

Modelling pregnancy: is a reconceptualisation of the
maternal-foetal relationship the key to better understanding
surrogacy and its regulation in India?

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Summary

Surrogacy is a complex subject that involves many ethical and legal challenges. International commercial surrogacy adds further complications as globalisation has facilitated the opportunity for an industry that exploits economic and social inequalities. India had become a ‘hotspot’ for international surrogacy, before its prohibition in 2015 and the end of commercial arrangements with the Surrogacy (Regulation) Act, 2021. It has therefore attracted a great deal of journalistic and academic interest with significant attention given to concerns over exploitation, commodification, and the legal parentage and nationality of the children born as a result. This thesis situates the practice within the Indian context and background conditions to explain its development and why it is a pertinent case study for this research. I argue that before addressing these complex issues, we need to establish how pregnancy is conceptualised in surrogacy and how it impacts on the surrogates themselves and on the relevant legal reforms. The main research question considers whether a reconceptualisation of pregnancy would lead to better approaches to the practice and regulation of surrogacy in India. I explore and evaluate two distinct and opposing models of pregnancy in guiding this analysis. The foetal container model is based on a containment view which considers the pregnant woman and foetus as two separate entities and the parthood view derives from the claim that the foetus is as a *part of* the pregnant woman. From a review of relevant Indian legal and policy materials, I conclude that the foetal container model is the dominant conception and that it facilitates harms, which I analyse within the frameworks of gendered harm and embodiment. The invasive procedures and controlling practices inherent in the practice in India provide evidence of harms from violations of the rights to autonomy, bodily/embodied integrity and to give informed consent which can be traced to the operation of the foetal container model. The original contribution of this work is in revealing the hidden assumptions about pregnancy operating in surrogacy in India, the manner in which they are problematic, and the need for increased awareness of the consequences of this model, leading to more effective regulation that places the surrogates at the centre of law, practice, and regulation.

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1 Surrogacy in India: an overview

1.1 Introduction

Surrogacy has attracted and continues to attract a great deal of interest and criticism, particularly when the arrangements are commercial in nature, which has resulted in a wealth of academic and journalistic investigations into the practice. Early ethnographic studies focussed on the USA, notably the groundbreaking study by Helena Ragoné,¹ but since international routes to India opened there has also been a keen interest from anthropology, sociology, and legal scholars into these arrangements.² The case study for this investigation is the practice of international commercial surrogacy in India. High profile cases from that of Baby M in the USA in the 1980s,³ Baby Manji in India in 2008,⁴ to Baby Gammy in Thailand in 2014,⁵ and many in between, have contributed to increasing concerns regarding the potential abuse and exploitation of the surrogate mothers and children, the commodification and commercialisation of motherhood and children, and the children's rights to legal parentage and nationality. International commercial surrogacy arrangements have added another dimension of unease

¹ Helena Ragoné, *Surrogate Motherhood: Conception In The Heart (Institutional Structures of Feeling)* (Westview Press 1994).

² I will return to discuss this in more detail in Chapter 4 of this thesis. This point is also argued by Elly Teman, 'A Case for Restrictive Regulation of Surrogacy? An Indo-Israeli Comparison of Ethnographic Studies' in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 58. See also, Susan Markens, 'The Global Reproductive Health Market: U.S. Media Framings and Public Discourses about Transnational Surrogacy' (2012) 74 *Social Science & Medicine* 1745.

³ *Matter of Baby M* (1988, N J) 537 A2d 1227. Case description: Ms Whitehead agreed to act as a surrogate mother for the Sterns. She gave birth to a baby girl via IVF and who was taken away immediately by the intended parents. Shortly afterwards Ms Whitehead felt she could not live without the baby and took her back from the Sterns. The father obtained a court decision ordering the enforcement of the contract and the return of the child. Upon learning of it, Ms Whitehead fled with the baby to Florida. There she was apprehended, and the baby was removed by force and returned to the Sterns. Ms Whitehead was awarded visitation rights. (Description taken from Katarina Trimmings and Paul Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 627–628.)

⁴ A detailed description of this case is given in Chapter 3 of this thesis.

⁵ Baby Gammy was one of twins born from a surrogacy arrangement in Thailand commissioned by an Australian couple. There are conflicting accounts of what happened in this case, but it is understood that the couple did not want to take Gammy back to Australia with them on account of the fact he was born with Down's Syndrome. They returned with the baby girl who was not born with condition and left Gammy with the surrogate mother in Thailand. Another serious concern in this case is the fact that the intended father had a previous conviction for child sexual abuse. For more detail on the case please see Bridie Jabour, 'Baby Gammy: Conflicting Reports about Baby Boy "abandoned" in Thailand' *The Guardian* (4 August 2014) <<https://www.theguardian.com/world/2014/aug/04/baby-gammy-conflicting-reports-about-baby-boy-abandoned-in-thailand>> accessed 20 January 2017.

as globalisation has facilitated the opportunities for an industry that exploits economic and social inequalities. As evidenced in the cross-border chains of egg sourcing from white, and usually impoverished, Eastern European women⁶ for fertilisation in wealthier (Western) countries before being shipped for gestation in India where this ‘labour’ was ‘cheap’ and plentiful.⁷ These cross-border ‘(re)production lines’ - of egg donation, fertilisation, and gestation occurring across different jurisdictions - allow for the evasion of regulatory controls and can result in the potential abuse and mistreatment of mostly disadvantaged and vulnerable women.⁸ Despite the sustained and varied focus on surrogacy in India little attention has been given to the conceptualisation of the maternal-foetal relationship underpinning the practice of surrogacy and the approaches to its regulation. The original contribution of this thesis is the exploration of how a specific model of pregnancy, and the discourses that construct it, have influenced the practice and regulation of surrogacy in India. I combine this with an examination of the conditions of the context within which these surrogacy arrangements take place as they impact the practice and the experiences of the surrogates. This chapter will give some background context and detail on the legal reforms to surrogacy in India as well as identifying the research questions, the ideas that shape the thesis and its design before providing a brief thesis outline.

1.1.1 Assisted Reproductive Technologies and wider context

The Assisted Reproductive Technologies (ARTs) industry, of which surrogacy is a part, is highly lucrative, particularly but not exclusively, in the few countries where a lack of regulation and legislation has allowed for surrogacy to become commercialised and highly profitable. However, it is

⁶ Marcia C Inhorn, ‘Globalization and Gametes: Reproductive “Tourism,” Islamic Bioethics, and Middle Eastern Modernity’ (2011) 18 *Anthropology and Medicine* 87, 91.

⁷ Evidence for this ‘(re)production line’ can be found in the film *Google Baby* which follows an Israeli ‘entrepreneur’ who facilitates surrogacy arrangements for male homosexual couples in Israel. They select their egg donor from an online database of mainly Eastern European women, the eggs are then fertilised in Israel and sent to India for implantation and gestation. *Google Baby* (Directed by Zippi Brand Frank, 2009). See also, April L Cherry, ‘The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice’ (2014) 17 *University of Pennsylvania Journal of Law and Social Change* 257, 261–262.

⁸ Kristin Engh Førde’s ethnographic study of surrogates in Mumbai exposes the reality of their situation and how it is the most marginalised of the women within poor communities who undertake surrogacy arrangements. See, Kristin Engh Førde, ‘Intimate Distance: Transnational Commercial Surrogacy in India’ (PhD, University of Oslo 2017).

not necessarily the fact that commercial surrogacy is permissible, or rather as in some jurisdictions not prohibited, that has fuelled the ART industry. Commercial surrogacy is prohibited in the UK⁹ but reasonable expenses are permitted and despite it being highly regulated it is a commercialised and profitable area for the clinics offering a wide range of fertility treatments. Unlike the UK, India had operated a ‘reproductive tourism’ business model of commercial surrogacy, with many other sectors surrounding and supporting these arrangements until the government sought to end international surrogacy in 2015 through issuing executive orders and then commercial arrangements through the Surrogacy (Regulation) Bill, 2016.¹⁰

ARTs cover a range of treatments and procedures from egg and sperm donations to *in vitro* fertilisation (IVF) and surrogacy. Although not all causes of infertility can be ‘cured’¹¹ these treatments and procedures can, however, provide a means through which it can be bypassed and offer an infertile couple¹² that longed for child. While surrogacy is not a new concept, it can be traced back in the ancient Hindu mythologies and to Biblical stories,¹³ the expansion of the commercial surrogacy industry has only taken place over the last few decades. It is largely due to advances in medical technologies,¹⁴ as well as, the apparent increase in infertility rates, especially in the developed world from where many commissioning parents hail.¹⁵ As a result of the profitability of this burgeoning industry and a lack of

⁹ Surrogacy Arrangements Act 1985, s 2(1).

¹⁰ Surrogacy (Regulation) Bill, 2016, 257 of 2016. Several executive order notifications were issued prohibiting international commercial arrangements and restricting the eligibility criteria for commissioning parents. I will discuss this in more depth in Chapter 3 on the Indian journey in regulating surrogacy.

¹¹ In some cases, fertility can be improved with medicinal or surgical interventions but in other cases there is no physical cure and therefore ART treatments are sought.

¹² Will also be referred to as either intended parent(s) or commissioning parent(s).

¹³ I will describe these ancient Hindu stories in more detail in Chapter 2. There are a few stories in the Bible that relate to this concept. One of which is in Genesis (Chapter 30) where Rachel who is childless compels her servant to procreate with her own husband Jacob in order to produce a child that she will claim as theirs and not the servant’s.

¹⁴ Other cited reasons are the development of much stricter controls over adoptions, particularly inter-country adoptions, and more importantly, for the concerns of this thesis, that gestational surrogacy makes a genetic link between the children and intended parents possible.

¹⁵ There is a great deal of disagreement over the definition of infertility which varies from no conception in 12 months to 2 years of trying to conceive. This issue was debated in the parliamentary discussion on the legislation, and it has been addressed by the committees scrutinising the Bills. There is also the factor of women delaying childrearing to pursue a career and their fertility decreasing with age. If it is that women are turning to surrogacy because of infertility issues as a

legally binding regulation until recently in India, there have been many opportunities for those involved to exploit the vulnerabilities of the women who become surrogates and to profit from these arrangements. The thesis is concerned with how the legal reforms to surrogacy in India aim to address these challenges, how they impact the surrogates, and the influence of the model of pregnancy underpinning the approaches to the regulation, which I will argue is the foetal container model.¹⁶

1.1.2 Focus on surrogate mothers

In this thesis I will identify legal, ethical, and philosophical challenges arising from the practice of commercial gestational surrogacy in India and evaluate the series of regulatory interventions by the Indian government. While there are serious concerns regarding the children born via surrogacy, as highlighted above, the focus here will be on the surrogate mothers. The issues surrounding the children born as a result of surrogacy have been explored by others.¹⁷ In terms of the surrogates the main concerns are usually ethical and point to the potential abuses and exploitation of the women.¹⁸ Yet, there are significant gaps in the literature concerning the surrogates and there are areas that are not adequately addressed by the dominant approaches.

The liberal notions of autonomy, bodily integrity, and agency as they are conventionally understood do not necessarily consider the interwoven nature of pregnancy, which has resulted in a two-patient

result of delaying childrearing to pursue a career first, then it potentially creates a narrative that pits wealthier women against those who are less financially independent and secure but who are fertile and 'rich' in a different sense.

¹⁶ Defined and explored in detail in Chapter 5 and briefly later in this introduction.

¹⁷ See for example, Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge 2003); Paula Gerber and Katie O'Byrne, 'Souls in the House of Tomorrow: The Rights of the Child Born via Surrogacy' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routledge 2015); Usha Rengachary Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India' (2008) 39 *Cumberland Law Review* 15.

¹⁸ In Chapter 4 I return to provide a definition for exploitation. For works on exploitation in surrogacy see for example Alan Wertheimer, 'Two Questions about Surrogacy and Exploitation' (1992) 21 *Philosophy and Public Affairs* 211; Stephen Wilkinson, 'The Exploitation Argument Against Commercial Surrogacy' (2003) 17 *Bioethics* 169; Caroline Vincent and Alene D Aftandilian, 'Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate' (2013) 36 *Suffolk Transnational Law Review* 671; Naomi Pfeffer, 'Eggs-Ploiting Women: A Critical Feminist Analysis of the Different Principles in Transplant and Fertility Tourism' (2011) 23 *Reproductive BioMedicine Online* 634; Alan Wertheimer, *Exploitation* (Princeton University Press 1996); Wilkinson (n 17).

dichotomous model between the pregnant woman and foetus.¹⁹ They promote atomistic views of the individual that appear ill-suited to adequately account for this relationship because of their grounding in the capacities and experiences of the male body.²⁰ This is problematic as it establishes principles based on the non-pregnant body, and thus marks the female and her reproductive capacities as ‘other’ and deviant in comparison to the ‘neutral’ male norm. A Marxist understanding of surrogacy as a form of work can offer a useful interpretation and approach to the area of reproductive labour within the broader understanding of social reproduction. It nonetheless provides an insufficient account of the practice since pregnancy, even outsourced, and contracted, cannot solely be conceived of as work.

Ultimately, these approaches fall short because they do not aim to address fundamental questions about the nature of pregnancy and how it impacts on the practice and regulation of surrogacy. Furthermore, within these traditions a particular model of pregnancy, i.e., the foetal container model, is taken for granted. The maternal-foetal relationship requires further exploration and definition in legal and philosophical terms as a reimagining of this relationship and an embodied integrity approach could lead to a very different conceptualisation of the nature of surrogacy arrangements. Therefore, understanding pregnancy’s ‘uniqueness’ is essential to better comprehending and addressing the ethical and legal complexities surrogacy poses and designing more effective and appropriate legislation. Consequently, adopting a metaphysical approach to exploring this relationship, and how that extends into cultural and legal practices, offers the potential for filling a significant gap in our knowledge.

¹⁹ Munro discusses the notion of a ‘two-person dichotomous model’. See, Vanessa E Munro, ‘Surrogacy and the Construction of the Maternal-Foetal Relationship: The Feminist Dilemma Examined’ (2001) 7 Res Publica 13.

²⁰ The difficulty with the liberal approach to women’s rights is discussed in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish 2007) 1. For more on how liberal approaches in law are male-centric see, Catherine A Mackinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006).

1.1.3 Why India and the Indian Context

India provides a pertinent case study for the practice of commercial surrogacy, through originally embracing the lucrative potential of ‘reproductive tourism’ and signing international trade agreements to establish itself as an attractive medical tourism destination.²¹ ‘First-world treatment at third-world prices’,²² a slogan created by India’s tourism ministry, encapsulates its political and economic strategy and highlights what made the practice of commercial surrogacy so successful before its prohibition. In Chapter 2 I will return to examine in more detail the background context and conditions that led to India becoming a popular destination for commercial surrogacy. Some of these were highlighted by Usha Rengachary Smerdon who asserted in 2008 that ‘India is well-positioned to lead the world in making commercial gestational surrogacy a viable industry: labor is cheap, doctors are highly qualified, English is spoken, adoptions are closed, and the government has aggressively worked to establish an infrastructure for medical tourism.’²³ India was proclaimed the global capital of surrogacy,²⁴ and its ARTs business had been reported to be worth over \$400 million a year²⁵ with over 3000 clinics offering surrogacy services.²⁶ In the absence of a detailed national registry,²⁷ extensive

²¹ For more detail see Rupa Chinai and Ruhul Goswami, ‘Medical Visas Mark Growth of Indian Medical Tourism’ (2007) 85 *Bulletin of World Health Organisation* 161. Also discussed in SAMA - Resource Group for Women and Health, ‘Birthing A Market: A Study on Commercial Surrogacy’ (2012) 8; Sarojini Nadimpally, Vrinda Marwah and Anjali Sheno, ‘Globalisation of Birth Markets: A Case Study of Assisted Reproductive Technologies in India’ (2011) 7 *Globalization and Health* 1; Smerdon (n 17) 23.

²² This phrase comes from the title of a medical tourism conference sponsored by India’s tourism ministry. Cited in Jan S Abhiyan, ‘Towards the National Health Assembly-II’ [2007] *Booklet on Globalization and Health*, (Booklet 1). And in Alison Bailey, ‘Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy’ (2011) 26 *Hypatia* 715, 717.

²³ Smerdon (n 17) 23.

²⁴ SAMA - Resource Group for Women and Health (n 21) 7; Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at International Level* (Hart Publishing 2013) 444.

²⁵ Reported in Nadimpally, Marwah and Sheno (n 21) 3. Some suggest it is in fact worth \$2bn a year: Cyra Akila Choudhury, ‘The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor’ (2011) 48 *Vanderbilt Journal of Transnational Law* 1. And Smerdon (n 17) 24.

²⁶ SAMA - Resource Group for Women and Health (n 21) 7. Also, Kimberly D Krawiec, ‘Altruism and Intermediation in the Market for Babies’ (2009) 66 *Washington and Lee Law Review* 203.

²⁷ The Surrogacy (Regulation) Act, 2021 has established the requirement of a national registry. The new website for registration is <https://registry.artsurrogacy.gov.in/#>. [Accessed 2 May 2022]. The previous IMCR Guidelines provided one and it can be found here <https://icmr.org.in/index.php/national-registry-of-assisted-reproductive-technology-art>. [Accessed 2 May 2022]. This is not to say that the creation of a national registry equates or replaces the more detailed data obtained through ethnographies.

empirical data has been difficult to obtain therefore NGO reports,²⁸ documentaries,²⁹ ethnographical studies³⁰ and newspaper articles provide the main sources of information and the data from which I have drawn throughout this thesis.

1.1.4 Outsourcing reproduction

In Chapter 4 I further develop the analysis of the conditions within which commercial surrogacy arrangements were taking place and an important aspect of this involves the outsourced nature of the arrangements. Surrogacy can be considered as a form of ‘outsourced pregnancy’. This relates to how pregnancy is viewed in the context of surrogacy and the model that underpins the approaches to its practice and regulation in India, which I will explain below when I introduce the models under investigation in this thesis. Outsourcing is defined as ‘the action or practice of obtaining goods or services by contract from outside sources.’³¹ The word ‘contract’ is particularly applicable to surrogacy, because the arrangement takes the form of a contract, albeit, one that is not enforceable in every jurisdiction, such as is the case in the UK.³² The enforceability of the surrogacy contract in India has been one of the draws for commissioning parents as I will discuss in more detail in Chapter 6. The contractual aspect of the arrangement has led some commentators to refer to surrogacy as ‘contract pregnancy’.³³ Surrogacy is a form of ‘outsourcing’ by its very nature; reproductive labour, in the sense of gestating a baby, is outsourced to another woman and in the case of cross-border arrangements in India it was outsourced to Indian women for a cheap(er) price.³⁴ Thus, echoing the practice in many

²⁸ Reports from SAMA - Resource Group for Women and Health (SAMA), and the Centre for Social Research will be drawn on throughout this thesis as both organisations work extensively on the topic of surrogacy in India.

²⁹ *Ma Na Sapna - A Mother's Dream* (Directed by Valerie Gudenus, 2013); *House of Surrogates* (Directed by Matt Rudge, 2013); *Mother India* (Directed by Raffaele Brunetti, 2011); *Made in India* (Directed by Rebecca Haimowitz and Vaishali Sinha, 2010); *Google Baby* (n 7).

³⁰ I will discuss these studies in greater detail in Chapter 2 and draw from them throughout the thesis.

³¹ ‘Outsourcing Definition’ (*Oxford English Dictionary (OED)*)

<<http://www.oed.com/view/Entry/257590?redirectedFrom=outsourcing+&>> accessed 10 January 2017.

³² Surrogacy Arrangements Act 1985, chapter 49, part 1a – the arrangement is not enforceable.

³³ See Debra Satz, *Why Some Things Should Not Be For Sale: The Moral Limits of Markets* (Oxford University Press 2010). It has also been referred to as ‘third party assisted reproduction’.

³⁴ Indian surrogates earn on average a quarter or third of what US surrogates earn. Reported in Kalindi Vora, ‘Indian Transnational Surrogacy and the Commodification of Vital Energy’ (2009) 28 *Subjectivity* 266, 270; Smerdon (n 17) 86;

industries that have outsourced their production to developing countries, e.g., the garment industry. In fact, the success of this business model had led to India being named ‘surrogacy outsourcing capital of the world’.³⁵

India’s position as a post-colonial state, its post-independence economic development strategies, and the global inequalities that existed along these cross-border reproduction lines are significant factors in understanding the context of these arrangements and will be dealt with in greater detail in Chapter 2. To return to the slogan created by the tourism ministry (‘First-world treatment at third-world prices’), not only does it capture the power dynamics in the arrangements, but it also raises serious concerns over the disregard for the women’s rights and interests and the invisibility and undervaluing of their labour. This concern is also addressed by Jennifer Rimm who goes as far as to claim that international surrogacy is ‘especially problematic when performed at “bargain prices” for wealthy foreigners because it promotes the racist and imperialist view that it is acceptable to exploit and dehumanize women of different origins’.³⁶ While Rimm takes a strong view against the practice, and the potential for exploitation and mistreatment can be somewhat mitigated, it does illuminate some of the difficult and unsettling aspects and dynamics in the context of these arrangements. These themes form the basis of the discussion in Chapter 4 on the effectiveness of the Surrogacy (Regulation) Bill’s objectives.

Amrita Pande, “‘At Least I Am Not Sleeping with Anyone’: Resisting the Stigma of Commercial Surrogacy in India’ (2010) 36 *Feminist Studies* 292, 297.

³⁵ Nadimpally, Marwah and Sheno (n 21) 4.

³⁶ Jennifer Rimm, ‘Booming Baby Business: Regulating Commercial Surrogacy in India’ 30 *University of Pennsylvania Journal of International Law* 1429, 1446.

1.1.5 The Indian journey in regulating surrogacy

The Indian journey in regulating surrogacy has been lengthy and varied with approaches that have developed from a liberal position to one that is restrictive and protectionist.³⁷ In Chapter 3 I will provide a detailed timeline and analysis of this journey, but I will give a brief account of some important points here. Surrogacy arrangements in India had been governed by the non-binding guidelines introduced in 2005 by the Ministry of Health and Family Welfare, the Indian Council of Medical Research, and the National Academy of Medical Sciences³⁸ until the Surrogacy (Regulation) Act 2021 was finally passed in December 2021³⁹ and came into force in January 2022.⁴⁰ In 2006 some additional provisions for surrogacy arrangements were provided in the ‘Ethical Guidelines for Biomedical Research on Human Participants’.⁴¹ The ruling by the Supreme Court of India in the 2008 *Baby Manji* case found commercial surrogacy in India to be lawful and largely unregulated.⁴² Additionally, the Law Commission of India in its 2009 report proclaimed commercial surrogacy to be legal because there was no law prohibiting it.⁴³ The lack of mandatory guidelines and legally binding regulations had been highly problematic, as the cases of the Balaz twins⁴⁴ and Baby Manji show,⁴⁵ and as such the Indian government had been failing to adequately control the industry and provide protections for the most vulnerable parties to the arrangements.

³⁷ In Chapter 3 I will return to discuss this at greater length within the framework developed by Prabha Kotiswaran, see Prabha Kotiswaran, ‘Surrogacy in India’ in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019).

³⁸ Indian Council of Medical Research and National Academy of Medical Sciences, ‘National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India’ (Ministry of Health and Family Welfare (Government of India) 2005). Indian Council of Medical Research and National Academy of Medical Sciences, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, (2005).

³⁹ The Surrogacy (Regulation) Act, 2021, 47 of 2021 came into force on 25th January 2022, but as this research was conducted prior to the passing of the Act it critiques the Bill as it was introduced and the subsequent versions before it was passed.

⁴⁰ Announcement in the Official Gazette. See, Gov. of India, Department of Health Research, F.No.U.11019/01/2017 (24 January 2022).

⁴¹ Indian Council of Medical Research and National Academy of Medical Sciences, ‘Ethical Guidelines for Biomedical Research on Human Participants’, (2006).

⁴² *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518. The Supreme Court of India has played a central role in directing the legal reforms to surrogacy which I will examine in greater detail in Chapter 3.

⁴³ Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Obligations of Parties to a Surrogacy*, Report No.228, para. 3.5(a), (August 2009) available at <https://lawcommissionofindia.nic.in/reports/report228.pdf> (accessed 16th February 2019).

⁴⁴ *Jan Balaz v Anand Municipality*, Special Civil Application, No. 3020 of 2008.

⁴⁵ These are described in detail in Chapter 3.

The Baby Manji case helped advance wider debates concerning the children born from these arrangements and led to the drafting of the Assisted Reproductive Technology Bill, 2008,⁴⁶ which underwent several revisions before finally passing in December 2021 and coming into force in January 2022.⁴⁷ However, the discussions surrounding the surrogates have been largely focussed on concerns over the exploitation and commodification of the women, with frequent mention in the questions raised at the Indian Parliament.⁴⁸ Yet the political will to acknowledge and address a fuller scope of issues affecting the women has been lacking and they have been given insufficient attention in the legal and paralegal discussions on surrogacy.⁴⁹ The core argument of the thesis is that these aspects have been overlooked, at least in part, because of a failure to recognise the model of pregnancy underpinning the legislation. The earlier versions of the draft bills had been more favourable to the clinics and commissioning parents and arguably at the expense of the surrogates.⁵⁰ Prominent women's rights organisations such as SAMA and Centre for Social Research also claim that the Draft Assisted Reproductive Technologies Bill failed to account for the surrogate mothers' needs in favour of protecting the profitability of the industry and various other parties' interests.⁵¹ As a result opportunities have been missed to ensure adequate protection of the surrogates' health and rights. An increased focus on the surrogates came with the introduction of the separate Surrogacy (Regulation) Bill, 2016, through one of its main objectives to protect them from potential exploitation. It aimed to achieve this by prohibiting commercial and international surrogacy in favour of 'ethical altruistic' arrangements and through restricting the eligibility criteria for the surrogate to a 'close relative' of the commissioning couple. The eligibility criteria clause was amended before the Bill's reintroduction in

⁴⁶ Indian Council for Medical Research, Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008.

⁴⁷ In 2010, 2014, 2015, 2016 and 2021. Announcement in the Official Gazette. See, Gov. of India, Department of Health Research, F.No.U.11019/01/2017 (24 January 2022).

⁴⁸ In Chapter 3 I will provide more detail on these questions.

⁴⁹ There are women's rights organisations such as SAMA and Centre for Social Research who have persistently lobbied for the interests and rights of the surrogates.

⁵⁰ This is a view also shared by Sneha Banerjee and Prabha Kotiswaran, 'Divine Labours, Devalued Work: The Continuing Saga of India's Surrogacy Regulation' (2021) 5 Indian Law Review 85, 87. I will discuss this further in Chapters 3 and 4.

⁵¹ See SAMA - Resource Group for Women and Health, 'The Myth of Regulation: A Critique of the 2008 Draft ART (Regulation) Bill and Rules' (2009).

2021 to allow ‘a willing woman’ to act as surrogate.⁵² The Bill made explicit reference to the potential exploitation and coercion of the surrogates. In Chapter 4 I will evaluate this main objective of the Bill at length by providing a definition of exploitation against which to assess its effectiveness at addressing this issue and through examining the conditions that can give rise to the potential exploitation of the surrogates. The Parliamentary Standing Committee on Health and Family Welfare which was tasked with scrutinising the Bill also discussed how the potential exploitation of the surrogates was being approached in the Bill and found it to be inadequate. In Chapter 3 will also present the Parliamentary Standing Committee’s discussions and recommendations on the Surrogacy (Regulation) Bill, 2016 and the ART Bill, 2020 as well as those of the Select Committee of the Rajya Sabha that also scrutinised the updated Surrogacy (Regulation) Bill, 2019.

On 9th July 2012 the Ministry of Home Affairs circulated notification no. 25022/74/2011-F-1 specifying that medical visas were required for those commissioning surrogacy arrangements in India.⁵³ On 3rd November 2015 this was superseded by another notification, no. 25022/74/2011-F-1 (Vol. III), also from the Ministry of Home Affairs declaring that medical visas would no longer be issued to international couples, thereby prohibiting foreign nationals, and People of Indian Origin (PIO) and Overseas Citizens of India (OCI) cardholders from commissioning surrogacy arrangements in India.⁵⁴ Furthermore, surrogacy would not be available to unmarried or same sex couples and therefore permitting only ‘heterosexual married couples with a marriage subsisting for two years or more to commission surrogacy in India’.⁵⁵ The Surrogacy (Regulation) Bill, 2016 also specified that

⁵² The initial eligibility criteria that restricted the possibility of becoming a surrogate to a close relative of the commissioning couple is an important discussion point and I will return to analyse it in Chapters 4 and 6.

⁵³ Ministry of Home Affairs, Most Immediate Circular No. 25022/74/2011-F-1 (Issued on July 9, 2012).

⁵⁴ See Bureau of Immigration (India), ‘Surrogacy Rules for Foreign Nationals’ (3 November 2015) <<https://boi.gov.in/content/surrogacy>> accessed 10 January 2017. Some more detail on these steps is given by Tariq Ahmad, ‘India: Draft Legislation Regulating Assisted Reproductive Technology Published’ (*Library of Congress*, 2015) <<https://www.loc.gov/item/global-legal-monitor/2015-11-02/india-draft-legislation-regulating-assisted-reproductive-technology-published/>> accessed 22 January 2017.

⁵⁵ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 1.4 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

surrogacy arrangements would be limited to Indian citizens only⁵⁶ and therefore ending the cross-border side of the practice. India had become a ‘hotspot’ for international surrogacy arrangements, as Thailand had been, and this move to prohibit commercial surrogacy appears to follow Thailand’s approach.⁵⁷ Thailand moved to prohibit commercial and international arrangements after the very public case of Baby Gammy, a baby boy born with Down’s Syndrome and left behind by the commissioning parents while his twin sister was claimed and taken to Australia, their country of residence. This case prompted a strong response from the Thai Government with lawmaker Wanlop Tangkananurak proclaiming that Thailand would no longer be ‘the world’s womb’.⁵⁸

1.1.6 International regulation

In response to several high-profile legal cases relating to international surrogacy arrangements, such as the Indian and Thai cases mentioned earlier, the Permanent Bureau of the Hague Conference on Private International Law has been working on the feasibility of creating a convention on international surrogacy arrangements.⁵⁹ In March 2021 the mandate of the Expert Group was extended by the Council on General Affairs and Policy for another year with a final report expected in 2023.⁶⁰ Some commenters on international surrogacy have argued that the stricter restrictions established by the

⁵⁶ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl.4.

⁵⁷ The Thai Government had begun the process of prohibiting commercial surrogacy in 1997 but the Guidelines that were introduced were non-mandatory as was the case in India. See, ‘Thailand Medical Council Regulations on Surrogacy and IVF’ (*Thai Law Forum*, 2 September 2014) <<http://www.thailawforum.com/medical-surrogacy-regulations/>> accessed 25 January 2017. For more detail on the legislation enacted in 2015, ‘Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act), B.E. 2558 (2015)’ see Ployparn Ekraksasilpchai and Sayuri Umeda, ‘Thailand: New Surrogacy Law’ (*Library of Congress*, 6 April 2015) <<https://www.loc.gov/item/global-legal-monitor/2015-04-06/thailand-new-surrogacy-law/>> accessed 3 February 2017. Also, Yuri Hibino, ‘Non-Commercial Surrogacy in Thailand: Ethical, Legal, and Social Implications in Local and Global Contexts’ (2020) 12 *Asian Bioethics Review* 135.

⁵⁸ See, ‘Thailand Bans Commercial Surrogacy for Foreigners’ *BBC News* (20 February 2015) <<https://www.bbc.co.uk/news/world-asia-31546717>> accessed 10 January 2017.

⁵⁹ Some detail on the background is available here - Hague Conference on Private International Law, ‘Parentage/Surrogacy - 2010 and Prior’ <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior>> accessed 3 February 2017. See also, Hague Conference on Private International Law, ‘A Preliminary Report on the Issues Arising from International Surrogacy Arrangements’ (2012) Prel. Doc. No 10.

⁶⁰ Updated information on the project can be found here - Hague Conference on Private International Law, ‘The Parentage/Surrogacy Project’ <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior>> accessed 4 April 2022.

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption⁶¹ have led to an increase in the demand for surrogacy arrangements to meet the decrease in ‘supply’ of babies.⁶² The tighter controls on inter-country adoption means that far fewer children are available for couples to adopt and therefore they are turning to surrogacy as an option. The convention on international surrogacy aims to respond to the legal issues that have caused complications such as the recognition of legal parenthood and nationality.⁶³ Unfortunately, the initial reports on the aims and purpose of the convention did not include the treatment or wellbeing of the surrogates, which could be useful and important in terms of the protection of their rights and interests. There is clearly a lacuna in the regulation in terms of the treatment and protection of the women involved in these arrangements at an international level and had been at a national level in India until the recent enactment of legislation. In Chapters 3 and 4 I will discuss the challenges arising from the long absence of legally binding and adequate regulation of the surrogacy arrangements in India and the creation of a wider industry to support and facilitate them.

1.2 Definitions of key terms

In this section I will discuss definitions of surrogacy and surrogate mothers and set out how they are defined in the Indian legislation.

⁶¹ Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 33. Hereinafter ‘Convention on Intercountry Adoption’.

⁶² See, International Social Service (ISS), ‘Evaluation of the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Inter-Country Adoption’ (2005) 3. Also, N Cantwell, ‘Intercountry Adoption – A Comment on the Number of “Adoptable” Children and the Number of Persons Seeking to Adopt Internationally’ (2003) V The Judges’ Newsletter (published by the Hague Conference) 69–72 <<https://assets.hcch.net/upload/spring2003.pdf>> accessed 10 January 2017. Hague Conference on Private International Law, ‘A Preliminary Report on the Issues Arising from International Surrogacy Arrangements’ (2011) Prel. Doc. No 11. See also Karen Smith-Rotabi and Nicole Footen Bromfield, ‘The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns’ (2012) 12 *Affilia: Journal of Women and Social Work* 129. And Seema Mohapatra, ‘Adopting an International Convention on Surrogacy—A Lesson from Intercountry Adoption’ (2015) 13 *Loyola University Chicago International Law Review* 25.

⁶³ These are the main issues from the cases of the Balaz twins and Baby Manji which I will give more detail on in Chapter 3.

1.2.1 Definitions of surrogacy and surrogate mother

Surrogacy is defined as the act of substitution for another in a particular role.⁶⁴ In terms of ARTs it is further defined and subdivided into gestational surrogacy: where the fertilised egg of the genetic mother or an egg donor is implanted into the surrogate mother, and straight or ‘traditional’ surrogacy: where the egg of the surrogate mother is fertilised with either the sperm of the intended father or that of a donor.⁶⁵ This practice was initially referred to as ‘surrogate motherhood’ before ‘surrogacy’ became the dominant and most frequently used term. The change in terminology marks a shift and process of diminished focus on the mother, which I would argue is related to the way the pregnant woman is viewed in the arrangement due to it being underpinned by the foetal container model of pregnancy. I will briefly outline this model later in this chapter before I return to give a fuller account in Chapter 5 of the thesis on the philosophical discussions surrounding the definition of the mother-foetus relationship.

The term ‘surrogate mother’, although often used to refer to the woman engaged in the surrogacy arrangement including in the Indian legislation, is seen by some as a value-laden and confusing phrase.⁶⁶ Some commentators on surrogacy prefer the term ‘gestational mother’ or ‘birth mother’. There is also some interesting discussion on whether the term ‘surrogate mother’ should in fact be completely rejected. Christine Overall argues that it is impossible to act as a surrogate mother and that what the arrangement consists of is the transfer of parental rights and not the substitution of a role.⁶⁷ In effect, you cannot be a ‘surrogate mother’ because you are simply ‘the mother’.⁶⁸ This also relates to

⁶⁴ ‘Surrogate Definition’ (*Oxford English Dictionary*)

<<http://www.oxforddictionaries.com/definition/english/surrogate?q=surrogate+>> accessed 22 January 2017.

⁶⁵ Taken from the definitions used in this study European Parliament, ‘A Comparative Study on the Regime of Surrogacy in EU Member States’ (European Parliament 2013) 12–13. For definitions also see Trimmings and Beaumont (n 3) 627.

⁶⁶ For more discussion on this see, Debra Satz, ‘Markets in Women’s Reproductive Labor’ (1992) 21 *Philosophy & Public Affairs* 107.

⁶⁷ Christine Overall, ‘“Whose Child Is This?” “Surrogacy” and the Value of Procreative Labour’ (2017). A paper given at the conference ‘Women’s and Mothers’ Labor: The Stakes of Surrogacy’ at Université Grenoble Alpes on 9 March 2017.

⁶⁸ Carole Pateman supports this view claiming that ‘[t]he wife is more accurately called the surrogate mother, just as; in cases of adoption, the couple are surrogate mother and father.’ The use of ‘wife’ here means the commissioning mother. Carole Pateman, *The Sexual Contract* (Polity Press 1988) 216.

the key contribution of this thesis on the interrogation of the model of pregnancy underpinning the practice and the legal reforms of surrogacy in India, as it includes assumptions about the role of the pregnant woman and the implications of this view. Such that the model in operation facilitates or allows the gestational mother to be considered a *surrogate* mother as opposed to *the* mother. The consequences of the model influencing the practice and legal reforms are the focus of Chapter 6 where I analyse them within the frameworks of gendered harm and embodiment. For the purpose of this work ‘surrogate’, ‘birth mother’, and ‘gestational mother’ will be used to mean the same thing. However, ‘surrogate’ will be favoured in this thesis simply for brevity, but the other terms may be used interchangeably when appearing in cited works unless otherwise stated.⁶⁹ The term ‘gestational carrier’ which is common in the USA will not be used because it is an impersonal term that works to dehumanise the pregnant woman and diminish her role, and subsequently reinforces the foetal container model of pregnancy.

1.2.2 Definitions in use in India: surrogacy and surrogate mother

As the practice of surrogacy in India is the focus of this thesis it is necessary to establish and assess the definitions in use in that jurisdiction. In Chapters 4 and 6 I will critically examine the definitions and provisions relating to surrogacy and the surrogate mother, and their reliance on the foetal container model of pregnancy. In the initial Guidelines produced by The Indian Council for Medical Research (ICMR) the following definition is given:

Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate.⁷⁰

⁶⁹ For more discussion on the definitions of ‘surrogate mother’ see, John Robertson, ‘Surrogate Mothers: Not so Novel after All’ (1983) 13 Hastings Centre Report 28. And Rosemarie Tong, ‘Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus’ in Joan Callahan (ed), *Reproduction, Ethics and the Law: Feminist Responses* (Indiana University Press 1995).

⁷⁰ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, (2005), 10.

Chapter 3 of the Guidelines on ‘Code of Practice, Ethical Considerations and Legal Issues’ section 3.10 gives ‘General Considerations’ for surrogacy which includes the transfer of parental rights for the child, the medical necessity of surrogacy for the intended parents, the payment and advertising procedure for the surrogate, as well as details on the required age range, relation to the intended parents, the screening process, and a limit of three times that a woman can act as a surrogate in her lifetime.⁷¹

The ICMR also produced the first Draft Assisted Reproductive Technologies (Regulation) Bill and Rules in 2008, which underwent several revisions before finally passing in 2021. The 2014 version of the Bill proposed the following definition:

“surrogacy”, means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.⁷²

This definition is slightly more comprehensive than the one given in the Guidelines, and both preclude the possibility of ‘traditional’ surrogacy through specifying that the arrangement involves gestational surrogacy. The Surrogacy (Regulation) Bill, 2016 proposed by the Department of Health Research, that operates within the Ministry of Health and Family Welfare, in August 2016 defines surrogacy as:

a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.⁷³

This is the same wording that appears in the Surrogacy (Regulation) Act 2021.⁷⁴ The Bill provides that:

“surrogate mother” means a woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4.⁷⁵

⁷¹ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, (2005), 68-69.

⁷² Indian Council for Medical Research, Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2014, Cl.2.

⁷³ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl.2, paragraph (zb).

⁷⁴ Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl. 2, ‘(zd) “surrogacy” means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth’.

⁷⁵ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 2, paragraph (ze) I will evaluate and provide detail on the conditions of the sub-clause in Chapters 4 and 6.

Although ‘traditional’ surrogacy is not expressly prohibited it is clear that gestational surrogacy is favoured in both Bills. Following the recommendations of the Parliamentary Standing Committee on Health and Family Welfare that the definitions be more comprehensive such as provided in the earlier version of the Draft ART Bills the Surrogacy (Regulation) Act, 2021 now includes the term ‘gestational surrogacy’ and gives an explanation.⁷⁶

1.2.3 Models of surrogacy: commercial and altruistic

The most significant change in definitions for surrogacy in the Surrogacy (Regulation) Bill is the inclusion of the categories of commercial and altruistic surrogacy. These models of surrogacy are defined as follows:

“altruistic surrogacy” means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.⁷⁷

“commercial surrogacy” means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.⁷⁸

In the context of the Indian legislation the key feature of commercial surrogacy that distinguishes it from altruistic surrogacy is any payment to the surrogate other than medical or as prescribed expenses. In Chapter 4 I will examine how the implications of these different types of surrogacy and how this radical change in the practice of surrogacy in India relate to the aim of eliminating the potential exploitation of the surrogates.

⁷⁶ Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl. 4.

⁷⁷ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 2, paragraph (b) The Surrogacy (Regulation) Act 2021 ‘and such other prescribed expenses’.

⁷⁸ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 2, paragraph (f). The Surrogacy (Regulation) Act 2021 provides the same definition with the inclusion of ‘and such other prescribed expenses’.

1.3 Research questions and contribution

This thesis considers whether a reconceptualisation of pregnancy is the key to a better understanding and regulation of surrogacy in India. To answer this, I seek to establish and evaluate which conceptualisation of pregnancy is underpinning the approaches to practice and regulation, and more crucially the consequences of that model for the surrogates. I will explore metaphysical claims about the nature of the maternal-foetal relationship and how they extend into cultural discourses and practices before applying them to surrogacy. This involves interrogating the underlying assumptions implicit in the dominant conception of pregnancy and how they operate in surrogacy. The main research question of this work stems from the position that in order to address the complex challenges of surrogacy and to implement effective regulation we must first consider the fundamental questions of how we conceive of pregnancy, if and how that is altered in surrogacy, and ultimately whether an alternative view of pregnancy would significantly transform the approaches to its practice and regulation. The maternal-foetal relationship and how it is defined in legal and philosophical terms is therefore essential to our conception of pregnancy in general and surrogacy in particular. The standard discourses surrounding surrogacy leave gaps which can best be addressed through an analysis of this relationship. I will now provide brief accounts of the models under investigation in this thesis.

