

# WHEN MORAL OUTRAGE DETERMINES A LEGAL RESPONSE: SURROGACY AS LABOUR

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## ABSTRACT

Surrogacy is a complex issue that evokes a strong moralistic response. In South Africa, commercial surrogacy is illegal and surrogacy agreements that contain financial incentives beyond expenses associated with the pregnancy and birth are unenforceable. Despite this, commercial surrogacy appears to remain a reality in South Africa. Further, given the pervasive poverty that exists in the country, the question arises, should commercial surrogacy be permitted as a means to alleviate the dire circumstances of poverty-stricken women and those dependent on them. I seek to answer this question by taking a close look at the nature of surrogacy, some of the arguments for and against it, and the Indian model of commercial surrogacy as a potential model for commercial surrogacy in South Africa.

**Key words:** human rights, adoption, children, dignity, gender, reproductive and sexual rights

## I INTRODUCTION

Surrogacy is a controversial issue and as such, worthy of attention. As will appear, the legal issues are complicated by a strong moralistic response to the very idea of one woman carrying a child for another, and, when this relationship is complicated still further by the exchange of payment, moral outrage sets in. The question I seek to address in this article is whether or not commercial surrogacy should be permitted in South Africa and whether it may offer possible benefits to the poverty stricken. I will commence with a brief overview of surrogacy and the prevailing legislation in South Africa. I will explore the human rights issues that arise in the context of surrogacy and then proceed to a discussion of the arguments associated with the use of commercial surrogacy as a possible form of labour. I will look at the Indian model of commercial surrogacy and conclude with some suggestions regarding whether or not the South African law should offer women an opportunity to earn an income by acting as surrogates. It should be noted however, that surrogacy will not be dealt with comprehensively, only a few aspects of the topic will be explored.

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**(a) What is surrogacy?**

Surrogacy occurs where one woman bears a child for another.<sup>1</sup> It may be total (gestational), where the surrogate is not biologically related to the child and partial (traditional), where her ovum is used.<sup>2</sup> A commissioned adoption takes place in circumstances where an infertile couple contract with a surrogate to carry a child unrelated to either of them.<sup>3</sup> Commissioned adoption is not permitted in South Africa.

A surrogate may be motivated by either altruistic or commercial considerations.<sup>4</sup> Commercial surrogacy takes place when the surrogate receives more financial compensation than the expenses incurred in relation to the medical and similar costs as a consequence of the surrogacy arrangement.<sup>5</sup>

The infertile couple or individual (commissioning parents) may be motivated to enter into a surrogacy arrangement by, amongst others, the short and definite waiting period associated with surrogacy. The nine months of gestation being considerably shorter than the waiting period generally associated with adoption. Further, the fact that the child born of surrogacy will be genetically linked to one or both commissioning parents may well be a strong incentive. It should also be noted that there is no age restriction applicable to the commissioning parents, making surrogacy available to persons who have been excluded from the adoption process due to age.<sup>6</sup>

The practice of surrogacy dates back to biblical times<sup>7</sup> and remains a reality of the modern world in which many are plagued with infertility problems,<sup>8</sup> adoption is subject to strict age restrictions, and the supply of babies for adoption is far outstripped by the demand.<sup>9</sup> Despite this, it has received very little attention over the decades.<sup>10</sup> Unfortunately there are no reliable statistics on the prevalence of the practice. Many surrogacy arrangements are made

1 Children's Act 38 of 2005 s 1; R Pretorius 'Practical Aspects of Surrogate Motherhood' (1991) 24 *De Jure* 52, 54; M Lupton 'Surrogate Parenting the Advantages and Disadvantages' (1986) 11 *J of Juridical Science* 148. For an international perspective on what constitutes surrogacy see B Stark 'Transnational Surrogacy and International Human Rights Law' (2012) 18 *ILSA J of Int & Comparative Law* 369–70.

2 See in this regard Lupton *ibid* 148.

3 D Meyerson 'Surrogacy Agreements' 1994 *Acta Juridica* 121, 123.

4 Lupton (note 1 above) 148; Stark (note 1 above) 369.

5 In this regard see Pretorius (note 1 above) 56; L Strauss 'Die Proefbuisbaba: Toekomstskok of Nuwe Burger' in H Pieterse (ed) 1982 *Wiskunde vir Natuurwetenskaplikes* 21; Lupton (note 1 above) 151–2.

6 M Lupton 'The Right to be Born: Surrogacy and the Legal Control of Human Fertility' (1988) 21 *De Jure* 36; Pretorius (note 1 above) 54; L Mills 'Certainty about Surrogacy' (2010) 3 *Stellenbosch LR* 429.

7 Tager 'Surrogate Motherhood, Legal Dilemma' (1986) 103 *SALJ* 381, 383–4; R MacKenzie 'Beyond Genetic and Gestational Dualities Surrogacy Agreements, Legal Parenthood and Choice in Family Formation' in K Horsey & H Biggs (eds) *Human Fertilization and Embryology Reproducing Regulation* (2007) 183.

8 In 2008 it was estimated that 7.3-million people in the US experience infertility. Roberts 'Surrogacy Clinics in India' <<http://www.surrogacyclinics.com/tag/commercial-surrogacy-in-india/>>.

9 Pretorius (note 1 above) 53.

10 Pretorius *ibid* 61–2; Lupton (note 1 above) 149.

within families and on an informal basis. Such arrangements generally escape attention unless a dispute arises between the parties.

Sensationalism surrounding surrogacy in South Africa peaked in the late 1980s and early 1990s after the birth of the Ferreira Jorge triplets.<sup>11</sup> Two weeks after the birth of the triplets, the Children's Status Act 82 of 1987 became operative.<sup>12</sup> This piece of legislation provided that the gestational mother and, where applicable, her consenting husband would be regarded as the parents of any child born of artificial insemination using donor sperm and eggs.<sup>13</sup> Despite the fact that this legislation was never designed to deal with surrogacy and, in fact, surrogacy was not considered in its drafting. It had the effect of making the gestational mother and, where applicable, her consenting spouse the parents of any child born as a consequence of total surrogacy. The legislation failed to simplify the legal situation, attributing as it did, parenthood to a woman who, at no time, had any intention of keeping the child and to a father whose input was minimal.<sup>14</sup> The legal situation was further complicated by the Human Tissue Act 65 of 1983, which terminates the rights of sperm and ova donors, effectively making it impossible for any 'father' indicated by the marriage, to rebut the *pater est quem nuptiae demonstrant* presumption.<sup>15</sup> This Act initially provided only for the artificial insemination and in vitro fertilisation of married women, effectively preventing unmarried women from acting as surrogates, this is no longer the case.<sup>16</sup> These two pieces of legislation thus effectively left prospective parents of children born from a surrogacy arrangement with only one option, to adopt the child in terms of the Child Care Act 74 of 1983,<sup>17</sup> an option fraught with difficulty.<sup>18</sup>

