their own legislation if the effort is to high due to conflict between international standards and specific cultural approaches to issues such as surrogacy. Therefore, how can the *right* rights truly be enforced? And is there a realistic way in which legislation can shift its focus from rights which ensure the satisfaction of the paying parents to the rights of the surrogate mother in today's capitalist

society? The answers are unclear, however in the next section we will explore ways in which the *right* rights can be addressed to improve the future of the surrogacy industry.

The Future of the Surrogacy Industry: Addressing the "Right" Problems

The future of the surrogacy industry should be effectively regulated and monitored in order to prevent the inevitable exploitation of the surrogate mother. As we've seen, blurry national policies and a lack of international legislation has allowed gestational surrogacy clinics to thrive; as these clinics gain money and recognition, more and more couples are opting for surrogacy, replacing the traditional preference for adoption, thus creating a never-ending snowball of demand and supply. Therefore, it would not be unreasonable to assume that with the constant development of reproductive technologies, the industry will continue to boom. Whilst the industry grows and national governments attempts to tame the market through patchy prohibition laws, serious human rights violations have occurred in the industry's attempt to evade the law. Thus, it is clear that a new strategy is needed, one may suggest preferably in the international sphere in order to have a minimum standard for the treatment of surrogate mothers that is in accordance with international human rights standards. In this way, this final part of the chapter will look at suggestions of ways to better regulate the practice in the future by putting an emphasis on the rights and service of the surrogate mother.

One of the major issues which connects surrogacy laws and human rights violations is a lack of universal consensus among nation states. Whilst it is clear that achieving complete agreement among states of differing religions, economic standing and histories is virtually impossible, the international community could take a step in the right direction by acknowledging the issue at hand and establishing a clear minimum standard of conduct which obliges nations to demonstrate their compliance with these standards in exchange for a valued seat at the table of the international community. In an ideal world that might consist of binding international conventions and customary declarations being revised to reframe the extremely important issues it has already highlighted within a modern setting; in this way illegitimate surrogacy would be explicitly included in protocols against torture, slavery and

degrading behaviour in addition to articles prohibiting all forms of human trafficking. In addition to this, the international community could impose requirements that countries are assessed through reports from special rapporteurs NGOs and other reliable sources to evaluate the nation's ability to monitor and enforce regulation of practices, namely gestational surrogacy. However, this may be a very lengthy process which is consumes both time and money, and is thus likely to be unfavourable among policy makers.

Another proposal is to increase awareness of the practice of gestational surrogacy among the general public, so that individuals are aware of the risks it may have and additionally to eliminate the taboo status which may surround the practice in some countries. By opening up the discussion in the media or eventually in education, the topic will become more recognisable to the average person, which may be able to help inform women to consider all of the risk factors before becoming a surrogate and may also help surrogate mothers who have been exploited to reach out to others as through ongoing discussion, the topic will slowly move away from being seen as taboo. This may also help women whose rights have been seriously violated to have more confidence bringing their issue before a court, as by clearly naming the disadvantages to the surrogate mother during surrogacy within a public sphere, surrogates may feel more reassured that speaking up against their exploitation will be actively heard and dealt with. This would likely create a snowball effect, as is the case with many other social movements, where one survivors story inspires others to speak up against their oppressors. Furthermore, as is the case with other human rights issues, an established body of case law which reinforces the human rights principles outlined in various conventions, can be a major way of influencing the future of certain problematic industries. In this way, augmenting the education, discussion and case law surrounding gestational surrogacy arrangements could be the key to major legislative change in the future.

Feminist and academic Timmer (2011) suggests a process of naming and contesting, whereby gender issues or gender-based biases in courts should first be identified, or named, and then be unpacked to understand why these biases occur, before they are eventually contested clearly in court. The function of this is to have everything out in the open. To recognise that there are issues within our patriarchal society relating to gender equality, or rather inequality, and to condemn them as being a mere product of the patriarchy before actively making an effort to contest such biases in a court. This may be crucial in the future of laws on surrogacy; for example, by looking at the potentially grave medical risks of surrogacy such as the

implantation of multiple embryos, and thus identifying that this is a conflict of interests between complying with human rights and guaranteeing profit is unacceptable, courts could hence contest the dangerous aspects of the practice and thus rightfully prosecute against agencies which compromise the rights of the mother in their quest to make money. This could further lead to the eventual criminalisation of some procedures or aspects of gestational surrogacy which deprives the surrogate mother from enjoying some of the most basic rights, such as the right to personal security.