1.3.1 Models of pregnancy: brief definitions

1.3.1.1 The Foetal Container Model

The foetal container model sees the foetus as a self-standing entity, that is merely *surrounded* by the pregnant woman but not a part of her. In Chapter 5 I will show how this model can be constructed from and traced in the Aristotelian view of pregnancy and the metaphors of seed and soil found in ancient Indian texts. This view is premised on the notion that the male seed (taken to contain the full potential of human life) is implanted in the female, which is considered mere matter or the ‘environment’, to gestate. In analysing metaphysical claims about the nature of the maternal-foetal

relationship I will present Barry Smith and Berit Brogaard's analogy of the foetus being inside the mother in the same way as 'a tub of yogurt is inside your refrigerator'.⁷⁹ This description of the relationship establishes them as two separate entities, where the foetus inhabits a space inside the pregnant woman, and she forms the environment for the foetus. The tub of yoghurt as a representation of the foetus and the refrigerator as the mother constructs an understanding whereby the entities are not only separate but also completely different. How this claim extends into cultural understandings of pregnancy leads to certain assumptions about the gestational role of the pregnant woman and how this function can be outsourced or transferred to any other woman. This analogy also suggests that they are separable parts, in that the foetus is already fully formed when placed inside the woman and can then be taken out and placed again inside her body in this state. Yet, this is clearly not the case in pregnancy. Explicit examples of how this model of pregnancy operates within the medio-legal context and decision-making are the cases of court-ordered and forced caesarean sections because they provide strong evidence of women being treated first and foremost as foetal containers.⁸⁰ Isabel Karpin claims that they represent 'the ultimate case for the construction of the female body as a replaceable container for the separate and alienated fetus and the annihilation of the female as active participant'.⁸¹

1.3.1.2 Parthood view or Part/Whole Model

In Chapter 5 I will also present an alternative conception of pregnancy to show how the foetal container model is not the only possible understanding of pregnancy and that it is also socially and culturally constructed. Elselijn Kingma develops and defends a parthood view of pregnancy, which proposes that foetuses are a *proper part* of the pregnant organisms – like blood, kidneys, and hair.⁸² This means that

⁷⁹ Barry Smith and Berit Brogaard, 'Sixteen Days' (2003) 28 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 45, 74.

⁸⁰ An in-depth discussion on this is beyond the scope of this thesis but see Sheelagh McGuinness, 'Legal Commentary: St George's Healthcare NHS Trust v S; R v Collins and Others, Ex Parte S [1998] 3 All ER 673.' in S Smith and others (eds), *Ethical Judgments: Re-Writing Medical Law*. (Hart Publishing 2016).

⁸¹ Isabel Karpin, 'Legislating the Female Body: Reproductive Technology and the Reconstructed Woman' (1992) 3 *Columbia Journal of Gender and Law* 325, 346.

⁸² Elselijn Kingma, 'Lady Parts: The Metaphysics of Pregnancy' (2018) 82 *Royal Institute of Philosophy Supplements* 165, 167.

the pregnant woman includes the foetus as one of her parts. Karpin also holds this position claiming that ‘the woman's body is seen as neither container nor separate entity from the fetus. Until the baby is born the fetus is the female body. It is part of her body/self.’⁸³ She further claims that ‘[t]here is no scientifically verifiable “fact” that designates woman and fetus as separate.’⁸⁴ Pateman also takes this view claiming that:

The “surrogate” mother contracts out right over the unique physiological, emotional and creative capacity of her body, that is to say, of herself as a woman. For nine months she has the most intimate possible relation with another developing being; the being is part of herself.⁸⁵

According to this model the foetus and mother are not two distinctly separate entities, where one is *surrounded* by the other, but two non-separate entities, where one (the woman) is the whole and the other (the foetus) is one of the many parts of that whole. It should be emphasised that the parthood view alone does not make any moral claims and tells us very little about the nature of the part. Parts differ; kidneys and hair are very different, and so are foetuses, which are neither like kidneys nor like hair.⁸⁶ The application of this alternative view of pregnancy could lead to a different or potentially better approach to understanding surrogacy and its regulation. Similarities are often drawn between surrogacy and organ donation, particularly in commercial surrogacy arrangements in terms of body commodification,⁸⁷ and the application of a parthood view could increase this alignment. However, there are fundamental differences, notably a woman can act as a surrogate multiple times but cannot donate multiple kidneys.

⁸³ Karpin (n 81) 326. [Emphasis in the original].

⁸⁴ *ibid.*

⁸⁵ Pateman (n 68) 215.

⁸⁶ Elselijn Kingma, ‘Were You a Part of Your Mother?’ (2019) 128 *Mind* 609, 637.

⁸⁷ There is a wealth of literature that deals with the similarities and differences between organ donation and commercial surrogacy with respect to body commodification. See for example, Sunita Reddy and Tulsi Patel, “‘There Are Many Eggs in My Body’: Medical Markets and Commodified Bodies in India’ 26 *Global Bioethics* 218.

1.3.2 Implications for surrogacy

A reconceptualisation of the mother-foetus relationship has general applicability and implications for the wider regulation of reproduction as well as the potential to fundamentally alter the perception and regulation of surrogacy. In this thesis, I will argue that the foetal container model of pregnancy is the received view of pregnancy, that is firmly embedded in understandings of pregnancy and is endemic in the treatment of (pregnant) women in the medical context and the law's approaches to regulating reproduction. Furthermore, that this view is especially dominant in (gestational) surrogacy because it requires and reinforces it. In constructing an account of the foetal container model in Chapter 5, I will reveal how deeply hidden it is in Western and Indian contexts through a critical review of the discourses and language relating to pregnancy and surrogacy. I will further show in Chapter 6 with reference to ethnographic studies and documentaries, and the regulatory interventions and paralegal discussions in India that the foetal container model is operating without acknowledgement and that is facilitating some of the harms sustained by the surrogates. I will do this through the framework of gendered harm⁸⁸ and theories of embodiment. Establishing the extent to which this model pregnancy is operating in the practice and reforms to surrogacy in India provides a better understanding of the problems that arise and the opportunity to design more effective and appropriate regulation that centres the surrogates.

1.3.2.1 Gestational surrogacy and genetic links

An important aspect of this work on different models of pregnancy is exploring whether and to what extent gestational surrogacy alters the maternal-foetal relationship, especially as it is the only type of surrogacy permitted by the ICMR Guidelines and the Surrogacy (Regulation) Bill. It is significant because the type of surrogacy practiced is fundamentally tied to how the maternal-foetal relationship is viewed and understood. Gestational surrogacy 'disrupts' the genetic link between the pregnant

⁸⁸ Robin West, *Caring for Justice* (New York University Press 1997).

woman and foetus and impacts how parentage is attributed because it is the genetic link between the intended parents and child(ren) that determines the legal parentage in surrogacy arrangements in India.⁸⁹ It is also important in terms of ‘ownership’ legally and emotionally speaking because the genetic link is seen to confer ‘ownership’ rights to the intended parents over the embryo, and then foetus, throughout the arrangement. I argue that this requires and reinforces the foetal container model of pregnancy. The absence of genetic link between the surrogate and foetus is seen to reduce the risk of her refusing to relinquish the baby⁹⁰ and to help her to distance from the child. However, this position has been countered in studies conducted by Amrita Pande through interviews with surrogates in India, as some of them maintained that their role of gestating the children and the sharing of blood creates ‘ownership’ and kinship ties.⁹¹

1.3.2.2 Assumptions about the role of the surrogate

The foetal container model is problematic for several reasons in surrogacy. It reinforces the perception of the surrogate as a mere incubator or environment for the foetus, which develops as an independent and continuous entity all the way from embryo to foetus to child, and where one is as good as the other. This preserves notions of the fungibility of the womb as any healthy womb will do, as long as it provides enough nutrients. It upholds the imagined ‘purity’ and ‘perfection’ of the foetus which merely extracts nutrients from its ‘environment’ but is not in important ways shaped, formed, or influenced by gestation: its ‘nature’ is determined by its, often carefully selected, genetic material alone. It also presents a more palatable picture of surrogacy as a commercial service-transaction rather than a trade

⁸⁹ The attribution of legal parenthood differs between jurisdictions, e.g., in the UK the birth mother is the legal mother and therefore parental rights are transferred after the birth to the intended parents.

⁹⁰ See reports by SAMA and Centre for Social Research: SAMA - Resource Group for Women and Health (n 51) 8–13; SAMA Resource Group for Women and Health, ‘Assisted Reproductive Technologies: For Whose Benefit?’ (2009) 44 *Economic and Political Weekly* 25; Centre for Social Research, *Surrogate Motherhood: Ethical or Commercial (Surat and Gujrat)* (2012); Centre for Social Research, *Surrogate Motherhood: Ethical or Commercial (Delhi and Mumbai)* (2012).

⁹¹ See Pande, “‘At Least I Am Not Sleeping with Anyone’”: Resisting the Stigma of Commercial Surrogacy in India’ (n 34); Amrita Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (2010) 35 *Signs* 969; Amrita Pande, ‘Commercial Surrogate Mothering in India: Nine Months of Labor?’ in Kenji Kosaka and Masahiro Ogino (eds), *A Quest for Alternative Sociology* (Trans Pacific Press 2008).

in babies. Such notions are contested, but they likely contribute to the dehumanisation of the surrogate through this objectification, which I define in Chapter 4 by drawing on the work of Martha Nussbaum, and where her reproductive capacity and its profitability have greater value than her rights, interests, and wellbeing as a full human subject. International commercial surrogacy further problematises this because the implantation of Western embryos in Indian women for gestation echoes the outsourcing of other industries that exploit global inequalities and where women in the Global South are favoured because of the accessibility and lower cost of their labour. Pande describes surrogacy as ‘dirty work’ due to its stigmatisation in India,⁹² which is a term used for work that is delegated to others because it is seen as undesirable, difficult, undervalued, and underappreciated. I will elaborate on this in Chapter 4 in the feminist analysis of the structural inequalities faced by the surrogates.

1.3.2.3 Assumptions about the transaction

The foetal container model also works to underpin certain assumptions regarding the nature of the transaction involved in surrogacy. Surrogacy is widely regarded as a ‘service’, that what the surrogate offers in exchange of money (in commercial arrangements) is the *service* of gestation, the act of pregnancy, the use of a body or space, the labour of providing nutrients and physical care.⁹³ This view of surrogacy as a service aligns it with other forms of body work, such as (but of course also very different from) prostitution or childcare work.

The part-whole model of pregnancy may prompt us to question the nature of the transaction. Does the commercial surrogacy transaction resemble the selling of an organ or body part, albeit an entirely unique one? For, like hair but unlike kidneys, foetuses are ‘renewable’. However, the processes and

⁹² Amrita Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (2009) 16 *Indian Journal of Gender Studies* 141.

⁹³ This conception of surrogacy as a service is criticised by Pateman. She argues that: ‘A woman can be a “surrogate” mother only because her womanhood is deemed irrelevant and she is declared an “individual” performing a service.’ Pateman (n 68) 217. See also *ibid* 212.

risks involved in doing so, unlike harvesting hair and like harvesting kidneys, are invasive and considerable. Or is the commercial surrogacy arrangement fundamentally a sale of babies? Although it is formally seen as a ‘service’ or ‘womb-rental’, in many arrangements the bulk of the fee is paid when the baby is born and relinquished which suggests that what is sold here is indeed a product rather than a service. Consequently, does the possibility of gestational surrogacy force us to change or reject Kingma’s argument that favours the part-whole model?

Crucially, surrogacy is neither exactly like any other form of body work, nor like any other form of body-part sale, because pregnancy is unique. It therefore does not fit neatly within the definition of service, job, or production. To adequately construe our understanding of surrogacy and to legislate for it, we must understand the nature of gestation as the unique thing that it is and equally, our understanding of this relationship must be able to comprehend and accommodate how surrogacy as an outsourced pregnancy might disrupt or alter our various understandings, definitions, and models of pregnancy.

1.4 Research design: Reflections on sources and methods

The research for this thesis consists of a theoretical, conceptual, and critical engagement with the issues arising from transnational commercial surrogacy in India. I conduct this through situating the practice in India’s economic and political development and exploring the ancient Hindu mythologies, Bollywood films, documentaries, and ethnographic studies described in detail in Chapter 2. As well as analysing the proposed legislation and paralegal discussions on the Bills presented and evaluated in Chapters 3 and 4. The critical thinking required when engaging with philosophical theories and metaphysical claims enables the exploration of the nature of pregnancy and how it applies to surrogacy. As surrogacy involves many ethical and legal challenges different approaches are required to deal with the complexity of the issue. I take an interdisciplinary approach and employ doctrinal, philosophical,

feminist, and discourse analysis to investigate fundamental questions about the nature of pregnancy and how it impacts on surrogacy both in its practice and regulation. Interdisciplinary and multimethod approaches can inform fresh and original insights and enrich the analytic quality of the research,⁹⁴ therefore offering the opportunity to develop new understandings of surrogacy and theoretical frameworks for evaluating its regulation.

The range of sources are used in combination to provide a rich and deep understanding of the phenomenon of surrogacy and its representation in Indian culture and society. I have engaged with varied sources to assess information at different levels and stages and to triangulate between a mix of methods for reliability and validity. The stories of surrogacy found in ancient Hindu mythology are often referred to by proponents of the practice as a means of justifying its existence in Indian culture and references to these stories have been made in the parliamentary debates on the Surrogacy (Regulation) Bill.⁹⁵ The depictions of surrogacy in Bollywood films help to explain how it has been understood in more recent years and how it has been stigmatised through an association with sex work. Through the extensive engagement with ethnographic studies that involved in depth interviews with the surrogates and other key actors in the arrangements we are able to access their voices and understand their experiences and intentions.⁹⁶ This follows from the fundamental need to centre the voices of the surrogates and to ground the analysis in their lived experiences.⁹⁷ Feminist scholarship argues for the capacity of counter-narratives to challenge systematic oppression and that such

⁹⁴ Paul Roberts, 'Interdisciplinarity in Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 106.

⁹⁵ Dr Boorna Narsaiah Goud (Bhongir): "Madam, in the Hindu mythology, Lord Balrama was born through surrogacy where the Devki's pregnancy was transferred to Rohini by Maya. We have had umpteen instances of surrogacy in Mahabharata and other mythologies..." Lok Sabha Debates, *Surrogacy (Regulation) Bill, 2018* 102, Session Number 16, 19 December 2018, *Comments by Dr Boorna Narsaiah Goud*, Available at https://eparlib.nic.in/bitstream/123456789/784190/1/lzd_16_16_19-12-2018.pdf (accessed 16th February 2019).

⁹⁶ The narratives of the surrogates have been translated into English which means that a layer of interpretation has already been applied by the documentary makers and the ethnographers.

⁹⁷ Bentzon et al. argue that research should be 'based in the reality of human life'. See, Agnete Weis Bentzon, Anne Hellum and Julie Stewart, *Pursuing Grounded Theory in Law. South-North Experiences in Developing Women's Law* (University of Michigan 1998) 25.

challenges should be based on lived experiences.⁹⁸ Grounded theory supports the engagement with ‘empirical knowledge about gender relations and local practices and procedures, in a constant dialogue within theoretical generalization and concept building’.⁹⁹ It also calls for ‘[l]egal concepts and theories... to be critically analysed through the medium of women’s and men’s lived experiences.’¹⁰⁰

Feminist researchers share common commitments and three of which concern giving voice to women’s lives and experiences, fighting gender inequalities, and empowering women by improving their opportunities and the quality of their lives¹⁰¹ This kind of research is not just *about* women but *for* women.¹⁰² As a feminist researcher based in the UK and therefore situated outside of the geographical and cultural context of these surrogacy arrangements in India it has been crucial to reflect on my own standpoint and perspectives as well as those of the surrogates in India and to be aware and sensitive to cultural, political, and societal differences.¹⁰³ This leads to acknowledging and understanding the importance of epistemological positions and biases, which is a central issue for feminist research.¹⁰⁴ Epistemology does not only concern what constitutes knowledge and how we know it but also how we recognise who the knowers are and what makes someone a knower.¹⁰⁵ The feminist standpoint

⁹⁸ Mari J Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations Minority Critiques of the Critical Legal Studies Movement’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323; Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 87 *Michigan Law Review* 2411; Catharine A MacKinnon, ‘Feminism, Marxism, Method, and the State: An Agenda for Theory’ (1982) 7 *Signs* 515.

⁹⁹ Weis Bentzon, Hellum and Stewart (n 97) 25.

¹⁰⁰ *ibid.*

¹⁰¹ Sharlene Nagy Hesse-Biber and Patricia Leavy, ‘Pushing on the Methodological Boundaries: The Growing Need for Emergent Methods within and across the Disciplines’ in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Handbook of Emergent Methods* (Guildford Publications 2008). Mary Hawkesworth, *Feminist Inquiry: From Political Conviction to Methodological Innovation* (Rutgers University Press 2006) 7. Alison M Jaggar, *Just Methods: An Interdisciplinary Feminist Reader* (Paradigm Publishers 2008) ix.

¹⁰² A view shared by Maureen McHugh. See, Maureen C McHugh, ‘Feminist Qualitative Research: Toward Transformation of Science and Society’ in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press 2014) 137.

¹⁰³ This relates to the need for ‘reflexivity’ – see Mary Maynard, ‘Methods, Practice, and Epistemology: The Debate about Feminism and Research’ in Mary Maynard and June Purvis (eds), *Researching Women’s Lives From A Feminist Perspective* (Routledge 1994). The researcher’s reflexivity is particularly important when looking at issues arising from globalisation and post-colonialism because of the complexities of historical power relations.

¹⁰⁴ Sandra Harding, *Feminism and Methodology* (Open University Press 1987). Liz Stanley and Sue Wise, *Breaking out Again: Feminist Ontology and Epistemology* (Routledge 1993).

¹⁰⁵ Maureen C McHugh and Lisa Cosgrove, ‘Gendered Subjects in Psychology: Dialectic and Satirical Positions’ in Lynn H Collins, Michelle R Dunlap and Joan C Chrisler (eds), *Charting a new course for feminist psychology* (Greenwood Press 2002).

perspective demands a critical analysis of women's lived experiences as described through their own eyes¹⁰⁶ as they are the authority on their own lives. It also recognises that a person's position within a political and social system will impact their understanding of reality.¹⁰⁷ Within this theory of standpoint is the recognition that other perspectives exist therefore a single woman's or feminist standpoint is not only implausible but impossible as other intersecting identities will impact a person's perspective, standpoint, and worldview.¹⁰⁸ One danger with this theory to be cognizant of is the criticisms of its inherent essentialism where women are considered a group,¹⁰⁹ therefore it is necessary to counter this by acknowledging the diversity and complexity of women's lives and experiences. A social constructionist position is also applicable to this research as it accounts for how views of the world are socially constructed and it requires making explicit the implicit assumptions that are embedded in our understandings of certain concepts,¹¹⁰ e.g., assumptions about pregnancy.

This is also achieved through employing discourse analysis where differing realities and cultural constructions of experience can be examined.¹¹¹ In this work I specifically analyse metaphors and other figures of speech in the language used to describe pregnancy and surrogacy.¹¹² Discourse relates to various types of communication including texts, language, conversations, narratives, interactions, or the production of a society.¹¹³ Norman Fairclough describes it as 'ways of representing aspects of the world—the processes, relations and structures of the material world, the “mental world” of thoughts,

¹⁰⁶ Patricia Leavy, 'Feminist Postmodernism and Poststructuralism' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Feminist research practice: a primer* (Sage Publications 2007).

¹⁰⁷ Maureen C McHugh and Lisa Cosgrove, 'Feminist Research Methods: Studying Women and Gender' in Michele A Paludi (ed), *The Praeger Guide to the Psychology of Gender* (Praeger 2004).

¹⁰⁸ Michelle Fine, *Disruptive Voices: The Possibilities of Feminist Research* (University of Michigan Press 1992).

¹⁰⁹ Abigail Brooks, 'Feminist Standpoint Epistemology: Building Knowledge and Empowerment Through Women's Lived Experience' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Feminist research practice: a primer* (Sage Publications 2007) 70.

¹¹⁰ McHugh (n 102) 143.

¹¹¹ Jennifer A Sandoval, 'Labour Pains: The Birth of Assisted Reproductive Technology Policy in India' (2016) 11 *Journal of Creative Communications* 119, 124.

¹¹² For an overview of metaphor analysis work see, Zazie Todd and Simon J Harrison, 'Metaphor Analysis' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Handbook of Emergent Methods* (Guildford Publications 2008).

¹¹³ Sandoval (n 111) 124.

feelings, beliefs and so forth, and the social world'.¹¹⁴ Rather than a static technique or formula it is a set of approaches that can be employed when working with text.¹¹⁵ Discourse analysis reveals the meanings attached to a concept or phenomenon within a particular context and a focus on the socio-political context of discourse shows how people are positioned or how they resist dominant discourses, which allows us to identify structural change strategies.¹¹⁶

The research also includes a textual analysis of the ICMR's Guidelines, the various drafts of the ART Bill and Surrogacy (Regulation) Bill and the final Acts, the committee reports on the Bills, the parliamentary debates surrounding the legislation, which I had translated from Hindi into English, key cases including court cases dealing with some of the legal and ethical complexities in surrogacy arrangements in India, and newspaper articles on surrogacy in the Indian and international press. This is a legal thesis concerned with how the law is made, applied, and reformed, which requires a doctrinal approach to analyse the legal principles found in statutes and case law.¹¹⁷ While this approach is appropriate for research questions that seek to determine what the law is¹¹⁸ it does not attempt to explore 'the fundamental questions about law's nature, sources, and consequences as a social phenomenon or about its moral groundings'.¹¹⁹ As such this thesis reflects the principles of socio-legal studies which concern the role, application and impact of law in society and challenge legal positivism.

¹¹⁴ Norman Fairclough, *Analyzing Discourse: Textual Analysis for Social Research* (Routledge 2003) 124.

¹¹⁵ Lisa Cosgrove and Maureen C McHugh, 'A Post-Newtonian, Postmodern Approach to Science: New Methods in Social Action Research' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Handbook of Emergent Methods* (Guildford Publications 2008) 78.

¹¹⁶ *ibid.*

¹¹⁷ Terry Hutchinson and Nigel James Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.

¹¹⁸ Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30.

¹¹⁹ Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociological Studies' (2002) 29 *Journal of Law and Society* 632, 633.

1.5 Outline of thesis

The thesis begins by describing the background context of commercial gestational surrogacy in India to explain how India came to dominate the global fertility industry and identifying some of the legal, ethical, and philosophical issues relating to the practice. After setting out the landscape of surrogacy in India in Chapter 2, I will present the timeline of regulation in Chapter 3, before critically examining one of the main objectives of the Surrogacy (Regulation) Bill in Chapter 4. I will argue that the Bill fails to fulfil its aim of protecting surrogates from exploitation and that this is (partly) due to the unacknowledged model of pregnancy underpinning the approaches to the practice and regulation. In Chapter 5 I will present and evaluate the foetal container model as well as offering an alternative view of pregnancy. In Chapter 6 I will tie this all together to illustrate how the foetal container model is operating in practice and legal reforms and how it facilitates the harms to surrogates, which manifest in violations and inadequate protections of their rights to autonomy, bodily integrity, and to give informed consent. I will analyse these harms through the framework of gendered harm and theories of embodiment to explain their nature and scope. I will also consider where and how an alternative view would lead to a different approach. The thesis aims to demonstrate why it is necessary to consider the conceptualisation of pregnancy operating in surrogacy and if a reconceptualisation would lead to better regulation. In order to assess the implications of a different model of pregnancy we need to establish the model at work and its consequences for the surrogates. This is the original and core contribution of this research, as the acknowledgement of the model underpinning surrogacy in India and the awareness of how it facilitates the potential harms of the surrogates can lead to more effective regulation that places them at the centre of law, practice, and regulation.

2 Surrogacy in India: surveying the landscape

*FIRST-WORLD TREATMENT AT THIRD-WORLD PRICES*¹²⁰

*India is well-positioned to lead the world in making commercial gestational surrogacy a viable industry: labor is cheap, doctors are highly qualified, English is spoken, adoptions are closed, and the government has aggressively worked to establish an infrastructure for medical tourism.*¹²¹

2.1 Introduction

This chapter will set out the landscape of surrogacy in India to situate it within the country's specific cultural, economic, and political context. I will examine in detail key features of the background conditions that led to India becoming a popular destination for commercial surrogacy. This will involve discussions on the legacies of colonialism, the post-independence reproductive politics, the drive to develop a knowledge society of highly trained medical professionals, and the neoliberal reforms that aimed to draw on the country's resources of skilled and 'cheap' labour. As the above quote indicates, India had all the necessary elements for a successful commercial surrogacy industry, and in addition to those listed by Smerdon were the availability of willing women, affordability, enforceable contracts, and the absence of legally binding regulation. I will identify some of the issues arising as result of this lacuna in the law and the main concerns and themes relating to the surrogates. I will also introduce the sources that I draw on for this research, which include the ancient Hindu stories with depictions that resemble (gestational) surrogacy, Bollywood films, documentaries, and ethnographic studies conducted in various cities in India. These sources are used to provide a deep and rich description of surrogacy and its representation in Indian culture and society.

¹²⁰ This phrase comes from the title of a medical tourism conference sponsored by India's tourism ministry. Cited in Abhiyan (n 22). Also in Bailey (n 22) 717.

¹²¹ Smerdon (n 17) 23.

2.1.1 Chapter outline

I will begin by charting the historical development of the practice within the wider medical tourism industry and introducing a key actor involved in ARTs and surrogacy in India, before engaging with the ethical and legal issues arising from the practice. Then I will examine the phenomenon of surrogacy within the broader context of India, discussing the conditions that led Indian women to undertake commercial surrogacy arrangements and how India's history, economic and social development, and geography led to it becoming a global hotspot for these arrangements as well as exploring its representation in Indian society and culture through the sources listed above. Finally, I will outline the main themes under investigation in this thesis.

2.2 History and development of surrogacy in India

India had become one of the main destinations for people seeking international surrogacy arrangements, since the practice became possible due to developments in assisted reproductive technologies. In fact, India has a prominent place in the history of ART development as it was quick to follow the UK in creating the world's second 'test tube baby'.¹²² As a result of Dr Mukhopadhyay's efforts India's first IVF baby was born in Kolkata only two months after the UK's first IVF baby, Louise Brown. The most well-known but second IVF birth in India occurred in 1986 in Mumbai under the care of Dr Anand Kumar and Dr Indira Hinduja. In 1988, another three doctors, including Dr Sulochana Gunasheela in Bangalore, successfully delivered IVF babies.¹²³

¹²² There was a great deal of controversy surrounding Indian's first IVF case, for more detail see Aditya Bharadwaj, 'The Indian IVF Saga: A Contested History' (2016) 2 *Reprod Biomed Soc Online* 54. See also Serena Josephine M, 'South India's First Test Tube Baby Turns Mother' *The Hindu* (11 July 2011) <<https://www.thehindu.com/news/cities/chennai/chen-health/south-indias-first-test-tube-baby-turns-mother/article6198130.ece>> accessed 12 January 2017.

¹²³ Described in the Indian Council of Medical Research and National Academy of Medical Sciences, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (2005) Cl. 1.1. Also in Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (NYU Press 2015) 34.

The non-binding guidelines set out by the Indian Council for Medical Research had allowed, amongst many other factors, for a very lucrative business to flourish with a large number of clinics establishing themselves in concentrated areas and regions of the country, such as Mumbai, and Anand in the State of Gujarat. Recent changes in regulation and legislation now appear to have brought about the end of India's reign as the global centre for international surrogacy arrangements. The Surrogacy (Regulation) Bill, 2016 calls for the prohibition of international and commercial arrangements.¹²⁴ The focus of this Bill, through its explicit wording, is eliminating the exploitation of the women who act as surrogates. In contrast to the Draft Assisted Reproductive Technology Rules and Regulations Bill, 2014 this separate Bill was designed with sole focus on surrogacy arrangements and in response to the numerous concerns raised by various actors; from the Supreme Court judges to women's organisations supporting the interests of the surrogates. However, how the Bill intends to do this also raises some serious concerns. These will be dealt with in turn in the following chapters, but I will highlight one here. The Bill specifies a list of criteria to be fulfilled before a woman can act as a surrogate, and in the initial proposal one key requirement was that the surrogate must be a close relative of the intended couple.¹²⁵ Although this requirement has been replaced with 'a willing woman'¹²⁶ in the final wording of the Act its original inclusion illuminates some of the thinking that underpins the approaches to regulating surrogacy. It appears that the motivation behind this move to altruistic surrogacy between family members stems from the belief that it is the commercial nature of the exchange that creates the potential for exploitation, and that containing surrogacy within the realm of gift and the family removes this potential. However, considering the status of women in Indian society and the strictly patriarchal structures within both the culture as a whole and the family this stipulation is troubling. It is highly possible that female family members, particularly less financially secure women, could be compelled to act as surrogates for their (wealthier) relations out of a sense of

¹²⁴ Now the Surrogacy (Regulation) Act, 2021, 47 of 2021.

¹²⁵ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl.4.

¹²⁶ The Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl.4.

duty or in payment for a debt. Therefore, by not accounting for these potential abuses of power the Bill would fail in its mission to protect women from potential exploitation. Support for this concern can be found in the ethnographic studies conducted by Amrita Pande at a clinic in Anand, in the State of Gujarat. She found that '[m]ost of the surrogates' husbands and in-laws view surrogacy as a familial obligation and not as labour performed by the women.'¹²⁷

2.2.1 The State of Gujarat

Fertility clinics offering a range of ART treatments and surrogacy 'services' have been mushrooming across India.¹²⁸ These clinics can be found in almost all of India's major cities such as Delhi, Mumbai, Bangalore, Kolkata, and Hyderabad but the city of Anand holds a very significant place in this business. It was one of the first places in India where a surrogacy arrangement was undertaken, carried out in 2003 by India's most well-known fertility doctor Nayna Patel, and then becoming the main centre for these arrangements. There have been reports of gestational surrogacy¹²⁹ arrangements taking place in India since the mid 1990s, with the first case reported in 1994 in Chennai.¹³⁰ In 1997, a woman from Chandigarh undertook a surrogacy arrangement in exchange of 50,000 rupees in order to pay for her paralysed husband's medical treatment.¹³¹ In 1999, an international arrangement between a couple from Germany and a woman from a village in Gujarat was reported in the Indian press.¹³²

¹²⁷ Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (n 92) 156.

¹²⁸ Stated in the Foreword by Shri Prasanna Hota, the Secretary of the Ministry of Health and Family Welfare to the ICMR Guidelines National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), p. ix.

Also mentioned in Lok Sabha Debates, *Artificial Reproductive Technology Clinics* 222, Session Number 11, 27 November, 2002, *Unstarred Question Number 1453 response by Shri A. Raja* Available at <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=49984&lsno=13> accessed 16th Feb 2019.

¹²⁹ Gestational surrogacy is defined as the process where the fertilised egg of the genetic mother or an egg donor is transferred to the surrogate mother's body.

¹³⁰ Geeta Padmanabhan, 'Hope in a Test Tube' *The Hindu* (19 January 2006) <<https://www.thehindu.com/todays-paper/tp-features/tp-metroplus/hope-in-the-test-tube/article3185857.ece>> accessed 20 November 2017.

¹³¹ Sandhya Srinivasan, 'Surrogacy Comes Out of the Closet' *Sunday Times of India* (6 July 1997) <http://www.womenstudies.in/elib/rep_%20tech/fr_surrogacy_comes.pdf> accessed 29 November 2017.

¹³² See Jyotsna Agnihotri Gupta, 'Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies' (2006) 13 *European Journal of Women's Studies* 23, 30.

It is noteworthy that the State of Gujarat has flourished as a destination for medical tourism. Gujaratis make up the highest percentage of the Indian diaspora and they are also the main group of non-resident Indians (NRIs) seeking medical treatments in Gujarat.¹³³ There are strongly established historical trading networks between Gujarat and the diaspora communities, notably those in East Africa. Kenya and Tanzania are home to large Gujarati communities.¹³⁴ Further to this Gujaratis are stereotypically known as traders and this is particularly evident in the way they are referred to in Tanzania; ‘mhindi’ which means ‘Indian’ in Kiswahili is also used to mean ‘businessperson’.¹³⁵ The high concentration of medical and reproductive tourism activity in Gujarat suggests that the phenomenon may largely occur in regional clusters rather than nationally¹³⁶ and questions whether it would make more sense to focus on the specifics of certain regions as opposed to India as a whole. This characteristic of international surrogacy arrangements, that they occur in concentrated areas, should inform the response of the Indian government to the practice. As there are likely to be specific aspects of the region, e.g., the demographic of women who engage in the arrangements, that affect how it should be approached and regulated. This could suggest that surrogacy arrangements in India require a localised response rather than the centralised approach that the government has taken, which perhaps does not take into account the variations and specifics of each region or even each city.¹³⁷ Notably, the State of Gujarat included a policy of promoting medical tourism in its economic strategy.¹³⁸ The fact that the

¹³³ See Pande, ‘Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India’ (n 92) 145–146. Padma Bhargav, ‘Gujarat Becomes the Preferred Medical Tourism Destination: More than 1,000 NRI’s and Foreigners Visit Every Year’ *Canada Free Press* (2006) <<https://canadafreepress.com/2006/india120706.htm>> accessed 18 March 2018. And Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 973.

¹³⁴ For a source on historical evidence of the size of the diaspora in East Africa see, Prakash C Jain, ‘Indians Abroad: A Current Population Estimate’ (1982) 17 *Economic and Political Weekly* 299, 299–304.

¹³⁵ Dibyesh Anand and Nitasha Kaul, ‘A Disruptive Ethnography of Tanzanian-Indians’ (2011) 3 *South Asian Diaspora* 183, 183.

¹³⁶ Although this is not to suggest that surrogacy arrangements are only carried out in this region as there is evidence of other pockets of concentrated activity such as in Delhi, Mumbai, Bangalore, and Hyderabad.

¹³⁷ While this is an important point it is not a key issue addressed in this thesis.

¹³⁸ ‘Gujarat Govt to Announce Its 1st Medical Policy’ *The Times of India* (29 December 2015) <http://timesofindia.indiatimes.com/articleshow/50366719.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 22 November 2017. See also Industries and Mines Department Government of Gujarat, *Tourism Policy for the State of Gujarat (2015-2020)* <<https://www.gujarattourism.com/content/dam/gujarattourism/images/document/Tourism%20Policy.pdf>> accessed 22 November 2017.

State of Gujarat had a policy in place to encourage medical tourism, by investing in infrastructure and providing financial support and incentives to hospitals, makes it unsurprising that it has become a hub for medical and reproductive tourism.

2.2.2 Dr Nayna Patel: ‘Mother of Surrogacy’¹³⁹

One person who has benefited greatly from this medical tourism policy is Dr Nayna Patel who opened her clinic, later becoming the Akanksha Hospital and Research Institute,¹⁴⁰ in Anand in the State of Gujarat in the early 2000s. Since then, she has gained celebrity status, and to some even divine-like,¹⁴¹ through her appearances on the US TV programme The Oprah Winfrey show¹⁴² and the numerous documentaries and news pieces about her clinic and work.¹⁴³ Despite a significant amount of criticism and attacks on her professional and moral integrity, including charges of exploiting the women she engages as surrogates, Dr Patel insists that she has the surrogates’ best interests at heart. To further demonstrate this, she reveals that she has developed training programmes to help the surrogates gain ‘transferable skills’, such as learning English and IT, and how to manage their finances. One of the doctors at her clinic reports that ‘we’ve also started English and computer lessons for them. We want them to learn something, some skills to face the world better after staying with us.’¹⁴⁴ She has also assisted the women in opening their own bank accounts to ensure that their wages are safeguarded.¹⁴⁵

¹³⁹ This is a label I have attached to Dr Patel; she is more often referred to a ‘goddess’ see footnote 141 below.

¹⁴⁰ ‘Akanksha Hospital Website’ <<http://ivf-surrogate.com/>> accessed 22 November 2017.

¹⁴¹ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 164. Pande documents a surrogate expressing: ‘These are our two Gods: Lord Krishna [a Hindu God] and Doctor *devi* [Doctor Goddess]... You can say Madam is our real *Devi*.’ -ibid 165. [emphasis in the original].

¹⁴² In this show Oprah Winfrey declares international gestational surrogacy an example of women helping other women. See CBS, ‘Oprah Winfrey Show’, *Lisa Ling Investigates: Wombs for Rent* (9 October 2007) <www.oprah.com/world/wombs-for-rent/1> accessed 22 November 2017.

¹⁴³ These are referenced throughout this thesis.

¹⁴⁴ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 983.

¹⁴⁵ She states this in numerous interviews and the documentaries she has done. Evidence of this can be seen in *House of Surrogates* (n 29). At 38.29 mins.

2.2.3 HARDtalk interview

Dr Patel made an appearance on the BBC HARDtalk programme on 31st December 2013 and was interviewed by Stephen Sackur.¹⁴⁶ This interview took place before the final draft of the ART Bill 2014 was released and before the introduction of the Surrogacy (Regulation) Bill, 2016. It offers an insight into a few of the most prominent arguments for and against surrogacy and an insider's perspective from someone who is at the centre of the field, albeit on the profit-making side. Dr Patel has been a significant figure in some of the most controversial cases of commercial surrogacy in India, such as the cases of Baby Manji and Balaz twins, which are described in detail in the key cases section in the following chapter.

Dr Patel explained in the interview that her entry into surrogacy arrangements came in 2003 when she met an Indian couple from the UK who had visited her clinic for IVF treatment and needed a surrogate. After searching unsuccessfully to find a local woman the intended mother's mother (the grandmother of the children) agreed to act as a surrogate for her daughter.¹⁴⁷ The process was successful, and the woman gave birth to twins. The links between India and the UK with regard to this practice have been established from the very start and it has been reported that UK couples including those of South Asian descent/heritage, along with those from the United States and Canada, make up the majority of foreign couples engaging in surrogacy arrangements in India.¹⁴⁸

One of the first major themes surrounding these arrangements addressed in this interview is the commercial nature of the transaction. Dr Patel expressed that there is no amount of money that could

¹⁴⁶ 'HARDtalk Dr Nayna Patel - Medical Director, Akanksha Infertility Clinic, India', *BBC News 24* (31 December 2013) <<https://learningonscreen.ac.uk/ondemand/index.php/prog/060062A0>> accessed 21 November 2017.

¹⁴⁷ See 'Twins for Surrogate Grandmother' *BBC News* (30 January 2004) <<http://news.bbc.co.uk/1/hi/health/3441939.stm>> accessed 21 November 2017. And David Derbyshire, 'Woman Gives Birth to Her Grandchildren' *The Telegraph* (30 January 2004) <<https://www.telegraph.co.uk/news/worldnews/asia/india/1453012/Woman-gives-birth-to-her-grandchildren.html>> accessed 22 November 2017.

¹⁴⁸ Izabela Jargilo, 'Regulating the Trade of Commercial Surrogacy in India' (2016) 15 *Journal of International Business and Law* 337, 354.

ever compensate the surrogate for what she does for the couple and that the word ‘business’ is too crude for this practice. She firmly believes that acting as a surrogate brings joy and happiness to the woman as she is giving the gift of a child to a childless couple, and that this is especially significant in India where childlessness carries a great stigma. When questioned on why it is that India has been a global centre for surrogacy Dr Patel proclaimed that many surrogacy arrangements are conducted in the USA, but the attention seems to be on India because it is a developing country. The interviewer countered this with the fact that it is three times more expensive in the USA than India, which suggested that a major draw is the much lower cost. He proposed that it is also largely because in India the surrogate mother is not the legal mother and has no legal protections. This is supported by Sharmila Rudrappa in her work *Discounted Life: The Price of Global Surrogacy in India* where she discusses the difference between traditional and gestational surrogacy, without a genetic link between the surrogate and baby there are very few legal responsibilities and protections for her.¹⁴⁹ Dr Patel confirmed that the guidelines on ARTs, as they existed then, were favourable in respect of the intended couple but it also worked to relieve the surrogate of any responsibility towards the baby. Sackur addressed the fact that the birth certificate would bear the name of the couple and not the surrogate’s, or her husband’s if she is married. This is a significant point as it differs from the law in the UK where the birth mother is the legal mother.¹⁵⁰ However, it does align with Ukraine where commercial surrogacy is legal as it is written into the Family Code that the commissioning mother is the legal mother.¹⁵¹ A deeper discussion on this point will be had in Chapter 6 regarding the invisibility of the surrogate’s labour and her alienation from the product of her labour.

One of the many major selling points for couples who travel from the Global North to India to engage in these arrangements, as Dr Patel stated in the interview, is that the geographical distance between

¹⁴⁹ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 3.

¹⁵⁰ Children Act 1989, pt 1 s 1; Surrogacy Arrangements Act 1985, pt 1 s 1; Human Fertilisation and Embryology Act 1990, s 30.

¹⁵¹ Article 123, Family Code of Ukraine [2002].

the intended parents and surrogate makes it almost impossible for the surrogate to contact or physically visit the couple, which she claimed is a problem that has occurred in cases in the USA. In India once the child or children are handed over that is almost certainly the end of the arrangement as far as interactions between the couple and surrogate are concerned, and in most cases, potentially to the detriment of the health of the woman, as far as the clinic and surrogate are also concerned. Dr Patel frames surrogacy as work and she believes that surrogates should consider themselves as labourers just like maids or garment makers. Although, she views a surrogate as much higher up the scale of labourer than a domestic worker. It offers, according to her, a greater sense of pride and dignity and also the opportunity to earn far more money than a domestic worker could earn in the same amount of time. She even goes as far as to proclaim that it is empowering for the women. As it offers hope of a better future for their children by ending the perpetual cycle of poverty and reliance on poorly paid hard labour jobs. It is a common argument amongst proponents of commercial surrogacy that the surrogates receive a life changing amount of money. However, there is plenty of evidence that undermines the idea that the money the surrogates earn permanently lifts them out of poverty. The fact that many women are compelled to return again and again to undertake these arrangements illustrates the precarity of their financial circumstances. Virginie Rozée, Sayeed Unisa, and Elise de La Rochebrochard discovered in their interviews with surrogates in Mumbai that they were engaged in the arrangements in order that the surrogates' own daughters would not have to face the same fate and that if they did become surrogates, they would view the whole process as a failure because the aim is to end the cycle of poverty.¹⁵²

Another of the central issues surrounding the practice raised by Sackur relates to the power dynamics and the status of women within a patriarchal society and family structure. He expressed concern over

¹⁵² Virginie Rozée, Sayeed Unisa and Elise de La Rochebrochard, 'Gestational Surrogacy in India' (2016) 537 *Population & Societies* 1, 4.

the possibility that some women might have been forced or coerced into the arrangements meaning that they could be involved against their will. This is a very real possibility and a serious issue that I will expand on during the discussions on exploitation in Chapter 4. In response to this Dr Patel claims to have a team that assesses why the surrogate is engaging in the process and what she is hoping to get out of the arrangement. She has counsellors working with the surrogates throughout the process. However, as studies by Pande reveal these counsellors are employed predominantly to ensure the interests of the clinic and intended parents are given paramount importance.¹⁵³

In quoting Margaret Somerville,¹⁵⁴ Sackur posited that the practice consists of commercialising and dehumanising the most intimate of human relations, that between parents and children. Dr Patel countered this by claiming that the child is not the surrogate's child in any case because it is genetically related to someone else. The definition of the maternal-foetal relationship is central to this thesis and will be explored in greater detail in Chapter 5. It is significant that Dr Patel considers that the (legal) parenthood of the children born from surrogacy is determined by the genetic links. In Chapter 5 I will return to discuss the importance given to maintaining a genetic link between the intended parents and the children and the implications of this for the surrogates.