In modern societies where the concept of family is rapidly changing, it must be remembered that surrogacy will no longer always, automatically be commissioned by a heterosexual married couple. The context has expanded significantly to include as commissioning parents, same-sex couples, persons

- 11 See Pretorius *ibid* 55–9. The following is a brief selection of the available literature on the topic: Lupton (note 1 above) 148; Tager (note 7 above) 38; R Pretorius 'A Comparative Overview and Analysis of a Proposed Surrogate Mother Agreement Model' (1987) XX *CILSA* 275; G Annas 'Death Without Dignity for Commercial Surrogacy' *The Hastings Centre Report* (1988) 21; Lupton (note 6 above); E Anderson 'Is Woman's Labour a Commodity' (1990) 19 *Philosophy & Public Affairs*; M Lupton 'The Effect of the Baby M Case on Commercial Surrogacy' (1991) *TSAR* 224; Pretorius (note 1 above); D Satz 'Markets in Women's Reproductive Labor' (1992) *Philosophy & Public Affairs* 21, 107; Meyerson (note 3 above); J Sloth Nielsen & B Van Heerden 'Putting Humpty Dumpty Back Together Again: Towards Restructuring Families' and Children's Lives in South Africa' (1998) 115 *SALJ* 156, 164–5; A Louw 'Surrogate Motherhood' in CJ Davel & A Skelton (eds) *Commentary on the Children's Act 2007* chapter 19; Mackenzie (note 7 above) 181–204.
- 12 Pretorius (note 1 above) 58.
- 13 Children's Status Act s 5(1)(a).
- 14 Pretorius (note 1 above) 58.
- 15 Human Tissue Act s 36. Pretorius (note 1 above) 58–9. On the *pater est quem nuptiae demonstrant* presumption see CJ Davel & RA Jordaan *Law of Persons Student's Textbook* 3 ed (2000) 93ff.
- 16 See the Human Tissue Act s 1 where artificial fertilisation is defined as '... the introduction ... of the male gamete or gametes into the internal reproductive organs of a female person ...'.
- 17 Now in terms of the Children's Act chapter 15.
- 18 Lupton (note 11 above) 230; Pretorius (note 1 above) 59 & case study 61.

in civil unions, cohabiting and in permanent partnerships as well as single persons.<sup>19</sup>

### (b) Attitudes to surrogacy arrangements

Surrogacy has been stigmatised and disapproved of. In some instances it has been treated as akin to sex work or prostitution.<sup>20</sup> It has been viewed as unnatural<sup>21</sup> in that the prefix ‘Surrogate’ suggests that the woman who carries the child is not a ‘real’ mother.<sup>22</sup> Other terms used to describe the surrogate are ‘hostess mother’,<sup>23</sup> ‘host mother’,<sup>24</sup> and even ‘renting a womb’<sup>25</sup> or ‘plumbing’.<sup>26</sup>

There has been considerable opposition to surrogacy in general but most opposition to the practice has been moralistic in nature and directed towards the perceived immoral and degrading practice of commercial surrogacy.<sup>27</sup> Commercial surrogacy has been viewed by some as tantamount to baby-selling, a practice that has effectively been excluded in cases of adoption by the prohibition of the exchange of financial rewards. Some<sup>28</sup> view full surrogacy as potentially more exploitative of the surrogate than partial surrogacy as it is potentially more attractive to wealthy couples who want a child that is genetically their own and who thus have no real interest in the socio-economic or cultural background of the surrogate.<sup>29</sup> Her genetic material is irrelevant.

## II THE CURRENT LEGAL POSITION IN SOUTH AFRICA

Until the intervention of the legislature, the matter of surrogacy was regulated only indirectly through the Human Tissue Act and its regulations, the Child Care Act, and the Children’s Status Act.<sup>30</sup>

Surrogacy in South Africa is currently regulated by chapter 19 of the Children’s Act. The Children’s Act was preceded by lengthy investigations

19 Meyerson (note 3 above) 121–2; Mackenzie (note 7 above) 184; B Dorrington ‘Giant Legal Leap for Gay Dads’ *Starobserver* (8 February 2013) <<http://www.starobserver.com.au/news/2013/02/08/giant-legal-leap-for-gay-dads/96342>>.

20 A Pande ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-worker’ (2010) 35 *J of Women in Culture and Society* 969, 975.

21 Mackenzie (note 7 above) 186 ‘... surrogacy was perceived as a sordid and unnatural practice akin to baby-selling’.

22 Meyerson (note 3 above) 121.

23 SALC Project 65 Report on surrogate motherhood 1993 para 8.2.13ff.

24 Pretorius (note 1 above) 57.

25 Roberts (note 8 above).

26 Anderson (note 11 above) 83.

27 Meyerson (note 3 above) 123–4; Pretorius (note 1 above) 62; R Pretorius ‘Surrogate Motherhood: A Detailed Commentary on the Draft Bill’ (1996) *De Rebus* 114, 121; Lupton (note 1 above) 151 & 154; B Clark ‘Surrogate Motherhood: Comment on the South African Law Commission’s Report on Surrogate Motherhood (Project 65)’ (1993) 110 *SALJ* 769, 773.

28 Clark *ibid* 773.

29 *Ibid* 773.