A final suggestion could be that if becoming a surrogate mother would be deemed a legitimate form of work, a working surrogate mother could be protected by labour laws which ensure a minimum standard of working conditions. Whilst this may also be difficult as many aspects of being employed as surrogate mother differ greatly from other forms of manual labour, some laws may be applied which must then be adhered to by surrogacy agencies. For example, a mother's right to extra compensation if her body is seriously damaged due to medical treatments which have gone wrong during her employment. This would hold agencies accountable for their treatment of surrogate mothers, as by considering them as workers rather than profitable living-wombs, they are likely to treat them with more respect. Hence, a shift in the importance of the surrogate mother and her well-being in surrogacy agreements would be the most suitable way of combatting the existing exploitation of surrogate women across the globe.

In this way, this chapter has identified that there are numerous aspects of any surrogacy agreement which may have grave effects on a surrogate's psychical and psychological health; therefore demonstrating the negative bioethical implications of the practice which may not always be the case, however the severity of these implications warrants the desire for a change in the laws governing the practice. Furthermore, regardless of whether a country deems the practice as a display of women's autonomy, in reality if a surrogate mother is being subjected to harmful or degrading treatment whilst taking part in an arrangement, one could question whether her engagement with surrogacy should be merited as her exercising her free will. In addition to this, the effects of surrogacy on other human rights issues, such as the rights of the child, have been seen to be intertwined with other ethical debates within the topic of surrogacy, such as the surrogate mother's right to anonymity which is sometimes breached in arrangements; hence, this reinforces the need for better legislation which addresses and encompasses all of the possible human rights violations which could occur.

Therefore, this chapter has suggested that in light of the bioethical implications or cross-border gestational surrogacy, in addition to the current focus of legislation on the legal and transactional matters within the arrangement, that a shift is the laws focus is compulsory form a human rights perspective. This would mean legislation concentrating on the protection of the rights owed to the surrogate mother, rights which are based upon the articles in human rights declarations which provide a standard for the international community and should thus also be respected in relation to gestational surrogacy arrangements. Furthermore, these rights could be implemented through the development of an international consensus which puts aside cultural and socio-economic differences thus making way for a much-needed base level of protection for the most vulnerable party in a surrogacy contract, the surrogate mother. In this way, the rights of all parties would be better protected.

Conclusion

This thesis has explored the legislative landscape of gestational surrogacy practices, with a focus on cross border arrangements, highlighting the bioethical and human rights issues which stem from gaps within policies. Moreover, this paper has identified which issues are addressed within legislation, and which rights are not protected; using a feminist lens to navigate which rights must be considered in the future of surrogacy to ensure the prevention of further exploitation of surrogate mothers. This is imperative as we have seen that the greatest risk of harm falls upon the surrogate mother in any surrogacy arrangement. Thus, a realignment of the focus of legislation which forces agencies to improve their standards on protecting the surrogate's well-being, or as suggested here by looking at the *right* rights of the surrogate mother, the future of the industry may be able to distance itself from the dystopian trajectory it is currently heading towards.

After reviewing the legal landscape on the practice of gestational surrogacy at present, one can see that international declarations and conventions are unable to protect the rights of the surrogate mother in today's gestational surrogacy arrangements because of the fact that artificial reproductive technologies used in surrogacy simply did not exist at the time they were written. Thus, there is clearly no explicit mention or protection provided for surrogate mothers detailed in these human rights conventions. Nevertheless, various international bodies, such as the UNESCO International Bioethics Committee, have conducted more recent investigations into the truth behind the surrogacy industry, commenting on how the current gestational surrogacy agencies operate in a way which consistently avoids the law in pursuit of making the most money possible. The lack of international consensus on the topic makes it impossible to create legislation which will be accepted and adopted among all nation states; however without the accountability provided by international laws to regulate surrogacy, profit lead agencies are able to "violate [..] the human rights and inherent dignity of women", whether money is exchanged for the service or not (McLatchie&Lea 1), (the latter relating to the absence of monetary compensation in cases of forced surrogacy or human trafficking). As we've seen, this has led to each individual nation state being in charge of how they regulate and monitor gestational surrogacy, if they do so at all. It is apparent that there is wide variation when looking at how countries approach legislation on surrogacy; furthermore, the way in which a country interacts with the practice mostly depends on their economic