Dr Patel is also questioned about the health of the surrogates and the procedures involved in the process. Sackur asked why 50% of the births at her clinic are delivered via C-section when the national average in India is 8%.¹⁵⁵ Dr Patel claimed that 70% of the births are via C-section and that the national average is 80% for IVF births. She admitted that the baby is the most important person in the arrangement, then it is the surrogate and then it is the couple. The payment the surrogate receives is worked out according to the length and success of the pregnancy; \$600 for up to 3 months, \$1200 for

¹⁵³ Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (n 91) 980.

¹⁵⁴ Formerly of McGill Centre for Ethics, Medicine, and the Law.

¹⁵⁵ These are the figures that Sakur quotes during the interview.

up to 6 months and then the full amount when the baby is delivered. In the event of a miscarriage the surrogate is only paid up to that point. The interviewer asked what happens if the surrogate dies or suffers long-term chronic conditions because of the pregnancy. Dr Patel claimed that this has never happened at her clinic but that her family would get considerable compensation. Sackur questioned Dr Patel on the fact that she does not always follow the guidelines set out by the ICMR regarding the recommended number of embryo implantations and that she offers four implants when the guidelines state only three. The number of embryo transfers is an important aspect of the practice and has significant health implications, which I deal with in greater detail in Chapters 4 and 6. She explained that this is usually in the case for an older couple because 90% of the eggs are abnormal. She is also asked about arrangements with single parents and same-sex couples. She admitted that she has helped several single men, but that Indian law does not allow for same-sex couples to commission children through surrogacy. The interviewer asked if she is interfering with nature and playing God. This is a charge that she completely rejects claiming to be offering treatment for infertility. However, as Dr Patel also explained, employing a surrogate is not a means to cure infertility it is merely a route to bypass it.

Dr Patel has invested \$6m in expanding her clinic into a state-of-the-art facility. It includes a number of floors that are dedicated to housing the surrogates during the pregnancy. Many of the surrogates have been housed in her hostels where their condition can be monitored, and their behaviour supervised. The surrogates' whole day is scheduled and programmed from morning prayers, mealtimes, medical treatments to evening classes.¹⁵⁶ Sackur asked her if she is unlawfully detaining the surrogates, but she explained that the women are free to go out with the permission of the supervisors¹⁵⁷ and can even visit their families for up to 20 days. She believes this is normal and

¹⁵⁶ Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (n 91) 982–983.

¹⁵⁷ There are scenes in the *House of Surrogates* documentary of Dr Patel going through the surrogates' requests to leave the hostel and personally approval or rejecting the request based on whether she believes it to be justified and valid.

compares the hostel to a student hostel where the director would also demand to know where the students were going if they were to leave. The tight control that Dr Patel and the clinic staff exert over the surrogates raises concerns over their rights to privacy, autonomy, and bodily integrity. I will return to this issue in Chapter 5 where I discuss in detail the potential harm sustained by the surrogates when these rights are compromised or violated. Despite Dr Patel's significant financial investment in her Institute and the highly lucrative nature of the practice she is adamant that it is not just about business, she insists that it is about so much more and that it is a very emotional process.

The detailed description of this interview has been given to highlight the many complex issues that surround the practice of surrogacy in India. These include concerns over the surrogates being exploited and coerced into undertaking the arrangement especially considering their socio-economic situation, the potential harm sustained by the surrogates during the invasive procedures such as the embryo transfers, foetal reductions, and the C-section deliveries, and in relation to this the failure to adhere to the IMCR's Guidelines, the compensation in case of death or injury, and how (legal) parenthood is determined in gestational surrogacy arrangements. The legal and ethical complexities of these issues will be dealt with in detail in Chapters 4 and 6.

2.3 Broader representations of surrogacy in India

2.3.1 Cultural perception of surrogacy in India

As mentioned in the introduction to the thesis the concept of surrogacy can be traced back to ancient Hindu mythologies and biblical stories. In the Abrahamic story of Rachel, Bilhah, and Jacob from the Jewish and then later Christian and Muslim traditions.¹⁵⁸ Hinduism also has its own significant depiction of surrogacy through the stories of Yashoda and Krishna and that of Vishnu, Devaki and

¹⁵⁸ Another story is that of Abraham, Sarah, and Hagar. For a discussion on how the story is not truly a case of surrogacy see, Barbara Katz Rothman, 'Motherhood: Beyond Patriarchy' (1989) 13 *Nova Law Review* 481. And Pateman (n 68) 213.

Rohini. The mother-son relationship between Yashoda and Krishna is a popular theme in representations of Indian mythology and more than likely contributes to the way surrogates view themselves in the role, the mother and nurturer of someone else's child. Pande reports that for the surrogates '[s]urrogacy... was more like a "calling"'.¹⁵⁹ The surrogates have pictures of Krishna up on the walls of the hostels.¹⁶⁰ In the documentary *House of Surrogates* Dr Patel prays to Lord Krishna for a successful outcome from the transfer of embryos.¹⁶¹ There are numerous devotional songs dedicated to Yashoda that depict her maternal care and attention for Krishna. The close relationship Yashoda and Krishna share is also illustrated in many prayers and paintings.¹⁶² In the *Bhagavata Purana*, an ancient Hindu text consisting of many stories, there is one that describes a tale of what appears to be a case of gestational surrogacy. In this story Vishnu hears and answers Vasudev's prayers begging Kansa not to kill his new-born sons. Kansa had received a divine warning that Vasudev and Devaki's eighth son would kill him. On hearing these prayers Vishnu has an embryo transferred from Vasudev's wife Devaki's womb to the womb of Rohini. Rohini gives birth to the baby, who is Balaram (elder brother of Krishna who was in fact the eighth son and eventually killed Kansa), and secretly raises the child while Vasudev and Devaki tell Kansa the child was born dead.¹⁶³

2.3.2 Bollywood and beyond

Surrogacy in India has a complex framing within the national discourse. It is often defined with reference to the analogy of the gift and as the ultimate expression of selfless femininity and motherhood,¹⁶⁴ but it has also been highly stigmatised because of its association with sex work.¹⁶⁵ Due to a lack of understanding about the actual procedures involved, surrogates, and society in general,

¹⁵⁹ Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (n 92) 161.

¹⁶⁰ *ibid* 148.

¹⁶¹ *House of Surrogates* (n 29).

¹⁶² For a detailed analysis of the significance of this story see, Prabha Krishnan, 'In the Idiom of Loss: Ideology of Motherhood in Television Serials' (1990) 25 *Economic and Political Weekly* 103, 103–115.

¹⁶³ Described in Smerdon (n 17) 16. See also, Veronica Ions, *Indian Mythology* (Newnes Books 1983) 58–59.

¹⁶⁴ Evidenced in the parliamentary debates and committee discussions on altruistic surrogacy. I will discuss these in more detail in Chapter 4.

¹⁶⁵ Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (n 92) 141.

are largely informed and influenced by the depictions of surrogacy in Bollywood films such as *Doosri Dulhan* (1983),¹⁶⁶ *Chori Chori Chupke Chupke* (2001),¹⁶⁷ *Filhaal* (2002)¹⁶⁸ and the television series *Mamta*.¹⁶⁹ *I Am Afia* (2010)¹⁷⁰ and *Vicky Donor* (2012)¹⁷¹ are other films that deal with the topic of sperm donation.¹⁷² There appears to be a common theme running through the films on surrogacy, from the depictions of the female characters to the sequences of events and the interpersonal relationships. These films portray an image of the ‘virtuous’ and ‘perfect’ woman, who wants to settle down, get married and have children. Yet, through some grave misfortune ends up unable to give birth to her own child. This representation of the ‘ideal’ female is enhanced by the portrayal of a woman who stands at the opposite end of the spectrum; one who does not want to get married and have children, and in some cases is a prostitute. The usual plot follows that the less than ‘virtuous’ woman agrees to be a surrogate mother for the childless couple. The situation becomes complicated when the husband is seen to be spending too much time with the surrogate and their relationship begins to raise suspicion. The women inevitably fall out and the whole arrangement is put at risk. However, there is often a happy ending where the couple receive the baby and become parents as they had wished. This enormous sacrifice on the part of the surrogate works to help her redeem herself and elevates her to the status of ultimate feminine selflessness. A clear message to take from these films and TV series is that motherhood is the pinnacle of womanhood and surrogacy despite its stigmatisation is justified when it brings the happiness of family to a childless couple. These depictions of surrogacy arrangements are significant and problematic because ‘[a]lmost all portrayals of commercial surrogacy in the media equate surrogacy with sex...all surrogates are portrayed as having some kind

¹⁶⁶ *Doosri Dulhan* (Directed by Lekh Tandon, 1983). Meaning ‘Second Bride’.

¹⁶⁷ *Chori Chori Chupke Chupke* (Directed by Abbas-Mustan, 2001). Meaning ‘Secretly and Stealthily’.

¹⁶⁸ *Filhaal* (Directed by Meghna Gulzar, 2002). Meaning ‘Momentary’.

¹⁶⁹ ‘Mamta’ (2007 2006).

¹⁷⁰ *I Am Afia* (Directed by Onir, 2010).

¹⁷¹ *Vicky Donor* (Directed by Shoojit Sircar, 2012).

¹⁷² For a discussion on the harmful depictions of surrogacy in these films see - Shriya, ‘How Does Bollywood Depict Surrogacy And How Is It Harmful?’ [2017] *Feminism in India* <<https://feminisminindia.com/2017/05/31/bollywood-depict-surrogacy-harmful/>> accessed 21 November 2017.

of ‘relation’ (sexual or emotional) with the adoptive father of the child.’¹⁷³ These misrepresentations of the practice have left it deeply stigmatised and lead to the surrogates hiding their pregnancies from their families and communities.¹⁷⁴ It is noteworthy that the contemporary portrayals and narratives of surrogacy differ significantly from those found in the ancient texts as described in the above section. It is likely that these different conceptions of surrogacy are both operating within the discourses surrounding the practice and are employed by both its proponent and opponents.

2.3.3 Documentaries

The documentaries *House of Surrogates*, *Mother India*, and *Made in India* discussed in this section offer an insight in the stories of some of the real people involved in surrogacy in India and present a far less romanticised version than found in the Bollywood films mentioned above. I will also draw on the documentary by SAMA called *Can we see the baby bump please?*¹⁷⁵ and another called *Outsourcing Surrogacy*¹⁷⁶ throughout the thesis, where relevant. While each documentary pursues its own narrative and agenda, the camera does at least give us a glimpse into the inner world of the arrangements, and a more realistic view of the conditions for the surrogates within the clinics and hostels. It is noteworthy that the intended audiences for the Bollywood films, which are the local and diaspora populations, likely differ from those of the documentaries made by non-Indian filmmakers, which aim to inform an international audience about the practice of commercial surrogacy in India.

2.3.3.1 House of Surrogates¹⁷⁷

House of Surrogates is a BBC4 documentary that follows the daily workings of Dr Patel’s surrogacy clinic in Anand and gives another perspective on her from the interview described above. The 2013

¹⁷³ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 155.

¹⁷⁴ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 975. And Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 154.

¹⁷⁵ *Can We See the Baby Bump Please?* (Directed by SAMA, 2002).

¹⁷⁶ *Outsourcing Surrogacy* (Directed by Shaul Schwarz, 2015).

¹⁷⁷ *House of Surrogates* (n 29).

documentary opens with scenes of the backstreets of Anand and an aerial view of Dr Patel's 'house of surrogates', where one hundred surrogates are waiting to give birth. It then cuts to reveal these women inside a cramped dormitory of closely aligned beds. The scenes change quickly from the surrogates in their bedrooms, to Dr Patel in surgery delivering a baby and then to her standing dressed in a beautiful sari in front of medical equipment.

Dr Patel is interviewed by the documentary makers and clips of the interviews appear throughout the film. In the very first clip Dr Patel proclaims: 'God is creating life and God has appointed me to do that on this Earth.' Dr Patel sees this work of helping childless couples as a divine calling. She firmly rebuts the criticisms that surrogacy commercialises childbirth and exploits the poor, and that she is essentially running a 'baby-making' factory. The film follows the stories of different couples who have travelled to India from Australia, the USA, and the UK. The various aspects and stages of the arrangements are documented. We see the egg harvesting, IVF and implantation processes, the surrogates at the hostels where they wait for confirmation of a successful transfer, their daily lives throughout the pregnancy, the births and the relinquishing of the babies, and the interviewing of new surrogate candidates. We witness a full range of different interpersonal relationships from those between the commissioning parents and surrogates, to those between the surrogates themselves, and their exchanges with the hostel staff and Dr Patel, who visits the hostel every two weeks to check on them and hear any complaints. Through these encounters many personal details of these individuals' lives are revealed. On the side of the commissioning parents there are stories of disappointment, heartache, and hope. The surrogates talk of their hardship but also their future dreams and ambitions. These groups of people have been brought together purely because one side wants what the other side can give.

Dr Patel frames this arrangement between the commissioning parents and surrogates in terms of basic human instincts. She believes that everyone is born with two instincts; one to survive and one to reproduce. She says ‘We have a couple that wants to procreate, the surrogate comes into the picture. She wants to survive. She gets financial help, her instinct to survive is fulfilled.’ She claims that ‘by denying surrogacy we are basically denying people of their basic instincts rather than helping them.’ In another interview Dr Patel explains that she is a feminist and sees her work with the surrogates as a feminist mission. During the women’s time as surrogates Dr Patel offers them different training opportunities to help them gain skills for after the pregnancy and support with managing their earnings. She assists some surrogates with opening bank accounts and even keeps a folder documenting how each surrogate spends her money. The reason for which she explains is to ensure that they spend their money the ‘right’ way and not waste it. Dr Patel views the process of being a surrogate as empowering for the women, by allowing them to earn money to improve their family’s situation. She believes the women should leave the process as the leader of their families. Rudrappa also documents that the surrogates she interviewed felt empowered by gaining a sense of *bele* which is social status and worth because of the greater earning capacity open to them by undertaking a commercial surrogacy arrangement.¹⁷⁸ Dr Patel’s plan to support the surrogates extends even further as she explains during a visit to the construction site of her \$6m institute for surrogacy. Her vision for the hospital is to house everyone under the same roof. There will be space for the surrogates to live and for the commissioning parents to stay. She also plans to employ former surrogates at the hospital.

Of all the relationships between the commissioning parents and surrogates it is the one between Barbara (intended mother) and Edan (surrogate) that is most interesting. Barbara is a 53-year-old Canadian woman who has been in India several months since the birth of her son, as she is waiting for an exit visa to return home. During these months Edan has been employed as a nanny for the baby

¹⁷⁸ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 59.

and visits him twice a day to feed him and play with him. Barbara had always wanted a large family but has suffered with fertility issues and opted for surrogacy after many years of trying to conceive naturally. It is rare for the intended parents and surrogate to have such an involved relationship after the birth. Before Barbara leaves for Canada, she revisits the clinic to meet a new prospective surrogate with Edan looking on. The most striking part of this encounter is the way that Barbara assesses the surrogate's suitability in terms of her physical frame and religious beliefs. The final farewell between Barbara and Edan appears to be a painful and distressing experience for the surrogate. It ends with a poignant scene of Edan unable to look at the baby as he is taken away, and then of her walking away with a plastic bag of items gifted to her by Barbara. The documentary ends with one final word from Dr Patel about how it takes a special woman to become a surrogate, and that a woman should never be ashamed of being a surrogate because she has changed a couple's life. The picture Dr Patel paints of the practice in her interviews is somewhat countered by the numerous scenes throughout the documentary of the physical and mental suffering of the surrogates, such as the one described above of the pain Edan experiences when saying goodbye to the baby. There are more scenes showing other surrogates fighting back tears and unable to look while the baby is handed over. Another concerning scene shows a woman lying on a bed in the hostel during one of Dr Patel's visits. She appears to be in a great deal of discomfort and distress while she complains about the situation with her husband who is a physically abusive alcoholic and is always demanding more money from her. This highlights the concerns over the women being coerced into the arrangement by family members, who are set to gain financially from the women's sacrifice.

2.3.3.2 Mother India¹⁷⁹

The title of this documentary may seem somewhat provocative considering the nature of the subject matter, but it is also well chosen as it is a name often given to the country. The historical and cultural

¹⁷⁹ *Mother India* (n 29).

significance of this title links very well with the practice of surrogacy, placing it within the wider biocapital industry and drawing from India's past, and present, as a fertile land. Here raw materials in the form of reproductive bodies are sourced, utilised, and discarded. This documentary deals with the theme of 'the mother' and its highly revered status within Indian culture and society. To be childless in India is to be abnormal; it is considered an inauspicious sign and is deeply stigmatised. Yet despite the stigma surrounding childlessness and India's position as a global provider of ART treatment people from poorer socio-economic backgrounds lack access to fertility treatments as there are very few public clinics and the cost of the treatment is largely unaffordable.¹⁸⁰ Marcia C. Inhorn and Pasquale Patrizio also found that in many regions in the world where childlessness is stigmatised people from socio-disadvantaged backgrounds are underserved in terms of ART treatments.¹⁸¹ The documentary charts the journey an infertile couple, Jhuma and Niladri, take from their home in Burdwan in the State of West Bengal to a clinic in Hyderabad specialising in assisted reproductive technologies. The 'curse' of infertility would have likely meant a life of abandonment for Jhuma, the intended mother, but the development of ART treatments and the availability of surrogate mothers offers her a new possibility of having children.

2.3.3.3 Made in India¹⁸²

This documentary tells the story of American couple Lisa and Brian Switzer who after seven years of failing to conceive try to start their family through engaging Indian surrogate Aasia at the Rotunda clinic in Mumbai. The Switzers are not wealthy people by American standards and could not afford to pay for a surrogacy arrangement in the USA therefore in search of a more affordable option they

¹⁸⁰ This is also a concern raised by the parliamentary committee scrutinising the Surrogacy (Regulation) Bill and ART Bill as they indicated the need for more affordable and accessible treatments at public clinics and hospitals for those who cannot pay private clinic fees.

¹⁸¹ Marcia C Inhorn and Pasquale Patrizio, 'Infertility around the Globe: New Thinking on Gender, Reproductive Technologies and Global Movements in the 21st Century' (2015) 21 Hum Reprod Update 411. This is also discussed in Gabriele Werner-Felmayer, 'Globalisation and Market Orientation: A Challenge Within Reproductive Medicine' in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 15–17.

¹⁸² *Made in India* (n 29).

turn to India. Lisa works several jobs in order to pay for the surrogacy fees. Aasia their surrogate is a 27-year-old mother of three who lives in a one-room house in a Mumbai slum. We also meet Rudy Rupak of Planet Hospital, which he describes as a ‘third party facilitator’ of medical tourism services and the first company to facilitate a surrogacy arrangement in India for US clients. Rupak, through Planet Hospital, promised ‘affordable healthcare from around the world’ but has been embroiled in a great deal of controversy and has faced charges of fraud.¹⁸³ He is an entrepreneur, and it is clear from his reply to the filmmakers on whether the surrogates should be paid more than they are that his only concern is profit. He says: ‘Could we give them more, \$10,000, \$12,000? I suppose so. But that makes it less affordable for the Americans. So, what’s the point of that?’ In one scene Lisa lists the breakdown of costs which indicates that the surrogate will receive \$7000 but in another scene with Aasia she reveals that she will only receive \$2000. There are frequent reports of surrogates in India being underpaid and having weak protections in the contracts. Aasia gives birth to twins which should have entitled her to more money. However, we see that after a longer than expected stay in hospital she has not received the amount she was promised and asks Lisa to advocate on her behalf. While Lisa is sympathetic and extremely grateful to Aasia because as she says: ‘She is giving me the family I can’t create. I will never... I will never be able to thank her enough’ she then expresses ‘We don’t have an extra \$1000 to hand out to anybody who’s asking...’ Yet, Aasia is clearly not just anybody who is asking because as Lisa earlier claims: ‘She’s doing me the biggest service any one human can do for another. She’s donating a part of her body. She’s growing my child; she’s nurturing my children for 9 months. And I am forever, forever grateful to her.’ During this documentary we also witness the complex legal issues that can arise over the transfer of parental rights to the intended parents due to an absence of legally binding regulation, which I will discuss in Chapter 3 in the key cases section. Lisa faces difficulties because the birth certificate is issued with Aasia’s name. Dr Radley Sharma of

¹⁸³ Tamar Lewin, ‘A Surrogacy Agency That Delivered Heartache’ *The New York Times* (27 July 2014) <<https://www.nytimes.com/2014/07/28/us/surrogacy-agency-planet-hospital-delivered-heartache.html>> accessed 22 November 2017.

the Indian Council of Medical Research (ICMR) is featured explaining that although the clinics and hospitals have received a governmental memorandum instructing them to follow the ICMR's Guidelines they are not mandatory. The issues that have arisen due to the absence of legally binding regulation are explored throughout this thesis.

2.3.4 Ethnographic studies on surrogacy in India

There have been several ethnographic studies into surrogacy in India as well as the documentaries mentioned above and in this section some of the most prominent will be discussed. It is important to note that most of these studies date from before the ban on international surrogacy and the exclusion of same-sex couples and single parents that came about in 2015.¹⁸⁴ Before the introduction of these restrictions surrogacy in India was marketed as a commercial and economically lucrative part of the wider medical tourism industry. Pande is a sociologist who has conducted studies, through interviews and observations, into surrogacy arrangements carried out at a clinic that she calls New Hope Maternity Clinic in Anand. She has changed the name of the clinic and the name of the clinic director, to Dr Khanderia, but it is evident that she is talking about Dr Patel's Akanksha clinic.¹⁸⁵ Pande interviewed fifty-two surrogates, their husbands, and in-laws, twelve intended parents, three doctors, three surrogacy brokers, three hostel matrons and several nurses. She also conducted participant observation for ten months at the surrogacy clinic and two surrogacy hostels. The interviews were in Hindi and other local languages and were conducted either at the clinic, the surrogacy hostels where most surrogates live, or at their homes.¹⁸⁶

¹⁸⁴ In Chapter 3 I give a detailed account of the timeline of regulatory reforms to surrogacy in India.

¹⁸⁵ This is evident because she talks about the well-known surrogacy arrangement of a grandmother carrying her daughter's twins that was arranged at this clinic and this story is also given by Dr Patel.

¹⁸⁶ Amrita Pande, 'This Birth and That: Surrogacy and Stratified Motherhood in India' (2014) 4 *PhiloSOPHIA* 50, 52.

Sharmila Rudrappa in her book *Discounted Life* presents the empirical work she undertook in India, which focussed on Bangalore, Mumbai, Anand, Delhi, and Hyderabad.¹⁸⁷ She conducted participant observations in an infertility clinic in Bangalore for two months in 2009. She spoke with eight heterosexual and twelve homosexual individuals and couples seeking infertility services in Mumbai, Anand, and Delhi between 2010 and 2012. She conducted interviews with seven infertility specialists from Bangalore, Mumbai, and Hyderabad. She also spoke with three lawyers who facilitate surrogacy arrangements in India and the United States. In 2011, she interviewed seventy surrogate mothers, thirty-one egg donors, and twenty-five garment workers in Bangalore.¹⁸⁸ Comparing and contrasting the interviews and studies by these two ethnographers provides a rich understanding of the reality of surrogacy arrangements for the participants, particularly as they are focussed on different regions of India with diverse conditions between the rural and urban populations. Pande's work concerns surrogates in Anand and Rudrappa offers a deeper look at those who live and work in and around Bangalore, where the main source of employment is the garment industry.

I also draw from the empirical work conducted by Arlie Russell Hochschild,¹⁸⁹ and Kalindi Vora,¹⁹⁰ also at the Akanksha clinic, Kristin Engh Førde,¹⁹¹ who focused on arrangements in Mumbai, and the studies conducted by the women's rights organisations SAMA¹⁹² and Centre for Social Research.¹⁹³ In addition to the studies by Daisy Deomampo,¹⁹⁴ Sheela Saravanan,¹⁹⁵ and Tanderup et al.¹⁹⁶ Bronwyn

¹⁸⁷ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 4.

¹⁸⁸ *ibid.*

¹⁸⁹ Arlie Russell Hochschild, 'The Surrogate's Womb' (2015) 16 *Gender and Research* 42.

¹⁹⁰ Kalindi Vora, 'Experimental Sociality and Gestational Surrogacy in the Indian ART Clinic.' (2014) 79 *Ethnos* 63; Kalindi Vora, 'Indian Transnational Surrogacy and the Disaggregation of Mothering Work' (2009) 50 *Anthropology News* 9.

¹⁹¹ Førde (n 8).

¹⁹² SAMA - Resource Group for Women and Health (n 21).

¹⁹³ Centre for Social Research, *Surrogate Motherhood: Ethical or Commercial (Delhi and Mumbai)* (n 90); Centre for Social Research, *Surrogate Motherhood: Ethical or Commercial (Surat and Gujrat)* (n 90).

¹⁹⁴ Daisy Deomampo, *Transnational Reproduction: Race, Kinship and Commercial Surrogacy in India* (New York University Press 2016).

¹⁹⁵ Sheela Saravanan, 'An Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India' (2013) 8 *Philosophy, Ethics, and Humanities in Medicine*, 1.

¹⁹⁶ Malene Tanderup and others, 'Reproductive Ethics in Commercial Surrogacy: Decision-Making in IVF Clinics in New Delhi, India' (2015) 12 *Journal of Bioethical Inquiry* 491.

Parry¹⁹⁷ has also conducted a large Wellcome Trust funded study into the business of ARTs in India, part of which involves interviews with surrogates and other stakeholders. In the following section I will explore the political environment and economic development that gave rise to India's position as a global centre for surrogacy arrangements.

2.4 Colonial legacies

*Surrogacy in India is a spectacular global phenomenon.*¹⁹⁸

*Assisted reproductive technology challenges traditional notions of family, childbearing and thus confronts cultural values as well. The politics of change are complex, particularly in a post-colonial democracy rising in global position. Cultural values influence decision-making and political policy and there are few issues that incite cultural debate more than reproduction and the female body.*¹⁹⁹

The focus of this section is on how India became a global centre for surrogacy arrangements. As the above quotes assert, surrogacy in India developed out of a globalised landscape and the State's neoliberal reforms. There are many factors that have converged to create the perfect environment for this practice to grow and flourish. In this section some of the most important aspects will be introduced and discussed. These include India's history as a former colony and its place in the economic global order, the Indian state's promotion of a medical tourism industry within which surrogacy lies as a reproductive 'service', the absence, until recently, of legally binding regulation, the importance of bio-capital, and the availability and accessibility of the 'raw materials' in form of women's bodies and reproductive capacities in this fertile land. As well as the outsourcing of industries from the Global North to the Global South because of the low cost of production and the abundance of cheap labour. Additionally, the development of low-cost high-tech industries and within this the medical advances in ARTs that created the possibility of gestational surrogacy. These technological developments are significant because 'gestational surrogacy also allowed the surrogacy market to go global'²⁰⁰ as it

¹⁹⁷ Bronwyn Parry, 'Narratives of Neoliberalism: "Clinical Labour" in Context' (2015) 41 *Med Humanit* 32.

¹⁹⁸ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 5.

¹⁹⁹ Sandoval (n 111) 120.

²⁰⁰ Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (n 92) 144.

enables couples and individuals to commission arrangements for children that are genetically related to them and not to the women who gestate the children. Thus, allowing the arrangements to cross national borders, and ethnic and racial lines.

2.4.1 Poverty and the economic situation of surrogates in India

A key reason why ‘reproductive tourism’ has been such a successful and lucrative business in India is because it cost significantly less than in other countries where commercial or compensated surrogacy is legal.²⁰¹ One of the factors, that is of significance to this thesis and will be discussed in more detail below, is that Indian surrogates provided their ‘labour’ for a much smaller fee. It has been reported that surrogates in the US earn on average \$30,000 whereas surrogates in India would earn as little as \$2800.²⁰² The abundance of cheap labour, due in part to a lack of alternative and stable employment options,²⁰³ and a willingness to engage in this practice are important components that have driven down the cost of surrogacy arrangements in India, along with low-cost air fares, and subsidised medical supplies.

Pande argues that it is of little use to discuss the morality of commercial surrogacy in India given the extreme poverty and desperate situations that the majority of women who act as surrogates experience. Surrogacy for these women had become a survival strategy.²⁰⁴ One of the women in her studies expressed that: ‘Prestige won’t fill an empty stomach’²⁰⁵ and another claimed that: ‘This is not work, this is majboori (a compulsion)...This work is not ethical—it’s just something we have to do to

²⁰¹ *ibid* 149. These observations were made before the ban on international arrangements and the prohibition of commercial arrangements.

²⁰² Rozée, Unisa and de La Rochebrochard (n 152) 3. Rudrappa documents that: ‘Compared to the close to \$80,000 to \$100,000 price tag for a baby in the United States, surrogacy in India costs between \$35,000 to \$45,000 see, Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 5. Others report that in the USA surrogacy can cost between \$120,000-\$150,000 of which the surrogate gets \$25,000-\$35,000 (20-23% of the total) Marcin Smietana, ‘Affective De-Commodifying, Economic De-Kinning: Surrogates’ and Gay Fathers’ Narratives in U.S. Surrogacy’ (2017) 22 *Sociological Research Online* 1, 2.

²⁰³ The surrogates’ unstable incomes are discussed by SAMA - Resource Group for Women and Health (n 21) 36.

²⁰⁴ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 971.

²⁰⁵ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 161.

survive.’²⁰⁶ Pande discovered that 34 out of the 42 surrogates she interviewed reported an income below or around the poverty line and for these women the money they earned through surrogacy was equivalent to five years of total family income. She further notes that they were all driven to surrogacy because of financial desperation or medical emergency.²⁰⁷ Førde found that the women in her studies were not just poor but that they were the most marginalised within the poorest communities.²⁰⁸ Yet, Rudrappa found that the women she interviewed were not the poorest but that they were desperate, and that this desperation led them to surrogacy. Many of the women she interviewed had worked in Bangalore’s garment factory industry, which she characterises as moving from the ‘production line’ to the ‘reproduction line’.²⁰⁹ Contrary, to some of the findings by Pande and Førde, Rozée et al., who studied surrogates in Mumbai, found that they were not of the poorest or least well educated demographic, stating that their monthly incomes placed them within the top 25% of people in India in 2011.²¹⁰ This figure is somewhat surprising considering the dominant narratives surrounding surrogates and that many other studies attest to the surrogates’ disadvantaged socio-economic situation. However, it could indicate that the demographics of women who undertake surrogacy arrangements differ from region to region or additionally, as SAMA discovered, that monthly and annual incomes differ significantly between cities and rural locations.²¹¹ Sandoval highlights that India was ranked 122 on the Gender Inequality Index of the 2010 The Human Development Report, and while it is only one of the ways to measure the status of women within a country, it does provide some political and cultural context for the factors that led Indian women to undertake surrogacy arrangements.²¹²

²⁰⁶ *ibid* 160.

²⁰⁷ Pande, ‘This Birth and That: Surrogacy and Stratified Motherhood in India’ (n 186) 53.

²⁰⁸ Kristin Engh Førde, “‘Good Work for Good Mothers’”: Commercial Surrogate Motherhood, Femininity and Morality’ [2016] *Asia in Focus* 5, 5–13.

²⁰⁹ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 78. Also Deomampo (n 194) 236.

²¹⁰ Rozée, Unisa and de La Rochebrochard (n 152) 3.

²¹¹ SAMA - Resource Group for Women and Health (n 21) 36.

²¹² Sandoval (n 111) 122.

Financial desperation and the draw of earning several times their usual annual income²¹³ has created a steady supply of women eager to undertaking these arrangements. As a result, there are serious concerns regarding the permissibility of an industry that profits from the disadvantaged circumstances of the very people on which it relies. In response, many have questioned whether such an industry should be prohibited or not, and if not, how the surrogates can be adequately and fairly, if at all, compensated. To fully understand the evolution and nature of this practice it is imperative to place and read it within India's colonial past and neoliberal economic development. The next section will explore the significance of India as a postcolonial state and the state's neoliberal approaches to economic development, particularly relating to medical tourism.

2.4.2 New India: welfare state to free market approach

In 1947 India became an independent country, with its first Prime Minister Jawaharlal Nehru in power it was finally free from British colonial control and able to forge its own path.²¹⁴ Yet, as with most postcolonial states, India inherited the colonial system of governance including the judiciary and law, the police, the army, the education system, government bureaucracy, and development agencies.²¹⁵ The colonial legacies left by the British run deep into the fabric of Modern India, of great concern here are the imported (Victorian) patriarchal power structures and the entrenchment and enforcement of divisions and differences based on class, caste, and race.²¹⁶ Vora asserts that the legacy of British colonial rule can be found in India's development as a global provider of fertility treatments through its historical relationship with Western medicine and the international division of labour in British

²¹³ Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (n 91) 974.

²¹⁴ Barbara D Metcalf and Thomas R Metcalf, *A Concise History of Modern India* (Cambridge University Press 2012) 219. The hope and confidence in India post-independence is discussed by John Keay, *India: A History* (eBook, HarperPress 2010). Chapter 20, para. 1.

²¹⁵ For a discussion on the political legacy of the British Empire see, Metcalf and Metcalf (n 214) 321–322.

²¹⁶ CJ Fuller, 'British India or Traditional India? An Anthropological Problem' (1977) 42 *Ethnos* 95, 111; David Mosse, 'Caste and Development: Contemporary Perspectives on a Structure of Discrimination and Advantage' (2018) 110 *World Development* 422, 425.

colonial practices, part of which involved the global outsourcing to India.²¹⁷ She further claims that the colonial legacy can be located in Indian transnational surrogacy practice because of the ‘histories of medicine as a technique of extracting resources from human bodies and disciplining subjects...[and where] Western medicine was [used] as a tool of colonial subjectification and the British civilising mission.’²¹⁸ This, she argues, explains how the combination of medicine, global inequalities, and assisted reproductive technologies render low-earning Indian women ‘as instruments for the reproduction of other populations, a necessary component in fertility travel to India.’²¹⁹

India is a country of vast contrasts and contradictions, and despite becoming the world’s largest democracy and fastest growing economy, social and economic inequalities have worsened and the gap between the rich and poor has continued to widen since Independence.²²⁰ This situation can be traced and understood through the country’s economic development, from Nehru’s democratic-socialist agenda with strict state control over production and industry, Indira Gandhi’s continuation and expansion of her father’s economic model, to Rajiv Gandhi’s cautious introduction of a more free-market approach that included the removal of licensing registrations for some industries, tax cuts and the reduction of tariffs, and then Manmohan Singh and Narendra Modi’s more expansive neoliberal reforms.²²¹

²¹⁷ Kalindi Vora, ‘Re-Imagining Reproduction: Unsettling Metaphors in the History of Imperial Science and Commercial Surrogacy in India’ (2015) 5 *Somatechnics* 88, 89.

²¹⁸ *ibid* 89–90.

²¹⁹ *ibid*.

²²⁰ According to the World Inequality Database 2022 income inequality in India has now surpassed that of the colonial period (10% and 1% hold 57% of income, compared to 50% in the colonial period). Anand JC, ‘India amongst the Most Unequal Countries in the World, Says Report’ *The Economic Times* (Mumbai, 9 December 2021) <<https://economictimes.indiatimes.com/news/economy/indicators/india-amongst-the-most-unequal-countries-in-the-world-report/articleshow/88141807.cms?from=mdr>> accessed 15 December 2021.

²²¹ Sanjay Ruparelia, “‘Minimum Government, Maximum Governance’: The Restructuring of Power in Modi’s India’ [2016] *South Asia: Journal of South Asian Studies* 755, 757. Arvind Panagariya, *India: The Emerging Giant* (Oxford University Press 2008) 78–94.

In 1991, in the midst of a financial crisis and on the brink of a major default the Indian government turned to the IMF for a \$1.8 billion bailout package.²²² The assassination of Rajiv Gandhi brought Narashima Rao to the post of PM and marked the start of a more aggressive reform process with Manmohan Singh as the newly appointed Finance Minister. Singh's vision was to build a 'New India', believing that Nehru's economic nationalism was outdated he aimed to draw on the country's vast and cheap labour market, its growing educated but unemployed population, and its considerable supply of natural resources. This reform process led to massive economic growth, a stable exchange rate, and a substantial increase in foreign direct investment, but these economic advances came at the expense of the country's most vulnerable communities, pushing home ownership out of reach of most Indians and creating greater inequalities. An important factor in India's development as global centre for medical tourism is the wealth of medically and technically trained professionals that resulted from the post-independence drive to develop a knowledge society through scientific and technological skills.²²³ The transnational market in surrogacy arrangements was therefore facilitated by highly trained medical professionals as well as the large pool of low-resourced and willing women.²²⁴

The key features enabling this vision of 'New India', notably the cheap labour, considerable supply of resources, and highly skilled medical professionals, combined with an increasingly globalised world worked to continue and expand India's legacy as a perfect destination for outsourced labour. As Joseph explains, 'Some outsourcing had of course always existed but the scale has now greatly increased and this has contributed to the "hollowing out" of the state.'²²⁵ Navtej Purewal argues that following the election of the Bharatiya Janata Party in May 2014 an aggressively market-oriented neoliberal

²²² Bernard Weinraub, 'Economic Crisis Forcing Once Self-Reliant India to Seek Aid' *The New York Times* (New York, 29 June 1991) <<https://www.nytimes.com/1991/06/29/world/economic-crisis-forcing-once-self-reliant-india-to-seek-aid.html>> accessed 28 April 2021.

²²³ For a discussion on the development of a knowledge society see, Sabil Francis, 'The IITs in India: Symbols of an Emerging Nation' (2001) 1 *South Asia Chronicle* 293, 294.

²²⁴ Vora, 'Re-Imagining Reproduction: Unsettling Metaphors in the History of Imperial Science and Commercial Surrogacy in India' (n 217) 88.

²²⁵ Sarah Joseph, 'Neoliberal Reforms and Democracy in India' (2007) 42 *Economic and Political Weekly* 3213, 3215.

economic agenda was pursued that promoted an open and ‘modern’ capitalist economic model but a conservative social agenda based on “‘traditional” values through an interwoven patriarchal and Hindutva ideology.’²²⁶ I will return to discuss the significance and influence of patriarchal culture and Hindutva ideology in the practice and regulation of surrogacy in Chapter 4. India had been a major source of labour and raw materials under colonial rule, but it is the dissolving of the distinction between public and private spheres and the commodification of traditionally private non-productive activities brought about through neoliberal ideology that set the ground for the development of transnational surrogacy in India. When viewed through a neoliberal framework the commercial surrogacy arrangement is regarded as ‘merely a market transaction between autonomous financialized economic agents, buyers and sellers of reproductive services.’²²⁷

2.4.3 Markets in life, bio-capital, and the value of surrogacy

It is the positioning of the individual as a ‘neoliberal subject/worker’, from the buyer’s and seller’s perspectives, that has allowed for the practice of commercial surrogacy to flourish. Hewitson asserts that ‘[t]ransnational gestational surrogacy only becomes possible when surrogate mothers are able to view themselves as sets of assets with market values.’²²⁸ This view is supported by Pande as she explains that ‘[c]ommercial surrogacy drives women like Varsha and Rita to think of their bodies as a possible source of value, a value denied by the state itself.’²²⁹ In the case of commercial surrogacy, reproductive activity becomes economically productive, and thus a market value is attached to what has traditionally been a private and devalued activity.²³⁰ This undervaluing of the women and their bodies by the state will be explored later in this section with reference to the Indian state’s extensive

²²⁶ Navtej Purewal, ‘Sex Selective Abortion, Neoliberal Patriarchy and Structural Violence in India’ (2018) 119 *The Feminist Review Collective* 20, 21.

²²⁷ Gillian Hewitson, ‘The Commodified Womb and Neoliberal Families’ (2014) 46 *Review of Radical Political Economics* 489, 492. See also Joya Misra, Jonathan Woodring and Sabine N Merz, ‘The Globalization of Care Work: Neoliberal Economic Restructuring and Migration Policy’ (2006) 3 *Globalizations* 317.

²²⁸ Hewitson (n 227) 490.

²²⁹ Pande, ‘This Birth and That: Surrogacy and Stratified Motherhood in India’ (n 186) 55.

²³⁰ Jessica L Peet, ‘A Womb That Is (Not Always) One’s Own’ (2016) 18 *International Feminist Journal of Politics* 171, 172.

sterilisation programmes and then subsequently its promotion of medical tourism of which transnational surrogacy was an integral part.

It is important to read the practice of surrogacy through India's social and economic development from the Nehruvian development model that aspired to an autarkic state to the neoliberal model where the focus and necessity of self-reliance has shifted from the State to the individual. Without the support of the State neoliberal individuals become 'competitive, productive, atomistic economic agents interacting within free markets to maximize lifetime utility. They make cost/benefit calculations with respect to human, physical, and financial capital investments, and consumption decisions, and they do not expect themselves or others to be supported by the state.'²³¹ Hewitson observes that this vision of self-commercialisation on the part of the surrogates is 'consistent with the policy paradigms of the World Bank and the IMF.'²³²

The neoliberal model is very well integrated into the practice of surrogacy as observed by Rudrappa in her study of women in Bangalore. She discovered a clinic operating under the name Creative Options Trust for Women (COTW); an illuminating name that at the same time works to obscure the true nature of the activities of the organisation. This clinic was established by a Mr Shetty who Rudrappa found to be a deeply controversial character and whose medical credentials and moral integrity were questionable. The success of this business could certainly be attributed to its neoliberal model because 'with very few actual employees on its payroll it was able to muster a sizeable workforce of women in prime reproductive age when needed. And when the work was done, the women, who were treated like "independent contractors," were moved out of the firm's premises and payroll.'²³³ There are parallels with the neoliberal model operating in the practice of surrogacy and the

²³¹ Hewitson (n 227) 490.

²³² *ibid* 494. See also, Purewal (n 226) 29.

²³³ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 64.

foetal container of model of pregnancy in terms of outsourcing and alienation, which I will return to discuss in Chapter 5.

Rudrappa introduces and develops the notion of ‘markets in life’²³⁴ which she builds from the concept of bio-economies. Gabriele Werner-Felmayer clarifies that the field of surrogacy is a “bio-economy” involving women who provide oocytes and babies for others while undergoing invasive treatments in the process and men who provide sperm.²³⁵ Rudrappa further explains that it is a new kind of economy based on biology where the latent value held in biological materials is transformed into business opportunities and profit.²³⁶ Vora also deals with this concept and suggests that bio-capital has evolved out of new forms of the global distribution of labour.²³⁷ Key to this notion of bio-capital is the idea of ‘surplus value’, Vora explains this through the example of kidney donations but also applies it to labour.²³⁸ Essentially, surplus value is created when an organ or embodied labour (or the product of that labour) is considered ‘extra’ in its current location but in demand elsewhere and through its freedom to be relocated it acquires value. Surplus value, therefore, in the context of commercial exchanges such as contract pregnancy, generates profit. Vora posits that in order for a kidney to become ‘unnecessary in its immediate context and therefore available for outsourcing, it must be the object of specific cultural and material practices that establish it as unnecessary.’²³⁹ This same logic could be applied to the commercial gestational surrogacy industry. In a simple, and perhaps reductive, sense this practice equates to one group wanting or needing what the other group has i.e., babies (or the ability and ease with which to produce them) and money, respectively. That is not to say that the

²³⁴ *ibid* 8.