30 See Pretorius (1996) (note 27 above) 114.

and extensive research by the then South African Law Commission<sup>31</sup> that produced a report on Project 65 along with a draft Bill.<sup>32</sup> In her comments regarding the report and draft Bill, Bridgette Clark points out that some of the Commission's research was conducted by way of a questionnaire that was not statistically representative of the South African population as a whole. Despite this fact, the findings gathered from the questionnaire were heavily relied upon by the Commission in drafting its proposals and draft Bill.<sup>33</sup> Amongst other things, the questionnaire revealed that the majority of respondents did not view surrogacy as *contra bonos mores*.<sup>34</sup>

The Commission identified the need for the law to provide for and regulate surrogacy arrangements and, to this end, determined that certain surrogacy agreements should be legally recognised and regulated.<sup>35</sup> First, the Commission, in the draft Bill, permitted only cases of total surrogacy.<sup>36</sup> Any partial surrogacy agreement would be invalid, thus failing the surrogate totally. Denise Meyerson argues that the proposed approach to partial surrogacy may deny an infertile couple the only available avenue to a child other than adoption.<sup>37</sup> This is not however correct, it simply means that a donor ovum may need to be obtained so that the surrogate is not biologically related to the child. There may be some difficulty associated with obtaining such a donor egg, as the process is more complex than obtaining donor sperm, involving invasive medical procedures, however, it remains a possible avenue.<sup>38</sup> Partial surrogacy is permitted in terms of the current legislation.<sup>39</sup> The report further indicated that: in the absence of a genetic link between the child and the commissioning parents, surrogacy would constitute 'child trade' and should not be permitted;<sup>40</sup> commercial surrogacy was a form of slavery and not permitted in terms of the Commission's proposals or draft Bill;<sup>41</sup> and only married, heterosexual couples should be permitted to be commissioning parents.<sup>42</sup> Absent statistical evidence that single and homosexual couples are

31 Now the South African Law Reform Commission: Judicial Matters Amendment Act 55 of 2002 s 5.

32 See a detailed discussion of the draft legislation in Pretorius (1996) (note 27 above) 114.

33 Clark (note 27 above) 769.

34 31 percent of respondents were against surrogacy in any form. Many respondents took issue with partial surrogacy, expressing the view that it would be more difficult for a surrogate to part with a child that was genetically her own than one that was not and for whom she had simply been an incubator. Clark *ibid* 771. Clark is critical of this view of motherhood as a matter of genetics, regarding this approach as both strictly male and patriarchal. *Ibid* 773.

35 Meyerson (note 3 above) 137 opines that the Commission's reasons for deciding upon the contents of the proposed legislation were questionable.

36 *Ibid* 137.

37 *Ibid* 138.

38 *Ibid*. Meyerson indicates that egg donation is a more complex medical procedure than sperm donation and thus less likely. Furthermore, it would necessarily involve the surrogate in the costly, risky and unreliable artificial insemination process.

39 See s 298 in which the position of the surrogate who is genetically related to the child is set out.

40 See Clark (note 27 above) 773.

41 *Ibid* 774. More about surrogacy and slavery under part III(a) below.

42 *Ibid* 772.

less suitable parents, this approach was discriminatory and is not reflected in the current legislation.<sup>43</sup>

Despite the eager anticipation that met the promulgation of the current legislation, it fails to deal with a host of difficult issues associated with surrogacy.<sup>44</sup> The legislation now requires that parties enter into a formal agreement that regulates the relationship between the intended parents and the surrogate mother in accordance with the legislative provisions. The formal agreement will replace informal and verbal agreements. The Children's Act clearly sets out both the prerequisites for creation of the agreement and the legal implications of the agreement for the parties.<sup>45</sup>

The Children's Act is thorough in establishing the requirements relating to (a) the agreement and its confirmation by the High Court,<sup>46</sup> (b) the surrogate and her rights regarding possible termination of the agreement,<sup>47</sup> (c) the artificial insemination of the surrogate; and (d) the payments that may be made to the surrogate mother.<sup>48</sup> There is, however, no comprehensive set of regulations under the Children's Act that detracts from its efficacy.<sup>49</sup>

The Children's Act makes it possible for a wide range of persons, not just married couples, to engage the services of a surrogate.<sup>50</sup> It does, however, limit recognition of surrogacy arrangements to circumstances where one or both commissioning parents are biologically linked to the child and only where the infertility of the commissioning parent or parents is irreversible.<sup>51</sup> The surrogate may not receive any compensation in cash or otherwise save for expenses associated with the surrogacy and pregnancy.<sup>52</sup>

43 Ibid.

44 For a detailed discussion of chapter 19 of the Children's Act see, amongst others: Louw (note 11 above) 19-1 – 19-31; C Nicholson & A Bauling 'Surrogate Motherhood Agreements and their Confirmation: A New Challenge for Practitioners' (2013) unpublished paper; and M Nothling-Slabbert 'Legal Issues Relating to the Use of Surrogate Mothers in the Practice of Assisted Conception' (2012) 5 *SAJBL* 27.

45 Children's Act s 292.

46 Ibid. Unclear on what supporting documents are required, hence Practice Directive 05 of 2011 of the South Gauteng High Court, *Re Application for Confirmation of Agreements in terms of Section 295 Children's Act 2011-02-16* was issued in an attempt to clarify the situation.

47 Children's Act ss 298–300.

48 Ibid s 301.

49 There are a number of practical problems associated with the implementation of the Children's Act in the absence of such regulations. For example, see *Ex Parte Applications for the confirmation of three surrogate motherhood agreements* in which the role of the court as protector of the child's best interests was stressed by the need for the court to be possessed of detailed expert reports in support of the application. Further requirements for confirmation were set out in *Ex parte matter between WH, UVS, LG and BJS* (October 2011) cited by Nothling-Slabbert (note 44 above) 28, 29 fn 30 in which it was indicated that the court must be apprised of details of any compensation as well as any agency involved in the process. For a more detailed discussion of the problems associated with the lack of regulations see Nicholson & Bauling (note 44 above).

50 Children's Act s 293.

51 Ibid s 295(a). Nothling-Slabbert (note 44 above) 30–1 notes that, if the surrogate child must be genetically related to one or both commissioning parents, the couple who has infertility in the case of both partners will be excluded from the process on the basis it amounts to commissioned adoption. I would also stress that in such cases, age restrictions may exclude such a couple from the adoption process.

52 Ibid s 301.

The Children's Act is emphatic that the surrogate must not use the surrogacy to acquire compensation but that she should be motivated purely by altruistic considerations.<sup>53</sup> Thus, commercial surrogacy is expressly prohibited. In fact, commercial surrogacy is criminalised in terms of the Children's Act.<sup>54</sup> To act as a surrogate, the woman must show that she has had at least one previous pregnancy, which was followed by a viable delivery and a living child of her own.<sup>55</sup>

The Children's Act permits only South African domiciliaries to participate in surrogacy arrangements in terms of the Children's Act,<sup>56</sup> possibly to reduce South Africa's attractiveness as a 'reproductive tourism destination' and the risk of commissioning parents shopping for physical and other characteristics in the child.<sup>57</sup> Clearly the Children's Act, though welcome, has not resolved all the issues associated with surrogacy.