standing, attitudes towards women's rights and women's autonomy, and most importantly, whether the country has been subject to exploitation from the industry, as is the case with most supply countries, or whether the country relies on the practice due to the high demand of their clients. Countries which experience higher rates of poverty are more likely to cause women to seek a means of providing for themselves and their family where due to a lack of high levels of education, these women often have limited career options or other ways to generate sufficient income. For these reasons, women in economically unstable or poor countries are more likely to become a surrogate as the pay they receive is far higher than what they would receive trying to find another job. In addition, due to these countries having poorer economies, such a is the case in Ukraine and India, couples from abroad who could perhaps find a surrogate in their own country, instead go abroad to ensure lower fees. These cross-border arrangements are usually complicated and require commissioning parents to fulfil criteria in order to hire a surrogate, additionally there are many laws pertaining to the surrogate child's nationality, as this is one of the main issues in cross-border arrangements from the perspective of the clinic which is seemingly trying to comply with whatever legislation is in place in order to complete the transaction; or alternatively clinics or other organisations such as traffickers find ways to evade the law and continue their contracts illegitimately. In order to protect the interests of the paying commissioning parents, agencies and policy makers in the past have created surrogacy laws which only detail the protects of the intending parents, such as ensuring they are noted as the surrogate child's legal guardian in the event the surrogate mother wants to keep the baby.

Even when supply countries try and protect themselves through prohibition, trafficking emerges as there is still a demand for surrogacy. In demand countries, like the US where it is banned in some states, regulated and restrictive in others, agencies just set up in other states and accept parents from any state so the issues remain. As we have seen as new legal barriers are created by countries who have been exploited by the surrogate industry, the industry evades, and pushing boundaries finding ways to override the barriers, and when this fails criminal activities and trafficking start to profit. Thus, there is a need for international regulation, an international judgement and voice of reason in this poorly regulated space, prohibition will not work, effective regulation is needed.

International recognition of this space and the establishment of gestational surrogacy as a dangerous form of labour could prompt countries to change their perspective by seeing

surrogacy as a violation of labour laws and workers' rights. Naming and contesting (Timmer 2011) practices normalised by surrogacy can act as a tool to change the narrative, where being honest about the bioethical issues, and putting the surrogate mother's wellbeing at the crux of the arrangement, rather than just the commissioning parents. Furthermore, increased media coverage could also help enforce a change in legislation, wider public knowledge and enforcement could help ensure effective regulation.

A feminist perspective that has been reviewed suggests that the surrogate mother has agency and free will and thus enters the arrangement voluntarily. However, framing surrogacy as woman's autonomy is only sufficient if they are actually benefitting as much as companies say they will. Thus, it has been said that branding the arrangement as a woman exercising her own autonomy allows an oppressive industry to capitalises off of giving women the illusion that they have a choice within the patriarchal society they live in, as suggested by American scholar Margaret Jane Radin (NeJaime and Siege 25). Although it may seem that a woman taking her situation into her own hands is an act of agency and autonomy, the industry is still taking advantage of and exploiting her for profit.

To avoid the industry from remaining unregulated across borders, the international community needs to move away from satisfying nations and transnational companies capitalist agendas and instead focus on the protection of each individual's human rights as is boasted through international organisations conventions and reports. The new enemy threatening human rights standards is not individual agendas for power, but rather it is found in the combination of quiet injustices which lie in the discrepancies between culture, religion and socio-economic class between differing nation states, as this is many exploitative industries (clothing, prostitution, agriculture, surrogacy) find their way in evading the law and reeling in profit. Thus, as the world is unable to come to an agreement and hence cannot create an international consensus on how to regulate the practice, the agencies from the market come up with new ways to continue their work. A change must be instigated by international organisations, especially those which are binding in wealthy demand countries, in order to cut demand at the source and prevent arbitrary surrogacy agreements that exploit the surrogate in supply countries. This will halt a newly-emerging form of neo-colonialism that comes with the reality of modern reproductive tourism. Hence, change can only be achieved if the focus shifts from the fulfilment of the paying clients wishes to the protection of the most vulnerable to exploitation in the arrangement. Human rights have always been

about ensuring the equality of fundamental rights for all human beings, it is time that reproductive rights are also protected robustly. Just as the commissioning parents are owed the right to found a family and to private and family life, the surrogate mother should be able to enjoy the right to her own psychical integrity, the right not to be subjected to cruel or degrading treatment and the right not to be subjected to human trafficking, which has been proven to occur in the most extreme cases. Surrogacy is considered a woman's rights issue, a lower-income group issue, a people from the global south issue, and it is thought to be a taboo issue, so it is neglected. However, through a change in the laws focus and a commitment from the international community to prohibit the surrogacy industry from treating surrogates like living-wombs, the future of the industry could be adapted to benefit all parties involve, as was the initial intention. But for now, as suggested by children rights academic Fenton-Glynn, surrogacy will continue to gain popularity, and in the meantime the legal and ethical dilemmas which surround it will only become more pressing, making it seem as if, "Pandora's Box has been opened and the law has failed to respond".

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