²³⁵ Werner-Felmayer (n 181) 13.

²³⁶ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 8.

²³⁷ Kalindi Vora, *Life Support: Biocapital and the New History of Outsourced Labor* (University of Minnesota Press 2015) 1.

²³⁸ The concept of ‘surplus value’ is taken from the work of Marx. See, Karl Marx, *Capital: A Critique of Political Economy* (Ben Fowkes tr, Penguin 1976). Also see, David Harvey, *Marx, Capital and the Madness of Economic Reason* (Profile Books 2017) 8–12. For how the framework of ‘synthetic value’ is used in the context of reproductive labour see, Ruth Fletcher, ‘Legal Forms and Reproductive Norms’ (2003) 12 *Social & Legal Studies* 217.

²³⁹ Vora, *Life Support: Biocapital and the New History of Outsourced Labor* (n 237) 2.

group wanting and needing money want it for its own sake. It is, as Parry observed in her studies of surrogates in Mumbai, for the opportunities it affords the women to fulfil their obligations towards their children, primarily, but also their immediate and extended families.²⁴⁰ These obligations are based on patriarchal structures which demand the sacrifices of these women for the good of their families. This narrative is evident in the stories of the surrogates captured in the documentaries and in the studies mentioned above. I will return to discuss this in more detail in Chapter 4.

2.4.4 Cross-border ‘reproduction lines’

Genea Corea, writing in 1987 at the beginning of the development of assisted reproductive technology and the practice of surrogacy, claimed that ‘[t]he rise of the surrogate industry does not take place in isolation. It is part of the industrialization of reproduction. It is part of the opening up of the “reproductive supermarket”.’²⁴¹ A bold statement perhaps, at the time of writing, particularly as there were great fears surrounding these technological advances. An example of which can be seen in the UK’s response in the drafting and passing of the Surrogacy Arrangements Act 1985, which is a piece of legislation that some commentators describe as a somewhat knee-jerk reaction.²⁴² After much campaigning on the part of various stakeholders the UK Law Commission has recognised the need to revisit the legislation and announced on 14th December 2017 that surrogacy would be one of the areas of legal reform.²⁴³ However, Corea’s fears were not completely unfounded considering the scale of the

²⁴⁰ See, Parry (n 197) 32–37.

²⁴¹ Quoted in France Winddance Twine, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market* (Routledge 2011) ix. Genea Corea wrote the influential book *The Mother Machine* dealing in part with the rise of surrogacy. Some aspects will be explored in greater detail in Chapter 4.

²⁴² Claire Fenton-Glynn, ‘The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case Law’ (2015) 27 *Child and Family Law Quarterly* 83. Michael Freeman, ‘Is Surrogacy Exploitative?’ in Sheila McLean (ed), *Legal Issues in Human Reproduction* (Gower 1989). The 1985 legislation was a response to press and public pressure over the commercial surrogacy arrangement involving Kim Cotton. The baby was born 4th January 1985 and the Act was given Royal Assent on 16th July 1985.

²⁴³ ‘14 New Areas of Law Set for Reform – Law Commission’ (*Law Commission (UK)*, 14 December 2017) <<https://www.lawcom.gov.uk/13th-programme-of-law-reform/>> accessed 10 March 2018. For more information on the campaign to reform surrogacy law in the UK see, ‘Surrogacy UK’ <<https://surrogacyuk.org/aboutus/surroref/>> accessed 21 November 2017. And ‘Brilliantbeginnings’ <<https://brilliantbeginnings.co.uk/surrogacy-law-reform/>> accessed 1 December 2020.

industry and the ‘supermarket’ description could be considered applicable to the practice, that consists of supply lines running from Eastern Europe via the UK and Israel to India, as evidenced in documentaries such as *Google Baby*.²⁴⁴ This film by Zippi Brand Frank features Israeli citizen Doron Mamet-Meged, who after becoming a father through surrogacy sets out to build a cost effective surrogacy business that draws on globalised networks to create a transnational reproduction line. We see homosexual men selecting their preferred egg donor from an online database, the eggs are fertilised in the UK, US, or Israel before being shipped to India for gestation.²⁴⁵

These cross-border (re)production lines bring into focus the stark contrasts between the social and economic power and wealth of the buyers and the sellers in this business. In Chapter 5 I explore models of pregnancy and argue that the foetal container model of pregnancy is the dominant view underpinning conceptions of surrogacy and its regulation. I explain how gestational surrogacy, the preferred form of surrogacy practiced in India, relies on, and reinforces this model of pregnancy. The implantation of embryos from wealthier intended parents into the bodies of socio-economically disadvantaged Indian women takes on another dimension and significance considering the context within which this flow of goods takes place. Important aspects of this model are tied into the discussion here regarding the commercial nature of the exchange and the disparity in the wealth and power between the different parties to the arrangement. As Hewitson asserts, drawing on the work of Johanna Oksala, ‘[t]he old binaries between family/market and public/private no longer apply as gendered binaries; rather, they are now racial/ethnic at a national and global scale.’²⁴⁶

²⁴⁴ *Google Baby* (n 7). Inhorn (n 6) 91.

²⁴⁵ For more discussion on this documentary see, Sayantani DasGupta and Shamita Das Dasgupta, ‘Introduction’ in Sayantani DasGupta and Shamita Das Dasgupta (eds), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014).

²⁴⁶ Hewitson (n 227) 492. See also Johanna Oksala, ‘Feminism and Neoliberal Governmentality’ (2013) 16 *Foucault Studies* 32.

Pande captures the disparity of wealth and valuing between the parties by claiming that the surrogates ‘become wombs for “precious” middle-class and international babies. Their bodies become only temporarily worthy of care because they are using their bodies to produce babies for rich(er), couples, oftentimes from the Global North.’²⁴⁷ This draws out another serious concern regarding this practice, which is the health of the surrogates and the healthcare provided during and after the pregnancies. The health concerns and healthcare provisions surrounding the practice will be dealt with in greater detail in Chapters 3 and 4, but a few points are highlighted here. Pande claims that a greater value is given to the child(ren) born out of the surrogacy arrangement than the health welfare of the surrogates’ bodies.²⁴⁸ This is supported by Alison Bailey who claims that these ‘Indian women’s reproductive health and rights are tied to the social or market value of the fetus they are carrying.’²⁴⁹ Thus, leading us to question whether commercial surrogacy should ‘be promoted in a country that has an abysmally poor record on women’s health, or that has such an extraordinarily high maternal mortality rate.’²⁵⁰ The surrogate mothers appear caught in the brutal cross-section between India’s preference for an open free market and its need for a welfare-state approach to minimise the country’s extreme social and economic inequalities. The contrasts in the public healthcare provisions afforded to these women when they are pregnant with their own children, and the private facilities available to them when they act as surrogates, clearly demonstrates that their bodies and reproductive labour have very different values when there is a market economy attached. Rudrappa articulates the issue very clearly, explaining that ‘[a]s the surrogates compare their experiences of giving birth as a surrogate mother to their previous pregnancies, they underscore the paradox of an industry based on pro-natal technology in an otherwise anti-natal state.’²⁵¹

²⁴⁷ Pande, ‘This Birth and That: Surrogacy and Stratified Motherhood in India’ (n 186) 59.

²⁴⁸ *ibid* 56.

²⁴⁹ Bailey (n 22) 736.

²⁵⁰ *ibid* 734.

²⁵¹ Pande, ‘This Birth and That: Surrogacy and Stratified Motherhood in India’ (n 186) 51.

2.4.5 Anti-natalist state and sterilisation programmes

The difference in healthcare provisions provided to these women becomes all the more troubling when viewed against the backdrop of India's extensive state-funded sterilisation programmes. In fact, it would be impossible to truly comprehend the significance and development of surrogacy in India outside the context of the state's anti-natalist agenda, because it is part of the wider historical control of women and their bodies, especially through reproduction.²⁵² In Chapter 6 I will return to discuss this practice within the framework of gendered harm and argue that way surrogacy has been practiced in India constitutes a gendered harm. Family planning was central to the Indian state's post-independence modernising efforts with India being the first state in the world to establish an official population control programme in 1952.²⁵³ Betsy Hartmann describes the measures and actions the Indian state took in pursuit of its population control goals. This description includes accounts from anthropologists who observed and interviewed women who had undergone the procedures in India. In citing the words of the Dr D. N. Pai, the former director of family planning in Mumbai, commenting on his plans for compulsory sterilisation Hartmann captures the nature of these programmes; 'If some excesses appear, don't blame me... You must consider it something like a war. There could be a certain amount of misfiring out of enthusiasm. There has been pressure to show results. Whether you like it or not, there will be a few dead people.'²⁵⁴ Unfortunately, Dr Pai's predictions were correct as evidenced in the more recent case of *Devika Biswas v. Union of India*²⁵⁵ where several women died following sterilisation procedures. I describe and discuss this case in more detail in Chapter 6 with references to the judgments that reaffirmed the protection of reproductive rights under the fundamental right to life granted by Article 21 of the Constitution of India.²⁵⁶

²⁵² This is a view shared by Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123).

²⁵³ Pande, 'This Birth and That: Surrogacy and Stratified Motherhood in India' (n 186) 53. See also Purewal (n 226) 29.

²⁵⁴ Quoted in Henry Kamm, 'India State Is Leader in Forced Sterilization' *The New York Times* (13 August 1976) <<https://www.nytimes.com/1976/08/13/archives/india-state-is-leader-in-forced-sterilization.html>> accessed 15 March 2018.

²⁵⁵ AIR 2016 SC 4405, 2016 (4) RCR 461 (Civil), 2016 (8) SCALE 707, 2016 (10) SCC 726.

²⁵⁶ Constitution of India, Art 21.

The intensity with which the government moved to control the population increased during the state of emergency imposed by Prime Minister Indira Gandhi in 1975. Encouraged by her son Sanjay who was very supportive of these population control measures Indira took strong action.²⁵⁷ The State of Maharashtra passed a Bill to enforce compulsory sterilisation, targeting both men and women but making some allowances for couples who appeared to be able to practice more controlled family planning themselves. They would be required to terminate pregnancies.²⁵⁸ In 1976, a variety of laws and regulations on sterilisation were enacted and the central government put pressure on states to meet quotas.²⁵⁹ As a result the authorities resorted to using incentives through payments and rewards, punitive measures through issuing fines and withholding food rations, and sometimes even violent coercion. It is unsurprising that it was the poorest communities that were targeted.²⁶⁰ India's early population control initiatives focused on men with vasectomies being held as the ideal choice, owing to the ease and speed with which they could be performed. The method was very popular during the 1960s and 1970s with the establishment of large sterilisation camps performing tens of thousands of these procedures in each round across a number of states.²⁶¹ It is believed that over 3 million vasectomies were performed between 1970 and 1971.²⁶² The popularity of the procedure decreased quite dramatically during the 1980s and continued to decline through to the 2000s. A major factor contributing to this downward trend is considered to be the forced sterilisations carried out during the state of emergency from 1975 to 1977. Indira Gandhi lost the national election in 1977 and it is thought that her defeat can be attributed to the abuses of the sterilisation regime.²⁶³ Following the end of the state of emergency and the reinstating of civil liberties the number of vasectomies being performed

²⁵⁷ Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control* (South End Press 1995) 251. It was believed that overpopulation impeded economic growth and it also relates to the Malthusian catastrophe. See, Purewal (n 226) 29.

²⁵⁸ Discussed in the same article, Kamm (n 254).

²⁵⁹ Hartmann (n 257) 251.

²⁶⁰ *ibid* 251–252.

²⁶¹ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 29.

²⁶² *ibid*.

²⁶³ *ibid* 30.

drastically declined but conversely the sterilisation of women increased dramatically. Sterilisation camps for women have been in operation in India since the 1970s and continue to be prevalent today.²⁶⁴

Hartmann also explains that the USA played a major role in assisting population control measures in developing countries through its Agency for International Development by funding the Program for International Education in Gynaecology and Obstetrics, which facilitated the training of international medical professionals in sterilisation techniques.²⁶⁵ There is much to be said about the USA's role in influencing and actively assisting population control measures in other countries, particularly developing countries such as India but it is beyond the scope of this thesis. One point worth noting is that many US citizens have availed of reproductive services in India as a solution to their own fertility issues. It is also particularly striking that, as Rudrappa discovered, '[t]he communities of working-class women targeted by population control policies are the very same ones that provide workers for Bangalore's reproductive assembly lines.'²⁶⁶

2.4.6 Pro-natalist economy and surrogacy

As earlier stated, reproductive labour, which involves gestating and birthing babies but also all the activities surrounding the nurturing and caring of children, has traditionally been confined to the private sphere and has been largely undervalued. Yet, with the advances in medical technology creating the possibility of gestational surrogacy, this previously devalued labour has moved to the marketplace allowing for the growth of multi-million-dollar industries. In many respects, surrogacy is just one of many burgeoning outsourced industries in India that rely on the use of women and their labour, such as the garment industry. As Frank Tipton remarks, '[t]he exploitation of women makes

²⁶⁴ *ibid* 32. Also Purewal (n 226) 29.

²⁶⁵ Hartmann (n 257) 246.

²⁶⁶ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 32.

up the dark underside of rapid development in Asia.’²⁶⁷ In Chapter 4 I will return to discuss the relationship between women and the state, and women and their labour under capitalist patriarchy.

It is striking that where the fertility of these women was once perceived as a threat, an impediment to social and economic development, that required severe and at times brutal deterrence came to be viewed as a profit-making asset. This is a view supported by Rudrappa who claims that the ‘state’s anxieties around working-class women’s bodies as a source of dystopic overpopulation and resultant poverty... have now been converted to an emerging hope that these very same bodies will generate new revenue streams by being harnessed to reproductive assembly lines.’²⁶⁸ Unfortunately, this has not necessarily translated into a greater fundamental valuing and better treatment of the women. The discussions in Chapters 4 on exploitation and objectification will explore how the women are treated as a means to an end for the benefit of others. It is also worth noting that despite the shift in perspective, on the reproductive activities of these women - through surrogacy only, it does not give rise to a population increase in their demographic. They are harnessing their reproductive capacities for the benefit of others.

2.4.7 Global women, stratified reproduction, and othering

Shellee Colen first used the phrase ‘stratified reproduction’ in 1985 in her work on white middle-class New Yorkers who hired nannies of West Indian origin.²⁶⁹ In this work she reveals that the reproductive labour, the skills of mothering and providing care, of the West Indian nannies was at the same time valued and devalued. She explains that they were sought out as nannies because they were seen to be excellent caregivers, but this level of care and energy was denied to their own children as it was

²⁶⁷ Frank B Tipton, *The Rise of Asia: Economies, Society and Politics in Contemporary Asia* (Palgrave Macmillan 1998) 367.

²⁶⁸ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 10.

²⁶⁹ Shellee Colen, “‘Like a Mother to Them: Stratified Reproduction and West Indian Childcare Workers and Employers in New York’” in Faye D Ginsburg and Rayna Rapp (eds), *Conceiving the New World Order: The Global Politics of Reproduction* (University of California Press 1995) 78.

demanded and given elsewhere. This establishes a form of stratified reproduction as the ‘physical and social reproductive tasks are accomplished differentially according to the inequalities that are based on hierarchies of class, race, ethnicity, gender, place in a global economy, and migration status... [which are] structured by social, economic, and political forces.’²⁷⁰

There is a strong case to support the claim that ‘transnational surrogacy in India is a classic case of stratified reproduction.’²⁷¹ This is evident first of all on the basis of the inequalities between the intended parents and the surrogates as the exchange takes place between unequal social actors. Much like the West Indian nannies, Indian mothers are sought out because they are considered to possess the traditional and ideal feminine virtues of selflessness, nurturing, and submissiveness, and therefore making them perfectly suited to this role.²⁷² In discussing the ways the surrogates, of her studies in Mumbai, also internalise these virtues and characteristics Førde introduces the term ‘motherly self-sacrifice’.²⁷³ Yet, this stratification of reproduction is most apparent through the fact that the Indian state has forcefully discouraged and deterred the procreation of this demographic of women whose reproductive functions facilitate the very much desired and encouraged reproduction of others, namely, wealthier paying customers of both Indian and foreign origin. The privileging of certain families occurs as a result of ethnic, class, and economic inequalities and disadvantage. Pande recounts a very poignant story of a surrogate who had to abort her own pregnancy as she could not afford to take care of another child but then undertook a surrogacy arrangement in order to earn money for her other children.²⁷⁴ Pande also makes an extremely pertinent point about the possibilities created through gestational surrogacy and the environment within which it occurs in India. She explains that the history of reproductive politics proliferated a rhetoric and policies along the lines of stratified reproduction,

²⁷⁰ *ibid.*

²⁷¹ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 40.

²⁷² This is supported by Kristin Engh Førde. She also reveals that these attitudes are internalised by the surrogates she interviewed and documents in Førde (n 208) 7.

²⁷³ *ibid.* 12.

²⁷⁴ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 976.

which discouraged poor women from reproducing, therefore ‘[p]lacing the growing demand for assisted reproductive technology within this historic context exposes the irony of this obsession with creating and preserving genetic ties.’²⁷⁵

2.4.8 (In)fertility - a global health problem

As illustrated above, the global fertility industry is structured along the lines of stratified reproduction. In addition to the ways already discussed the approaches to the global health problem of infertility further reveals this phenomenon. France Winddance Twine explains that ‘the global market for fertility therapies is structured by racial, class and economic inequalities.’²⁷⁶ Infertility is not something that only affects people in the Global North, as figures from the World Health Organisation reveal, at least one in every ten couples in developing countries experience infertility during their reproductive lives.²⁷⁷ Yet, most of those couples and individuals in developing countries experiencing fertility issues do not have access to the treatments and services open to those who seek surrogacy arrangements in India, or in their own countries, where permitted. As I outlined earlier during the description of the documentary *Mother India*, that even in countries where childlessness is deeply stigmatised, such as India, there is a lack of access to affordable ART treatments. The inequality in accessing fertility treatment was a concern highlighted by the Committees scrutinising the ART Bill, which I discuss in more detail in Chapter 3. They called for better access to ART treatments at public hospitals for those who cannot afford the fees of private clinics and a reduction to the cost of injections.²⁷⁸

²⁷⁵ Pande, ‘This Birth and That: Surrogacy and Stratified Motherhood in India’ (n 186) 60.

²⁷⁶ Quoted by Twine (n 241). ix-x.

²⁷⁷ *ibid.*

²⁷⁸ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, paras. 5.2, 5.3, 5.7 (March 2021) available at [https://prsindia.org/files/bills_acts/bills_parliament/2020/SCR%20The%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2020/SCR%20The%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202020.pdf) accessed 21st September 2021.

2.4.9 A Handmaid's Tale: a breeder class of women?

The privileging of certain families, and women, over others exposes the vast gulf between the reproductive rights, choices, and health of those women, predominantly from the Global North, who seek these surrogacy arrangements and those women who act as the surrogates in the Global South. Choice and freedom are important principles in the exercising of reproductive rights and are two privileges often denied to the surrogates. Early worries, surrounding the technologies that facilitate the possibility of gestational surrogacy, related to the belief that women would engage surrogates in pursuit of 'convenience' surrogacy, and the eventual downward spiral would lead to a 'breeder class of women'.²⁷⁹

Although there does not appear to be much evidence to support this, that women are engaging other women as surrogates to avoid the 'inconvenience' of pregnancy for themselves,²⁸⁰ the concerns surrounding the possibility of a real-life 'Handmaid's Tale'²⁸¹ continue to persist and are not too far-fetched. The tiered structure of the women in Margaret Atwood's work can be found, at least to some degree and perhaps on a superficial level, in the practice of surrogacy in India; the wives are the intended mothers, Marthas are the recruiters, intermediaries and hostel supervisors, and the handmaids are the surrogates. The cloistering of the women under the constant eye of the hostel supervisors and director that happens in clinics such as that of Dr Patel's, where the surrogates' daily routines, activities, and diets are strictly controlled, also according to some conjures up the image of the living arrangements and experiences of the handmaids.²⁸² I will return to discuss this in more detail in Chapter

²⁷⁹ For more discussion on the notion of 'convenience' surrogacy see, Martha Field, 'Surrogate Motherhood' in John Eekelaar and Peter Šarčević (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (Nijhoff 1993) 224–226.

²⁸⁰ Indian celebrities have been accused of convenience surrogacy see, Neeta Lal, 'Priyanka Chopra Backlash Spotlights India's Surrogacy Stigma – Even Though It's Big in Bollywood' *South China Morning Post* (New Delhi, 25 January 2022) <<https://www.scmp.com/week-asia/people/article/3164653/priyanka-chopra-backlash-spotlights-indias-surrogacy-stigma-even>> accessed 10 February 2022.

²⁸¹ Margaret Atwood, *The Handmaid's Tale* (McClelland and Stewart Houghton Mifflin 1985).

²⁸² The images of the surrogacy hostels in India and the notion of The Handmaid's Tale is discussed by Teman (n 2). And Susan Markens, 'Interrogating Narratives About the Global Surrogacy Market' [2010] *The Scholar & Feminist Online* 1. For a critical race analysis of Atwood's work and the TV adaptation see, Angelica Jade Bastién, 'In Its First Season, The

4 and provide a detailed analysis of the metaphors used to describe pregnancy and surrogacy in Chapter 5.

The class differences between the various actors and the subsequent exploitation and abuse of these class differences are serious issues in these arrangements and they become even more pronounced as a result of the global nature of the practice. As Jessica Peet asserts that ‘[t]ransnational commercial surrogacy also reflects global hierarchies of gender, race and class that serve to reinforce such divisions.’²⁸³ This is also a view supported by Hewitson who surmises that surrogacy ‘supports the vast class inequalities between women, between families, and between the privileged and the working class, which have been massively expanded under global neoliberalism.’²⁸⁴ Peet further elaborates on this point to explain that the commissioning individuals benefit from the diminished status of the surrogates because it serves to lower the cost of the arrangement and limit the rights of the women, and they also benefit from ‘historical and contemporary neoimperial relationships between the West and the developing world which both appropriate and devalue care labor performed by people of color, particularly women, in the Global South.’²⁸⁵

The notion of a ‘breeder class of women’ relies on the othering of women from less affluent backgrounds and countries. It leads us to question why states where commercial, or all forms, of surrogacy has been prohibited allow their citizens to travel to jurisdictions where it is permitted. Surely, the moral and ethical objections that have led to the criminalisation of this activity are universally and equally applicable, and in fact should be of greater concern and importance when there are vast disparities of wealth and power between the parties. The othering of women from

Handmaid’s Tale’s Greatest Failing Is How It Handles Race’ (*Vulture*, 14 June 2017)
<<https://www.vulture.com/2017/06/the-handmaids-tale-greatest-failing-is-how-it-handles-race.html#comments>>
accessed 20 July 2020.

²⁸³ Peet (n 230) 172.

²⁸⁴ Hewitson (n 227) 494.

²⁸⁵ Peet (n 230) 178–179.

the Global South, who now account for a large number of surrogates in this global industry, was a concern expressed by Barbara Katz Rothman in 1988 when she asked ‘Can we look forward to baby farms, with white embryos grown in young and Third World women?’²⁸⁶ Usha Rengachary Smerdon echoes this by asserting that the rise of surrogacy in India was predictable because ‘surrogacy in the international context involves overlapping issues of neocolonialism, classicism[sic], and racism but to a more extreme degree.’²⁸⁷ One of the dangers here, which will be elaborated on in Chapters 4 and 5, is that ‘the fertility, bodies, and reproductive decisions of lower-class women get revalued only insofar as these women serve as human incubators for their richer sisters.’²⁸⁸ As previously mentioned the Indian surrogates are given vastly different levels of healthcare during their contract pregnancies than when they are pregnant with their own children. Yet, they experience this greater care and attention because two sets of women at opposite ends of the reproductive hierarchy have been brought together and therefore the surrogates are treated as ‘bodies that are facilitating other women’s access to cutting-edge reproductive technologies.’²⁸⁹

2.5 Conclusion

In this chapter I have provided a view of the landscape of surrogacy in India by describing and discussing the historical, political, and economic conditions that gave rise to India’s ascent to a global centre for transnational surrogacy arrangements within the wider field of medical tourism. In order to fully understand the development of India’s transnational surrogacy industry, it is imperative to acknowledge the legacies of colonialism, the post-independence population control programmes and initiatives to create a knowledge society of highly trained medical and technological professionals, and the reforms that brought about a ‘New India’ and an aggressive neoliberal economic agenda. I have introduced a key figure in India’s fertility industry, namely Dr Nayna Patel, and drawn out some of

²⁸⁶ Quoted in Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 971.

²⁸⁷ Smerdon (n 17) 51.

²⁸⁸ Pande, ‘This Birth and That: Surrogacy and Stratified Motherhood in India’ (n 186) 60.

²⁸⁹ *ibid* 59–60.

the most pressing ethical and legal concerns and challenges arising from the practice of commercial surrogacy, which will be given further scrutiny in the subsequent chapters of this thesis.

The outsourcing of reproductive labour and care work to working-class women has a long history. Debra Spar claims that the ancient practice of wet nursing bears a great deal of similarity to surrogacy today.²⁹⁰ Holly Donahue Singh feared that, considering India's history of outsourcing and the high prevalence of exploitation in the cheap labour market, surrogates would fall victim to the same mistreatment experienced by garment factory workers and a 'race-to-the-bottom' would also occur in this industry.²⁹¹ Surrogacy in India, having been left to the self-regulating markets principles of neoliberalism, has involved the serious abuse and mistreatment of the women, which I will discuss in detail in Chapters 4 and 6. The Indian government recognised the need to regulate this practice as the non-binding guidelines produced by the Indian Council of Medical Research have been insufficient and ineffective in this regard. In the following chapter I will outline the measures taken by the Indian government to address the issues arising from these arrangements that included imposing restrictions on who could avail of surrogacy through implementing executive notifications and drafting new legislation. I will provide a detailed account of the timeline of regulatory interventions, and important key cases that influenced the actions taken by the government, before assessing whether their effectiveness.

²⁹⁰ Debra Spar, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (Harvard Business Review Press 2006).

²⁹¹ Holly Donahue Singh, "The World's Back Womb?": Commercial Surrogacy and Infertility Inequalities in India" (2014) 116 *American Anthropologist* 824, 826.

3 Regulating surrogacy in India: a journey

*India is probably one of the few countries in the world to have adopted every possible regulatory approach to surrogacy in the space of fifteen years.*²⁹²

3.1 Introduction

The purpose of this chapter is to chart the Indian journey in regulating surrogacy and to explain and evaluate how the actions of the Indian government brought about the current situation. I will do this by presenting the timeline of regulatory interventions and key events and cases that directed and influenced the legal reforms, before critically examining their effectiveness at addressing the issues arising from the practice. In setting out the pathway to the enacted legislation I will describe and analyse the Bills as initially introduced and the subsequent amendments with a focus on the Surrogacy Bill 2016, as this was the first legislative attempt aimed solely at the regulation of surrogacy and marked a separation with the regulation of ART.²⁹³ By attempting to synthesise this evolving journey, from the initial non-binding guidelines of the Indian Council for Medical Research (ICMR) to the subsequent steps of the introduction of legislation²⁹⁴ and executive order notifications, I will show how the approach developed from a liberal position to a restrictive one.²⁹⁵ Furthermore, how the regulatory approach went from being favourable to the clinics and intended parents but at the expense of the surrogates to one that aimed, if at times misguidedly, to give the women stronger protections.²⁹⁶

²⁹² Banerjee and Kotiswaran (n 50) 87.

²⁹³ The core aim of this thesis is to uncover the model of pregnancy operating in the drafting of the legislation and the debates surrounding it and therefore underpinning the approaches to the legal reforms. The research was conducted in real time as the Surrogacy legislation was introduced, debated, amended, and ultimately passed into law. The present tense is used in reference to the debates and amendments that were being introduced in order to accurately reflect the subtle changes that were being made which is key to uncovering the model of pregnancy that underpins not just the final wording of the legislation but also shaped the debates that were taking place.

²⁹⁴ The Surrogacy (Regulation) Bill 2019 was further amendment following the Select Committee of the Rajya Sabha's report, re-introduced into both houses of the Indian parliament before receiving Presidential assent on 25th December 2021 and coming into force on 25th January 2022.

²⁹⁵ This framework of liberal to restrictive approaches was developed by Prabha Kotiswaran and will be discussed in more detail later in the chapter. See Kotiswaran (n 37).

²⁹⁶ A view also shared by Banerjee and Kotiswaran (n 50) 87.

This critique of the Indian government's attempts to regulate surrogacy is drawn from The National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 (Guidelines), the various versions of the Draft Assisted Reproductive Technology Bill (ART Bill) and the Surrogacy (Regulation) Bill (Surrogacy Bill), the Assisted Reproductive Technology (Regulation) Act, 2021 (ART Act) and Surrogacy (Regulation) Act, 2021 (Surrogacy Act), the executive orders, the reports from the Parliamentary Standing Committee on Health and Family Welfare and the Select Committee of the Rajya Sabha, and the Parliamentary Debates on the legislation in Lok Sabha and Rajya Sabha.²⁹⁷ In Chapters 4 and 6 I will critically evaluate the provisions of the initially proposed legislation and offer a detailed examination of key clauses. This chapter furthers my overall thesis arguments by providing the detail and structure of the framework for regulating surrogacy in India, which I will then evaluate against various philosophical frameworks as set out in Chapters 4 and 5.

A central concern of this thesis is the potential mistreatment of and harm to the surrogates, not only through the conditions of the practice but also from how the law aims to regulate it. I will explore this further in Chapter 6 with reference to the concept of gendered harm. In this chapter I will show that the surrogates' rights and interests are not fully recognised and respected because of the government's failure to include the women, through allowing their voices to be heard, and to place them at the centre of the conversations on the legal reforms. By this I mean taking a woman and surrogate centred approach to the regulation that acknowledges how underlying assumptions about the phenomenon of pregnancy not only influence conceptions of surrogacy and how it should be regulated but can also result in harms to the surrogates. The evidence for this lies in the approaches to the drafting of the

²⁹⁷ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005); Draft Assisted Reproductive Technology (Regulation) Bill, 2008, 2010, 2013, 2014; Surrogacy (Regulation) Bill 2016; Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report (August 2017); Surrogacy (Regulation) Bill 2019; Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*; Assisted Reproductive Technology (Regulation) Act, 2021 and Surrogacy (Regulation) Act, 2021.

provisions of the Bills and their content, the Public Interest Litigation case brought by Jayashree Wad (Wad PIL case) against commercial surrogacy, where the surrogates were directly excluded from speaking, and the paralegal discussions surrounding the Bills.

It will be further argued that despite several redrafts the legislation continues to fall short in addressing several of the problems outlined in the previous chapter and in some cases increases the likelihood of mistreatment and harm. While all the issues mentioned are worthy of attention this chapter and the following one will focus on those related to the only types of surrogacy permitted; altruistic and gestational and the ‘close relative’ requirement, which limited the eligibility criteria for surrogates to only close relatives of the intended parents. Although the ‘close relative’ requirement has been amended, with the Surrogacy Act now allowing ‘a willing woman’²⁹⁸ to undertake the arrangement, it still reveals a great deal about the thinking that influenced the drafting of the legislation, and it was one of the most discussed issues in the parliamentary debates and committee reports. In the following chapter I will closely examine the provisions relating to the invasive clinical procedures (e.g., embryo transfers, foetal reduction, abortions, and C-section deliveries) and those dealing with the insurance and aftercare.

3.1.1 Chapter outline

The chapter will begin by providing the background context to the legislation and describing the state of the practice, the expressed motivations for the legal reforms, and how laws are passed in India. It will outline key cases that have been instrumental in leading the Indian government to take action through enacting legislation. Then the evolution of the various regulatory interventions will be set out

²⁹⁸ On 26th February 2020 the Union Cabinet approved the Rajya Sabha Select Committee’s recommendation to amend the criteria of eligibility for the surrogate to ‘a willing woman’ from ‘a close relative’. See ‘Union Cabinet Approves Surrogacy (Regulation) Bill’ *The Hindu Business Line* (New Delhi, 26 February 2020) <<https://www.thehindubusinessline.com/news/union-cabinet-approves-surrogacy-regulation-bill/article30921500.ece>> accessed 22 September 2020. The Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl.4.

by charting the development from the Guidelines to the Bills and the final wording of the Acts. In detailing the chronology of the Indian journey in regulating surrogacy I will explore and describe the legal pathway to the enacted legislation and the key substantive legislative goals that were achieved. The different actions taken by the government are often inconsistent, at times contradictory and have largely worked in favour of protecting the profitability and longevity of the wider Assisted Reproductive Technology industry, and the interests of the clinics and commissioning parents, with insufficient regard for the rights and interests of the surrogate mothers.²⁹⁹ I will explain briefly below, and explore in detail in the following chapters, how this relates to the main question of the thesis.

This thesis considers the extent to which the foetal container model of pregnancy underpins the approaches to the regulation of surrogacy and poses the question of whether a reconceptualisation of pregnancy and the maternal-foetal relationship is the key to better regulation. This question stems from a concern about the long-term absence of legally binding regulation of surrogacy in India and the lack of a woman-centred approach that would treat the surrogates as embodied persons rather than reducing them to their role as mere foetal containers. I aim to uncover the unacknowledged operations of the foetal container model of pregnancy and reveal how it can facilitate the mistreatment of surrogates through creating the illusion of a separation between the woman's body and the foetus and between her body and herself, that results in a state of disembodiment.³⁰⁰ Chapter 5 sets out this model in detail as well as the alternative view of pregnancy described in the introduction to the thesis. The parthood

²⁹⁹ This is view shared by many commenting on surrogacy in India. See, Jyotsna Agnihotri Gupta, 'Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalized Fertility Market' (2012) 5 *International Journal of Feminist Approaches to Bioethics* 25, 43. Also Norman Witzleb and Anurag Chawla, "'Surrogacy in India: Strong Demand, Weak Laws'" in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routledge 2016) 175. See also Imrana Qadeer, 'The ART of Marketing Babies' (2010) 7 *The Indian Journal of Medical Ethics* 209., Sharmila Rudrappa, 'Working India's Reproductive Assembly Line: Surrogacy and Reproductive Rights?' (2012) 66 *Western Humanities Review* 77., Sarojini Nadimpally and Aastha Sharma, 'The Draft ART (Regulation) Bill: In Whose Interest?' (2009) 6 *The Indian Journal of Medical Ethics* 36., Chayanika Shah, 'Regulate Technology, Not Lives: A Critique of the Draft ART (Regulation) Bill' (2009) 6 *The Indian Journal of Medical Ethics* 32.).

³⁰⁰ Munro argues that the creation of a separation between the pregnant woman and the foetus results in an alienation for the pregnant woman in terms of her life, treatment on her body, and freedom to define those experiences. See, Munro (n 19) 35.

view of pregnancy forces us to reconceptualise the maternal-foetal relationship and therefore the role of surrogate. If the treatment of the surrogate based on the foetal container model of pregnancy causes a sense of disembodiment, then the application of the parthood view could result in a more embodied experience for the women. I will return to explore these questions at greater length in Chapter 6.

3.2 Background context

The previous chapter gave a view of the landscape of surrogacy in India and highlighted some of the most pressing issues arising from the practice. These included concerns regarding the surrogates' health and access to aftercare, insurance, and compensation in the case of injury or death, lack of adherence to the ICMR's Guidelines by clinics, and risks of exploitation and coercion. Additional concerns related to the patriarchal control over the women's bodies, the devaluing of the surrogate's contribution and investment rendering her a mere foetal container and her labour invisible, which involves treating her as separate from her body and the foetus and results in her alienation from the 'product' of her labour. Concerns regarding the commodification of children and the risk of abandonment were also highlighted. The reasons for India's popularity and success as a global hub for surrogacy have been identified, amongst others, as owing to 'loose' regulation, many willing women, highly qualified medical professionals, world class technology and infrastructure, high standards of medical care during the arrangement and for medical tourists, governmental incentives through the promotion of medical tourism and tax breaks, widely spoken English, lower costs than elsewhere, and enforceable contracts.³⁰¹ It has also been argued that the restrictions on and prohibition of surrogacy in certain jurisdictions also worked to drive intended parents to seek out arrangements in India's more permissive environment.³⁰² Despite this long list of attractive and favourable conditions for those

³⁰¹ Also discussed by Sharmila Rudrappa, 'Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015' (2018) 44 *Critical Sociology* 1087, 1090–1091.

³⁰² Sunita Reddy and others, 'Surrogacy in India: Political and Commercial Framings' in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 156.

seeking surrogacy, some arrangements in India have been hugely problematic and attracted a great deal of attention both domestically and internationally. The cases of Baby Manji and the Balaz twins, described in the key cases section, are two such cases and highlighted the difficulties and complexities in determining the legal parenthood and nationality of the children.

Jagat Prakash Nadda was the Minister of Health and Family Welfare between 9th November 2014 and 30th May 2019, and at the time of the Surrogacy Bill's introduction in the Lok Sabha.³⁰³ During his submission he outlined the aims of the legislation claiming that the Bill was 'keeping the Indian ethos in mind' by attempting to stop the exploitation of surrogate mothers, ending the abandonment of children, and ensuring that 'foreigners do not get away over surrogacy.'³⁰⁴ He explained that the motivations for the Bill included the need to end the exploitation of surrogates through banning commercial surrogacy in favour of altruistic arrangements, to protect the rights of the children, and to control unethical practices such as the 'rackets of intermediaries in importing, exporting and selling of human embryos as well as gametes.'³⁰⁵ In the Statement of Objects and Reasons of the Bill these same motivations and concerns about the practice are outlined.³⁰⁶ It is clear that the international reputation India gained as a 'surrogacy hub for couples from different countries' had an impact, particularly as it is noted that there had been 'widespread condemnation of commercial surrogacy in India...in different print and electronic media for [the] last few years.'³⁰⁷ It is also stated that due to a lack of legislation

³⁰³ The Minister of Health and Family Welfare is responsible for the separate Surrogacy (Regulation) Bill. Jagat Prakash Nadda was the Minister between 09/11/2014 and 30/05/2019, and Dr Harsh Vardhan was in the post between 26/05/2014 and 9/11/2014 and between 30/05/2019 and 7/07/2021.

³⁰⁴ Lok Sabha Debates, *Surrogacy (Regulation) Bill, 2018* 80-81, Session Number 16, 19 December 2018, *Comments by Shri Jagat Prakash Nadda*, Available at https://eparlib.nic.in/bitstream/123456789/784190/1/lzd_16_16_19-12-2018.pdf (accessed 16th February 2019).

³⁰⁵ Lok Sabha Debates, *Surrogacy (Regulation) Bill, 2018* 80-81, Session Number 16, 19 December 2018, *Comments by Shri Jagat Prakash Nadda*, Available at https://eparlib.nic.in/bitstream/123456789/784190/1/lzd_16_16_19-12-2018.pdf (accessed 16th February 2019); Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 392, 19 November 2019, *Comments by Dr Harsh Vardhan* available at <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F19.11.2019.pdf> (accessed 16th March 2020).

³⁰⁶ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Statement of Objects and Reasons.

³⁰⁷ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Statement of Objects and Reasons.

the practice had been misused by surrogacy clinics and had led to the ‘rampant [use] of commercial surrogacy and unethical practices.’³⁰⁸ The drafting of the Bill also came in response to the 2009 Law Commission of India 228th report, that was released seven years earlier, recommending the prohibition of commercial surrogacy by enacting suitable legislation.³⁰⁹

Dr Harsh Vardhan, who was the Minister of Health and Family Welfare (between 26th May 2014 and 9th November 2014 and again between 30th May 2019 and 7th July 2021) at the time of the Surrogacy Bill’s introduction in Rajya Sabha also pointed out that the government had committed to enacting legislation to regulate surrogacy.³¹⁰ The submission took place on 19th November 2019, during which he explained that there were eleven pending parliamentary assurances from the government for legislation on the practice, including the Law Commission’s report that recommended prohibiting commercial surrogacy by ‘legalizing altruistic surrogacy arrangements’.³¹¹ He also cited the Public Interest Litigation case at the Supreme Court,³¹² described in the key cases section of this chapter, and the affidavit filed at the Supreme Court also promising that the government would prohibit commercial surrogacy. Before providing a detailed account of the Indian journey in regulating surrogacy I will give a brief overview of the legislative process in India.

³⁰⁸ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Statement of Objects and Reasons.

³⁰⁹ Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Obligations of Parties to a Surrogacy*, Report No.228, (August 2009) available at <https://lawcommissionofindia.nic.in/reports/report228.pdf> (accessed 16th February 2019).

³¹⁰ The Surrogacy (Regulation) Bill, 2019, 156 of 2019, was introduced in Rajya Sabha on 19th November 2019. Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 391-403, 19 November 2019, *Comments by Dr Harsh Vardhan* available at <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F19.11.2019.pdf> (accessed 16th March 2020).

³¹¹ Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Obligations of Parties to a Surrogacy*, Report No.228, (August 2009), p. 7.

³¹² It has been argued by some commentators that the PIL case brought by Jayashree Wad was influential in directing the government’s regulation of surrogacy. A detailed discussion on this is given in the key cases section.

3.2.2 Indian Legislative Process

The Indian system for making new laws is similar to the British system, where Bills are introduced in the Houses of Parliament to be discussed and passed. The Indian Parliament consists of the President and two houses with almost equal powers: the Lok Sabha (House of the People), and the Rajya Sabha (Council of States). Each Bill that is introduced, either a Government Bill introduced by a minister or a Private Member's Bill introduced by a member other than a minister, must be approved by both houses and given the assent of the President of India before becoming law. A Bill goes through three readings in both houses before being submitted to the President for assent. It has become general practice since the creation of Department-related Standing Committees to refer a newly introduced Bill to the relevant committee for examination, consultation with stakeholders, and a report detailing the discussions, the various submissions of the stakeholders, and recommendations for amendments to the Bill. A Bill is not deemed to have been passed by Parliament unless it has been agreed to by both houses, either with or without amendments agreed to by both houses. Bills can be introduced into either house apart from Money Bills which can only be introduced in the Lok Sabha, but the process is similar in both houses.³¹³

3.2.2.1 Parliamentary sessions and questions

There are three parliamentary sessions each year, but the Parliamentary Standing Committees meet throughout the year.³¹⁴ The first hour of the List of Business is dedicated to questions. Question Hour has a special significance in parliamentary proceedings as it is an opportunity for members to highlight people's grievances and to ask questions of ministers and other members on all aspects of

³¹³ For more information on the legislative process and workings of the Indian Parliament including what happens at each stage of the readings see, Yogendra Narain, 'Practice & Procedure-Abstract Series: The Upper House of Indian Parliament' (*Rajya Sabha*, 2005) <https://rajyasabha.nic.in/rsnew/practice_procedure/book1.asp> accessed 22 September 2021.