By criminalising commercial surrogacy, the legislature silenced the loudest critics of surrogacy. Despite this, it is not certain that the legislature will not possibly reconsider this option in the future and embrace a model such as that in India where commercial surrogacy is a recognised, if stigmatised, form of labour.<sup>58</sup>

### III A SAMPLE OF ARGUMENTS ASSOCIATED WITH SURROGACY

#### (a) Human rights issues

Modern international and national legal development reflects a heightened awareness of the need to recognise and protect the human rights of both women and children.<sup>59</sup> It is against this backdrop that strong human rights based arguments, both for and against surrogacy in general, and commercial surrogacy in particular, have developed.

All laws in South Africa are subject to constitutional imperatives. Thus it is important to discuss the portions of the Constitution of the Republic of South Africa, 1996 that are relevant to the current discussion. The Constitution does not directly protect the right to have children or to procreate, although the rights to equality, privacy, religion, belief and opinion may indirectly protect this right. Both the Cairo Declaration of the International Conference on Population and Development, 1994 and the African National Congress

53 Ibid s 295(c)(iv) & (v).

54 Ibid s 301 read together with s 303.

55 Ibid s 295(c)(vi) & (vii). See also the discussion of the mother-worker dichotomy mentioned in relation to the Indian surrogacy model under part IV below.

56 Ibid s 292.

57 Nothling-Slabbert (note 44 above) 30–1.

58 More about this below.

59 R Dixon & M Nussbaum 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) *Cornell LR* (2012) 550 <[http://papers.ssm.com/s013/papers.cfm?abstract\\_id=2060614](http://papers.ssm.com/s013/papers.cfm?abstract_id=2060614)>.

(ANC)'s National Health Plan for South Africa<sup>60</sup> support the right to freedom of procreative choice.

The Preamble to the Constitution commits to improving the quality of life of South African citizens and freeing each person's potential. In s 1(a), human dignity, equality and the advancement of human rights and freedoms are identified as founding values of the Constitution, a Constitution that is proudly premised upon principles of non-racialism and non-sexism.<sup>61</sup>

The values of human dignity, equality and freedom are again stressed as the cornerstone of democracy in art 7(1) of the Bill of Rights. Article 9 clearly and unambiguously sets out what is meant by 'equality' and, art 10 specifies that every person has inherent dignity that must be respected and protected. Article 11 protects the right to life and art 12 deals with the rights to freedom and security of the person. In this context art 12(2) is of particular interest, protecting as it does, the right to bodily and psychological integrity, including, amongst others, the right to make decisions concerning reproduction<sup>62</sup> and the individual's right to security and control of his or her body.<sup>63</sup>

Article 13, which states that no person may be subjected to slavery, servitude or forced labour, and art 22, which protects the freedom to choose a trade, occupation or profession,<sup>64</sup> also bear mention. Labour relations are governed by art 23.

Finally, art 28 which protects the rights of children and makes their best interests the paramount consideration in any matter involving them is of importance.

Clearly, human rights arguments can be made both for and against the practice of surrogacy. Legislative provisions that prohibit surrogacy may well infringe upon an infertile person's reproductive rights,<sup>65</sup> right to dignity<sup>66</sup> and right to privacy.<sup>67</sup> It may also infringe upon the right of the surrogate to an improved life,<sup>68</sup> her right to freedom and control of her body<sup>69</sup> and her right to choose a trade, occupation or profession.<sup>70</sup>

The protection of these rights would suggest that commercial surrogacy should be permitted. Fully informed adults should be able to make any arrangement regarding their bodies and reproduction they wish, provided their decisions do not harm the children produced. However, the practice may lead to desperate women entering into surrogacy arrangements for very little

60 See <[www.un.org/popin/icpd/conference/bkg/egypt/html](http://www.un.org/popin/icpd/conference/bkg/egypt/html)>; <[www.imsa.org.za/PB7R%20ANC%20HEALTH%20PLAN%201994.pdf](http://www.imsa.org.za/PB7R%20ANC%20HEALTH%20PLAN%201994.pdf)>. On the Cairo Conference see Starke (note 1 above) 9–10.

61 Bill of Rights art 1(b).

62 Ibid art 12(2)(a).

63 Ibid art 12(2)(b).

64 Any trade, occupation or profession may be regulated by law.

65 Bill of Rights art 12(2)(a).

66 Ibid art 10.

67 Ibid art 14.

68 Constitution Preamble.

69 Bill of Rights art 12(2)(b).

70 Ibid art 22.



financial consideration, rendering them vulnerable to the type of exploitation the statute seeks to avoid.<sup>71</sup> The pervasive poverty that prevails in South Africa makes for an environment which compromises the ability of destitute women to forego an opportunity to make some money, exposing them to exploitation by the wealthy. This could compromise the surrogate's dignity and, in extreme cases, amount to her engaging in a form of forced labour or slavery. If, however, carrying a child for another is an altruistic labour of love there should be no objection to the surrogate's actions and they should be encouraged.

The primary arguments that have been made against commercial surrogacy are that it undermines human dignity, degrades the surrogate and the child, and is tantamount to trading in babies.<sup>72</sup> Those who favour commercial surrogacy have responded with arguments such as the surrogate is selling her services in carrying the child and not the baby itself.<sup>73</sup> They have also argued that where one of the commissioning parents is genetically linked to the child, a prerequisite in terms of the Children's Act, the child is that of the commissioning parent.<sup>74</sup> This argument was countered with the response that where there is partial surrogacy the payment made is not for the services rendered, but for the termination of the surrogate's parental rights to the child. This is the same objective as that of a paid adoption, which is unlawful.<sup>75</sup> Meyerson, who favours both commercial surrogacy and paid adoption,<sup>76</sup> indicates that in her opinion, irrespective of whether the surrogacy is partial or total, the surrogate should be regarded as doing more than simply rendering a service. Consequently, and in order to protect her interests, no option for specific enforcement of the agreement between the parties should be countenanced.<sup>77</sup> She is adamant in her view that those who allege that paid adoptions and commercial surrogacy are contrary to the best interests of the child, in that they expose the child to potentially abusive situations, are mistaken.<sup>78</sup> Instead, she alleges that parents who commission a surrogacy are desperate to conceive a child and are thus 'no more likely to abuse or exploit their child than those who conceive their children in the natural way'.<sup>79</sup> Natural parents are not evaluated in any manner. Further, she indicates that in her opinion, the child's interests can be protected through 'state scrutiny of the prospective parents' rather than the prohibition of financial consideration.<sup>80</sup> This does not mean that there are not real issues associated with the 'commodification of children'<sup>81</sup> and parents should be discouraged

71 Nothling-Slabbert (note 44 above) 31.

72 Meyerson (note 3 above) 130.

73 Ibid 126.

74 Ibid 127.

75 Ibid.

76 Ibid.

77 Ibid.

78 Ibid 127–8.

79 Ibid 127.

80 Ibid.

81 Term used by Meyerson *ibid* 128.

from associating physical and other attributes of a child with monetary value. If however, the true motivation for allowing surrogacy is to assist parents to have a child that is genetically related to them in circumstances where it would otherwise be impossible, then considerations of genetic engineering and shopping for superior genes would be eliminated.

Further, Meyerson states clearly that if exploitation of the surrogate is to be avoided and, I might add, to protect the commissioning parents from possible exploitation by the surrogate, a fixed fee for the surrogacy could be established.<sup>82</sup> Martin Lupton too, favours commercial surrogacy, stating that it is an historical practice that results from careful consideration on the part of all the parties to place a much wanted child in a loving home.<sup>83</sup> He emphasises that it is not the sale of an unwanted child and that both the pregnancy and child are planned by parties who have the child's best interests at heart.

### **(b) Surrogacy as labour**

Meyerson argues that to exclude commercial surrogacy amounts to denying women the right to make their own decisions, detrimentally affecting their ability to improve their financial position and alleviate their impoverished and desperate conditions.<sup>84</sup> That the surrogate may perform a stereotypical and alienated labour role is not a sound reason to prohibit the practice as there are many such roles in South Africa that are legally sanctioned.<sup>85</sup> In a society in which poverty is endemic, the question must be asked whether or not the exchange of monetary benefits could amount to duress? Meyerson argues that if the law refuses to enforce specific performance where the woman changes her mind about giving up the child, issues around both the informed nature of her agreement and the potential coercive nature of the promise of money are dealt with, even though the practice may well remain exploitative.<sup>86</sup> Certainly, commissioning parents may take advantage of the dire financial position of the surrogate to bargain unfairly. Regulation of the relationship is thus essential.

Lupton indicates that the compensation dimension of commercial surrogacy has been criticised for applying 'a means test to parental suitability' and turning impoverished women into 'baby farms' for the rich.<sup>87</sup> In response he makes the point that:

[T]hose who are outraged by this approach should bear in mind that this is the natural consequence of an unequal society, and if we cannot save people from being poor it makes no sense to stop them making sacrifices to alleviate their situation merely because we are appalled at the nature of those sacrifices.<sup>88</sup>

82 Meyerson (note 3 above).

83 Lupton (note 1 above) 149–51.

84 Meyerson (note 3 above) 130–1.

85 Ibid 131.

86 Ibid 131–2.

87 Lupton (note 1 above) 151.

88 Ibid 151.

I agree with this last statement of Lupton and with Meyerson's view that even though a woman may suffer some psychological harm when giving up the child, paternalistic protection of the woman should not be countenanced in modern society.<sup>89</sup> Further, Meyerson is correct in her assertion that couples who elect to have a genetically related child through the process of surrogacy rather than to adopt a child should be permitted to do so, even if the effect is to decrease the pool of potential adoptive parents.<sup>90</sup>

Approaches to commercial surrogacy differ across the globe. Commercial surrogacy is prohibited, for example, in Canada, Australia and New Zealand<sup>91</sup> but, is permitted amongst others, in India, Israel and the state of California.<sup>92</sup> The various states of the US each have their own state law regulating surrogacy. The development of the surrogacy landscape in the US was, however, strongly influenced by a world-renowned judgment written up by the US Chief Justice in the New Jersey Supreme Court case, *Baby M*.<sup>93</sup>

The child in the *Baby M* case was the subject of a commercial surrogacy arrangement, which the lower court had held to be enforceable.<sup>94</sup> It had awarded the child to the father on the basis of its best interest, terminated the surrogate's rights; and granted the father's wife's request to adopt the child.<sup>95</sup> On appeal, it was the surrogate's contention that the contract should be regarded as unenforceable and her parental rights should be reinforced. The core of her argument was that the enforcement of the contract amounted to judicial bias in favour of the rich and against the poor. The Supreme Court judgment addressed these issues.<sup>96</sup> George Annas noted that in arriving at its decision the court recognised that in this case the surrogate was the natural mother of the child<sup>97</sup> and that to build a family for the commissioning family by means of the surrogacy would amount to giving the commissioning parents a child at the expense of the surrogate's family, severing the mother-child bond with the surrogate.<sup>98</sup> The court asserted that the contractual relationship between the parties was simply a ploy designed to circumvent existing legal provisions regulating children.<sup>99</sup> Consequently, the court found commercial surrogacy contracts to be invalid on the basis that they conflict with laws prohibiting the giving of financial incentives in exchange for relinquishing parental rights; adoption laws that permit the relinquishing of such rights only

89 Meyerson (note 3 above) 132–3.

90 Ibid 133–4.

91 Roberts (note 25 above). Pande (note 20 above) 972, indicates that Australia, China, the Czech Republic, Denmark, France, Germany, Italy, Mexico, Spain, Switzerland, Taiwan, Turkey and some states in the US ban surrogacy either entirely or partially.

92 Pande ibid 972; Stark (note 1 above) 2–3.

93 *Baby M (In the matter of Baby M)* 1987 14 FLR 2007 per Willentz CJ.

94 *Baby M (In the matter of Baby M)* 1987 13 FLR 2001.

95 Per Sorkow J 2029–30.

96 *Baby M* (note 93 above) 2012–6. The judgment is discussed in Annas (note 11 above) & Lupton (above note 11).