³¹⁴ The Budget Session between February and May, the Monsoon Session between July and August and Winter Session between November and December.

governmental activities and policies.³¹⁵ MPs have used this mechanism to raise concerns about the functions of ART clinics and the plans to regulate surrogacy arrangements on several occasions since 2002.³¹⁶ For example, on 27th November 2002 Ram Singh Kaswan and others raised a question in the Lok Sabha on whether the government intended to recognise ART clinics.³¹⁷ The Minister of Health and Family Welfare responded that they had received reports of the ‘mushrooming of ART Clinics where the services provided seem to be highly questionable’ and that the Indian Council for Medical Research had released Guidelines, which would be implemented to regulate and supervise the clinics after receiving the views of all stakeholders.³¹⁸ Again, in 2004 Shri Hannan Mollah raised concerns over the ‘absence of any law to regulate ART clinics’ and that ‘thousands of people are suffering physically, mentally, and financially.’³¹⁹ On 23rd November 2007 another question was submitted to the Minister of Women and Child Development on the accuracy of reports indicating an increase of surrogacy in India and whether the government proposed to bring a comprehensive law to regulate it. Shrimati Renuka Chowdhury responded that there was ‘no proposal to bring any law to regulate surrogacy in the country’ but that the Guidelines by the ICMR had been approved, that they were available online and had provisions with respect to surrogacy.³²⁰ However, in response to Joshi Shri Pralhad Venkatesh’s question on 8th July 2009 regarding the regulation of surrogacy the Minister of Health and Family Welfare confirmed that the Draft Assisted Reproductive Technologies (ART) Bill

³¹⁵ ‘Seventeenth Lok Sabha: Type of Questions’ (*Parliament of India Lok Sabha*) <<http://loksabhaph.nic.in/Questions/TypeOfQuestions.aspx>> accessed 8 October 2021.

³¹⁶ The details of the questions raised in the Indian Parliament can be found here: <http://loksabhaph.nic.in/Questions/Qtextsearch.aspx> and <https://rajyasabha.nic.in/Questions/IntegratedSearchForm> accessed 16 February 2019.

³¹⁷ Lok Sabha Debates, *Artificial Reproductive Technology Clinics* 222, Session Number 11, 27 November, 2002, *Unstarred Question Number 1453* <<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=49984&lsno=13>> accessed 16 February 2019.

³¹⁸ Lok Sabha Debates, *Artificial Reproductive Technology Clinics* 222, Session Number 11, 27 November, 2002, *Unstarred Question Number 1453* response by Shri A. Raja Available at <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=49984&lsno=13> accessed 16 February 2019. These are the Guidelines referred to in the introduction of the chapter.

³¹⁹ Lok Sabha Debates, *Reported illegal practices adopted by ‘Assisted Reproductive Technology Clinics’ causing danger to Society* 426, Session Number 3, 20 December 2004, Comments by Shri Hannan Mollah. Available at <http://loksabhaph.nic.in/Debates/result14.aspx?dbsl=1604> accessed 16 February 2019.

³²⁰ Lok Sabha Debates, *Laws to Regulate Surrogacy* 160, Session Number 12, 23 November 2007, *Unstarred Question 1021* available at <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=58291&lsno=14> accessed 16 February 2019.

& Rules, 2008 had been made available. In answer to a question on 4th December 2015 asking if the government proposed to ban commercial surrogacy through enacting legislation the Minister of Health and Family Welfare responded that the government did not support commercial surrogacy and that the Surrogacy (Regulation) Bill was under inter-ministerial consultation.³²¹ Many further questions have been submitted on the practice of surrogacy and the developments on legislation.³²²

3.2.2.2 The passage of the Surrogacy (Regulation) Bill and the ART Bill

The Surrogacy (Regulation) Bill 2016 was first introduced in the Lok Sabha on 21st November 2016,³²³ and marked a separation of the regulation of surrogacy from that of the wider field of Assisted Reproductive Technologies. This move has baffled many commentators including the members of the committees scrutinising the Bill because gestational surrogacy, the only type of surrogacy permitted, relies on the functions of ART clinics.³²⁴ The Surrogacy Bill was referred to the Department-related Parliamentary Standing Committee on Health and Family Welfare on 12th January 2017, their report was submitted on 10th August 2017. The recommendations in this committee's report and those of the Select Committee of the Rajya Sabha will be discussed in greater detail later in the chapter. On 21st March 2018 the Union Cabinet³²⁵ gave its approval to move forward with official amendments to the

³²¹ Lok Sabha Debates, *Surrogacy*, Session Number 6, 4 December 2015, *Starred Question Number 100* available at <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=25002&lsno=16> accessed 16 February 2019. The MP asked if the government was introducing legislation 'in order to protect the rights of uneducated and indigent surrogate mothers' and had taken note of 'the precarious condition of poor women being lured to surrogacy'.

³²² Another example can be found here Lok Sabha Debates, *Regulation of Surrogacy*, Session Number 2, 8 July 2009, *Unstarred Question Number 526* <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=71050&lsno=15> accessed 16 February 2019.

³²³ The passage of the Bill can be track here <<https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>> accessed 16 February 2019.

³²⁴ Press Information Bureau, 'Cabinet Approves Moving Official Amendments in the "Surrogacy (Regulation) Bill, 2016"' (*PIB Government of India*, 21 March 2018) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=177806>> accessed 30 August 2018.

³²⁵ The Union Council of Ministers exercises executive authority in the Republic of India and the Union Cabinet is a smaller executive body with supreme decision-making powers.

Bill.³²⁶ The Bill was passed by the Lok Sabha on 19th December 2018.³²⁷ However, as the term of the Lok Sabha lapsed the Bill was amended followings some of the recommendations of the Parliamentary Standing Committee which I will detail in section 3.4.5.3.

The Bill was re-introduced on 15th July 2019 as the Surrogacy (Regulation) Bill, 2019. The Department of Health Research, responsible for drafting the Bill, stated that they had accepted 13 of the 42 recommended amendments.³²⁸ It was passed by the Lok Sabha on 5th August 2019 and referred to the Select Committee of the Rajya Sabha on 21st November of the same year.³²⁹ The Select Committee released their report on 5th February 2020. On 26th February 2020 the Union Cabinet approved 15 of the major recommendations of the Select Committee of the Rajya Sabha including, amending the contentious clause that limited the eligibility of a surrogate from a ‘close relative’ only to ‘a willing woman’.³³⁰ The amended Surrogacy (Regulation) Bill was re-introduced during the Winter session of 2021, passing in Rajya Sabha on 8th December and in the Lok Sabha on 17th December. It received Presidential ascent on 25th December and came into force on 25th January 2022.³³¹

³²⁶ ‘Union cabinet approves Surrogacy Bill amendments, proposes National Surrogacy Board’ at India Legal 22 March 2018, see <http://www.indialegalive.com/top-news-of-the-day/news/union-cabinet-approves-surrogacy-bill-amendments-proposes-national-surrogacy-board-45731> [last accessed 30 August 2018].

³²⁷ ‘Lok Sabha clears Bill banning commercial surrogacy’ 20 December 2018 <https://timesofindia.indiatimes.com/india/lok-sabha-passes-surrogacy-regulation-bill-2016-which-bans-commercial-surrogacy/articleshow/67165408.cms> [last accessed 10 Jan 2019]. A list of the Bills planned to be discussed can be found here <https://www.india.com/news/india/winter-session-of-parliament-to-commence-from-december-15-heres-the-list-of-bills-2746869/> [last accessed 16 Feb 2019].

³²⁸ They specified that 13 would be part of the rules and regulations, 4 were already part of the Surrogacy (Regulation) Bill and that 11 would not be accepted. Select Committee on The Surrogacy (Regulation) Bill, 2019, Rajya Sabha, *Report of the Select Committee on The Surrogacy (Regulation) Bill, 2019* 2020, Para. 1.14. Available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf accessed 11 October 2021.

³²⁹ Rajya Sabha Parliamentary Bulletin Part II, No.59420, dated 26th November 2019.

³³⁰ ‘Union Cabinet Approves Surrogacy (Regulation) Bill; Widows, Divorced Women to Also Benefit’ *Deccan Herald* (New Delhi, 26 February 2020) <<https://www.deccanherald.com/national/union-cabinet-approves-surrogacy-regulation-bill-widows-divorced-women-to-also-benefit-808357.html>> accessed 11 October 2021.

³³¹ Govt. of India, Department of Health Research, F.No.U.11019/01/2017 (24 January 2022). Department of Health Research, ‘Notification on Enforcement Date of the Surrogacy (Regulation) ACT, 2021’ (24 January 2022) <<https://dhr.gov.in/document/acts-circulars/notification-enforcement-date-surrogacy-regulation-act-2021>> accessed 22 February 2022.

The Select Committee and the Parliamentary Standing Committee recommended that the ART Bill be passed before the Surrogacy (Regulation) Bill because it aims to regulate the wider practice of ARTs on which surrogacy depends. The ART Bill, 2020 was introduced in the Lok Sabha on 14th September 2020 following significant re-drafting. The Bill had limited mention of surrogacy unlike the previous versions which also aimed to regulate the practice by providing definitions for the surrogate, surrogacy, intending couple, infertility and setting out a compensation framework for the surrogates, which explicitly contradicted the main objective of the Surrogacy Bill. The ART Bill, 2020 was referred to the Department-related Parliamentary Standing Committee on Health and Family Welfare on 3rd October 2020 and they submitted the 129th Report on 19th March 2021. The ART Bill was also re-introduced in the Indian Parliament in the Winter session of 2021, it passed in Lok Sabha on 1st December and Rajya Sabha on 8th December. It received Presidential ascent on 18th December and came into force on 25th January 2022.³³²

The process for passing new legislation is lengthy and time-consuming, but it does allow for a thorough scrutiny of the provisions and opportunities for various stakeholders to submit their views. While the recommendation to amend the ‘close relative’ clause to ‘a willing woman’ was finally accepted there is no guarantee that views even those that widely held and supported will be taken into consideration as has been the case with the Surrogacy Bill on the issue of compensation. More discussion on the recommendations and views of stakeholders is given later in this chapter and in the following chapter that evaluates the provisions of the Bills. The lengthy process can partly account for the delays in passing legislation to regulate surrogacy, but they are also due to the Indian government adopting various and contradictory approaches, which I will discuss in more detail in section 3.4.

³³² Govt. of India, Department of Health Research, F.No.U.11019/01/2017 (24 January 2022). Department of Health Research, ‘Notification on Enforcement Date of the Assisted Reproductive Technology (Regulation) ACT, 2021’ (24 January 2022) <<https://dhr.gov.in/document/acts-circulars/notification-enforcement-date-assisted-reproductive-technology-regulation>> accessed 22 February 2022.

3.3 Key cases

The purpose of this section is to draw out from these cases some of the legal and ethical challenges that have arisen in arrangements in India and show how they have influenced the regulatory reforms and the actions of the Indian government. I will deal with the cases surrounding to the surrogates and those related to the children separately and group them according to the themes and issues that arose. In terms of the surrogates these include health risks and the deaths of surrogates, the consequences of a lack of essential medical care and aftercare, and potential exploitation. The issues relating to children include the serious difficulties in determining the legal parentage and nationality of the children, and child abandonment. The discussion on the Wad PIL case will reveal the role the Supreme Court of India has played in directing and shaping the legislative reforms through holding numerous hearings on the cases and exerting pressure on the government to respond to the concerns raised in the cases. The influence of the Wad PIL case has received limited attention by others commenting on the legal reforms to surrogacy in India. During the presentation of the timeline of regulation later in the chapter I will indicate and evaluate how, if at all, the government responded to these main challenges. These cases reveal some of the serious problems that can occur when there is an absence of adequate regulation and oversight and the role of the Supreme Court of India in influencing the legislation. They also serve to demonstrate the potential dangers posed to the children born from these arrangements as a result of insufficient mechanisms and processes in the case of transnational arrangements.

3.3.1 Cases related to the surrogates

I will deal with the cases relating to the surrogates first as their potential mistreatment through various aspects of the practice and legal reforms is the primary concern of the thesis. The cases discussed in this section are not as widely known as those related to the children presented in the next section and have not all reached the courts. I will begin with the case of Anandhi that concerns inadequate aftercare and the potential exploitation by intermediaries and from discrepancies between the agreed and

received payments, then I will discuss the cases involving the deaths of surrogates. Finally, I will evaluate the influence of the Supreme Court of India on the current regulation through the Wad PIL case that sought to prohibit commercial surrogacy on the grounds that it exploits the surrogates and violates Article 21 of the Constitution of India and the dignity of women. The concerns surrounding the surrogates' health are far reaching and the relevant provisions have a wide range. They include the definition of surrogacy, the conditions of eligibility for the surrogate, insurance, and aftercare, which are explored in Chapter 4. They also relate to the invasive procedures (e.g., embryo transfers, foetal reduction, abortions, and C-section deliveries) which are examined at length in Chapter 6. The potential exploitation by intermediaries is addressed through criminalising their involvement in procuring surrogates which I outline below.

3.3.1.1 The Anandhi case: healthcare and exploitation concerns

This case involved a complaint, filed at the High Court of Chennai (WP No.26485/2014),³³³ that Anandhi had not received medical attention and treatment during and after the pregnancy when she suffered various complications.³³⁴ The intervention of court to order the clinic to provide her with medical care reveals a lack of concern for the health of the surrogate mothers and demonstrates that protecting their health and providing aftercare is not always prioritised or guaranteed. It is evidence of a disregard for the women's health and wellbeing which is considered less important than the function they perform. Anandhi also claimed that she received less than half the amount she was promised because an intermediary took a fifty-percent cut.³³⁵ This case has received little attention and there are only limited details from a small number of sources available, which is indicative of the insufficient focus on cases involving the mistreatment of women who undertake surrogacy arrangements.

³³³ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Annexure III (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

³³⁴ Shaikh Azizur Rahman, 'Indian Surrogate Mothers Suffer Exploitation' *Aljazeera* (27 March 2014) <<https://www.aljazeera.com/news/2014/3/27/indian-surrogate-mothers-suffer-exploitation>> accessed 28 September 2021.

³³⁵ *ibid.*

While surrogacy in India had an absence of legally binding regulation it did in fact operate with highly organised internal regulation and cooperation, and the intermediaries who connected all parties were the central actors in the reproduction line.³³⁶ The use and activities of agents, intermediaries or brokers has been addressed throughout the various regulatory reform proposals to surrogacy. The Draft ART Bill, 2010 provided that individual brokers could face imprisonment for up to three years and a fine. The Minister for Health and Family Welfare, as quoted above, expressed that the need to end unethical practices by intermediaries was one of the main motivations of the legal reforms. The Surrogacy Bill proposes to criminalise the recruitment of surrogates as set out in Chapter VII on Offences and Penalties. Clause 35, sub-section (1) prohibits any ‘person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind’ from a list of activities including undertaking or providing commercial surrogacy, running a racket or organised group to select surrogates, and the use of individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures. The list also includes the prohibition of exploiting the child and surrogate mother ‘in any manner whatsoever’, but without further detail on or examples of exploitation. Sub-section (2) provides that contraventions of sub-section (1) ‘by any person shall be an offence punishable with imprisonment for a term which may extend to ten years and with fine which may extend to ten lakh rupees.’³³⁷ Due to the potential of exploitation by those who recruit women into surrogacy and act as intermediaries, as evidenced in the case of Anandhi, their involvement has been prohibited in the Offences and Penalties of the Surrogacy Act 2021, Chapter VII.³³⁸

³³⁶ Sayani Mitra, ‘Cross-Border Reproflows: Comparing the Cases of India, Germany, and Israel’ in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan) 97.

³³⁷ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 35. Same wording in Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl. 38.

³³⁸ The Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl.38-45.

3.3.1.2 Deaths of surrogates

There are other reports of surrogates experiencing serious health issues and dying due to complications during the pregnancy. During an investigation into the death of a 42-year-old, who was 17 weeks pregnant with twins when she died in 2019, it was discovered that she had a history of multiple illnesses that would have made her ineligible to act as surrogate had she been properly screened, and the guidelines been followed.³³⁹ A young woman named Easwari died after giving birth at the Ishwarya Fertility Clinic in Coimbatore, in the State of Tamil Nadu, she started haemorrhaging and the clinic was unprepared to deal with the complications. They advised her husband, who had requested that she undergo the surrogacy arrangement, to order a private ambulance to the nearest hospital. Tragically, Easwari died on her way to the hospital.³⁴⁰ In 2015, another surrogate was reported to have died while 8 months pregnant, but the cause of her death was never established and efforts were made to disguise that she was a surrogate.³⁴¹ Premila Vaghela, is another surrogate who died in 2012 while waiting for a routine examination at a hospital in Ahmedabad. After collapsing in the waiting room, the doctors rushed to perform an emergency C-section before transferring her to another hospital for treatment where she later died. Some commentators on this case claim that the health of the surrogate was secondary to that of the foetus, who was prioritised and given more importance as evidenced through the urgency at which the C-section was performed. However, we cannot firmly conclude that this was the case, because of the demands of pregnancy on the body the best course of action could be to perform a C-section to free up oxygen, blood, and resource for the woman herself. The high prevalence of C-section deliveries in surrogacy arrangements in India is an important issue that is discussed in much greater detail in Chapter 6. The same commentator also remarked on the lack of liability on the

³³⁹ Neha Sharma and others, 'Regulation of Surrogacy in India: Need of the Hour' (2019) 3 RFP Journal of Hospital Administration 33.

³⁴⁰ Scott Carney, 'Inside India's Rent-a-Womb Business' *Mother Jones* (April 2010) <<https://www.motherjones.com/politics/2010/04/surrogacy-tourism-india-nayna-patel/>> accessed 30 November 2017.

³⁴¹ Vandana Shukla, 'Unregulated Surrogacy: Law yet to Deliver' *Tribune India* (23 June 2015) <<https://www.tribuneindia.com/news/archive/comment/unregulated-surrogacy-law-yet-to-deliver-97741>> accessed 30 November 2017.

side of the medical professionals and intended parents should anything happen to the surrogate.³⁴² In fact, Dr Patel explains this to a prospective surrogate in *House of Surrogates* when reading out the conditions of the consent form; ‘The hospital, doctor, or the couple will not be responsible for any risks.’³⁴³ The surrogate therefore undertakes a huge amount of risk and responsibility which would require adequate insurance and aftercare provisions. The insufficient attention given to protecting the rights and interests of the surrogates is a central concern of the thesis. I argue that this deprioritising of the surrogates stems from the foetal container model of pregnancy underpinning the approaches to surrogacy and its regulation. This model facilitates a treatment of the surrogates as disposable and interchangeable, and merely or simply performing a task.

3.3.1.3 Insufficient attention on surrogates

The cases of Baby Manji and the Balaz twins described later in this section have received far more attention than the cases involving the surrogates. These cases relating to the children were transnational arrangements involving other jurisdictions which created added complications due in part to a conflict of laws and generated significant international media attention. While it is crucial that the legislation addresses the problems arising from these cases, it must not lose sight of the issues concerning the surrogates which are often obscured. The surrogates’ interests and rights are in danger of becoming secondary to those of the children when they are the main focus as the most vulnerable parties, and through a standard assumption of exploitation and how that is addressed. In a commercial transaction the surrogate would be less likely to complain in fear of jeopardising the arrangement.³⁴⁴ One of the main objectives of the legislation is to protect the surrogates from exploitative arrangements and it is

³⁴² Kishwar Desai, ‘India’s Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection’ *The Guardian* (5 June 2012) <<https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>> accessed 28 September 2021.

³⁴³ *House of Surrogates* (n 29).

³⁴⁴ This is an issue also discussed by Teman (n 2) 66. And Prabha Kotiswaran, ‘Law’s Paradoxes Governing Surrogacy in India’ in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 136.

a frequently cited concern by those commenting on the practice. Yet, there has been a failure to provide a comprehensive definition of exploitation or acknowledge that mistreatment can occur in other ways such as through the procedures and conditions at any stage of the legislative process. In fact, the debates on exploitation have become polarised on the pros and cons of commercial versus altruistic surrogacy, which as Venkatachalam et al argue does little to advance the rights of the surrogates. They also warn of the exploitative nature of the family, where women could be subjected to ‘various kinds of patriarchal pressures to become surrogates.’³⁴⁵ In the following chapter I will critically evaluate whether the main objective to eliminate the exploitation of the surrogates is achieved by exploring a possible definition for exploitation, how it is linked to the foetal container model, and that a narrow focus on exploitation functions to obscure the other ways surrogates sustain harm and results in a failure to address them. I will expand on this within the framework of gendered harm in Chapter 6. An important and arguably influential case on the issue of exploitation is the Public Interest Litigation case of *Jayashree Wad v Union of India* described below.³⁴⁶

3.3.1.4 Public Interest Litigation case *Jayashree Wad v Union of India*³⁴⁷

In 2015, lawyer and Supreme Court advocate Jayashree Wad filed a Public Interest Litigation (PIL) case in the Supreme Court of India with the aim of protecting surrogate mothers from exploitation through prohibiting commercial surrogacy. Public Interest Litigation in India has played a significant role in addressing the social justice issues of disadvantaged groups.³⁴⁸ It originated in the 1970s through a series of Supreme Court decisions and the groundwork prepared by Supreme Court Judges; Chief Justice of India Prafullachandra Natwarlal Bhagwati and Justice Vaidyanathapuram Rama Iyer

³⁴⁵ Deepa Venkatachalam, Sarojini Nadimpally and Oshin Siao Bhatt, ‘Surrogacy Should Be Regulated, but the New Bill Falls Short’ *The Wire* (20 December 2018) <<https://thewire.in/rights/regulation-is-necessary-but-the-surrogacy-bill-falls-short-on-several-counts>> accessed 6 October 2021.

³⁴⁶ Pragna Paramita Mondal and Achin Chakraborty argue that this case has influenced the drafting of the Surrogacy Bill. A more detailed account of this follows in the next section.

³⁴⁷ *Jayashree Wad v. Union of India*; W.P. (C) 95/2015.

³⁴⁸ Also known as ‘social action litigation’.

Krishna Iyer.³⁴⁹ It was originally envisioned as a route for the poor and marginalised sections of Indian society to access justice for violations of constitutional rights.³⁵⁰ The traditional requirements of *locus standi* were modified and expanded to allow an individual to bring a proceeding to court despite not being personally affected if it involved the violation of a constitutional right and that those affected could not do so themselves due to reasons such as poverty, helplessness, or disability.³⁵¹ Any citizen can bring a PIL case by filing a petition under Article 32 of the Constitution of India in the Supreme Court,³⁵² under Article 226 of the same in the High Court³⁵³ or under section 133 of the Criminal Procedure Code in the Court of Magistrate.³⁵⁴ During the late 1970s and early 1980s the Court relaxed the procedural requirements for a PIL case by accepting letters from individuals, journalists or third parties as legal petitions under Article 32.³⁵⁵ Supreme Court Judges themselves can also initiate a PIL case. Surya Deva suggests that PIL as well as offering a route to justice for the disadvantaged sections of society, enables civil society to raise awareness about human rights and participate in government decision-making, which can contribute to good governance by keeping the government to account.³⁵⁶ The PIL process differs from traditional and conventional common law litigation, it is not adversarial but rather a collective and cooperative effort to address the issue in question. In the absence of the usual fact-finding of adversarial cases evidentiary problems are overcome through court-appointed third parties, and the convening of expert committees with specialist knowledge of the area. The Court

³⁴⁹ Surya Deva, 'Public Interest Litigation in India: A Critical Review' [2009] Civil Justice Quarterly 19, 23.

³⁵⁰ Fertilizer Corp. Kamgar Union v. Union of India 1981 AIR 344, 1981 SCR (2) 52, 11.

³⁵¹ The landmark decision on expanded *locus standi* was given in S.P. Gupta v. Union of India (1981) Supp SCC 87 (*The Judges' Case*). See, Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India' in Diana Kapiszewski, Gordon Silverstein and Robert A Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013) 272. And Avani Mehta Sood, 'Gender Justice through Public Interest Litigation: Case Studies from India' (2008) 41 Vanderbilt Journal of Transnational Law 833, 839.

³⁵² The Constitution of India, Article 32. (32 (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.)

³⁵³ The Constitution of India, Article 226. (Power of High Courts to issue certain writs, (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.)

³⁵⁴ The Code of Criminal Procedure Act, 1973 Section 133.

³⁵⁵ Mate (n 351) 274.

³⁵⁶ Deva (n 349) 19.

may also use *amici curiae* which is an individual appointed to conduct fact-finding, provide comparative examples, suggest innovative remedies, keep the case on track if the original petitioners lose interest, and ensure important considerations are not overlooked.³⁵⁷

PIL cases have also allowed the Supreme Court to expand the interpretations of the Fundamental Rights and Directive Principles guaranteed in Parts III and IV of the Indian Constitution. Fundamental Rights define the basic human rights of all citizens and are enforceable in court whereas Directive Principles are nonjusticiable guidelines for the government to apply when framing laws and policies.³⁵⁸ The Fundamental Rights relate to equality, freedom, protection against exploitation, freedom of religion, cultural and educational rights, and constitutional remedies. The Supreme Court has taken an active role in addressing violations against women and protecting women's human rights through PIL cases, albeit with varying levels of success.³⁵⁹ Despite the potential for remedying gender injustices the Court is ultimately constrained by the cultural context and the patriarchal society within which it operates.³⁶⁰ Avani Mehta Sood argues that the judgments reflect the consensus of India's educated middle and upper classes which are often shaped by patriarchal biases.³⁶¹ The Fundamental Rights provisions that have been most relevant in cases related to women's rights are Article 14 on equality, Article 15 on the prohibition of sex discrimination, and Article 21 on the protection of life and personal liberty.³⁶² The Court has adopted wide interpretations of Article 21 to include rights to human dignity, health, and privacy.³⁶³ I will discuss the case law relating to this right in Chapter 6 of this thesis.

³⁵⁷ Sood (n 351) 842.

³⁵⁸ Constitution of India, Parts III and IV.

³⁵⁹ See Sood (n43) for her analysis of two PIL cases; *Vishaka v. Rajasthan*, (1997) Supp. 3 S.C.R. 404 (India) which led to national guidelines to prevent sexual harassment in the workplace and *Javed v. State of Haryana*, A.I.R. 2003 S.C. 3057 which upheld coercive sterilisation programmes.

³⁶⁰ Sood (n 351) 859.

³⁶¹ *ibid* 851.

³⁶² *ibid*.

³⁶³ In *Paschim Banga Khet. Samity v. State of West Bengal*, A.I.R. (1996) S.C. 2426 the Supreme Court of India for the first time considered the right to emergency medical care as a fundamental right. The Court's wide interpretation and application of Article 21 has been criticised by some as going too far and resulting in the diluting of its effectiveness.

Shekhar Naphade the senior advocate in the Wad PIL case contended that commercial surrogacy amounted to a violation of Article 21 of the Indian Constitution due to, as they argued, the exploitation of vulnerable women.³⁶⁴ It was also reported that the petition claimed that the cross-border importation of embryos and their transplantation in the womb of the surrogate amounted to trafficking in human beings.³⁶⁵ During the parliamentary questions on 5th May 2005 MP Veerendra Kumar also claimed that the use of donor genetic material infringes on the Constitutional rights guaranteed under Article 21, due to the alleged absence of consent from the concerned spouses and that it affected ‘the social and moral framework of the society’ by causing ‘indecisiveness in paternity’.³⁶⁶ In the hearing on 24th February 2015 of the Wad PIL case the Court joined it with the Balaz twins’ appeal case.³⁶⁷ The merging of the cases broadened the mandate of the Court to question whether commercial surrogacy violated the fundamental rights of surrogates and therefore not restricting them to only questions concerning the citizenship of children born from surrogacy arrangements.³⁶⁸

On 14th October 2015 the Court directed the Indian government to respond to the claims of exploitation and whether the practice was an affront to the dignity of women therefore violating Article 21 of the Constitution.³⁶⁹ They collated the issues raised which included questions on the status of the mother in

³⁶⁴ R Balaji, ‘Plea in SC to Ban Commercial Surrogacy’ *The Telegraph* (New Delhi, 2015)

<<https://www.telegraphindia.com/india/plea-in-sc-to-ban-commercial-surrogacy/cid/1510481>> accessed 5 October 2021.

³⁶⁵ *ibid.*

³⁶⁶ Lok Sabha Debates, *Need to bring a legislation to regulate functioning of Associated Reproductive Technology (ART) clinics in the country* 222, Session Number 4, 5 May 2005, *Comments by Shi M.P. Veerendra Kumar*, available at https://eparlib.nic.in/bitstream/123456789/785463/1/lscd_14_04_05-05-2005.pdf accessed 16 February 2019.

³⁶⁷ Supreme Court of India, Civil Appeal No. 8714/2010, Union of India & Anr. V. Jan Balaz & Ors. The High Court case had concluded in 2010. There have been 40 hearings on the appeal case so far. Daily orders can be found here <https://main.sci.gov.in/daily-order#> accessed 12 September 2021.

³⁶⁸ Supreme Court of India, Writ Petition(s)(Civil) No(s). 95/2015, Jayashree Wad v. Union of India, Item No. 801, Court No. 1, Section PIL W, 24 February 2015.

³⁶⁹ Supreme Court of India, Civil Appeal No. 8714/2010, Union of India & Anr. V. Jan Balaz & Ors., Item No. 101(PH), Court No. 8, Section IX, 14 October 2015. Reported in ‘Supreme Court Asks Government to Explain Stance on Commercial Surrogacy’ *The Economic Times* (26 February 2015)

<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-asks-government-to-explain-stance-on-commercial-surrogacy/articleshow/46378518.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 12 October 2019. Also discussed by Rudrappa, ‘Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015’ (n 301) 1087.

commercial arrangements and egg donation, and whether commercial surrogacy amounted to the economic and psychological exploitation of women and ‘womb rental’, involved the sale of children and therefore human trafficking, and whether it was immoral, opposed to public policy and void under section 23 of the Contract Act. And ultimately, whether commercial surrogacy should be prohibited. Notices were issued to the Ministries of Home Affairs, Law and Justice, Health and Family Welfare, Commerce and External Affairs as well as the Medical Council of India and the Indian Council of Medical Research asking them to respond to the concerns raised by the petitioners in the Wad PIL case.³⁷⁰ The Courts have, through PIL orders, called on the legislature to enact or reform laws and directed the introduction of new measures or stricter enforcement of existing policies.³⁷¹ Some commentators claim that the Wad PIL case has been influential in directing the drafting of the Surrogacy (Regulation) Bill, 2016. Pragna Paramita Mondal and Achin Chakraborty assert that the Surrogacy Bill reflects the main objectives of the case, which called for a ban on commercial surrogacy on the premise that it degenerates motherhood to a womb-renting business and that the surrogates are from poor socio-economic backgrounds lacking a proper understanding of the practice. Additionally, as a result of their disadvantaged position there is an absence of consent and a prevalence of economic coercion and because of ‘the financial gains by doctors, hospitals and the institutions involved that take undue advantage of the women’s marginalised socio-economic condition.’³⁷² The Select Committee of Rajya Sabha in its report on the 2019 version of the Bill stated that in the wake of the Wad PIL case the Cabinet Secretariat on 21st October 2015 asked the Department of Health Research to expediate the legislation to regulate surrogacy. Subsequently, an Affidavit was filed in the Supreme

³⁷⁰ Dhananjay Mahapatra, ‘SC Notice to Govt on PIL Seeking Ban on Commercial Surrogacy’ *Times of India* (26 February 2015)

<http://timesofindia.indiatimes.com/articleshow/46376012.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 22 September 2020.

³⁷¹ Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (The University of Chicago Press 1998) 86.

³⁷² Pragna Paramita Mondal and Achin Chakraborty, ‘In Search of Non-Tangential Premises: The Surrogacy (Regulation) Bill, 2016’ (2018) 53 *Economic and Political Weekly* 31, 31.

Court with this guarantee.³⁷³ Sital Kalantry claims that the Supreme Court's actions in this PIL case are an example of 'creeping jurisdiction', where a normative agenda was pushed with the executive without the adequate thought and consideration that would be required in a judicial review of legislation on surrogacy.³⁷⁴ The Court has continued to hold hearings on the case including hearing testimony from the senior counsel for the government on the status of the Surrogacy Bill.³⁷⁵ Kalantry suggests that the Court 'insinuates itself in a constitutional dialogue with the executive by making arguments about surrogacy based on its authority to interpret the Constitution.'³⁷⁶ She further argues that the Court has pushed the executive to ban commercial surrogacy to rectify what it considers to be violations of fundamental rights.³⁷⁷ The questions issued by the Court related to commercial surrogacy and not surrogacy per se, which is significant because the legislation prohibits commercial surrogacy in favour of altruistic arrangements. This suggests that the position held is that exploitation and violations of Article 21 must only occur in commercial arrangements. In Chapter 4 I evaluate at length the government's response to the risks of exploitation including how they relate to commercial and altruistic surrogacy.

One of the dangers of this form 'creeping jurisdiction', where several short hearings are held in place of a final judgement, is that the voices of all parties and most importantly those who are directly affected, namely the surrogates themselves, are not heard. Groups of surrogate mothers from Delhi, Gujarat, and other states and overseas citizens of India approached the Supreme Court with pleas against the orders prohibiting commercial arrangements and banning foreigners from commissioning

³⁷³ Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, para. 1.9 Available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf accessed 11 October 2021.

³⁷⁴ Sital Kalantry, 'When "Creeping Jurisdiction" Goes Awry: The Social Action Litigation to Ban Surrogacy' in Salman Khurshid and others (eds), *Judicial Review: Process, Powers, and Problems (Essays in Honour of Upendra Baxi)* (Cambridge University Press 2020) 80.

³⁷⁵ The last one listed as 21st January 2021.

³⁷⁶ Kalantry (n 374) 87.

³⁷⁷ *ibid.*

arrangements in India.³⁷⁸ The Court deferred the surrogates' pleas of intervention on the basis that legislation was already being drafted by the executive.³⁷⁹ The surrogates were excluded from the conversation and proceedings despite being the central concern of the case, illustrating the paternalistic approach taken where others decide what they believe is best for the women. Mondal and Chakraborty report that there were also pleas against the Wad PIL case filed at the Supreme Court by medical bodies including the Indian Society for Third Party Assisted Reproduction, the Indian Society for Assisted Reproduction, the Federation of Obstetric and Gynaecological Societies of India and the Indian Medical Association.³⁸⁰ There are other deficiencies with the process in PIL cases; the Court usually gives oral orders which are not always written down and therefore making it is impossible to scrutinise them unless they are recorded by persons present. The Court is not required to give a final written judgment, which as Kalantry argues abdicates them of their responsibility to engage with precedents and develop constitutional and legal arguments, and ultimately to deliver a well-reasoned normative view.³⁸¹

3.3.2 Cases on the children: legal parenthood, nationality

As outlined at the start of this section the main issues arising from the cases on the children concern the difficulties in determining legal parenthood and nationality and the abandonment of children. The following three cases will illustrate how in the absence of any precedents and specific laws governing surrogacy the courts did not have the appropriate legal powers to deal with the cases. While the children are not the focus of this work these cases are significant because the public outcry over the

³⁷⁸ Prabhati Nayak Mishra, 'Surrogate Mothers Seek Supreme Court's Intervention' *DNA* (India, 26 November 2015) <<https://www.dnaindia.com/india/report-surrogate-mothers-seek-supreme-court-s-intervention-2149015>> accessed 22 September 2020. 'Surrogate Mothers Stage Protest in Anand' *Times of India* (30 October 2015) <<https://timesofindia.indiatimes.com/city/ahmedabad/surrogate-mothers-stage-protest-in-anand/articleshow/49589988.cms>> accessed 11 November 2018. Also, Mondal and Chakraborty (n 372) 32.

³⁷⁹ Kalantry (n 374) 89.

³⁸⁰ Mondal and Chakraborty (n 372) 32.

³⁸¹ Kalantry (n 374) 92.

situation the children were left in prompted the introduction of legislation and therefore, they warrant some attention.³⁸²

3.3.2.1 Baby Manji case

The 2008 case of *Baby Manji Yamada v Union of India*³⁸³ is the most well-known surrogacy case in India. It is significant for many reasons; it was during this case that the Supreme Court of India declared commercial surrogacy in India to be lawful. They described it as ‘legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions.’³⁸⁴ It also forced the Indian government to finally enact legislation, in the form of the Draft Assisted Reproductive Technology Bill, 2008 (Draft ART Bill, 2008), to legally regulate surrogacy and the wider field of assisted reproductive technologies. The clinics were operating under the non-binding Guidelines created by the ICMR. The Supreme Court called on the government to address the serious problems that had occurred in this case and to put mechanisms in place so that they would not arise again.

The case involved a Japanese couple, Ikufumi and Yuki Yamada, who commissioned a surrogacy arrangement at Dr Patel’s clinic in Anand in November 2007. There are conflicting reports over the genetic mother of baby Manji, the judgment of the Supreme Court describes Yuki Yamada as the genetic mother. Yet, there are several media reports of the couple using an anonymous egg donor, and separate surrogate and Mr Yamada’s sperm. This version of the events is reproduced throughout the academic literature on the case. The baby was born on 25th July 2008 but transferred to Arya Hospital

³⁸² Majumdar addresses the discussion of this case and the Balaz twins in the Indian media. See, Anindita Majumdar, ‘The Rhetoric of the Womb: The Representation of Surrogacy in India’s Popular Mass Media’ in Sayantani DasGupta and Shamita Das Dasgupta (eds), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014) 111–113.

³⁸³ *Baby Manji Yamada v Union of India* [2008] INSC 1656, JT 2008 (11) SC 150 (20 September 2008).

³⁸⁴ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

in Jaipur, Rajasthan on 3rd August 2008 due a law-and-order situation in Gujarat following the outbreak of riots in Ahmedabad. The couple had divorced a month before the baby was born and the commissioning mother Yuki Yamada no longer wanted to raise the child, but the Ikufumi Yamada the biological father did. However, he encountered several difficulties in taking the baby to Japan with him which I will now discuss.

The Japanese Embassy in Delhi refused to issue a passport for Manji because the Japanese Civil Code recognises the birth mother as the legal mother and as the birth mother was Indian, they claimed that she needed an Indian passport and ‘no-objection’ certificate to leave the country. Mr Yamada tried to apply for an Indian passport for Manji, but a passport application requires a birth certificate. Under Indian law the birth certificate must state the names of both the mother and father. The Municipal Council of Anand refused to grant Manji a birth certificate because it was not clear to the vital records registrar who to state as the mother on the certificate and therefore the case was referred to the national level. Despite being the biological father of the baby, for a time it seemed Mr Yamada would need to adopt the baby.³⁸⁵ He hired a lawyer, Indira Jaisingh, who filed an appeal with the Indian government to issue the essential documents as the records clearly stated Mr Yamada was her biological father. Eventually a birth certificate was issued stating only Ikufumi Yamada as the father. The president of the Anand City Council commented on the ambiguity concerning the legal mother³⁸⁶ as Manji had three potential mothers; the surrogate, the egg donor, and the intended mother.³⁸⁷ On receipt of the birth certificate, Mr Yamada could proceed with the application for travel documents. In the meantime,

³⁸⁵ It is widely quoted that this would have been because of the provisions of the Guardians and Wards Act 1890, India that prohibit single men from adopting girls. However, the amendments to this Act that would prohibit single men from adopting girls came about later than this case. It is an issue mentioned by Pande, see Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 39.

³⁸⁶ There is a lack of clarity on how the legal mother is defined in India law as there does not appear to be legislation on it. In the case of surrogacy, the Guidelines and Bills provide that the intended mother is the legal mother. For more detailed discussed on this and how the mother is defined and determined in Indian Case Law see, Diksha Munjal-Shankar, ‘Identifying the “Real Mother” in Commercial Surrogacy in India’ (2014) 3 *Technology and Development* 387.

³⁸⁷ Japanese Baby Finally Gets Birth Certificate.” *The Times of India* (August 10, 2008).

Manji's paternal grandmother Emiko Yamada had travelled to India to care for her because Mr Yamada had to return to Japan due to his visa expiring.

Unexpectedly, a social justice and child welfare organisation called Satya filed a *habeas corpus* petition at the Rajasthan High Court claiming that the baby was a victim of child trafficking.³⁸⁸ The Rajasthan High Court issued notices to the Union Home Ministry and Department of Home Affairs³⁸⁹ to produce Manji in front of the court within four weeks. Emiko Yamada, the grandmother, filed a writ petition on the child's behalf to the Supreme Court of India. On 14th August 2008, the Supreme Court dismissed the accusations of trafficking and granted temporary custody in India to Manji's paternal grandmother Emiko Yamada. The police were stopped from taking any steps to produce Manji before the Rajasthan High Court. The assistance of the Solicitor General of India was sought to examine the practice of international commercial surrogacy and the resulting nationality issues. Finally, an identity certificate as part of a travel document was issued for Manji at the Rajasthan Regional passport office, it did not mention the child's nationality or the mother's name. The Japanese Embassy issued a one-year visa for the baby on humanitarian grounds to travel to Japan. The Japanese authorities stated at that time that Manji could become a Japanese citizen 'once a parent-child relationship has been established, either by the man recognizing his paternity or through his adopting her.'³⁹⁰ This case was significant to the law reforms because it established commercial surrogacy as legal in India, led to the introduction of the Draft ART Bill, 2008 and brought a significant amount of attention to the practice of surrogacy in India. As earlier mentioned, international condemnation was a motivating factor for the introduction of new legislation. It also involved several governmental departments. The extended

³⁸⁸ Satya is an acronym for 'Social work/research, Academy for action and protection of Truth and Yearning for its Anticipation' taken from <http://www.satyaanngo.org/Brochure.html> [last accessed on 20th Feb 2019]. It is an NGO working on social justice issues.

³⁸⁹ This is a ministry of the Government of India responsible for internal security and domestic policy.

³⁹⁰ "Surrogate Baby Born in India Arrives in Japan." *Hindustan Times* (November 3, 2008). [last accessed 27th Sept 2021].

focus on this case and the resulting legal complications have also directed attention away from important concerns regarding the surrogates.

3.3.2.2 Balaz twins case

The case of the Balaz twins³⁹¹ is another well-documented case about a surrogacy arrangement, that also took place at Dr Patel's clinic, involving a German couple; Jan Balaz and Susanne Anna Lohle. The surrogate became pregnant with twins from the eggs of a donor and Mr Balaz's sperm. The twins, Leonard and Nikolas, were born on 4th January 2008 and the birth certificates were registered at the Anand Municipality with Jan Balaz and Susanne Anna Lohle listed as the parents. However, this did not conform to the names that had been registered at the hospital where the babies had been born. It was the surrogate's name that was on the birth registrations at the hospital. This case went to the Gujarat High Court where a series of interim orders were issued. In an interim order dated 26th March 2008 the court joined Dr Patel as a party respondent and claimed that there had been negligence on her behalf when dealing with the birth registrations and threatened to cancel her licence. The court granted interim relief so that the petitioner Mr Balaz could take the twins to Germany from India. The surrogate gave permission for the twins to leave, and her name was added to the birth certificates in place of the intended mother, Susanne Lohle. However, further problems occurred with taking the children home with them because in German law the birth mother is considered the legal mother. As surrogacy of all kinds is prohibited in Germany the authorities refused to issue visas for the twins. The intended parents were forced to go through the inter-country adoption process, supervised by the Central Adoption Resources Agency, in order to obtain the legal parentage of the children. As a result of a lack of clarity on the legal parentage and nationality of children born from surrogacy arrangements in India the twins were left in limbo for two years without legal parents or nationality.³⁹² In response to the legal

³⁹¹ *Jan Balaz v Anand Municipality*, Special Civil Application, No. 3020 of 2008.