97 Ibid 2016; Annas ibid 21; Lupton ibid 225.

98 Annas ibid; Lupton ibid.

99 Ibid. Annas asserted that the contract purporting to regulate the relationship was the only novel aspect of the case.

after birth of the child; and laws that prohibit termination of parental rights or adoption without consent in the absence of proof of abandonment or unfitness of the parent.<sup>100</sup>

New Jersey, and most other US states, prohibit paid adoption and, despite the attempt to disguise surrogacy contracts as contracts for the hiring of services, the court remained unconvinced that they were anything other than payment to obtain a child.<sup>101</sup> The court felt that this finding was supported by the fact that the surrogate would be paid significantly less if the child were to be stillborn, despite the fact that the services would have been rendered in full.<sup>102</sup> The court thus viewed commercial surrogacy as tantamount to ‘baby bartering’ without due regard to the suitability or otherwise of the commissioning parents to parent the child. The court also stressed the absence of any provision to counsel the surrogate and the coercive nature of the payment. It regarded the relationship as potentially exploitative.<sup>103</sup> The court was also critical of the effect of introducing a profit motive into the situation.<sup>104</sup> It was concerned that in the pursuit of profit, brokers might avoid doing suitable evaluations of the parties for fear of compromising their fees. The court referred to the broker as a ‘middleman, propelled by profit’.<sup>105</sup>

The court was quite clear in its condemnation of commercial surrogacy. That the response is one of moral outrage is clearly apparent from this statement:

There are, in a civilized society, some things that money cannot buy ... There are ... values that society deems more important than granting to wealth whatever it can buy, be it labor, love or life.<sup>106</sup>

The court found that, even in altruistic surrogacy contracts, the surrogate must be granted an opportunity to revoke the agreement after the birth and, in the event that the father should challenge the surrogate for custody, he should only succeed where abandonment or unfitness to parent is clearly established.

Finally, the court determined that surrogacy contracts contravene public policy by placing monetary considerations ahead of the child’s best interests and by promoting the rights of the father above those of the mother.<sup>107</sup> The court briefly stated that the father’s right to procreate did not extend to doing so by way of surrogacy and that there is no constitutional right to custody.<sup>108</sup> Outside of this, the court failed to discuss the constitutionality of the process in any depth. The court then went on to determine custody of the child by examining the child’s best interests. The child was awarded to

100 *Baby M* (note 93 above) 2012.

101 *Annas* (note 11 above) 21–2.

102 *Ibid.*

103 *Ibid.* 22. *Annas* added, at 22, that in his opinion, the court could also have noted that the contract commodifies children, treating them as akin to pets.

104 *Ibid.*

105 It is my opinion that middlemen should either be very strictly regulated or, preferably, eliminated altogether from the process.

106 *Annas* (note 11 above) 22.

107 *Ibid.*

108 *Baby M* (note 93 above) 2016.

the commissioning parents on the basis that its best interests were served by leaving the child in the stable family environment in which bonds had been established.<sup>109</sup> The court indicated that in future cases, the child should remain with the natural mother pending the outcome of any such dispute.<sup>110</sup> This, Annas asserts, simply reflects the biological reality surrounding a newborn child.<sup>111</sup> Annas notes that commercial brokers responded to the decision predictably, indicating that the practice would continue unabated by the decision and the parties to these contracts will continue to find them fulfilling, despite their unenforceability in certain states.<sup>112</sup> Annas is extremely critical of brokers whom he views as motivated almost exclusively by greed and hiding behind the façade of assisting infertile couples.<sup>113</sup> Annas favours a total ban on surrogacy and touts prosecution of attorneys who draft contracts they know will be unenforceable.<sup>114</sup> He is vocal about the need to protect surrogates from exploitation and stresses that in cases of full surrogacy, the potential for exploitation is increased. He hails the *Baby M* decision as promoting the New Jersey Supreme Court to the position of the pre-eminent bioethical court in the country.<sup>115</sup>

A completely different approach has been followed in India, Israel and the state of California where commercial surrogacy has been recognised. The Indian model of commercial surrogacy has been heralded a great success and is founded upon the concept of a liberal market model.<sup>116</sup>

#### IV AN INDIAN MODEL OF COMMERCIAL SURROGACY

Surrogacy in India takes place within the framework of the Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 (ART). This Bill was drafted after consultations between the Indian Council of Medical Research and the Ministry for Health and Welfare.<sup>117</sup> It is a thriving industry. It is estimated that 25,000 foreign couples take advantage of the Indian surrogacy industry each year.<sup>118</sup> Despite this, the industry is not without problems. India has recently passed a regulation in terms of which foreign commissioning parents are limited to married heterosexual couples from countries where surrogacy is not illegal.<sup>119</sup> This restriction is a blow to single and gay commissioning parents who will have to seek an alternative market.<sup>120</sup>

109 Ibid 2022–4.

110 Ibid 2025.

111 Annas (note 11 above) 23.

112 Ibid.

113 Ibid.

114 Ibid.

115 Ibid 24.

116 Pande (note 20 above) 972–3.

117 ‘Outline of Proposed Indian ART Legislation’ <<http://www.indian-surrogacy.com/item/outline-of-the-proposed-indian-art-legislation.html>>.

118 N Bhowmick ‘Why People are Angry about India’s New Surrogacy Rules’ <<http://world.time.com/2013/02/15/why-people-are-angry-about-indias-new-surrogacy->>>.

119 Ibid.

120 Ibid.

It seems these restrictions are designed to prevent the child being placed in some legal limbo when it is taken to the country of the commissioning parents.<sup>121</sup>

Surrogacy in India is perceived to be a survival strategy that forms a temporary occupation for women who come from a predominantly poor, rural and uneducated background where their family income is often less than US\$60 per month.<sup>122</sup> In Anand, surrogates are recruited through brokers and are then counselled.<sup>123</sup> This counselling takes the form of instruction as to the process to be followed, the absence of any immorality in regard to the process, and the fact that there can be no genetic link to the child. In the process, issues associated with the mother-worker duality are highlighted in that surrogates are treated as factory workers who only lend their bodies to the process whilst at the same time they are expected to be virtuous mothers throughout the pregnancy.<sup>124</sup> The surrogates observed and interviewed by Pande were closely controlled throughout the pregnancy and housed in hostels.<sup>125</sup> Pande found the hostels to be gendered spaces that created an avenue for the surrogates to resist exploitation, network with others, create opportunities and to acquire skills for future employment.<sup>126</sup> She highlighted some of the radical feminist perspectives on gender in the workforce and cleverly used the term ‘labour’ in both the workplace/production and the reproductive context to further illustrate the dichotomy that surfaces in this regard.<sup>127</sup>

Pande found that surrogates could earn in the region of five times their annual family income for one pregnancy.<sup>128</sup> The surrogates come from areas where unemployment is rife and most are desperate to provide for their own child or children.<sup>129</sup> This reinforces the image of the virtuous mother. Their desperation is exploited not only by wealthy childless couples, most of whom are, surprisingly, Indian or non-resident Indian couples,<sup>130</sup> but also by surrogacy brokers who are paid substantial sums for each surrogate they deliver.<sup>131</sup> That said, resistance within the hostel that Pande visited, resulted in a change in the surrogacy contract, requiring that the broker’s fee be paid by

121 Ibid. L Coffey ‘A Rights-based Claim to Surrogacy: Article c23 of the Convention on the Rights of Persons with Disabilities’ (2012) 20 *Michigan State Int LR* 259, 276–82 takes a brief look at the Indian model, its challenges and measures to address these. On the problems associated with returning the child to the state from which the commissioning parents hail, see Y Ergas ‘Babies Without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy’ (2013) 27 *Emory Int LR* 117.