³⁹² For a detailed recounting of the cases see, Smerdon (n 17).

complications arising in this case and the Baby Manji case and the significant amount of attention they attracted in national and international press the Indian government took measures to protect the children born via surrogacy from potential statelessness by banning transnational arrangements.³⁹³ The prohibition of international surrogacy relates to the Minister of Health and Family Welfare's statement on not allowing foreigners to 'get away over surrogacy'. Although it is not clear what exactly the Minister is referring to in this statement it is likely linked to these cases.

3.3.2.3 Volden case

A similar situation occurred in the case of Kari Ann Volden, a Norwegian woman who commissioned an arrangement in 2009 at the Rotundá fertility clinic in Mumbai³⁹⁴ with the donor eggs of an Indian woman and the sperm of a Scandinavian man. Norway's Consul General rejected Volden's request for passports for the twins after the mandatory DNA test showed that she was not biologically related to the children. A spokesperson at the Norwegian embassy in New Delhi stated that under Norwegian law the only woman recognised as the legal mother is the birth mother and therefore the Indian surrogate. According to the Guidelines in India it is the commissioning parent who is considered the legal parent. The Norwegian authorities insisted that Norwegian maternity or paternity must be established in order to grant citizenship. They also did not approve Volden's initial application to adopt the children.³⁹⁵ The children were stateless and stranded in India for two years before Volden could legally adopt them and return to Norway.³⁹⁶

³⁹³ As set out in notification no. 2502/74/2011-F-1 introduced on 9th July 2012 and issued by the Ministry of Home Affairs.

³⁹⁴ The clinic's website is <https://iwannagetpregnant.com/> - simple and to the point. [Accessed 12 October 2021].

³⁹⁵ Sumitra Debroy, 'Stateless Twins Live in Limbo' *Times of India* (Mumbai, 2 February 2011) <<https://timesofindia.indiatimes.com/city/mumbai/stateless-twins-live-in-limbo/articleshow/7407929.cms>> accessed 12 October 2021.

³⁹⁶ Emma Batha, 'International Surrogacy Traps Babies in Stateless Limbo' *Thomson Reuters Foundation* (18 September 2014) <<https://www.reuters.com/article/us-foundation-statelessness-surrogacy-idUKKBN0HD19T20140918?edition-redirect=uk>> accessed 12 October 2021. See also, Hanna Ingber, 'Bandra Diaries: Surrogacy Turned Nightmare' *The World* (Mumbai, 10 March 2011) <<https://www.pri.org/stories/2011-03-10/bandra-diaries-surrogacy-turned-nightmare>> accessed 28 September 2021.

Each of the above three cases attest to the serious and significant problems that have arisen in determining the legal parenthood and nationality of the children born from transnational arrangements in India. They also document the difficult situation the commissioning parents and children found themselves in due to a conflict of laws between the different jurisdictions. It is the case of Baby Manji that is perhaps the most influential. It was during this case that commercial surrogacy was found to be legal and therefore confirming India as a desirable destination for commercial surrogacy arrangements. It helped bring about the introduction of legislation in the form of the Draft ART Bill 2008 as evidenced through the Supreme Court's direction to the government to respond to the issues that arose in the case. It has also been hugely influential in shaping the public perception of surrogacy in India within the country and outside. The need to protect the children born from these arrangements is cited as a major motivation for the legislation. The impact of these cases can also be seen through the government's actions in issuing executive orders to create stricter conditions for those accessing surrogacy in India. These notifications issued by various ministries are discussed in more detail in section 3.4.4, but they included the requirement for medical visas for those commissioning surrogacy arrangements in India and proof that their home country will acknowledge the surrogacy arrangement and allow entry to the child or children.

3.3.2.4 The abandonment of children

In addition to the above cases there have been accounts of the abandonment of children born from these arrangements, which can impact on the surrogate as well as the child(ren). In 2012 the Australian Chief Justice of the Family Court Diana Bryant and Federal Circuit Court Chief Judge John Pascoe called for a national inquiry after an Australian couple, who had commissioned a surrogacy arrangement in India resulting in the birth of twins, returned home with only one child.³⁹⁷ They applied

³⁹⁷ Rod McGuirk, 'Judge: Surrogate Baby Rejected in India on Gender' *AP News* (Canberra, 9 October 2014) <<https://apnews.com/article/02d2169c40c349e98ffec3f8fad191d>> accessed 28 September 2021.

for Australian citizenship for only one of the children abandoning the other in India without legal parents or citizenship.³⁹⁸ The possibility of a child being abandoned by the commissioning parents calls for provisions and mechanisms that ensure the child's best interests are protected and that the care responsibilities do not automatically fall on the surrogate. A potential solution could involve transferring the legal parentage to the intended parents before the child or children are born. Surrogacy arrangements have been governed by the law of private contract under the Indian Contract Act 1872. Section 23 sets out that 'The consideration or object of an agreement is lawful unless it is forbidden by law...or would defeat the provisions of any law...or involves...injury to a person or property of another, or the Court regards it as immoral or opposed to public policy.'³⁹⁹ This relates to the discussion at the Supreme Court during the Wad PIL case on the potential injury to women through violations of their dignity. The abandonment of children born from these arrangements is a serious issue that the government has attempted to address in the legislation, and it is cited in the original Statement of Objects and Reasons of the Surrogacy Bill. The abandonment of children is prohibited in the Bill and Act as set out below:

The intending couple shall not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever, including but not restricted to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like:

Provided that any child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.⁴⁰⁰

The Offences and Penalties Chapter states that the abandonment of the child or children is punishable 'with imprisonment for a term which may extend to ten years and with fine which may extend to ten

³⁹⁸ 'Australian Couple Abandons Surrogate Baby in India' *Times of India* (9 October 2014) <<https://timesofindia.indiatimes.com/india/australian-couple-abandons-surrogate-baby-in-india/articleshow/44747623.cms>> accessed 20 February 2019.

³⁹⁹ The Indian Contract Act, 1872. §23.

⁴⁰⁰ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 7. The same wording is given in The Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl. 7-8.

lakh rupees' (approximately £10,000).⁴⁰¹ The purpose of providing such a detailed account of these cases is to demonstrate the complexities of transnational arrangements and the problems that can occur in the absence of appropriate regulation. The chapter will now provide the timeline of regulatory interventions and how the approaches developed.

3.4 From liberal to protectionist: a timeline of regulatory approaches

This section will analyse the Indian government's approaches to regulating surrogacy that developed from an initial liberal position to one that is restrictive and protectionist. I set out the key cases above to highlight some of the most serious problems that have arisen in the practice of surrogacy in India. I will indicate and evaluate how these issues were addressed through the regulatory interventions and reforms in this chapter and Chapter 4. It has been twenty years since the first proposals to regulate assisted reproductive technologies and surrogacy were released and yet the recently enacted legislation continues to fall short in offering adequate safeguards for the surrogates. Due to a conflict of laws the children born from these cross-border surrogacy arrangements were left, although temporarily, without legal parents and nationality. The absence of legislation has meant that the courts have not had appropriate legal powers to address these problems. However, these were not the only areas of this practice in need of urgent attention. Strong and clear protections for the rights and interests of the surrogates are still lacking despite some improvements. This thesis argues that the failure to effectively provide for the surrogates stems from assumptions about their role, which are based on the unacknowledged and implicitly adopted foetal container model of pregnancy. My aim is to reveal the operation of this model and to show how it has influenced the approaches to regulation and facilitated the mistreatment of and harm to the surrogates.

⁴⁰¹ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 37 and The Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl.40.

3.4.1 Historical development framework

The evolution of the regulatory approaches to surrogacy in India has been argued by Kotiswaran to take the form of three different stages, which I will adopt as it provides an instructive framework for my analysis.⁴⁰² The Medico-Liberal phase 1990s-2008, which is characterised by a liberal approach to surrogacy with favourable conditions for the clinics but less so for the surrogates. During this phase the ICMR constituted a committee of experts to develop national standards for ART clinics and consulted with a wide range of stakeholders. The Contested and Regulatory phase 2008-2012, included the legal cases of Baby Manji and the Balaz twins described in the earlier section and the introduction of the first draft Bill to regulate surrogacy and ART in the form of the Draft ART Bill, 2008. The third is the Contracting and Normative phase 2012-2017, which brought about an end to international surrogacy in India and sought to prohibit commercial arrangements. During this period several executive orders were given to restrict access to surrogacy and the Surrogacy (Regulation) Bill, 2016 was introduced. Arathi argues that since 2018 the approaches to regulation have entered the Hindutva morality phase,⁴⁰³ which will be explored in more detail in the following chapter with reference to the definitions of surrogacy and the close relative requirement. Purewal asserts that a visible feature of the post-2014 Indian government has been the ‘protection’ and ‘safety’ of women within the rhetoric of an emerging patriarchal, neoliberal state, with Narendra Modi as the symbolic patriarch of Hindu-nationalist India.⁴⁰⁴ The notion of protecting surrogates from exploitation was a strong feature of the motivations behind the Surrogacy Bill and will be explored in detail in the following chapter.

⁴⁰² This grouping of the approaches was proposed by Prabha Kotiswaran during a paper given at the conference ‘Women’s and Mothers’ Labor: The Stakes of Surrogacy’ at Université Grenoble Alpes on 9 March 2017. See also, <https://thewire.in/women/stuck-between-market-family-and-state-empower-surrogates-themselves> [last accessed 16 Feb 2019] And Kotiswaran (n 37).

⁴⁰³ See PM Arathi, ‘Silent Voices: A Critical Analysis of Surrogacy’s Legal Journey in India’ (2019) 49 Social Change 344.

⁴⁰⁴ Purewal (n 226) 21.

The following sections will provide the timeline of the steps and varying approaches taken to regulate surrogacy, which includes exploring the legal pathway to the enacted legislation and the key substantive legislative goals the Acts achieved. The different policy documents and pieces of legislation, and their main features, will be described and evaluated and some of the major criticisms of the Bills and the recommendations of the Parliamentary Committees will be discussed. A detailed examination of the provisions of the Surrogacy (Regulation) Bills and the final wording of the Act as well as those set out in the Guidelines and Draft ART Bills relating to key aspects of the practice will be given in the following chapter. The Indian journey in regulating surrogacy is long and complex therefore I have developed a graphic with a timeline of key events to refer to at the end of this chapter.

3.4.2 Medico-Liberal phase: The Indian Council of Medical Research Guidelines

In 2002, the Secretary of Family Welfare released a draft of the ‘National Guidelines for Accreditation, Supervision, and Regulation of ART clinics in India’ (Guidelines).⁴⁰⁵ These guidelines were created by a committee formed by the Indian Council of Medical Research and the National Academy for Medical Science in 1999 and after several years of debate they were finally published in 2005.⁴⁰⁶ Although the Guidelines were an attempt toward some form of regulation of surrogacy they are non-binding and liberal in their approach. They are also more favourable to clinics and commissioning parents than the surrogates. They do not restrict who can access surrogacy on the grounds of nationality and citizenship, sexuality, or the marital status and they do not limit the eligibility of the surrogate to married women. The Guidelines provided for the accreditation of ART clinics and while many clinics claimed to comply with them, there was no legal obligation to do so therefore they had limited power in controlling the unscrupulous activities of some clinics. However, until the Surrogacy Bill was enacted these Guidelines continued to apply in part. The Guidelines also provided provisions for

⁴⁰⁵ Ministry of Health and Family Welfare (India), ‘ART Clinics in India’ (Press Release, 4 September 2002), available at <http://pib.nic.in/archieve/lreng/1yr2002/rsep2002/04092002/r040920029.html> [last accessed 20th September 2015]

⁴⁰⁶ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005) [hereinafter Guidelines].

informed consent including offering model consent forms, confidentiality, and counselling as well as outlining the permissible roles for the stakeholders and qualifications of the donors, surrogates, and commissioning parents. The Guidelines permitted commercial gestational surrogacy allowing intended parents to commission a surrogacy arrangement and pay compensation to the surrogate and gamete donors.

3.4.3 Contested and Regulatory phase: The Draft ART Bill and Law Commission Report

In 2008, the first version of the Assisted Reproductive Technology (Regulation) Bill⁴⁰⁷ was drafted and released to the public for review. The provisions of the Draft ART Bill largely followed the provisions set out in the Guidelines but with the addition of some amendments after input from stakeholders and lawyers. It introduced offences and imposed restrictions on egg donation but continued to allow unrestricted access to ART. It also provided for the appointment of a local guardian by the commissioning couple to take care of the surrogate and required that the couple guarantee that they would and could return home with the child or children. This Bill came in response to the Baby Manji case and these provisions respond to the problems faced by the intended father to return home with the baby. The Bill also afforded greater protections for the surrogates' payments as sample surrogacy agreement forms indicated that 75% should be paid at the embryo transfer stage.⁴⁰⁸ The Bill was updated in 2010,⁴⁰⁹ 2013,⁴¹⁰ 2014⁴¹¹ and again in 2020⁴¹² following the recommendations of Parliamentary Standing committee and the Select Committee. In 2009, the Law Commission of India released the 228th report 'Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy', in which it proclaimed that commercial

⁴⁰⁷ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 [hereinafter Draft ART Bill 2008].

⁴⁰⁸ This would suggest a payment for 'services' model as opposed to for a 'product'. The actual practice has been that the bulk of the payment is made when the baby is handed over which suggests that a product model underpinned by the foetal container view has been operating.

⁴⁰⁹ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2010 [hereinafter Draft ART Bill 2010].

⁴¹⁰ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2013 [hereinafter Draft ART Bill 2013].

⁴¹¹ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2014 [hereinafter Draft ART Bill 2014].

⁴¹² The Assisted Reproductive Technology (Regulation) Bill, 2020, 97 of 2020 [hereinafter ART Bill 2020].

surrogacy involves the ‘commoditization [sic] of the child... leads to [the] exploitation of poor women in underdeveloped countries who sell their bodies for money,’⁴¹³ and recommended a ban on commercial surrogacy whilst allowing altruistic arrangements.⁴¹⁴

The revised Draft ART Bill, 2010 continued to permit commercial arrangements but altered the payment schedule for surrogates to receive 75% only after delivery.⁴¹⁵ This version defined the ‘couple’ as two people living in India and in a relationship that was legal in India, and continued access to all single persons, married couples, and unmarried couples. Provisions were added to prevent the potential of stateless children, a problem highlighted by the key cases, which required the intended parents to provide documentation that their home country permitted surrogacy and would allow the child or children entry. The local guardian would be legally obliged to take delivery of the child and surrender them for adoption or keep them thus qualifying the child(ren) for Indian citizenship in the case of abandonment by intended parents. Individual brokers or paid intermediaries recruiting donors or surrogates could face imprisonment for up to three years and be issued with a fine.

Following further redrafts the regulatory approach started to become more restrictive and detailed. The 2013 version of the Draft ART Bill limited the number of surrogacy pregnancies of a woman to three live births including her own children with a two-year interval between them. The commissioning parents were required to pay for health insurance for the surrogate until the child was relinquished and she was free of complications. At least one of the intended parents had to be genetically related to the child(ren) and they were required to be insured until the age of 21. These provisions indicate some

⁴¹³ Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Obligations of Parties to a Surrogacy, Report Number 228, (August 2009) Para 1.1.

⁴¹⁴ Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Obligations of Parties to a Surrogacy, Report Number 228, (August 2009) Para 4.1.

⁴¹⁵ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2010, 84. A move to what looks like a product model and that the payment is for the ‘goods’.

improvements in protecting the surrogate's health and ensuring better aftercare which is a serious issue observed in the case of Anandhi.

Despite years of discussion the Draft ART Bill, 2014 was not as comprehensive as it could have been and faced criticisms that it prioritised the interests of the intended parents and clinics over of the surrogates and their health.⁴¹⁶ Although it did not address some of the fundamental problems concerning the potential exploitation and abuse of the surrogates it did establish provisions for protecting the health of the surrogates, which correspond to the issues outlined in the key cases section. It provided insurance in the event of the surrogate's death, a medical emergency, or complications and that in such cases the ART clinic would be presumed negligent. During the delivery the life of the surrogate was to be prioritised over the baby's and that she would receive the full payment regardless of the outcome. This responds to the criticisms of the baby being prioritised over the surrogate in the case where the surrogate died after collapsing in the hospital, also described in the cases section. The surrogate would be required to be 'ever married', between 23-35 with at least one live child aged 3 or over, she could only have one live surrogate birth and undertake no more than three IVF cycles. The ART bank was required to act as her legal representative free of charge. This version also explicitly excluded same-sex and foreign commissioning parents. Non-resident Indians, Overseas Citizens of India, People of Indian Origin, and foreigners married to an Indian citizen could still commission a surrogacy arrangement in India, and different levels of compensation were proposed for commissioning couples who were resident in India and for international couples. Following this Bill and its various versions a number of executive orders were introduced prohibiting non-married couples and foreigners from commissioning surrogacy arrangements in India.⁴¹⁷

⁴¹⁶ Aarti Dhar, 'Gaps in Surrogacy Bill', October 27, 2013 <http://www.thehindu.com/features/metroplus/society/gaps-in-surrogacy-bill/article5276062.ece> [last accessed 9th Feb 2018]. SAMA, an Indian women's rights organisation, has written extensively on surrogacy in India; conducting detailed reports and advocating for the surrogates' rights and interests and has been very critical of the Draft ART Bills.

⁴¹⁷ More detail on these will be given later. Letter from the director of the Department of Health Research, Ministry of Health and Family Welfare, Government of India, dated 30 September 2015 detailed the release of another version of the

The Guidelines and the Draft ART Bill, 2014 grouped the provisions for surrogacy arrangements under the wider practice of ART treatments. Both documents were produced by the Indian Council of Medical Research, which is a highly specialised medical organisation. It is therefore perhaps unsurprising that the particular issues concerning the surrogates, their interests and welfare, had not been adequately addressed. The ICMR's focus is on the medical and technological procedures rather than the wider and greater social injustices and inequalities that operate within the practice, both nationally and internationally.⁴¹⁸ Pande commenting on the 2014 version of the Bill claimed that 'if passed... the new Assisted Reproductive Technology (Regulation) Bill and Rules... would be one of the most permissive surrogacy laws in the world.'⁴¹⁹ The Draft ART Bill, 2014 was never passed in the Indian Parliament. Pande, who writes about the concept of 'stratified motherhood',⁴²⁰ proclaimed that 'most clauses in the bill support and accentuate... the rights of upper-class women of historically advantaged races to reproduce at the expense of women from disadvantaged class and races.'⁴²¹ In the designing and drafting of the Surrogacy (Regulation) Bill, 2016 the Indian government took a huge step in the opposite direction and therefore placed this attempt to regulate surrogacy at odds with the approaches and provisions of the earlier versions of the Draft ART Bill. The introduction of the Surrogacy (Regulation) Bill is part of the Restrictive/Normative phase. A more detailed treatment of this separate Bill will be given later in this chapter.

Draft ART Bill to be scrutinised by the public and all stakeholders. It is also stated in the Bill that it aims to establish 'the National Advisory Board, the State Advisory Boards and the National Registry for the accreditation, regulation and supervision of assisted reproductive technology clinics.

⁴¹⁸ These authors discuss the criticism the Guidelines and Bills received from women's rights organisation because of the way they work in favour of the clinics and uphold patriarchal norms. Smitha Sasidharan Nair and Rajesh Kalarivayil, 'Has India's Surrogacy Bill Failed Women Who Become Surrogates?' (2018) 3 ANTYAJAA: Indian Journal of Women and Social Change 1. This is also discussed by Olinda Timms, 'Report of the Parliamentary Standing Committee on the Surrogacy (Regulation) Bill, 2016: A Commentary' (2018) 3 Indian Journal of Medical Ethics 102, 102.

⁴¹⁹ Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (n 91) 973.

⁴²⁰ I discussed this in Chapter 2. It relates to how the procreation of some groups is celebrated and facilitated while other groups are discouraged and even prohibited from procreating.

⁴²¹ Pande, 'This Birth and That: Surrogacy and Stratified Motherhood in India' (n 186) 52.

3.4.4 Contracting and Normative phase: Ending international and commercial surrogacy

In 2012, steps were taken to limit international surrogacy arrangements in India through the restrictions applied by several Indian ministries. The Ministry of Home Affairs⁴²² circulated notification no. 25022/74/2011-F-1 on 9th July 2012, it specified that medical visas were required for those commissioning surrogacy arrangements in India. It also redefined the eligibility criteria to heterosexual couples married for two years and stipulated that a letter from the embassy or foreign ministry of the couple's country must accompany the visa application stating that the country recognises surrogacy and that the child(ren) born from the arrangement will be permitted entry into the country. It also explained that an exit visa would need to be obtained from Foreigners Registration Office (FFRO/FRO). Notification 25022/74/2011-F-1(Vol. III) issued on 19th February 2014 clarified the visa requirements for Overseas Citizens of India (OCI) and People of Indian Origin (PIO), they would not require a separate medical visa for commissioning a surrogacy arrangement in India but would still need to obtain special permission for the FFRO/FRO concerned on the same conditions set out in the circulator dated 9th July 2012. The Ministry of Commerce and Industry issued notification no. 25/2015-2020 on 26th October 2015 prohibiting the importing of human embryos except for the purpose of research. The notification, no. 25022/74/2011-F-1 (Vol. III), issued by the Ministry of Home Affairs on 3rd November 2015 expressly prohibited foreign nationals, and PIO and OCI cardholders from commissioning surrogacy arrangements in India. It intended 'to prohibit foreigners, homosexuals, and singles from commissioning surrogacy in India and permit only such heterosexual married couples with a marriage subsisting for two years or more to commission surrogacy in India.'⁴²³ The Department for Health Research through notification no. 2502/1/119/2015-HR issued on 4th November 2015 validated the notifications of the Ministry of Home Affairs by banning commercial surrogacy arrangements in India, stating 'As per the Affidavit files in the Hon'ble Supreme Court of India, the

⁴²² The Ministry of Home Affairs is responsible for internal security and domestic policy.

⁴²³ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 1.4 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

Government intends to ban commercial surrogacy through a proper legislation.’⁴²⁴ This notification also clarified that until the Draft ART Bill passed the provisions provided within it and the ICMR Guidelines would apply unless they were contrary to the circular and would be applicable to all ART clinics and surrogacy services. The Minister for Health and Family Welfare also confirmed in reply to Starred Question No.100 in Lok Sabha that as health is a state subject the state governments had been asked to constitute regulatory authorities to regulate surrogacy in accordance with the ICMR’s Guidelines.

The measures were partly taken in response to issues arising in the highly publicised cases of Baby Manji and the Balaz twins. However, since the government issued the memorandum in 2015 advising clinics not to engage in arrangements with overseas couples as visas would not be granted many of the various stakeholders were left in a legal limbo. The circulator issued on 3rd November specified that permission for exit visas for children born through surrogacy to foreign nationals and OCI cardholders already commissioned on or before the notification would be decided on a case-by-case basis. It has been reported in various newspaper articles that the surrogates themselves were very concerned about the Indian government’s move to end international and commercial arrangements. They were dismayed and disappointed that a means of survival had been taken away from them.⁴²⁵ Ranjana Kumari, the director of the women’s rights group Centre for Social Research expressed concern that the government’s move to ban surrogacy arrangements for overseas couples would not stop the arrangements from taking place but would likely push the industry underground and out of the reach of proper regulation.⁴²⁶ Anil Malhotra shares this view and warns that Indian women ‘will be

⁴²⁴ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 2.5 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁴²⁵ “‘We pray that this clinic stays open’: India’s surrogates fear hardship from embryo ban”, 2nd January 2016: <https://www.theguardian.com/world/2016/jan/03/india-surrogate-embryo-ban-hardship-gujarat-fertility-clinic> [last accessed 27th November 2017].

⁴²⁶ ‘India bans foreigners from hiring surrogate mothers’ 28th October 2015: <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers> [last accessed 27th November 2017] Since China banned commercial surrogacy the practice has continued unregulated see

impregnated in India and shifted to permissible jurisdictions with lax laws.⁴²⁷ Rudrappa discovered that Indian women had be taken to Nepal to evade the restrictions in India and that Kenyan women had been taken to India to engage in surrogacy arrangements and sent back for the duration of the pregnancy. She asserts that as a result of these developments ‘surrogate mothers become analogous to shipping containers.’⁴²⁸

3.4.5 The Surrogacy (Regulation) Bill

On 8th August 2014 Dr Kirit Premjibhai Solanki an MP from the State of Gujarat introduced a Private Members’ Bill in the Lok Sabha, ‘The Surrogacy (Regulation) Bill 2014’ number 61. This Bill was intended to extend to the whole of India.⁴²⁹ On 28th November 2014 MP Shri Bhartruhari Mahtab introduced Bill number 117 again named ‘The Surrogacy (Regulation) Bill, 2014’ but amended to extend to the whole of India except the State of Jammu and Kashmir.⁴³⁰ At the time the Private Members’ Bill was introduced a draft Surrogacy Bill by the Department of Health Research had already been circulated for inter-ministerial consultation, it was publicised on 30th September 2015 inviting comments from stakeholders, and submitted to the Cabinet to consider its introduction in Parliament on 21st April 2016. The Cabinet postponed making any decision, and a Group of Ministers was constituted to scrutinise the government Bill.⁴³¹ The Bill was finalised after consultation with the Ministry of Law and Justice and approved by the Cabinet on 24th August 2016.⁴³² Shortly afterwards,

<https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html> [last accessed 20th Feb 2019].

⁴²⁷ Anil Malhotra, ‘Surrogacy in India at crossroads’, (2016) *Journal of Reproductive Health and Medicine* 2, S17.

⁴²⁸ Rudrappa, ‘Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015’ (n 301) 1093.

⁴²⁹ The Surrogacy (Regulation) Bill 2014, 61 of 2014, Cl. 1.

⁴³⁰ The Surrogacy (Regulation) Bill 2014, 117 of 2014, Cl. 1. The State of Jammu and Kashmir had special autonomy under Article 370 of the Constitution of India but since 5 August 2019 and the enactment of the Jammu and Kashmir Reorganisation Act, 2019 it has been divided into two union territories.

⁴³¹ Group of Ministers mentioned in Lok Sabha Debates, *Surrogacy*, Session Number 8, 6 May 2016, *Unstarred Question 2208* Available at <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=34620&lsno=16>.

⁴³² Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, para. 1.11-1.12 Available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf accessed 28 September 2021.

Sushma Swaraj, the Minister for External Affairs, held a press conference proclaiming that the Surrogacy (Regulation) Bill 2016 was in keeping with the ‘ethos of the Indian people’ by prohibiting commercial surrogacy but allowing altruistic arrangements.⁴³³ On 21st November 2016 the Indian Government introduced Bill number 257 ‘The Surrogacy (Regulation) Bill, 2016’. The evaluation and critique of the provisions of the Surrogacy Bill relate to the government Bill as introduced and all subsequent versions, with reference to any significant amendments highlighted. There are very few amendments overall and only a small number that are relevant to this discussion.⁴³⁴ This is also the case with the Surrogacy Act and any amendments that are of relevance to the core arguments of the thesis are presented in detail.

3.4.5.1 The Surrogacy (Regulation) Bill, 2016 - Main objectives and key features

The Surrogacy (Regulation) Bill, 2016 was drafted by the Department of Health Research (the Department) with the expressed aim of prohibiting the potential exploitation of women who act as surrogates.⁴³⁵

The Department lists the following points as the major objectives of the Bill:

- (i) to regulate surrogacy services in the country
- (ii) to provide altruistic ethical surrogacy to the needy infertile Indian couples
- (iii) to prohibit commercial surrogacy including sale and purchase of human embryo and gametes
- (iv) to prevent commercialization of surrogacy
- (v) to prohibit potential exploitation of surrogate mothers and protect the rights of children born through surrogacy.⁴³⁶

⁴³³ Amy Kazmin, ‘India Surrogacy Crackdown Raises Concerns’ *Financial Times* (New Delhi, 16 September 2016) <<https://www.ft.com/content/866643bc-7b19-11e6-ae24-f193b105145e>> accessed 19 March 2019.

⁴³⁴ A table of the amendments can be found here https://www.prsindia.org/sites/default/files/bill_files/Note%20on%20Amendments%20-%20Surrogacy%20Bill.pdf [last accessed 16 Feb 2019].

⁴³⁵ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Statement of Objects and Reasons.

⁴³⁶ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 2.3 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

The accessibility and eligibility criteria for both intended parents and surrogates became even more restrictive in this Bill.⁴³⁷ The key features can be summarised as follows: the prohibition of commercial surrogacy in favour of ‘ethical altruistic surrogacy’ with the payment of medical expenses to the surrogate,⁴³⁸ only heterosexual Indian couples who have been married for five years can access surrogacy and provided at least one of them has proven fertility issues,⁴³⁹ same-sex couples, singles and unmarried couples are excluded, foreigners including overseas Indians but not NRIs are also excluded from accessing surrogacy in India. The surrogate must be a close relative of the intending couple and can only act as a surrogate once in her lifetime.⁴⁴⁰ Other features include the establishing of a National Surrogacy Board, the registration of all ART clinics and the requirement that they keep records of each arrangement for twenty-five years.⁴⁴¹ The Bill has also introduced punishments for anyone engaging in commercial surrogacy, abandoning the child(ren), exploiting the surrogate mother, and selling and importing human embryos consisting of a jail term of at least 10 years and a fine of up to Rs 10 lakh.⁴⁴² The difficulties in determining the legal parents of the child(ren) were addressed by the requirement of an order concerning the parentage and custody of the child to be passed by a court of the Magistrate on an application made by the intending couple and surrogate mother.⁴⁴³

The Surrogacy Bill is solely focussed on surrogacy unlike the Draft ART Bill which is aimed at regulating the wider field of assisted reproductive technologies. Considering the extensive consultations and revisions of the Draft ART Bill and its wider reaching scope, as it aims to regulate assisted reproductive technologies and not just surrogacy, it would be more logical to pass it before or

⁴³⁷ The restrictions align with the measures taken in Thailand that I outlined in the introduction of the thesis. The conditions limit surrogacy to Thai citizens who are married, heterosexual, and related to the surrogate. Protection for Children Born through Assisted Reproductive Technologies Act, B.E. 2558.

⁴³⁸ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 51.

⁴³⁹ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 51.

⁴⁴⁰ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 51.

⁴⁴¹ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 43.

⁴⁴² Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 35.

⁴⁴³ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl.4 (II) ‘an order concerning the parentage and custody of the child to be born through surrogacy, have been passed by a court of the Magistrate of the first class or above, on an application made by the intending couple and surrogate mother’.

at least at the same time as the Surrogacy Bill. As indicated in the earlier section on the passage of the Bills, the ART Bill was re-introduced and passed at the same time as the Surrogacy legislation. Dr Kamini Rao, who was a member of the Advisory Committee for Drafting of Guidelines on Assisted Reproductive Technology, reported during his submissions to the Parliamentary Standing Committee that none of the members responsible for drafting the Draft ART Bill were invited to consult on the Surrogacy Bill, which could explain the divergence in the provisions of the respective legislative instruments.⁴⁴⁴

3.4.5.2 Parliamentary Standing Committee on Health and Family Welfare

The Surrogacy (Regulation) Bill, 2016 was referred to the Department-related Parliamentary Standing Committee on Health and Family Welfare (PSC) by the Chairman of the Rajya Sabha in consultation with the Speaker of the Lok Sabha on 12th January 2017 for an examination and a report. The Committee sent out a press release inviting views on the proposed legislation, it sat ten times to discuss the Bill and to hear submissions from experts and stakeholders. These included representatives from the government departments⁴⁴⁵ including the Advisory Committee for Drafting of Guidelines on Assisted Reproductive Technology, many organisations working the field of ARTs and interested individuals.⁴⁴⁶ Submissions were also made by one commissioning parent and a small number of women who have acted as surrogates. The evidence for the report, that was drafted and adopted on 8th August 2017, included the Surrogacy (Regulation) Bill, 2016, background notes, presentations and

⁴⁴⁴ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 4.9 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁴⁴⁵ Ministry of Women and Child Development, Ministry of Home Affairs, Ministry of External Affairs, and National Commission for Women.

⁴⁴⁶ Federation of Obstetric and Gynaecological Societies of India (FOGSI), Indian Society of Assisted Reproduction (ISAR), Indian Society of Third Party Assisted Reproduction (INSTAR), International Surrogacy Forum and Surrogacy Laws India, Trust Legal, Advocate and Consultants. And a journalist and human rights activist, the lawyer and Supreme Court advocate Jayashree Wad, an Associate Professor in Law at the National Law University in Delhi, a student at the Amity Law school.

responses from the Department of Health Research, memos from experts, institutes, associations, and organisations, oral and written submissions from experts and stakeholders.

3.4.5.3 Parliamentary Standing Committee – Key Recommendations

The Committee proposed a far less restrictive regulatory approach to surrogacy than given in the Bill and recommended amending several of its key features. They supported compensated surrogacy and claimed that banning commercial arrangements was paternalistic, it denied the women an opportunity to earn a wage and that other forms of employment are ‘equally, if not more, exploitative and nowhere close to being as remunerative as surrogacy.’⁴⁴⁷ They also recommended removing the close relative stipulation and relaxing the eligibility criteria for intended parents to allow live-in couples, divorced women, widows, NRIs, PIOs and OCIs to avail of surrogacy after only one year of proven infertility. When the Surrogacy Bill, 2019 was re-introduced in the Lok Sabha it passed (Bill No. 156-C of 2019) without adopting any of these key and important recommendations. However, the following amendments were made in the 2018 version of the Bill before its re-introduction as the 2019 version. The amendments aimed to clarify that only gestational surrogacy is permitted and that the surrogate cannot provide her own gametes for the arrangement, that she is able to withdraw from the arrangement before the embryo transfer, and that the insurance should extend to a period of sixteen months post-partum to cover any complications. The terms of the punishments were amended from being minimum periods to a maximum.⁴⁴⁸

3.4.5.4 Select Committee of Rajya Sabha

The Surrogacy Bill 2019 was introduced and debated in the Rajya Sabha on 19th and 20th November 2019. A number of MPs rose to express concerns over several core aspects of the Bill such as the

⁴⁴⁷ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.18 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁴⁴⁸ Surrogacy (Regulation) Bill, 2019, 156 of 2019, Clauses 4; 6; 35-42.

compensation for surrogates, the insufficient attention given to the rights of the children born from the arrangements, the restrictive eligibility criteria for intended parents and the unjustified period of proven infertility set out in the definition, the social stigma attached to infertility and the failure to incorporate any recommendations for the PSC report including the need to pass the ART Bill before or alongside the Surrogacy Bill. In light of these reservations the Bill was referred to the Select Committee of the Rajya Sabha which was constituted on 21st November and consisted of 23 members. The Select Committee also consulted with various stakeholders⁴⁴⁹ including the Secretary of the Department of Health Research and received a presentation on the Parliamentary Standing Committee on Health and Family Welfare's report. They undertook research trips to Vadodra, Anand, Hyderabad and Mumbai visiting surrogacy clinics and communicating with doctors, surrogates, children born from surrogacy arrangements and intended parents. They also heard the views of the State governments in Gujarat, Telangana and Andhra Pradesh and Maharashtra.

3.4.5.5 Select Committee – Key recommendations

The Select Committee talked of the social, ethical, moral, legal, and scientific issues arising from the practice of surrogacy and that its regulation involves a difficult balancing act between protecting the rights and interests of all parties. They claimed that the Surrogacy Bill was a step in the right direction as it seeks to end 'the exploitation of poor vulnerable women', protect the rights of the child and allow access to 'only needy infertile couple [sic] and widow [sic] and divorced women'.⁴⁵⁰ However, they echoed some of the same concerns raised by the PSC such as the need to pass the ART Bill before the Surrogacy Bill. They also recommended permitting PIOs, OCIs, widowed and divorced women to

⁴⁴⁹ Representatives from the National Human Rights Commission, National Commission for Protection of Child Rights, SAMA – Resource Group for Women and Health, Ministry of Women and Child Development, United Nations Population Fund, PRS Legislative Research, Dr Prof Neeta Singh an expert in Division of Reproductive Medicine, AIIMS New Delhi and Dr Kamini A. Rao, Milann.

⁴⁵⁰ Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, preface Available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf accessed 28 September 2021.

commission surrogacy arrangements, amending the definition for infertility and the ‘close relative’ clause to allow ‘a willing woman’ between the age limit and meeting the other criteria to act as a surrogate. Additionally, they recommended extending the insurance cover for the surrogates from 16 months as set out in the Bill to 36 months and to include medical costs, as well as cover for loss, damage, illness, or death as provided in the Bill and other prescribed expenses but did not provide further detail. Unlike the PSC the Select Committee supported the Bill’s approach to permit only altruistic arrangements and prohibit commercial or compensated surrogacy on the grounds that it risked ‘commodifying the noble instinct of motherhood’⁴⁵¹ and they questioned whether the ‘sublime and divine instinct of motherhood could be allowed to be turned into a mechanical paid service of procreation devoid of divine warmth and affection’⁴⁵² The Select Committee had initially considered an intentions-based approach to the model of surrogacy, where if a woman indicated that the payment was the motivation then it would be compensatory surrogacy but if it was to help a childless couple then it would be considered altruistic. However, after considering whether ‘the noble act of motherhood’ could or should be compensated, what amount should be fixed, whether the practice of a woman ‘renting out her womb’ could be considered ethical and if she would be awarded ‘the same respect as other women and mothers get in the society’ the Select Committee decided altruistic was most appropriate.⁴⁵³ In fact, they claimed that a woman who acts as a surrogate ‘shows a strong inclination to render selfless services and takes a forward step to abolish the stigma of infertility from society’ and for this ‘sets an example of being a model woman in the society.’⁴⁵⁴ The MP Dr Vikas Mahatme submitted in the Rajya Sabha debates on the Bill that, ‘It’s a delightful thing that she is contributing to help others become parents. She is doing this not with any commercial interest, but

⁴⁵¹ Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, Para 4.8.

⁴⁵² Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, Para 4.11.

⁴⁵³ Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, Para 4.9 and 4.13.

⁴⁵⁴ Select Committee on The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019*, para. 4.9.

with a sense of charity. So, she will also feel good and happy.’⁴⁵⁵ These sentiments strongly reflect the depictions of women in the Bollywood films described in Chapter 2.

3.4.5.6 The Surrogacy (Regulation) Act, 2021 – Main features

I will summarise here how the main features in the final wording of the Act differ or not from those of the initially proposed Bill. The Surrogacy Act prohibits commercial surrogacy in favour of altruistic surrogacy with the payment of ‘the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother’.⁴⁵⁶ A couple is defined as a ‘legally married Indian man and woman above the age of 21 years and 18 years respectively’⁴⁵⁷ but in order to fulfil the criteria to be issued with an eligibility certificate for surrogacy they must be ‘married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification’.⁴⁵⁸ The eligibility criteria have been extended to allow an ‘intending woman’ to avail of surrogacy and is defined as ‘an Indian woman who is a widow or divorcee between the age of 35 to 45 years’.⁴⁵⁹ In terms of the citizenship of the couple or woman they must be of ‘Indian origin’ and shall obtain a certificate of recommendation from the Board provided that they have ‘a medical indication necessitating gestational surrogacy’, as such the much criticised and stricter definition of infertility in earlier versions of the Bill has been relaxed.⁴⁶⁰ Although it appears that the requirement for the intending couple to be married for 5 years has been removed the age limits indicate that even though a couple can marry at 18 for a woman and 21 for a man, they would be required to wait 5 years before being able to avail of surrogacy. As previously highlighted, the eligibility criteria for the surrogate mother have been amended to allow ‘a willing woman’ to undertake the arrangement. She

⁴⁵⁵ The Surrogacy (Regulation) Bill, 2019 Rajya Sabha Debates 20 Nov 2019, p.365. Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 357, Session 250, 20 November 2019, *Comments by Dr Vikas Mahatme* available at <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>

⁴⁵⁶ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 2.

⁴⁵⁷ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 2.

⁴⁵⁸ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 4.

⁴⁵⁹ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 2.

⁴⁶⁰ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 2.

will be issued with an eligibility certificate provided she fulfils the prescribed conditions which include being ‘an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation’, does not provide her own gametes, only acts as a surrogate once in her lifetime and has ‘a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner’.⁴⁶¹ The Act also requires an order concerning the parentage and custody of the child to be passed by a court of the Magistrate of the first class or above on an application made by the intending couple/intending woman and the surrogate mother which is the birth affidavit after the child is born.⁴⁶² The punishment for anyone engaging in commercial surrogacy, advertising for commercial surrogacy or component procedures including the use of intermediaries, abandoning the child(ren), exploiting the surrogate mother and/or the child(ren), selling and importing human embryos, or conducting sex selection is a jail term that may extend to 10 years and a fine that may extend to 10 lakh rupees.⁴⁶³ For contravening any provisions of the Act other than those listed above shall be punishable with imprisonment for a term which may extend to five years and with a fine which extend to ten lakh rupees.⁴⁶⁴ Any intending couple/woman who seeks to aid a clinic, laboratory or registered medical practitioner etc or any other person in conducting commercial surrogacy shall be punishable with imprisonment for a term which may extend to five years and with a fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to ten years and with fine which may extend to ten lakh rupees.⁴⁶⁵

3.5 Conclusion

This chapter has presented and evaluated the timeline and course of the legal reforms to the practice of surrogacy in India. The approaches taken to regulating the practice have varied considerably from

⁴⁶¹ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 4.

⁴⁶² The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 4.

⁴⁶³ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 38.

⁴⁶⁴ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 39.

⁴⁶⁵ The Surrogacy (Regulation) Act, 2021, 47 of 2021, CL. 40.

the early liberal guidelines to the more restrictive Surrogacy Act. The Indian journey has shown that the task of enacting legislation for such a challenging issue is not an easy one and that a multitude of different positions are held on the practice. The Surrogacy Bill has received a great deal of criticism due to the exclusion of certain groups from commissioning a surrogacy arrangement in India and how it defined infertility. Many have argued that the Bill is discriminatory⁴⁶⁶ and that could result in constitutional litigation.⁴⁶⁷ It may well return to the Supreme Court for violations relating to privacy, forced labour and discrimination. While the recommendations to pass the ART Bill before the Surrogacy Bill were heeded by the government, with the introduction of the 2020 version in Parliament, greater care was needed to ensure cohesion and compatibility between the two pieces of legislation. There are overlapping provisions which lack consistency such as the definition for infertility. ART treatments are not restricted to Indians only unlike surrogacy. The provisions relating to the rights of the child also required more clarity, such as who is legally responsible for the child born from a surrogacy arrangement if they are abandoned by the intended parents.