122 Amitra Pande, a sociologist from the University of Cape Town (UCT), conducted interesting field work in Anand, Gujarat in this regard and, as a consequence, made some interesting observations about the manufacturing of a perfect mother-worker in the Indian, commercial surrogacy context (note 20 above) 971 & 974.

123 Ibid 975–6.

124 Ibid 976–80.

125 Ibid 981–5.

126 Ibid 985–8.

127 Ibid 972.

128 Ibid 974.

129 Ibid 975–6 & 988.

130 Ibid 974.

131 Ibid 975.

the commissioning parents and not from the fee due to the surrogate herself.<sup>132</sup> The surrogates viewed the broker as a crocodile in a dirty pond in which they were fish.<sup>133</sup> This metaphor clearly demonstrated both the surrogate's sense of vulnerability and the predatory nature of the relationship between surrogate and broker. Even in India, which has a thriving reproductive tourism industry, the labour remains so stigmatised that most surrogates interviewed kept their activities secret from their families.<sup>134</sup>

Surrogates are closely controlled and the hostels in which they stay are the most 'concrete' manifestation of the control over them.<sup>135</sup> One of the reasons offered for keeping the surrogates in hostels is to ensure their proper care throughout the pregnancy. They are given a healthy diet, regular medical check-ups and all the necessary prenatal vitamins and medical care.<sup>136</sup> At the same time, the hostels offer the surrogates a shared identity that engenders a sense of solidarity and potentially creates the space for resistance.<sup>137</sup> The surrogates are encouraged to treat the hostel as 'home' but are, at the same time kept apart from their families with visits 'home' being used as an incentive to cooperate throughout the process.<sup>138</sup> Training within the hostels includes teaching surrogates English and computer skills, thus better placing them to communicate with the intended parents and prospective commissioning parents.<sup>139</sup> These skills are however, viewed by the state as an investment in the modernising of these women who are regarded as being without any experience of 'real work' in the public space. This paternalistic approach prevails despite the fact that most of the surrogates did have some form of work outside the home.<sup>140</sup>

Surrogates resist the idea that they are disposable by stressing both their bond with the child and their special relationship with the intended parents. Thus the women have resisted being reduced to mere commodities.<sup>141</sup> However, the attachment of the surrogate to the image of herself as a selfless mother undermines her ability as a worker to negotiate the terms of her agreement, especially payment.<sup>142</sup>

Thus, commercial surrogacy is a double-edged sword that, given the realities of the global South, could well lead to exploitation of desperate circumstances and the creation of baby farms. Should the prospective surrogate be denied this opportunity to knowingly accept this as an avenue to relieve her desperation?

132 Ibid 990.

133 Ibid 989–90.

134 Ibid 975.

135 Ibid 981–3.

136 Ibid 981–2.

137 Ibid 985.

138 Ibid 982–3.

139 Ibid 983.

140 Ibid 983–4.

141 Ibid 985–8.

142 Ibid.

Certainly there are some, such as Elizabeth Anderson,<sup>143</sup> who have examined whether or not women's reproductive capacity can or should be viewed as a commodity. She was particularly concerned about the possible treatment of babies as 'durables' and women as 'baby factories'.<sup>144</sup> After taking a detailed look at commercial surrogacy in the American context she concluded that commercial surrogacy indeed 'constitutes an unconscionable commodification of children and of women's reproductive capacities'.<sup>145</sup> Her point of departure in arguing against the recognition of commercial surrogacy practices was that any item that is excluded from the application of market norms to its production, exchange or enjoyment by means of any moral or ethical imperative is not a commodity properly so called.<sup>146</sup> To treat something as a commodity when it is excluded from the definition is to value it inappropriately.<sup>147</sup> Anderson then proceeds to a Kantian argument that slaves cannot simply be treated as a commodity to be used without regard to their interests because they are possessed of a dignity that must be respected.<sup>148</sup> Commodities are things that are valued for their uses while persons command a different valuation.

Slaves thus cannot simply be used as they have a greater value. Likewise, surrogates. Anderson does not find herself convinced by arguments that surrogacy should be treated the same way as egg and sperm donation, wet nursing and the like.<sup>149</sup> She takes the view that in the context of surrogacy the market invades a new sphere, namely, women's labour in carrying children, and that there are thus new ethical considerations.<sup>150</sup>

She takes the view that to treat the woman's labour as a commodity is degrading to them and that treating the baby as a commodity degrades it too.<sup>151</sup>

Anderson is of the opinion that children should be loved and cherished and neither manipulated nor used for personal advantage.<sup>152</sup> Rather, they should be nurtured and valued in such a manner that their interests should always be placed ahead of those of their parents. This view of children goes hand in hand with the imperative that the parent-child relationship and the achievement of a stable and loving family environment places a duty on others to refrain from interfering in the relationship.<sup>153</sup> She alleges that commercial surrogacy replaces the norms of parental love with market norms, treating parental rights as property rights rather than trusts.<sup>154</sup> The surrogate renounces

143 Anderson (note 11 above) 71. On commodification, see Ergas (note 121 note) 139ff.

144 Anderson *ibid.*

145 *Ibid* 71 & 92.

146 *Ibid* 72.

147 *Ibid.*

148 *Ibid.* Ergas (note 121 above) 145ff also develops a communitarian argument based upon the importance of the human dignity of women and children.

149 Anderson *ibid* 75.

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Ibid* 76.