The progressively more restrictive approaches to the regulation of the practice have been in part due to a shifting political landscape. It is no coincidence that the protectionist and prohibitionist move taken in the legal reform, as evidenced in the Surrogacy Bill which prohibits commercial surrogacy and limits it to heterosexual married couples, has come about under the central government rule of the Bharatiya Janata Party, and Modi's leadership, with its conservative and Hindu nationalist ideology. Under the previous central government of the United Progressive Alliance commercial surrogacy was permitted and open to all regardless of sexuality and citizenship. The approach was very liberal with no legally binding regulations or strict monitoring of ART clinics.⁴⁶⁸ As argued by Reddy et al. the approach to the Surrogacy Bill was based on the ideology that the practice of commercial surrogacy is

⁴⁶⁶ Banerjee and Kotiswaran (n 50) 94.

⁴⁶⁷ Sneha Banerjee and Prabha Kotiswaran, 'Regulating Reproductive Technologies A Blow to Inclusive Family Forms' (2021) 56 Economic and Political Weekly 21, 105.

⁴⁶⁸ Reddy and others (n 302) 160. The authors talk about this shift in approaches to surrogacy.

against ‘traditional Indian family’ values.⁴⁶⁹ It is therefore significant that under Modi’s government access to surrogacy has been restricted to Indians (resident Indian citizens and Non-resident Indians) as such a move can be seen as protecting Indian women from outsiders. A sentiment also expressed by Jagat Prakash Nadda, the Ministers for Health and Family Welfare, over the need to ensure ‘foreigners do not get away over surrogacy’.⁴⁷⁰ Kotiswaran argues that the development of ART in India was to reverse the effects of the mass sterilisation programme introduced as a population control measure,⁴⁷¹ which are discussed in Chapter 2 and in Chapter 6 with reference to gendered harm. Attempting to keep surrogacy within the borders and for Indians only aligns with a Hindu nationalist and nation building agenda.⁴⁷² Thus, revealing perhaps the true motivations behind prohibiting international commercial surrogacy. It is an unusual move considering the previous promotion of medical tourism of which surrogacy was an important part. The following chapter will explore feminist criticisms of the practice of surrogacy, evaluate the effectiveness of the objective to protect surrogates from potential exploitation, and examine in detail key issues and clauses of the legislation.

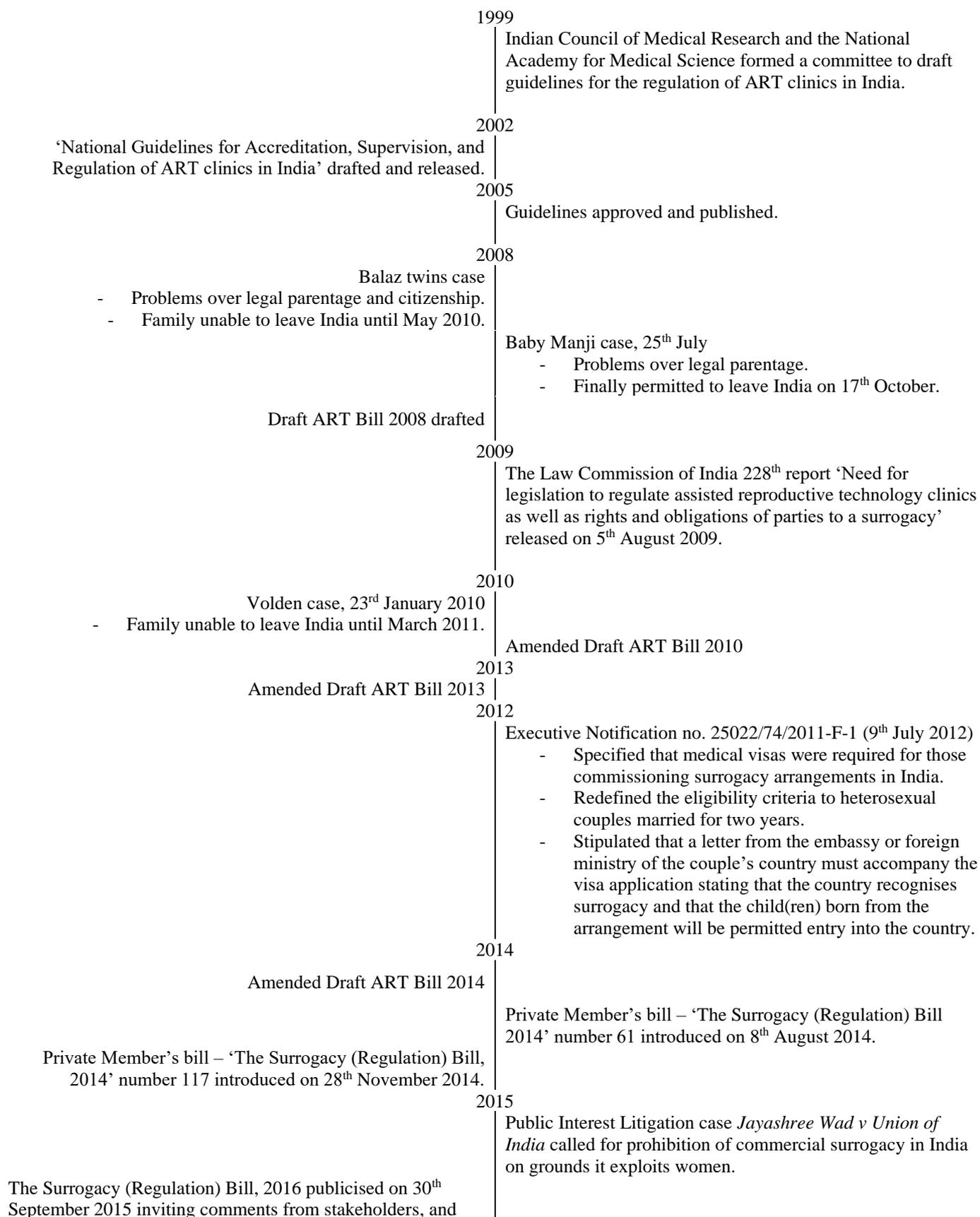
⁴⁶⁹ *ibid* 161.

⁴⁷⁰ Also expressed by Shri V. Vijayasai Reddy an MP for Andhra Pradesh. See, The Surrogacy (Regulation) Bill, 2019 Rajya Sabha Debates 20 Nov 2019, p.369. Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 357, Session 250, 20 November 2019, *Comments by Shri V. Vijayasai Reddy* available at <https://cms.rajasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>.

⁴⁷¹ Kotiswaran (n 344) 132. This is also set out in the ICMR Guidelines, that ART can be a treatment option to reverse sterilisation. See, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005) p.5.

⁴⁷² Ruth Fletcher discusses the adoption of a pro-natalist policy that ensures ‘the reproduction of people as a national resource [and] the management of women’s sexuality towards reproductive ends’ in the Irish context. See, Ruth Fletcher, ‘Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics’ (2001) 28 *Journal of Law and Society* 568, 573.

Figure 1. Timeline of regulatory interventions and key events



submitted to the Cabinet to consider its introduction in Parliament on 21st April 2016.

Executive Notification no. 25/2015-2020 (26th October 2015)
- prohibiting the importing of human embryos except for the purpose of research.

Executive Notification no. 25022/74/2011-F-1 (Vol. III) (3rd November 2015)

- issued by the Ministry of Home Affairs and expressly prohibited foreign nationals, and PIO and OCI cardholders from commissioning surrogacy arrangements in India.

Executive Notification no. 2502/1/119/2015-HR (4th November 2015)

- validated the notifications of the Ministry of Home Affairs by banning commercial surrogacy arrangements in India, stating 'As per the Affidavit files in the Hon'ble Supreme Court of India, the Government intends to ban commercial surrogacy through a proper legislation.'

2016

The Surrogacy (Regulation) Bill, 2016 – introduced to Lok Sabha on 21st November 2016

- marked separation in regulation of surrogacy and ART.

2017

PSC report on The Surrogacy (Regulation) Bill, 2016 published on 10th August 2017

The Surrogacy (Regulation) Bill, 2016 referred to Parliamentary Standing Committee on Health and Family Welfare (PSC) on 12th January 2017

2018

Amended Surrogacy (Regulation) Bill, 2018 passed in the Lok Sabha on 19th December 2018

2019

Amended Surrogacy (Regulation) Bill, 2018 lapsed on 3rd June 2019

Amended Surrogacy (Regulation) Bill, 2019 reintroduced into the Lok Sabha on 15th July 2019

Amended Surrogacy (Regulation) Bill, 2019 passed Lok Sabha on 5th August 2019

Amended Surrogacy (Regulation) Bill, 2019 referred to Select Committee on 21st November 2019

2020

Select Committee report on Amended Surrogacy (Regulation) Bill, 2019 published on 5th February 2020

The Assisted Reproductive Technology (Regulation) Bill, 2020 reintroduced (ART Bill) on 14th September 2020

ART Bill referred to PSC on 3rd October 2020

2021

PSC Report on ART Bill, 2020 published on 19th March 2021

ART Act, 2021 passed Lok Sabha on 1st December, passed
Rajya Sabha 8th December and gained Presidential approval
on 20th December 2021

Surrogacy Act, 2021 passed Rajya Sabha on 8th December,
passed Lok Sabha on 17th December and gained Presidential
approval on 25th December 2021

2022

Surrogacy Act and ART Act came into force on 25th January
2022

4 Failed objectives: a critical examination of key provisions

Due to [a] lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant [use] of commercial surrogacy and unethical practices... it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers.⁴⁷³

4.1 Introduction

In this chapter I will build on my analysis of the Indian journey in regulating surrogacy from the previous chapter to further examine how the Indian government has attempted to respond to some of the major challenges of the practice. One of the main objectives of the legal reforms is to protect the surrogates from exploitation and the government aims to do this by prohibiting commercial arrangements in favour of altruistic surrogacy.⁴⁷⁴ They also proposed that exploitation could be minimised by restricting surrogates to close relatives of the intended parents, but after much objection this has been amended to ‘a willing woman’. I will show that this main objective to eliminate exploitation not only fails, but that the initial ‘close relative’ eligibility requirement had the potential to increase the likelihood of exploitation and coercion. I will explore how the surrogates are (potentially) exploited, revealing that altruistic surrogacy is also problematic, and offer a definition for exploitation against which to assess the practice and the provisions of the various pieces of legislation. Furthermore, I will argue that the government’s focus on exploitation, which is left undefined in the legislation, results in other forms of harm and mistreatment being overlooked and unaddressed. This relates to the main argument of my thesis which claims that the lack of attention given to the other harms sustained by the surrogates is because of the government’s failure to recognise the underlying assumptions about pregnancy influencing the regulation. Consequently, how these assumptions based

⁴⁷³ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Statement of Objects and Reasons.

⁴⁷⁴ The Indian government also aims to achieve this is through the restrictions on the eligibility criteria for intended parents to heterosexual married couples only and divorced or widowed women between 35 and 45 years of age.

on a foetal container model facilitate the harm of the surrogates through treating them first and foremost as foetal containers.⁴⁷⁵

The problems arising from the ‘close relative’ requirement are also closely related to another central concern of this thesis, which is the manifestation of the patriarchal control of women, their bodies, and their reproductive labour. This requirement also illustrates how the Indian government failed to recognise its potential consequences in such a strongly patriarchal culture and society. I will also look at how ‘contract pregnancy’ disrupts the traditional expectation of reproduction being confined to the private and family sphere, how Indian women became the ‘raw material’ in India’s medical tourism industry, and how the proposed ‘close relative’ requirement along with the prohibition of commercial arrangements was a move to return the practice of reproduction to unpaid labour within the family.

In order to critically examine the themes identified in this introduction, I focus my analysis on specific case studies which I think best show the risks created and exacerbated by the regulatory framework. These include the prohibition of commercial surrogacy, the permissibility of only gestational surrogacy, embryo transfers, foetal reductions, abortions, and caesarean sections. The health implications of these invasive clinical procedures and the corresponding legislative provisions will be examined along with those dealing with consent, insurance, and aftercare. Considering the potential health risks of these procedures they should be and can be the target of effective regulation. The chapter will offer some concluding thoughts on the model of pregnancy that is implicit in the legislative framework by outlining how and why the model is problematic. This leads into Chapter 5’s detailed analysis of the metaphysics of pregnancy which also explores an alternative model of pregnancy that has the potential to change how surrogacy is understood and regulated.

⁴⁷⁵ I will be developing this model in more detail in the following chapter but this term has been used by George J Annas, ‘At Law: Pregnant Women as Fetal Containers’ (1986) 16 *The Hastings Center Report* 13. And Laura Purdy, ‘Are Pregnant Women Fetal Containers?’ (1990) 4 *Bioethics* 273. And Karpin (n 81). And Kelly E Maier, ‘Pregnant Women: Fetal Containers or People with Rights?’ (1989) 4 *Affilia: Journal of Women and Social Work* 8.

4.1.1 Chapter outline

I will begin by examining historical criticisms of surrogacy including the early fears of some feminists who predicted the outsourcing of surrogacy to the Global South, before discussing how a concentrated focus on the practice of surrogacy in India by journalists and academics developed. I will then explore the ways in which surrogates are susceptible to exploitation and construct a definition of exploitation to provide a framework for assessing the practice and provisions of the legislation. Finally, I will critically examine the key provisions relating to case studies outlined above.

4.2 Criticisms of surrogacy

The practice of surrogacy has received a great deal of attention and criticism since the first very well-known case of Baby M in 1986,⁴⁷⁶ and the subsequent high-profile cases such as the 2014 case of Baby Gammy in Thailand, and the Indian cases of Baby Manji and the Balaz twins discussed in detail in Chapter 3. These criticisms include, amongst others, charges of exploitation, commodification of women and children, commercialisation of intimate relationships, degradation of women and motherhood, and misuse of women's bodies. Martha Field asserted in 1989 that 'one of the most serious charges against surrogate motherhood contracts is that they exploit women.'⁴⁷⁷ In Chapter 2 I introduced and discussed some of these criticisms, but I will develop them further here with reference to the main themes under discussion in this chapter. Gena Corea in her 1985 work *The Mother Machine* strongly opposed surrogacy and viewed it as the subordination of women and an exploitation of their bodies under patriarchal regimes.⁴⁷⁸ Andrea Dworkin also warned of the potential for 'reproductive

⁴⁷⁶ A description of this case is given in the introduction of the thesis. Susan Markens notes between 1986 and 1988 during the time this case went to trial there was an explosion of articles on surrogacy with *The New York Times* publishing 131 articles on surrogate motherhood in 1987. See, Markens, 'Interrogating Narratives About the Global Surrogacy Market' (n 282).

⁴⁷⁷ Martha Field, *Surrogate Motherhood: The Legal and Human Issues* (Harvard University Press 1989) 25.

⁴⁷⁸ Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*. (Harper & Row 1985). See also, Robyn Rowland, *Living Laboratories: Woman and Reproductive Technologies* (University of Indiana Press 1992). And Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Norton 1989).

brothels' where women's reproductive capacities are sold and used by others much like sex brothels.⁴⁷⁹ Barbara Katz Rothman, who also views surrogacy as a legacy of patriarchy, claims that it 'is so very dangerous to the motherhood and personhood of all women, not just the very few women who serve as surrogates.'⁴⁸⁰ She warns that women will be 'but half-owners of the babies within' and '[i]f any pregnant woman is not necessarily, inherently, legally, morally, and obviously the mother of the baby in her belly, then no woman can stand firm before law and the state in her motherhood.'⁴⁸¹ In this case *mater semper certa est* (the mother is always certain) becomes *mater semper certa erat* (the mother was always certain).⁴⁸² Part of what Rothman is referring to is the fact that surrogacy and especially gestational surrogacy separates and divides up the roles of the mother, as the birth mother is not always the genetic mother (when donor eggs are used) and is not the intended social mother. She is also pointing to the fact that some surrogacy contracts are enforceable, such as in the case of Baby M, and that parental rights are transferrable. Further to this, Rothman warns of the dangers that in such an arrangement the birth mother '[t]he woman in whom that embryo is implanted is reduced to mere space, a body part.'⁴⁸³ This is a view shared by Sayantani DasGupta and Shamita Das Dasgupta, who also talk about the separating out of reproduction but at the physical level where the woman's body is divided into 'usable parts' and claim that 'the whole woman, whose body has been sectioned, becomes substitutable and even dispensable.'⁴⁸⁴ These fears that gestational surrogacy renders the surrogate mother an interchangeable and disposable container aligns with the view of pregnancy conceptualised in the foetal container model of pregnancy, which is the core concern of this thesis and is explored in detail in the following chapter. For now, I will focus on how India came to dominate not only the

⁴⁷⁹ Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females* (Perigee Books 1983) 176.

⁴⁸⁰ Barbara Katz Rothman, 'The Legacy of Patriarchy as Context for Surrogacy: Or Why Are We Quibbling Over This?' (2014) 14 *The American Journal of Bioethics*, 36, 37.

⁴⁸¹ *ibid.*

⁴⁸² 'Mater semper certa est' is based on the Roman principle that the mother is demonstrated by gestation (*mater est quam gestation demonstrate*). For more discussion on this see, Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' (2012) 60 *The American Journal of Comparative Law* 475. For another interesting discussion on the topic see, Rita D'Alton-Harrison, 'Mater Semper Incertus Est: Who's Your Mummy?' (2014) 22 *Medical Law Review* 357. This concept is also discussed in Pateman (n 68) 217.

⁴⁸³ Rothman, 'The Legacy of Patriarchy as Context for Surrogacy: Or Why Are We Quibbling Over This?' (n 480) 36.

⁴⁸⁴ DasGupta and Das Dasgupta, 'Introduction' (n 245) xiii.

global market in fertility treatments but also journalistic investigations and academic scholarship on surrogacy and on some of the main criticisms it has attracted.

Vrinda Marwah and Sarojini Nadimpally have remarked on how surrogacy is considered far more controversial than ARTs and that ‘often surrogacy is banned in countries where ARTs otherwise flourish.’⁴⁸⁵ Judit Sándor argues that to prohibit surrogacy but to allow egg donation produces ‘a strange contradiction’ and claims that the reproductive rights of women who are unable to gestate are valued less than those who can but require an egg donation.⁴⁸⁶ However, there is a key difference between the practices, while both egg donation and surrogacy require the involvement of a third party, the surrogate’s contribution and the demands on her body are far greater and carry with them much more risk. Also, to create positive rights to reproduce that involves a third party is highly problematic and unjustifiable as it would establish an entitlement to another person’s body. While egg donation can also be risky it shares greater parallels with organ donation and sperm donation, as there is a clear delineation with respect to the ‘ownership’ over the materials. They are the donor’s while they are within their body but when they are extracted, donated, and transplanted, they belong to the receiver. In terms of surrogacy the ‘ownership’ over the foetus is far more complicated as it has the promise of future ‘ownership’ and ‘partial ownership’ while inside the surrogate. In Chapter 6 I return to discuss how the foetal container model, which is only present in surrogacy and not in egg donation, directs how ownership is conferred during the arrangement. I will also discuss through the lens of gendered harm the surrogates’ vulnerability to mistreatment due to the harmful conceptualisation of pregnancy and reproductive labour in surrogacy arrangements. The potential for surrogacy to generate more criticism and controversy because of the greater and unique nature of the involvement of a third party

⁴⁸⁵ Vrinda Marwah and Sarojini Nadimpally, ‘Surrogacy and Social Movements in India: Towards a Collective Conversation’ in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 205.

⁴⁸⁶ Judit Sándor, ‘Transnational Surrogacy: An Overview of Legal and Ethical Issues’ in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 37.

constitutes part of the reasons for my own analysis of the practice and continued focus and attention of others.

4.2.1 Focus on India

The purpose of this chapter is not to provide a comprehensive treatment of all the criticisms of surrogacy or to arrive at a definitive conclusion regarding its permissibility, but rather to draw out the arguments and perspectives which are most relevant to the issues arising from the regulation of surrogacy in India. In Chapter 2 I explained how the conditions of the Indian context led to its success as a destination for international surrogacy arrangements and make it a pertinent case study. These factors include colonial legacies, globalisation, neoliberalism, and the development of medical tourism where risks of exploitation are exacerbated by global inequalities. Additionally, and most relevant to my research, that features of the practice and regulation of surrogacy in India provide clear examples of the influence of the foetal container model, which I will deal with at length in Chapter 6.

How surrogacy should be regulated in India continues to be a live issue and has been a ‘hot topic’ since commercial surrogacy in the country became widely available to international intended parents. As the international media focus on India began to increase so did the attention of (sociology, anthropology, and legal) scholars, and therefore a great deal of ethnographic research has been carried out.⁴⁸⁷ There was an increase in news reports in international media on surrogacy in India during the 2000s and the language often included variations on the phrase ‘wombs-for-rent’ and references to

⁴⁸⁷ Here are some examples of the news reports from 2008 and 2009 Judith Warner, ‘Outsourced Wombs’ *The New York Times* (3 January 2008) <<https://opinionator.blogs.nytimes.com/2008/01/03/outsourced-wombs/?scp=1&sq=outsourced%20wombs&st=cse>> accessed 21 December 2019; Henry Chu, ‘Wombs For Rent, Cheap’ *Los Angeles Times* (19 April 2009) <<https://www.latimes.com/archives/la-xpm-2006-apr-19-fg-surrogate19-story.html>> accessed 21 December 2019; Ellen Goodman, ‘The Globalization of Baby-Making’ *The Boston Globe* (11 April 2008) <http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/11/the_globalization_of_baby_making/> accessed 21 December 2019; Amelia Gentleman, ‘India Nurtures Business of Surrogate Motherhood’ *The New York Times* (10 May 2008) <<https://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>> accessed 21 December 2019; Kritivas Mukherjee, ‘Rent-a-Womb in India Fuels Surrogate Motherhood Debates’ *The Washington Post* (4 February 2008) <<https://www.reuters.com/article/us-india-surrogacy-idUSDEL29873520070204>> accessed 21 December 2019.

‘outsourcing’ for a ‘cheaper’ price. In 2007, the Oprah Winfrey Show, an American daytime TV show, ran a segment covering the story of an American couple seeking a surrogacy arrangement at Dr Patel’s clinic in Anand which was titled ‘Wombs for Rent’.⁴⁸⁸ In the following chapter I will explore the use of metaphor, metonymy, and synecdoche when describing pregnancy and surrogacy, and the effects of reducing the surrogate to a ‘womb’ and the process of surrogacy to ‘womb rental’. It is through critically reviewing the use of metaphors and analogies to describe pregnancy that I develop the foetal container model and reveal its prevalence in the social constructions of the maternal-foetal relationship. As well as how it is implicitly assumed in the approaches to regulating reproduction in general and surrogacy in particular.

Anthropologist Elly Teman has noted that of the places where commercial surrogacy is legal or has been, such as some US states and Thailand, it is India that has received the most attention. She suggests that this focus stems from the way that surrogacy in India ‘seems to embody the feminist dystopia of reproductive inequality and exploitation imagined by Margaret Atwood in her classic, *The Handmaid’s Tale*.’⁴⁸⁹ Susan Markens discusses early feminist responses to surrogacy explaining that many feared that poor women of colour would be held in ‘reproductive brothels’⁴⁹⁰ to provide babies for elite white women and couples.⁴⁹¹ The numerous documentaries and news reports on surrogacy in India frequently capturing and portraying scenes inside surrogacy hostels of women lying on beds in cramped dormitories give the impression that this once imagined future has in fact become a reality.⁴⁹² Aditya Bharadwaj remarks that ‘[w]hat seemed plausible in 1985 has become an empirical reality.’⁴⁹³ Markens also explains that the most common charge against surrogacy from the very beginning has been that it

⁴⁸⁸ CBS (n 142).

⁴⁸⁹ Teman (n 2) 58.

⁴⁹⁰ Discussed earlier with reference to Dworkin (n 479). And a notion discussed much later by Cherry (n 7).

⁴⁹¹ Markens, ‘Interrogating Narratives About the Global Surrogacy Market’ (n 282) 1. Rothman, ‘Motherhood: Beyond Patriarchy’ (n 158) 486.

⁴⁹² Markens, ‘Interrogating Narratives About the Global Surrogacy Market’ (n 282) 1.

⁴⁹³ Aditya Bharadwaj, ‘The Other Mother: Supplementary Wombs and the Surrogate State in India’ in Michi Knecht, Maren Klotz and Stefan Beck (eds), *Reproductive Technologies as Global Form. Ethnographies of Knowledge, Practices, and Transnational Encounters* (Campus Verlag 2012) 149.

is exploitative and that the main focus of the criticism was on the commodification of children. The renewed interest in surrogacy since the early 2000s has been directed towards the effects of global outsourcing and transnational arrangements, with India holding a prominent position in this arena.⁴⁹⁴ Many of the criticisms and commentaries on surrogacy in India involve discussions on the potential for exploitation, but they also often extend to the conditions of globalisation and the impact of an increase in outsourcing to the Global South. The following sections will explore different criticisms of surrogacy in India and understandings of exploitation that focus on the aspects of most relevance to the Indian context.

4.2.2 Criticisms of surrogacy in India

As surrogacy in India has been and continues to be the focus of a great deal of journalistic and academic inquiry there is a considerable wealth of work covering a multitude of different perspectives. However, there are several recurring themes and arguments concerning the practice which largely relate to exploitation, inequality, globalisation and outsourcing, mistreatment and harm, stigmatisation, commodification, and commercialisation.⁴⁹⁵ This chapter will use these themes as a frame of analysis and draw from ethnographic studies with surrogates in India.

4.2.2.1 Context for exploitation

The following section will explore theories of exploitation in greater detail, but first I will set out the context within which the surrogacy arrangements take place and some of the various ways surrogates in India are susceptible to exploitation. The surrogate's financial desperation and socio-economic status can be taken advantage of, in the sense that she becomes a surrogate out of desperation and poverty and would likely not do so otherwise. As a consequence of the surrogate's vulnerable position,

⁴⁹⁴ Sharmila Rudrappa, 'Making India the "Mother Destination": Outsourcing Labor to Indian Surrogates' in Christine L Williams and Kirsten Dellinger (eds), *Gender and Sexuality in the Workplace* (Emerald 2010) 254.

⁴⁹⁵ DasGupta and Das Dasgupta, 'Introduction' (n 245).

she is more likely to accept a less favourable deal and due to the disparity of wealth and power between her and the commissioning parties and the clinic she is in a weaker negotiating position and less willing or able to challenge poor conditions. The relationship between the surrogate and the commissioning parents is heavily mediated by the clinic meaning she has no way of negotiating a better fee with them directly. There is also the potential of exploitation and harm to the surrogate when she is given insufficient information about the process and risks, and a lack of education may limit her knowledge and understanding of what is involved in gestational surrogacy. She could be forcefully recruited or coerced into undertaking the arrangement, either by family members and/or recruiters who are set to gain from the transaction. The surrogate is also exploited when in a commercial arrangement she does not receive the full payment. This happens when the clinic or intended parents do not pay her the full fee and in the absence of a formal and written contract and/or no access to legal counsel the woman has limited means to raise a dispute.⁴⁹⁶ In some cases a recruiter takes a large cut as a commission for introducing the woman to the clinic as was reported in the case of Anandhi in the key cases section of the previous chapter.⁴⁹⁷ There are also occasions when the surrogate is charged for receiving aftercare or it is deducted from her earnings. Rudrappa who studied surrogacy arrangements in Bangalore encountered Mr Shetty who operated a clinic of the name Creative Options Trust for Women. She observed that he had a policy of charging surrogates for aftercare and describes the case of Indirani who had decided against staying at the surrogacy dormitory after giving birth to twins via C-section because she would have been charged for the postnatal care, food, and board.⁴⁹⁸ She was also not paid the extra fee she was entitled to for having twins or the additional money the intended parents gave a token of appreciation. Furthermore, she had to pay \$200 to the agent and give presents to the staff.⁴⁹⁹

⁴⁹⁶ There are reports of surrogates not receiving a written contract until after the embryo transfer and there are even reports of the surrogates only receiving oral agreements with the clinics – DasGupta and Das Dasgupta (n 6) (Haimowitz and Sinha 2008; Raywat, Green, and van Beinum 2012; Rudrappa, 2012; Vorzimer 2012).

⁴⁹⁷ Surrogates in Rudrappa's study reported having to pay \$200 to the recruiting agent. See, Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 71.

⁴⁹⁸ *ibid.*

⁴⁹⁹ *ibid.*

Even when the potentially exploitative aspects outlined above are not present in the surrogacy arrangement other harms can be sustained through the invasive procedures, which I will explain in Chapter 6.

4.2.2.2 Poor conditions and controlling practices

The controlling practices of the clinics and the poor conditions that the surrogates are subjected to are often criticised by those commenting on surrogacy in India. The surrogates are at best encouraged and at worst compelled to live at the surrogacy hostel under the surveillance of the hostel staff and even in some cases CCTV cameras. I explained above that the images of multiple beds lined up together in cramped dormitories rooms have been used to draw comparisons with *The Handmaid's Tale*. These conditions are heavily criticised and appear shocking to many observers.⁵⁰⁰ Yet, there is evidence of the positive aspects of the surrogacy hostels for the women; they can conceal their pregnancy from family members and neighbours which is helpful due to the stigma surrounding surrogacy. It allows the women to form close relationships, build kinship ties, and gain social support from others who are in the same situation.⁵⁰¹ It is also important to note that what may appear unbearable to some is tolerable for the women due to their own past experiences and unique set of circumstances. In *Made in India* we first meet Aasia, the surrogate for the American couple, in her one room house in a Mumbai slum which she shares with her husband and three children. The communal sleeping arrangements are not necessarily what is problematic about the situation at the hostels as many of the surrogates are likely accustomed to sharing a bedroom. As in the case of Aasia, it is overcrowding that results from poverty that is the real concern. Furthermore, even if each surrogate had a separate room, they would still be subjected to the other forms of controlling practices that limit their agency and autonomy in their daily

⁵⁰⁰ Perhaps most predominantly because it evokes images of the conditions of factory farming. This comparison is referenced in Sam Dolnick, 'Pregnancy Becomes Latest Job Outsourced to India' *USA Today* (31 December 2007) <https://usatoday30.usatoday.com/news/health/2007-12-30-surrogacy_N.htm> accessed 22 April 2017.

⁵⁰¹ Nishtha Lamba and Vasanti Jadvā, 'Indian Surrogates: Their Psychological Well-Being and Experiences' in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 195.

activities and contact with their families.⁵⁰² Ultimately, it is easy to underestimate what can be tolerated by others in their pursuit of something that will greatly benefit them. The temporary discomfort is bearable with the knowledge that the final result will bring improvement to their lives and their families.

Labour scholar Preet Rustagi emphasises the need to consider surrogacy within the wider context of women's labour in India. She highlights the fact that there are many people whose poverty leads them to putting their bodies at risk and as such are not discouraged from undertaking certain kinds of work.⁵⁰³ This position is also shared by bioethicist Amar Jesani⁵⁰⁴ who explains that what to some may appear exploitative to others is acceptable and even attractive, due to the financial gain, when they are already employed in high-risk but low-paid jobs. He concludes that it is difficult to define and assess exploitation in India, particularly at the micro-level.⁵⁰⁵ The experiences of the surrogates in Rudrappa's study attest to this as they found working on the 'reproductive assembly line' in the surrogacy business preferable to the 'production assembly line' at the garment factories because of the poor working conditions that left them completely burnt out, subjected to sexual harassment, overworked and underpaid, and at risk of developing health problems.⁵⁰⁶ The women are able to tolerate demanding and challenging conditions, such as the physical and psychological harms and the controlling practices involved in surrogacy, even if they can be exploitative and unethical. It is therefore crucial to consider the context within which surrogacy is practiced and the women's circumstances, as this will influence how exploitation is defined and experienced, and whether the women themselves feel that they are being exploited or consider the treatment to be exploitative. It is fair to say that some contexts and situations are more likely to lead to exploitation and that the practice may fall into several of the

⁵⁰² This is done in case the surrogate engages in sexual intercourse with her husband; evidenced in SAMA - Resource Group for Women and Health (n 21) 72.

⁵⁰³ Marwah and Nadimpally (n 485) 214.

⁵⁰⁴ Also the founder-editor of the Indian Journal Medical Ethics.

⁵⁰⁵ Marwah and Nadimpally (n 485) 208.

⁵⁰⁶ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 90–91.

multiple categories of exploitation that will be defined below. A benchmark to measure the exploitation against is difficult to establish considering the variations in the way surrogacy is practiced both within India and across different jurisdictions. However, I will attempt to give an account that draws from different theories of exploitation to critically evaluate the ways that the surrogates experience exploitation.

4.2.3 Exploitation in theory and practice

The aim of this thesis is not to provide a deep and thorough investigation into exploitation. However, as the elimination of the exploitation of the surrogates is a stated main objective of the Surrogacy Bill it warrants attention to see (i) how the Bill aims to do that (ii) if it achieves its aim and (iii) how the focus on exploitation in the regulation impacts the surrogates. I will explore these questions over the course of this chapter. Exploitation is not easily and neatly defined. As John Hill notes it ‘has long been a greatly overused and misused concept, serving to fill the vague intellectual gap between the pre-analytic intuition that there is something wrong with this bargain and the post-analytic determination as to what this something wrong is, exactly.’⁵⁰⁷ The issue of exploitation in a surrogacy arrangement is complex and multi-faceted and it becomes even more so in the Indian context due to the greater inequalities between the various parties. In the following sections I aim to explain what exploitation is, under what conditions the surrogates experience exploitation and why it is problematic. The potential exploitation can take various forms as outlined above. They include the surrogate and her circumstances being taken unfair advantage of, an unfair exchange, and misuse or a wrongful use resulting in the surrogate being in a worst position than before the arrangement due to physical, mental, and/or financial mistreatment or harm. I will construct a definition of exploitation along three main strands, 1. unfair advantage exchange, 2. exploitation of background conditions, and 3. objectification and degrading treatment.

⁵⁰⁷ John Lawrence Hill, ‘Exploitation’ (1994) 79 Cornell Law Review 631, 699.

4.2.3.1 Unfair advantage exchange: unfair market price

Most philosophical approaches to defining exploitation categorise it as consequentialist, meaning result-oriented, or deontological, meaning process or actor oriented, or sometimes both.⁵⁰⁸ This categorisation can be found in Alan Wertheimer's work on exploitation, where he makes the claim 'that A exploits B when A takes unfair advantage of B.'⁵⁰⁹ A transaction that involves taking an unfair advantage can be indicated by the outcome or result; where either A profits considerably more than B or where A profits and B is harmed, or the process; where B is manipulated, defrauded or coerced by A.⁵¹⁰ The key feature of this version of exploitation involves the exploiter gaining something from the exploitee. However, we can still argue that A has acted in an exploitative way towards B even if the outcome did not result in A gaining something and therefore in this case the result becomes less relevant than the process.

This definition of the exploitation that relies on the fairness of the exchange is connected to mutually advantageous exploitation where all parties are considered to be better off and to have gained something from the transaction. Proponents of commercial surrogacy often claim that the arrangement is a win-win situation for everyone as the intended parents receive a much-desired baby and the surrogate receives a fee that will improve her financial situation and presumably her quality of life. However, even if the surrogate benefits from the arrangement, we can still argue that she is exploited when the cost to her has been too great or when she does not receive a fair exchange for what she has given.

⁵⁰⁸ See Suzanne Ost and Hazel Biggs, *Exploitation, Ethics and Law: Violating the Ethos of the Doctor-Patient Relationship* (Routledge 2021) 13. This categorisation is also explained in Silke Schicktanz, 'Beyond Relativism: Comparing the Practice and Norms of Surrogacy in India, Israel, and Germany' in Sayani Mitra, Silke Schicktanz and Tulsi Patel, *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives From India, Germany and Israel* (Palgrave Macmillan 2018) 106.

⁵⁰⁹ Wertheimer, *Exploitation* (n 18) 16.

⁵¹⁰ Also discussed by Schicktanz (n 508) 106.

It can be difficult to determine what exactly makes a mutually advantageous transaction exploitative, but one possibility is that it occurs when one party gains far more than the other party. This is precisely what is argued in the case of surrogacy, both commercial and altruistic, because what the surrogate provides is in some respects incommensurable as a price cannot and should not be placed on a baby. Yet, the surrogate might still feel satisfied with what she has received and gained. The money earned in a commercial arrangement is valuable and important to the surrogate and can work to improve the fairness of the exchange. Nishtha Lamba and Vasanti Jadvā, in their studies on the psychological well-being of surrogates discovered that in the narratives about their life after the arrangement the surrogates talked about their satisfaction or dissatisfaction with the payment.⁵¹¹ However, this definition of exploitation based on the distribution of gains falters when applied to for example a surgeon who operates on a patient to save their life. If the surgeon is fairly remunerated, then we would not consider them exploited despite the fact that the patient whose life is saved has the greater gain.

The main limitation of this strand of exploitation is that it concerns individual transactions within the conditions of a fair market, but it cannot say much about market itself. This notion of exploitation is useful when the problem is that unfair advantage is taken in comparison to relatively fair background market conditions. For example, a clinic that takes unfair advantage of the surrogate's circumstances to pay a price that is 'less than fair' and deviates from the market price, given the costs and burdens of surrogacy,⁵¹² and the relative gain to them and intended parents is acting exploitatively according to the above analysis. Another important factor to highlight is the unequal distribution of the total fee paid by the intended parents that sees the clinic retaining up to five times as much as the surrogate.⁵¹³ The difficult question raised here is, what is a fair price for surrogacy? The incommensurability of the

⁵¹¹ Lamba and Jadvā (n 501) 196.

⁵¹² And that does not include reasonable provisions for aftercare and the physical risks taken by the surrogate.

⁵¹³ There have been reports of clinics keeping \$20,000 and paying surrogates \$3000-4000. According to Rudrappa in 2015 surrogacy in India cost USD35,000-45,000. See, Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 5 and 17.

exchange points to one of the core questions regarding the nature of the commercial transaction; is it payment for a baby, or for gestational services, or purely the transfer of parental rights? Although it is relatively easy to agree a fair market price for services such as childcare, to establish a fair price for this particular kind of work, which is unique, is a far trickier and more unsettling task.

Another aspect of the potential exploitation of the surrogate in terms of the distribution of gains is when she is unable to ascertain the value of her contribution and therefore will accept a lower amount.⁵¹⁴ Additionally, whether she is satisfied with the transaction or not she is still underpaid, under rewarded, undervalued, or under compensated in other ways, such as being denied a desired long-term relationship with the child(ren) or adequate aftercare for ongoing complications that might impact on her ability to work or maintain her household. It is therefore problematic to evaluate fairness by simply comparing each party's gains. A baseline measurement is equally difficult to establish when attempting to decide what the surrogate should gain because there is no independent standard amount. There are huge variations between the clinics, and surrogates in India earn a fraction of what surrogates in the USA are paid. There is also a lack of consensus on how to characterise the harms involved and what would be a fair transaction.

Wertheimer's definition offers a basic framework for understanding and interpreting exploitation, but it is based on transactional and individual exploitation and as I discussed above its scope is limited to exchanges within fair market conditions. Since surrogates in India operate within unfair background conditions a richer and more nuanced approach to defining exploitation is required. In the preceding section I highlighted the importance of understanding the context within which these arrangements

⁵¹⁴ Also troubling are the reports of women in India being paid different rates based on their personal attributes such as caste, educational attainment, religion, skin tone and also their willingness to gestate multiple pregnancies.

take place, therefore Indian and feminist accounts of exploitation are also vital when dealing with the real-life situations of surrogates, as shown throughout the chapter.

4.2.3.2 Background conditions: exploitation of desperation and poverty

Another way to analyse exploitation, that is less well accounted for in the above strand based on Wertheimer's unfair advantage claim, is through unfair background conditions, which makes the situation particularly problematic in international surrogacy or also organ donation markets. Surrogacy arrangements or organ donation become an attractive option because they offer a higher earning capacity than the alternatives such as the garment industry, as discovered by Rudrappa in Bangalore. In that sense the price seems fair given the market as it is higher than the alternatives and as many liberal commentators argue that to prohibit commercial surrogacy only serves to deprive the women of an option that they deem desirable.⁵¹⁵ The charge of exploitation in these situations concerns the realisation of the gross unfairness of the background market conditions, which becomes far more apparent when we realise that people will 'rent a womb' or sell a kidney, than if we merely hear that people work long hours in poor conditions for very little money. Whereas the first kind of charge of exploitation based on unfair advantage exchanges can be levelled at the surrogacy industry in isolation, the latter kind of charge on unfair background conditions is not just a reflection on the practice of surrogacy it also reflects the wider social and global inequalities at play.

As outlined in the introduction to this chapter, one of the main objectives of the legislation is to protect women from exploitation by prohibiting commercial surrogacy. This intervention into private commercial surrogacy contracts has been justified on the belief that as the surrogates' primary motivation is money and if it were not for their economic desperation then they would not engage in

⁵¹⁵ For a discussion on the liberal feminist position that supports women's freedom to enter the market to contract their 'reproductive wares' see, Munro (n 19) 16–17. Also, the higher salary is a statement on the poor earning capacity of regular jobs because even the higher pay of surrogacy does not completely lift the women out of poverty.

these arrangements. The position taken by the Indian government is that the financial reward incentivises the surrogate to undertake the arrangement and therefore it should be removed. Despite giving their consent the surrogates are still being exploited and it is from this that the Indian government is protecting them. This leads us to ask whether poverty and desperation invalidate consent. DasGupta and Das Dasgupta argue that the surrogate's consent cannot be considered voluntary in situations of economic need and compensation.⁵¹⁶ Arlie Russell Hochschild also casts doubt on whether the surrogate entered the arrangement freely when faced with very few other options. In her study on surrogacy in India she describes the circumstances that lead women to surrogacy as 'appalling government neglect – rundown schools, decrepit hospitals, and few well-paying jobs' meaning that 'surrogacy was the most lucrative job in town for uneducated women.'⁵¹⁷ Lamba and Jadvva document a surrogate from their studies explaining that: 'No one comes happily. Each woman has her problems and they come here because of that. If they have a good home and stuff, why would they do this?'⁵¹⁸

At this point it would be helpful to build on Wertheimer's claim, set out in the first strand, by employing Cécile Fabre's definition of 'wrongfully exploitative' transactions.⁵¹⁹ She explains that to be 'wrongfully exploitative' a transaction must meet three conditions: person *A* benefits from a transaction with person *B*, which is harmful or unfair to *B*, *A* gets *B* to agree to the transaction by seizing on some features of *B*'s situation, and *B* would not agree if it were not for these features.⁵²⁰ In this sense exploitation is cumulative because the background conditions compound the internal market exploitation, i.e., the person agrees to something they would not do otherwise if it were not for the desperation and they are paid less as they are more likely to accept a lower price because they are

⁵¹⁶ DasGupta and Das Dasgupta, 'Introduction' (n 245) xii.

⁵¹⁷ Hochschild (n 189) 44.

⁵¹⁸ Lamba and Jadvva (n 501) 185.

⁵¹⁹ A distinction is made here between 'wrongful exploitation' and other forms of exploitation because there are ways in which a person is exploited but not 'wronged' or 'harmed'. For more on this see, Ost and Biggs (n 508) 27.