154 *Ibid.*



her rights and responsibilities to serve her own interests and not those of the child.<sup>155</sup> To allow parents to specify certain genetic traits in the surrogate<sup>156</sup> further commodifies the child.<sup>157</sup>

It is this potential commodification of children and the potential exploitation of the surrogate that has proven to be a strong argument against both commercial surrogacy and paid adoption.<sup>158</sup> For this reason, ‘marketplace mechanisms’ are excluded from adoption processes in the United Kingdom.<sup>159</sup> By extension, they should also be excluded from the surrogacy process. It should, however, be borne in mind that in the case of surrogacy, the agreement to give up the child takes place prior to the pregnancy and thus the analogy to the adoption process is not entirely satisfactory.<sup>160</sup>

Surrogate agencies promote the interests of the commissioning parents to the exclusion of the child’s interests, deliberately destroying any natural parent-child bond that might develop during the pregnancy.<sup>161</sup> Anderson acknowledges that the ultimate objective of surrogacy is to place a child in a loving home, but stresses that the attitude to children that is manifest in the process undermines the ‘norms of parental love’.<sup>162</sup>

Debra Satz<sup>163</sup> also argues against commercial surrogacy, but differs in her reasoning from Anderson in that she indicates that it is her opinion that the reason to reject commercial surrogacy is based on what she calls the ‘asymmetry thesis’.<sup>164</sup> The asymmetry, however, not founded upon (a) the need to treat women’s reproductive labour as distinct from human labour generally,<sup>165</sup> (b) the perspective that to treat women’s reproductive labour as a commodity is inherently degrading,<sup>166</sup> or (c) that norms of parental love must be applied to the relationship.<sup>167</sup> She alleges that the true basis to distinguish women’s reproductive labour lies in the socio-economic and political context within which the surrogacy takes place. She argues that in contexts in which gender inequality is entrenched and economic inequality is pervasive and

155 Ibid. In cases of altruistic surrogacy Anderson alleges that the surrogate promotes the interests of the commissioning parents ahead of those of the child.

156 Presupposing partial surrogacy, which is not permitted under South African law.

157 Anderson (note 11 above) 76.

158 Mackenzie (note 7 above) 186. See too, D Smolin ‘Intercountry Adoption and Poverty: A Human Rights Analysis’ (2007) 36 *Capital Univ LR* 413, 416–21 where the author sets out the potentially exploitative nature of the poverty that pervades countries from which babies are adopted. The author calls for a ‘prioritization of interventions’ to assist families to remain together, 422–5.

159 Ibid.

160 Lupton (note 6 above) 44.

161 Anderson (note 11 above) 76–7. This is certainly the case in India where the surrogate is encouraged, through counselling, to distance herself from the child throughout the pregnancy and not to form any emotional attachment. See Pande (note 20 above) 976–80.

162 Anderson (note 11 above) 76 & 80–7.

163 Satz (note 11 above).

164 Ibid 108.

165 Ibid 110–6.

166 Ibid.

167 Ibid 116–21.

often racially biased, commercial surrogacy further entrenches the gender hierarchies and creates potential for racial exploitation.<sup>168</sup>

An examination of surrogacy websites and the like, clearly reveal that commissioning parents certainly do not undermine the norms of parental love. They are desperate for a child of their own and some have gone to extraordinary lengths to achieve their objectives.

## V CONCLUSION

In South Africa, surrogacy is regulated by chapter 19 of the Children's Act, which ignored the call for recognition of commercial surrogacy so as to avoid the practice being driven underground.<sup>169</sup> Invalidity of agreements that offer a financial incentive leaves the parties unprotected, however, the practice continues outside of the law.<sup>170</sup> Unlawful agreements are not enforceable. The commissioning couple will thus have to pursue adoption to establish parental rights and responsibilities in respect of the child born of such an arrangement. Further, the restriction on payment for surrogacy services may result in a shortage of surrogates to perform lawful services, as, as has been correctly pointed out,<sup>171</sup> few women are willing to act as surrogates without some pecuniary incentive.

Poverty is endemic in South Africa and, while the ideal would be to assist members of society to improve their lot, absent meaningful interventions, surrogacy may be a viable alternative for a few. Should South Africa therefore consider a surrogacy model similar to that in India? Personally I think the answer should be yes. I am aware of the distaste with which the practice may be viewed by many and of the potential for exploitation. I am not, however, convinced that in a country pervaded by poverty, we have the luxury to deny a legitimate source of income to those whose dignity is already severely compromised by their dire financial circumstances. Obviously the practice has long been surrounded by moralistic arguments that are premised on assumptions that it is harmful to the child and degrading to women whose subordinate position in society is further entrenched thereby.<sup>172</sup> The most convincing arguments against commercial surrogacy are those associated with the economic, social and political context within which the practice takes place.<sup>173</sup> These issues require serious consideration.

168 Ibid 123–9.

169 Meyerson (note 3 above) 138.

170 Informal interview with Dr M Coetsee-Spies, social worker and academic (24 August 2012). This is the case in other jurisdictions too. See Stark (note 1 above) 5, where she indicates that approximately five per cent of the gestational surrogacy procedures take place in a state that refuses recognition to surrogacy agreements, the state of New York.

171 Meyerson (note 3 above) 138.

172 Ibid 129–30.

173 Satz (note 11 above) 123–9.

Arguments for recognition of commercial surrogacy, such as that it offers the surrogate opportunities for a future she and her own children might not otherwise have,<sup>174</sup> are as emotive as most of the arguments against surrogacy.

The reality is that commercial surrogacy is still taking place despite legislative intervention. The lack of regulation of the practice leaves the parties unprotected and therefore vulnerable to exploitation. I would argue that it is preferable to regulate the practice and at least attempt to introduce some protection for the parties involved than to leave them exposed as they currently are. I am inclined to share the view of Lupton that we cannot deny the surrogate the right to make the sacrifice simply because we are appalled by its nature.

Poverty-stricken women, with little education and few opportunities should not be denied the means, no matter how distasteful to some, to alleviate their desperate circumstances and those of their families. However, surrogacy, whether it be commercial or altruistic, has the potential to lead to an unacceptable level of exploitation. It is possible to protect parties from some exploitation by removing brokers and agencies from the context altogether or, alternatively by regulating and monitoring them closely.

It remains, however difficult to decide for or against commercial surrogacy. In the event that commercial surrogacy is permitted in the future, South Africa must heed the dangers inherent in transnational surrogacy as experienced in other jurisdictions.<sup>175</sup> An international response to the potential conflict of laws issues is urgently required so as to ensure the realisation of the child's right to citizenship from birth.<sup>176</sup>

174 Bhowmick (note 118 above).

175 Ergas (note 121 above) in which she develops a strong argument for the development of an international regulatory framework to address issues of, amongst others, filiation of the child(ren) born of surrogacy, who might otherwise find themselves in a legal limbo.

176 Ibid.