⁵²⁰ Cécile Fabre, *Whose Body Is It Anyway?: Justice and the Integrity of the Person* (Oxford University Press 2006) 200.

desperate. This relates to non-consensual exploitation which is characterised by the absence of voluntary and valid consent and can involve fraud, manipulation, or coercion.⁵²¹ The coercive aspect of exploitation falls in the process category and can be defined in very simple terms as *A* coerces *B* to do *X* only if *A* proposes or threatens to make *B* worse off with reference to some baseline condition if *B* chooses not to do *X*.⁵²² In SAMA's film we meet women who have been threatened and coerced by intermediaries to become egg donors or surrogates otherwise they risk eviction from their homes.⁵²³ I will return to this definition again later when examining the provisions defining altruistic and commercial surrogacy in the Surrogacy Bill. While consensual exploitation does involve voluntary and informed consent it can also be problematic. It is within this territory that the motivations behind the move to prohibit commercial surrogacy in India are situated. Fabre posits that for a transaction to be deemed wrongfully exploitative it must contain all three conditions including being harmful and unfair, but could the exploitation be eliminated or significantly minimised if the arrangement is made fairer and safer? The drafters have attempted to make the practice safer through regulation and stricter controls, but they have not considered whether the conditions are fairer for the women.

It has been widely documented that the primary motivation for women undertaking commercial surrogacy arrangements in India is the financial reward, which they often use to pay for their children's education, medical expenses, housing, or to settle debts.⁵²⁴ Consequently, the surrogate's poverty and financial needs are seen to be taken unfair advantage of because it is believed that if it were not for her desperation she would not agree to the arrangement. In fact, many surrogates have expressed that while they derive a great sense of satisfaction from helping a childless couple, they would not undertake the

⁵²¹ The presence or absence of consent is again another tricky aspect because for example Stephen Wilkinson argues that there must be at least minimal consent for exploitation to have occurred. For more explanation on and interrogation of this see, Ost and Biggs (n 508) 34.

⁵²² Wertheimer, 'Two Questions about Surrogacy and Exploitation' (n 18) 213.

⁵²³ *Can We See the Baby Bump Please?* (n 175).

⁵²⁴ Lamba and Jadva (n 501) 196. See also Sharvari Karandikar and others, 'Economic Necessity or Noble Cause? A Qualitative Study Exploring Motivations for Gestational Surrogacy in Gujarat, India.' (2014) 29 *Affilia* 224.

arrangement if it were not for their economic circumstances.⁵²⁵ Salma, a surrogate in Pande's studies, expressed that: 'This work is not ethical—it's just something we have to do to survive.'⁵²⁶ Marwah and Nadimpally ask '[i]s it not exploitative and extractive that poor women have to resort to surrogacy at considerable risk simply to educate their children or build their homes?'⁵²⁷ For some of the women who become surrogates there are alternative modes of employment but very few that are as remunerative as a commercial surrogacy arrangement. The real issue is therefore the failure of the government to ensure that these women are not in such a position, and that they have state support and other employment opportunities that can sustain their families and provide for their basic needs such as housing, education, and medical care.

On the level of individuals, it might still be false to claim that *A* exploited *B* by taking advantage of their vulnerabilities if *A* offered them a reasonable proposal, and even if *B* had no alternative but to agree, or when *A* has no obligation to improve *B*'s disadvantaged or unjust circumstances.⁵²⁸ However, the consent to a transaction is still questionable if it was given in conditions of desperation, or from an unequal bargaining position, or due to disadvantaged or unjust background circumstances. With respect to the main concern of this chapter and thesis, the regulation and prohibition of commercial surrogacy in India, should we prohibit such proposals and refuse to enforce these arrangements if they made under these conditions? In cases of harmful and non-consensual exploitation state intervention to prohibit these arrangements may be justifiable but a stronger argument for intervention can be made on the grounds of a right's violation. In Chapter 6 I will explore the harm to surrogates through the

⁵²⁵ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 117 and 349.

⁵²⁶ Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (n 92) 160.

⁵²⁷ Marwah and Nadimpally (n 485) 207.

⁵²⁸ Whether someone has an obligation to improve someone else's disadvantaged situation is not clear cut, as some might argue that we all have an obligation to help others in some way and within our means. However, there is a much clearer moral duty not to take unfair advantage or disproportionately benefit from someone else's vulnerability or misfortune.

potential violation of their rights to autonomy and bodily integrity.⁵²⁹ This leads us to the third strand of exploitation involving objectification and degrading treatment.

4.2.3.3 Objectification and degrading treatment: unethical and unsafe practice

While objectification can be considered a harm in its own right, I will show how certain aspects also involve exploitation. This category has overlapping connections with the foetal container model as I will explain in the conclusion of this section. The problem with objectification is not in treating a thing as an object, but rather as Martha Nussbaum explains it is because ‘one is treating *as an object* what is really not an object, what is, in fact, a human being.’⁵³⁰ In developing her theory of objectification Nussbaum lists seven key features which are outlined in detail below:

1. *Instrumentality*: The objectifier treats the object as a tool of his or her purposes.
2. *Denial of autonomy*: The objectifier treats the object as lacking in autonomy and self-determination.
3. *Inertness* [denial of agency]: The objectifier treats the object as lacking in agency, and perhaps also in activity.
4. *Fungibility* [interchangeability]: The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.
5. *Violability* [rights to bodily integrity, autonomy, and self-determination]: The objectifier treats the object as lacking in boundary- integrity, as something that it is permissible to break up, smash, break into.
6. *Ownership*: The objectifier treats the object as something that is owned by another, can be bought or sold, etc.
7. *Denial of subjectivity*: The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account.⁵³¹

This account of objectification is a multiple concept and for Nussbaum it means treating a human being in one or more of these ways.⁵³² However, she explains that while in some circumstances objectification is always morally problematic in others it is the context that dictates when and how it becomes

⁵²⁹ In the Wad PIL case described in detail in the previous chapter the Supreme Court considered whether commercial surrogacy violated the women’s fundamental rights and directed the government to act to protect these rights. There is also a potential conflict of rights in terms of the surrogates’ right to work.

⁵³⁰ Martha C Nussbaum, ‘Objectification’ (1995) 24 *Philosophy and Public Affairs* 249, 256.

⁵³¹ *ibid* 257.

⁵³² *ibid* 258.

problematic.⁵³³ By challenging the assumption that objectification is always inherently bad Nussbaum's application of the concept allows for a more nuanced analysis. I will now take the separate features of this theory which I believe to be most applicable to surrogacy in India and reveal how and when objectification is problematic in this context and involves exploitation.

Instrumentality is the most clear and obvious feature at work in surrogacy arrangements because very simply the intended parents use the surrogate as a tool to have a child. In gestational surrogacy where the surrogate has no genetic link with the child(ren) her role in the process is often diminished by the intended parents and her function in gestating the foetus takes greater prominence. I will return to discuss this in more detail in Chapter 5 on the foetal container model and Chapter 6 on the invisibility of the surrogate. Instrumentality therefore involves using others as a means to an end, but this becomes problematic and exploitative when it consists of 'treating someone *primarily* or *merely* as an instrument.'⁵³⁴

This can also be understood as misuse exploitation, and it is the misuse of a person that distinguishes wrongful exploitation from morally neutral exploitation.⁵³⁵ The misuse can be defined in the broadest and most general sense as treatment that fails to respect the humanity of a person. Allen Wood posits that 'proper respect for others is violated when we treat their vulnerabilities as opportunities to advance our own interests ... It is degrading to have your weaknesses taken advantage of, and dishonourable to use the weaknesses of others for your ends.'⁵³⁶ The clinics use the surrogates as a means to make money which is several times more than what the surrogates earn, and to fulfil the requests of the intended parents, who in turn use the surrogates to become parents with the knowledge that the process has

⁵³³ *ibid* 251.

⁵³⁴ *ibid* 265.

⁵³⁵ Ost and Biggs (n 508) 27. Surrogacy can involve elements of both wrongful and unfairness exploitation but due to the invasive nature of the procedures it is important to consider misuse and wrongful exploitation.

⁵³⁶ Allen W Wood, 'Exploitation' (1995) 12 *Social Philosophy and Policy* 136, 150–151.

significant physical and psychological risks and harms. While risks and harms can be mitigated by offering a fair compensation and by ensuring the practice is safe and ethical, I will show later that this does not always happen in India. These parties use the surrogate as a means to their own ends which becomes exploitative in terms of this category and wrong when she is not treated as an end in herself deserving of respect and dignity. Suze G. Berkhout who argues that the objectification in commercial surrogacy diminishes the surrogates' autonomy considers objectification as a whole to be degrading treatment.⁵³⁷

The surrogates are at risk of 'misuse exploitation' through their recruitment into the arrangements because not only are their circumstances taken advantage of but their characteristics too.⁵³⁸ Teman concluded from her analysis of ethnographic studies on surrogacy in India that the women are selected 'based on their submissiveness and dependency or even desperateness. What directs their recruitment is not their emotional and medical stability, but how easy it might be to control them and the resultant stability and easy management of the surrogacy process.'⁵³⁹ The failure to treat the surrogates as ends in themselves can also be observed from the way they are subjected to invasive and potentially harmful clinical procedures and controlling practices, particularly at the surrogacy hostels where their daily routines and activities are carefully managed. These practices are carried out with the knowledge that the women are unlikely to complain or refuse for fear of missing out on an arrangement that will benefit them financially. They are also in this sense treated as fungible as they will be replaced by someone who is more willing to accept the conditions. This leads us to the other features of objectification, the subjection of the surrogates to invasive and harmful procedures and controlling

⁵³⁷ Suze G Berkhout, 'Buns in the Oven: Objectification, Surrogacy, and Women's Autonomy' (2008) 34 *Social Theory and Practice* 95, 113.

⁵³⁸ There is also evidence of recruiters and intermediaries taking advantage of the women's vulnerabilities, weaknesses or other characteristics which enables the misuse. Selecting them on the basis of their submissiveness and desperation ensures they are even more likely to conform to the demands of the clinic and intended parents. And they are trained to think and behave in a certain way that is favourable to the intended parents. See, Førde (n 8) 209–210.

⁵³⁹ Teman (n 2) 64. Saravanan describes how the clinics preferred and selected surrogates who were submissive and any who showed assertiveness or aggression were rejected on medical pretexts. See, Saravanan (n 195).

practice is evidence of treatment that involves a denial of autonomy and subjectivity, violability, and inertness. I will expand on how this results in harm in Chapter 6 with reference to the invasive clinical procedures. Although the surrogates' rights to bodily integrity can be ensured through informed and valid consent the threshold for obtaining this is low and not always respected despite the need for higher standards due to the nature of the procedures.

It is important to note that the harm is not only physical, as Lamba and Jadva contend that surrogates in India are highly vulnerable to psychological problems due to circumstances which they believe are unique to cross-border arrangements in India. They highlight that the majority of surrogates enter the agreements because of economic desperation, that most do not see or meet the new-born baby or the commissioning parents, and they do not receive professional counselling.⁵⁴⁰ These conditions increase the risk of harm to the surrogates and also point to the features of the foetal container model of pregnancy. The fact that the surrogates do not always meet the intended parents or even the new-born babies suggests that their unique personhood is not important and that they are viewed as fungible i.e., interchangeable and disposable. For the intended parents it could be anyone gestating the baby as the surrogate is reduced to the functions of her womb and then after the birth she is no longer needed.⁵⁴¹ Lamba and Jadva observed that the clinics controlled the relationship between the intended parents and the surrogate resulting in the surrogates' wishes being ignored.⁵⁴² They also found that the absence of standard protocols on the relationship and level of contact between the surrogates and intended parents created feelings of uncertainty for most surrogates.⁵⁴³ All of which is further evidence of treatment that denies their subjectivity. Furthermore, they noted that the surrogates' happiness with

⁵⁴⁰ Lamba and Jadva (n 501) 184.

⁵⁴¹ While this is true for some intended parents it is not the case for everyone. We saw earlier in Chapter 2 that Barbara the intended mother was selective about the religion of the surrogate. There have been multiple reports of intended parents wanting surrogates with particular characteristics such as caste, religion, educational level, skin tone. See, SAMA - Resource Group for Women and Health (n 21) 43–44.

⁵⁴² Lamba and Jadva (n 501) 189.

⁵⁴³ *ibid* 190.

the handover positively correlated with meeting the intended parents after the delivery and therefore increasing their satisfaction with the arrangement.⁵⁴⁴ It is unsurprising that the surrogate feels greater happiness and satisfaction with the arrangement on meeting the intended parents because not meeting her denies her the respect she deserves as a full human being, not just a foetal container, and as the birth mother of the children and fails to acknowledge her enormous contribution and sacrifice.

What is clear about surrogacy is that because the nature of the work is particular it demands appropriate protocols to ensure the practice is safe and ethical. It is its unique nature that makes objectification more problematic and troubling in this context. Unlike other forms of work, such as for example that of a shop assistant, surrogacy is deeply personal involving intimate and embodied labour which is physically and psychologically demanding and is continuous over 9 months and consists of a period of recovery. Other challenging professions such as firefighting demand appropriate conditions tied to its nature such as access to protective equipment and counselling. To ensure adequate respect for the surrogate the regulation of the practice must provide for specific and appropriate conditions so that it is safe and ethical. In Chapter 6 I propose recommendations for the invasive clinical procedures, and the need for provisions to guarantee adequate aftercare and possibly even access to the children if the surrogates wish.

To conclude, surrogates in India despite being able to give the other parties what they greatly desire are particularly vulnerable to highly unfair market conditions which reflects the background in which they operate. They are also vulnerable to being further exploited within the market due to asymmetries in knowledge, economic wealth, and power.⁵⁴⁵ Therefore, they are in a weaker bargaining position to ask for the necessary working conditions that would render the practice less internally exploitative and

⁵⁴⁴ *ibid* 191.

⁵⁴⁵ 'It has been reported that as surrogates in India are predominately illiterate, they are highly susceptible to neo-colonial exploitation, such that risks, impacts and basic information regarding pregnancy and surrogacy are (often deliberately) not communicated.' As quoted in *ibid* 184.

help improve their circumstances. The clinics are in the stronger position and frequently take maximum advantage of all the surrogates' vulnerabilities. Part of the way that the surrogate's weakened position is achieved and then maintained is through convincing her of her fungibility and that the supply outweighs the demand i.e., that there are plenty of other women ready and willing to take her place if she creates difficulties or does not agree to the terms of the arrangement.⁵⁴⁶ Seizing upon the surrogate's desperation and fear of jeopardising the arrangement, and therefore the much-needed money, to ensure her compliance with poor or harmful conditions are clear examples of exploitation as I have defined it above. To answer whether the main objective of the Surrogacy Bill to eliminate exploitation is achieved we must consider if how well it succeeds according to these definitions of exploitation, and I will offer a conclusion after critically examining the key provisions of the practice.

When outlining the criticisms of surrogacy in India at the very start of this section I argued that the context within which it takes place impacts how exploitation is defined and experienced. I have shown through establishing three separate strands that theories which focus on the contractual arrangements of an interaction and at the level of the individual are insufficient to fully account for how exploitation operates in these arrangements. When applied to the context of transnational surrogacy arrangements in India, it is also necessary to examine the structural inequalities and injustices that the surrogates experience. As well as interrogating the patriarchal control of women and their bodies and the expectations placed on them and on their reproductive capacities. By doing this we are able to locate the individual within the dynamics and structures of the wider society and communities, which allows for an analysis of systemic marginalisation and empowerment. As Saravanan asserts '[t]he practice of surrogacy in countries like India is embedded in structural and socio-economic inequalities.'⁵⁴⁷ Now I

⁵⁴⁶ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 134.

⁵⁴⁷ Sheela Saravanan, *A Transnational Feminist View of Surrogacy Biomarkets in India* (Springer 2018) 54.

will return to the other themes I identify at the start of the criticisms of surrogacy in India section to reveal the other factors operating in the background conditions that are not usually explored in classic examples that point out economic unfairness and circumstances. For the surrogates in India there are many forms of intersecting and compounding inequalities relating to patriarchy, caste, class, colonial legacies, neo-colonialism, and the State's anti-natalist agenda and without acknowledging these additional factors we risk underestimating the extent of the background inequalities and if we focus on the first strand of exploitation.

4.3 Feminist analysis of structural inequalities

In this section I will expand on my critique of the institutional and structural problems that I introduced above and in Chapter 2, to explore the themes of inequality, discrimination, poverty, and insufficient legal response in greater detail and through the lens of exploitation, as I have defined it above, where relevant.

4.3.1 Globalisation: 'reproscapes' and 'reproflows'

International surrogacy and ART treatments have established a 'reproduction line' that has given rise to a new understanding of the cross-border flow of goods and people in the global arena. Anthropologist Marcia C. Inhorn introduces the term 'reproscapes', which she develops from Arjun Appadurai's theory of global 'scapes',⁵⁴⁸ to describe 'a distinct geography traversed by global flows of reproductive actors, technologies, body parts, money, and reproductive imaginaries.'⁵⁴⁹ She argues that the reproscape, which involves multiple 'flows', is highly gendered as the technologies are enacted in highly differentiated ways on women's and men's bodies. Furthermore, she notes that it entails a form

⁵⁴⁸ According to Appadurai globalisation is characterised by five 'scapes': movement of people (ethnoscapes), technology (technoscapes), money (financescapes), images (mediascapes), and ideas (ideoscapes). Arjun Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' in Mike Featherstone (ed), *Global Culture: Nationalism, globalization and identity* (Sage 1990); Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press 1996).

⁵⁴⁹ Inhorn (n 6) 90.

of reproductive labour where women (from the Global South) assist others in their reproductive goals by undertaking risky procedures.⁵⁵⁰ In Chapter 2 I explained the reasons for India's success as a global centre for ARTs and surrogacy, these included a cheaper price than elsewhere and the promotion of medical tourism of which fertility treatment was an important part. Some commentators prefer to refer to this practice as cross-border reproductive care instead of reproductive tourism,⁵⁵¹ because the idea of tourism which usually involves leisure, pleasure and free time does not accord with the experiences of fertility travel.⁵⁵² However, India had originally marketed surrogacy within the field of tourism with package deals offering fertility treatment, sightseeing, hotels, transport, and guides.⁵⁵³

The outsourcing to the Global South features as one of the major concerns of those commenting on transnational surrogacy arrangements in India. Along with the early feminist fears about the practice that would see women from poorer countries being employed or even compelled to produce babies for wealthier couples within their own countries and from abroad. The features and success of globalisation, where the site of production is relocated in order to reduce costs and increase profits and where there are looser regulatory controls, involve exploitation along all three of the strands set out in the definition above. The global inequalities that make India an attractive location for outsourcing intersect with the poor local background conditions experienced by the surrogates, placing them at a disadvantage globally and locally, and result in them not receiving a fair price for their labour. Pande points out that an integral part of the workings of global capitalism is 'how Third World women

⁵⁵⁰ *ibid.*

⁵⁵¹ Mitra, 'Cross-Border Reproflows: Comparing the Cases of India, Germany, and Israel' (n 336) 83. See also Marcia C Inhorn and Zeynep B Gurtin, 'Cross-Border Reproductive Care: A Future Research Agenda' (2011) 23 *Reproductive BioMedicine Online* 665. And Marcia C Inhorn and Pasquale Patrizio, 'The Global Landscape of Cross-Border Reproductive Care: Twenty Key Findings for the New Millennium' (2012) 24 *Current Opinion in Obstetrics & Gynecology* 158.

⁵⁵² Richard F Storrow, 'Quests for Conception: Fertility Tourists, Globalization, and Feminist Legal Theory' (2005) 57 *Hastings Law Journal* 285.

⁵⁵³ The slogan 'See Taj Mahal by the moonlight while your embryo grows in a Petri-dish' – taken from a reproductive tourism website. See, Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 525) 33.

workers are made to feel disposable.’⁵⁵⁴ The disposability and fungibility of the workers in the practice of surrogacy in India is well documented and are elements of objectification as defined above. While many of the poor conditions of the global economy are not limited to surrogacy as they are present in many other industries such as garment making the fact that surrogacy is a form of embodied labour that involves submitting to risky and invasive procedures makes it more problematic.⁵⁵⁵ Indian feminists such as DasGupta and Das Dasgupta remark on the international criticism India has received for ‘enabling rich westerners to exploit poor and vulnerable Indian women’ and the cases of children being left without legal parents and nationality.⁵⁵⁶ The disparity of wealth and therefore power between the surrogates and the intended parents, especially international ones, is an important issue for feminists commenting on surrogacy as it seen to re-evoke historic global inequalities and exacerbate the potential for exploitation on several fronts. April Cherry calls for the prohibition of global commercial surrogacy due to the context within which it takes place and because, she claims, regulation under the current conditions of globalisation only works to reinforces gender, race, and class hierarchies.⁵⁵⁷ The inequalities along these cross-border ‘reproduction lines’ bring into sharp focus the surrogates’ unfair background conditions which are compounded by other factors such as the colonial legacies and subordination on the grounds of gender, class, ethnicity, caste, and religion. The surrogates experience multiple forms of intersecting inequality and discrimination that increase the likelihood of unfair treatment and harm. The practice therefore becomes even more problematic because it takes place between unequal actors and due to the context. Outsourcing to India can be understood as a legacy of colonialism, as I explained in Chapter 2, and as Saravanan argues a form of neo-colonialism.⁵⁵⁸

⁵⁵⁴ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 162; Sandoval (n 111) 120–121.

⁵⁵⁵ This can also be said of clinical research trials that involve invasive, harmful, and risky procedures.

⁵⁵⁶ DasGupta and Das Dasgupta, ‘Introduction’ (n 245) xvi. See also Saravanan (n 547).

⁵⁵⁷ Cherry (n 7) 257.

⁵⁵⁸ See, Saravanan (n 547). See also, Kalindi Vora, ‘Medicine, Markets, and the Pregnant Body: Indian Commercial Surrogacy and Reproductive Labor in a Transnational Frame’ (2010) 9.1-9.2 S&F Online <http://sfonline.barnard.edu/reprotech/vora_01.htm>.

International commercial surrogacy arrangements are frequently referred to as ‘win-win’ situations and criticisms of the stark inequalities between the various actors are rebuffed with narratives that cast intended parents as rescuing the poor Indian women from poverty.⁵⁵⁹ Pande observed that this idea of helping poor Indian women was deeply ingrained in the attitudes of the intended parents she interviewed who viewed themselves almost as missionaries. It is along these lines that an intended mother Anne justifies her decision to undertake a surrogacy arrangement in India:

Most importantly we realized that for surrogates here the amount we pay would be a life-altering one while in the U.S. it’s just some extra money... It would feel good to make such a change in someone’s life. I am not religious, but this seemed almost like God’s work, call it a worthy cause ... a mission.⁵⁶⁰

This narrative of the wealthy/white rescuer, as Pande argues, cultivates new forms of ‘subjection based on race and class domination.’⁵⁶¹

The rhetoric of altruism, gift-giving, and of ‘women helping women’, even expressed by Oprah Winfrey in the TV segment quote earlier,⁵⁶² is strongly evoked in discussion surrounding international surrogacy.⁵⁶³ However, as DasGupta and Das Dasgupta argue it can work to obscure the differences in economic and political power between the actors and create the assumption that the exchanges take place across a level playing field, whereas the realities of the Indian women are quite different.⁵⁶⁴ They also point out that the relationship is only temporary and contractual, and they argue, contains elements of a new type of neo-colonialism.⁵⁶⁵ Vora asserts that within these international surrogacy arrangements the surrogates’ bodies are reformulated ‘as empty spaces that can be cultivated to re-

⁵⁵⁹ For a discussion on the themes of neo-colonialism, victim and rescuer in the film *Monsoon Baby* see, Waltraud Maierhofer, ‘Indian Womb — German Baby: Transnational Gestational Surrogacy in the Film *Monsoon Baby* (2014)’ (2019) 4 *Asian Journal of German and European Studies* 1.

⁵⁶⁰ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 525) 188–189.

⁵⁶¹ Pande, ‘Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India’ (n 92) 169.

⁵⁶² CBS (n 142).

⁵⁶³ Susan Markens, *Surrogate Motherhood and the Politics of Reproduction*. (University of California Press 2007).

⁵⁶⁴ Sayantani DasGupta and Shamita Das Dasgupta, ‘Business as Usual? The Violence of Reproductive Trafficking in the Indian Context’ in Sayantani DasGupta and Shamita Das Dasgupta (eds), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014) 191.

⁵⁶⁵ DasGupta and Das Dasgupta, ‘Introduction’ (n 245).

produce Western society and Western lives [which] recapitulates the colonial epistemology of land as property, where resources, including native labor, were used to sustain the metropole.’⁵⁶⁶ The Indian state’s pursuit of a neoliberal economic agenda enabled the development and success of its ART industry and surrogacy. Within the dynamics of globalisation and the ideology of neoliberalism the individual is constructed as an autonomous decision-maker, however, as anthropologist Balmurli Natrajan argues this construction only serves to reproduce power by naturalising and obscuring any history of subordination.⁵⁶⁷ Building on this I will now look at how the patriarchal control of women, their bodies, and their reproductive labour operates within the local cultural and societal structures that disadvantage and marginalise women in India.

4.3.2 Women’s work, ‘Dirty work’ and Patriarchal power structures

Surrogacy is not a new concept in India, as described in Chapters 2 and 5 of this thesis, the idea has ancient roots in the stories of the *Bhagavata Purana*. In fact, some surrogates have expressed that it is a part of their Hindu religion by recalling the story of Krishna and his adoptive mother Yashoda.⁵⁶⁸ The important and revered status of motherhood in Indian culture is discussed in Chapter 2 and explored later in this chapter and Chapter 5. The practice of surrogacy also has a long history in modern day India, as sexual and reproductive health and rights activist Prabha Nagaraja explains that: ‘Even before there was technology for assisted reproduction, there was a form of surrogacy; what we today call altruistic genetic surrogacy has always been around in families.’⁵⁶⁹ Yet, she warns that ‘now that the technology has become an industry, the potential for exploitation in this exchange has grown

⁵⁶⁶ Vora, ‘Medicine, Markets, and the Pregnant Body: Indian Commercial Surrogacy and Reproductive Labor in a Transnational Frame’ (n 558) 5.

⁵⁶⁷ Balmurli Natrajan, ‘Legitimizing Globalization: Culture and Its Uses’ (2002) 12 *Transnational Law and Contemporary Problems* 127, 129–130.

⁵⁶⁸ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 167.

⁵⁶⁹ Quote in Marwah and Nadimpally (n 485) 206. I take Nagaraja to be describing ‘traditional’ surrogacy where the birth mother is also the genetic mother and likely a relative of the intended couple. It could also refer to the practice of child sharing where children would be sent to childless relatives to take care of them or even the illegal activity of buying and selling babies.

exponentially.⁵⁷⁰ Renu Addlakha, a women's and disabilities studies scholar, also shares this position and describes surrogacy as 'the murky world of a reproductive subterranean' where new innovations meet old regressive ideas.⁵⁷¹ The issues here are twofold; first, where technological innovations interact with historic structures of inequality and second, when surrogacy, which involves these technologies, moved into the global arena the mistreatment and abuse of women that had always existed was exacerbated.

The women's movement in India has for decades engaged with issues related to the body and resisted, as Marwah and Nadimpally put it, 'the reduction of women to their wombs and vaginas.'⁵⁷² As I explained in Chapter 2 infertility and childlessness is highly stigmatised in India and given cultural dominance of the Hindu majority there is a spiritual premium placed on genetic progeny to complete end-of-life religious rituals.⁵⁷³ As a consequence there is pressure and expectation placed on Indian women to reproduce, including for their extended families, which is part of the patriarchal control of women and their bodies. It is also one aspect of the structural realities, inequalities, and injustices that they experience. In terms of commercial surrogacy within patriarchal societies, where women have limited power, control, and agency over their lives, a woman is at risk of becoming a surrogate 'not from her own free will but because her family seeks to generate income in this manner.'⁵⁷⁴ In analysing these patriarchal cultural norms and expectations Saravanan claims that '[w]omen in India are known to prioritize their family over one's own needs.'⁵⁷⁵ She further elaborates to explain that self-identity is also a shared social entity and that in India 'the social identity is more important than the individual self, wherein the body itself is construed as a shared entity.'⁵⁷⁶ This is also supported by DasGupta and

⁵⁷⁰ *ibid.*

⁵⁷¹ *ibid.*

⁵⁷² *ibid* 211.

⁵⁷³ Explained in Kotiswaran (n 37) 474.

⁵⁷⁴ Sándor (n 486) 39.

⁵⁷⁵ Saravanan (n 547) 52.

⁵⁷⁶ *ibid* 51.

Das Dasgupta who claim that ‘one’s body is not one’s own but the responsibility of the collective.’⁵⁷⁷ This could then explain, at least in part, why Indian women are willing to become surrogates, particularly when it is for the benefit of their families. It is also further evidence of the patriarchal expectations placed on women.

Sunita Reddy and Tulsi Patel also emphasise the need to culturally contextualise notions of ‘property in the body’, especially when women undertake surrogacy arrangements because of financial desperation and a lack of alternatives.⁵⁷⁸ Pande attests that commercial surrogacy had become a temporary occupation as well as a survival strategy for some poor rural women.⁵⁷⁹ She documents, as earlier quoted, a surrogate in her study claiming that ‘This work is not ethical—it’s just something we have to do to survive.’⁵⁸⁰ Rudrappa observed that the surrogates in her studies were not destitute but that they were desperate.⁵⁸¹ Whereas Pande discovered that almost all the women in her studies were below or around the poverty line.⁵⁸² Indian women undertaking international commercial surrogacy arrangements due to financial desperation is another example of work in the ‘feminisation of survival’.⁵⁸³ This term is used by Saskia Sassen to describe how the survival of households and even whole communities has become increasingly dependent on women. She further argues that governments are also ‘dependent on their earnings as well as enterprises where profit making exists at the margins of the ‘licit’ economy.’⁵⁸⁴

⁵⁷⁷ Sayantani DasGupta and Shamita Das Dasgupta, ‘Shifting Sands Transnational Surrogacy, E-Motherhood, and Nation Building’ in Sayantani DasGupta and Shamita Das Dasgupta (eds), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014) 73.

⁵⁷⁸ Reddy and Patel (n 87) 220.

⁵⁷⁹ Pande, ‘Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India’ (n 92) 144.

⁵⁸⁰ *ibid* 160.

⁵⁸¹ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 78.

⁵⁸² Pande, ‘Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India’ (n 92) 150.

⁵⁸³ This echoes Dr Patel’s words quoted in Chapter 2 that everyone is born with two instincts – to survive and to reproduce.

⁵⁸⁴ Saskia Sassen, ‘Women’s Burden: Counter-Geographies of Globalization and the Feminization of Survival’ (2000) 53 *Journal of International Affairs* 503, 506.

Despite the phenomenon of surrogacy being embedded within Indian history and culture commercial surrogacy has been highly stigmatised, leading Pande to coin the term ‘sexualized care work’⁵⁸⁵ and to describe it as ‘dirty work’.⁵⁸⁶ The reasons for its stigmatisation result in part from the association with sex work but also with baby-selling and the commodification of motherhood, all of which are deemed immoral in India. Pande explains that ‘moral rhetoric and stigma are often evoked whenever the bodies of poor women are in focus.’⁵⁸⁷ She adds that the work of poor women, whether they are domestic workers, nannies, nurses or maids, is often associated with ‘a physical and moral taint.’⁵⁸⁸ In addition to this the fact that the baby is usually handed over immediately after the birth reinforces the ‘disposability of these “desperate” women and emphasises the “unnatural” nature of their motherhood.’⁵⁸⁹ Lamba and Jadvva recount a surrogate explaining that her husband initially would not consent to her undertaking a surrogacy arrangement, calling it ‘dirty work’ because he did not understand how the pregnancy is brought about.⁵⁹⁰ Due to the negative associations surrogates often keep the arrangement secret which is facilitated by living in the surrogacy hostels.⁵⁹¹ The stigmatisation of commercial surrogacy contributes to the harm and mistreatment surrogates experience within their communities and families. One of the ways the surrogates in Pande’s studies were able to neutralise some the stigma attached to their involvement in commercial surrogacy was to appeal to ‘higher loyalties’, which are their responsibilities and obligations to their families and children. This links with Saravanan’s claim that Indian women prioritise their families over themselves and act selflessly. The husband of a surrogate in Pande’s studies described his wife’s sacrifices as *tapasya*, which is a Hindu principle and practice of physical and spiritual austerity and discipline to achieve a greater aim. He

⁵⁸⁵ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92).

⁵⁸⁶ See also Pande, “‘At Least I Am Not Sleeping with Anyone’: Resisting the Stigma of Commercial Surrogacy in India’ (n 34); Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91); Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 525).

⁵⁸⁷ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 154.

⁵⁸⁸ *ibid.*

⁵⁸⁹ *ibid.*

⁵⁹⁰ Lamba and Jadvva (n 501) 194.

⁵⁹¹ *ibid.* 191. This is widely documented in many ethnographies on surrogacy in India. See Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 154.

declared that: ‘It is like God helped her do this for our family.’⁵⁹² The framing of undertaking commercial surrogacy in this way as a familial obligation works to reinforce certain gendered hierarchies and gender norms. In the sense that it is the women’s duty to be selfless, to put other’s before themselves, and to serve their families. It is another dimension of the patriarchal control of women and their bodies. Pande observed that many surrogates employed narratives of a ‘lack of choice’ and ‘higher loyalties’ to justify their undertaking a surrogacy arrangement, which she argues reinforces the image of the women as ‘selfless dutiful mothers’.⁵⁹³

4.3.3 Surrogates: raw material, worker, and machine

In the preceding two sections I have shown how surrogates in India operate, and suffer harms, under the deeply unequal, unfair, and unjust conditions of globalisation and patriarchy. Labour performed by women whether within the domestic sphere or the marketplace is and has historically been undervalued by patriarchal structures, cultures, and societies. This is true for most industries, and not just surrogacy, where women workers have been classed as unskilled or low skilled and then this classification has been used as a justification for their lower and unfair pay rates.⁵⁹⁴ Feminist scholar and activist Nivedita Menon claims that feminist lessons from sex work are tested in surrogacy because it is like no other form of labour.⁵⁹⁵ Commercial surrogacy is particular in nature because there is no clear distinction between the ‘raw material’ and the ‘worker’ in the arrangement. The surrogate is both and she is also the ‘machine’, which makes it unique.⁵⁹⁶ In the following chapter I will return to the use of metaphors such as ‘machine’ to describe the role and functions of the pregnant woman. To characterise the unique work of the surrogate Pande coined the term ‘mother-worker’.⁵⁹⁷ In Chapter 2

⁵⁹² Pande, ‘Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India’ (n 92) 162.

⁵⁹³ *ibid.*

⁵⁹⁴ Jane L Collins, ‘Mapping a Global Labor Market: Gender and Skill in the Globalizing Garment Industry’ (2002) 16 *Gender & Society* 921, 936.

⁵⁹⁵ Marwah and Nadimpally (n 485) 212.

⁵⁹⁶ *ibid* 212–213.

⁵⁹⁷ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91).

I discussed how the women's bodies and their labour provide the 'raw material' and bio-capital in India's medical tourism industry, following the legacy of resource extraction under colonialism, and now I will elaborate on how this relates to the forms of exploitation outlined earlier in this chapter. Surrogacy presents a particular set of challenges and vulnerabilities because the conditions and labour are unique, meaning it does not fit neatly and easily into pre-existing definitions of work. As a result, setting a fair market price for this kind of work is difficult if not almost impossible. In the previous section I introduced the concept of the 'feminisation of survival' and explained that governments are also dependent on women's labour for economic development. In the case of commercial surrogacy in India huge profits have been generated for the clinics and wider economy,⁵⁹⁸ especially the supporting industries e.g., legal services, hospitality etc., and yet the surrogates who provide the essential resources have profited the least.⁵⁹⁹

Another issue that I also highlighted earlier was the huge disparity in the distribution of the fees between the clinics and surrogates, and further compared to surrogates in the USA women in India received a much smaller percentage of the total fees.⁶⁰⁰ Surrogacy is a form of third-party reproduction where the surrogate is used as a means to another's end, and which constitutes a problematic example of objectification when she is used merely or primarily as such. The intended parents travelling to India for commercial surrogacy were able to benefit from a cheaper price because of these global inequalities. The clinics and all those involved profited from the surrogate's greater contribution, and to a greater extent than she did because even if the intermediaries only had a fraction of the fee their investment was far less. Menon also questions how the conditions can be made fair in this type of

⁵⁹⁸ Hochschild reports that the Indian government considered surrogacy as part of its economic development within the medical tourism industry that gave tax breaks to private hospitals. She quotes the annual turnover of surrogacy at \$455m and argues that it improves the national bottom line. Hochschild (n 189) 44.

⁵⁹⁹ While they may have earned more than in alternative options, they are the ones bearing the risks and providing the labour which is not reflected in their fee.

⁶⁰⁰ Surrogates in the USA would get on average 30-40% of the total fee paid by the intended parents whereas for Indian surrogates it would be around 10% - as referenced in Chapter 2.

situation.⁶⁰¹ I would argue that it will not be achieved by prohibiting payments other than ‘medical expensive and other such prescribed expenses’ as the only party not being paid for their contribution, which is the most significant, is the surrogate.

By setting out how the surrogates are positioned within the global economy and the local socio-cultural and institutional structures we can see how the background conditions extend beyond poverty to include discrimination and subordination through the intersecting and compounding factors of patriarchy, gender, class, ethnicity, caste, and religion. All of which are part of the colonial legacies that are further entrenched under the conditions of globalisation and neoliberalism. While the feminist responses to commercial surrogacy in India include a range of liberal,⁶⁰² radical,⁶⁰³ Marxist,⁶⁰⁴ postcolonial,⁶⁰⁵ and humanitarian⁶⁰⁶ approaches it is prominently a materialist feminist stance that is taken.⁶⁰⁷ This approach understands that the material conditions within which surrogates live are dictated by capitalist patriarchy. Zillah Eisenstein defines capitalist patriarchy as ‘the mutually reinforcing dialectical relationship between capitalist class structure and hierarchical sexual structuring.’⁶⁰⁸ The materialist feminists do not support a blanket ban for fear that the practice will be driven underground and therefore leading to further harm. Is the best approach then to prohibit commercial surrogacy and regulate altruistic surrogacy as the Indian government are doing? Considering all of this it is even more important that the surrogates have strong legal protections. If

⁶⁰¹ Marwah and Nadimpally (n 485) 212–213.

⁶⁰² Gita Aravamudan, *Baby Makers: The Story of Indian Surrogacy* (Harper Collins 2014).

⁶⁰³ Sayantani DasGupta and Shamita Das Dasgupta (eds), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014).

⁶⁰⁴ Mohan Rao, ‘Why All Non-Altruistic Surrogacy Should Be Banned’ (2012) 47 *Economic and Political Weekly* 15.

⁶⁰⁵ Ana Cristina Mendes and Lisa Lau, ‘A Postcolonial Framing of International Commercial Gestational Surrogacy in India: Re-Orientalisms and Power Differentials in Meera Syal’s *The House of Hidden Mothers*’ [2018] *Interventions* 1.

⁶⁰⁶ Saravanan (n 547).

⁶⁰⁷ Banerjee and Kotiswaran (n 50) 87.

⁶⁰⁸ Zillah R Eisenstein, *Capitalist Patriarchy and the Case for Socialist Feminism* (Monthly Review Press 1978) 5. See also, Mechthild Hart, ‘Capitalist Patriarchy’, *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies (Online)* (Wiley-Blackwell 2016) <<https://onlinelibrary.wiley.com/doi/10.1002/9781118663219.wbegs403>> accessed 7 June 2022. Pateman argues that ‘The sexual division of labour in patriarchal capitalism and the ‘feminization of poverty’ ensure that a surrogacy contract will appear financially attractive to working-class women, although the payment is very meagre for the time involved and nature of the service.’ Pateman (n 68) 212.

the prohibition of commercial surrogacy could lead to an unregulated market or the intercountry movement of women, as it is difficult to radically alter an established practice, then robust and effective regulation following a compensated model that ensures appropriate working conditions is the better and safer option. I will now assess if measures the Indian government have taken to regulate the practice are effective.

4.4 Critical evaluation of key provisions and clauses

In the following sections I will examine in detail the relevant provisions of the Surrogacy Bill to consider whether this piece of legislation achieves the main objective of prohibiting the exploitation of the surrogates and how it responds to the issues surrounding the treatment of the surrogates during and after the pregnancy.⁶⁰⁹ This will include examining the definitions for surrogacy and the surrogate mother, and how the health risks and invasive procedures involved in gestational surrogacy are managed and regulated. As the Indian government has separated the regulation of surrogacy and the wider field of ARTs into two pieces of legislation this critique of the government's legal responses to surrogacy will largely focus on the provisions of the Surrogacy (Regulation) Bill as introduced in 2016 but will also examine those of the Guidelines and Draft ART Bill where relevant.⁶¹⁰

4.4.1 Definitions of surrogacy and surrogate mothers

The Surrogacy Bill 2016 aimed to achieve its main objective of ending the exploitation of women by prohibiting commercial surrogacy in favour of 'altruistic ethical surrogacy' and through restricting the eligibility criteria for surrogates to close relatives only.⁶¹¹ The prohibition of commercial surrogacy is

⁶⁰⁹ Harsh Vardhan, the Minister for Health and Family Welfare, talks of protecting the dignity of women and preventing the commodification of their bodies and reproductive functions, which demonstrates a recognition by the legislators of some of the issues with the practice of surrogacy in India.

⁶¹⁰ There are few amendments to the various versions of the Surrogacy Bill and the final Surrogacy Act, but I will indicate them where relevant.

⁶¹¹ Note that this has been amended to allow 'a willing woman' but the initial proposal is significant in revealing the thinking underpinning and influencing the drafting.

a fundamental change to how surrogacy had been practiced in India and contradicts the provisions in the versions of the Draft ART Bill prior to the 2020 version, which set out payment procedures for the surrogates.⁶¹² The provisions that establish this are set out in Chapter II on Regulation of Surrogacy Clinics⁶¹³ and Chapter III on Regulation of Surrogacy and Surrogacy Procedures.⁶¹⁴ The definitions of surrogacy⁶¹⁵ and the eligibility criteria for the surrogates are also of central importance and are as follows:

Clause 2 (b)

“altruistic surrogacy” means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother her dependents or her representative.⁶¹⁶

Clause 2 (f)

“commercial surrogacy” means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading in services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.⁶¹⁷

Clause 2 (zb)

“surrogacy” means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;⁶¹⁸

⁶¹² Draft ART Bill, 2014, Chapter 7, section 60(3)(a): Notwithstanding anything contained in sub-section (2) and subject to the surrogacy agreement, the surrogate may also receive monetary compensation from the commissioning couple, as the case may be, for agreeing to act as surrogate. Draft ART Bill, 2014, Chapter 7, section 60(3)(b): Appropriate formula and mechanism shall be developed under Rules for payment of compensation to the surrogate mother and to transfer the funds to the bank account of the surrogate mother at different stages starting from signing of the agreement till the child/children is/are handed over to the commissioning parents.

⁶¹³ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter II, Clause 3, Sub-clause ‘(ii) no surrogacy clinic, paediatrician, gynaecologist, human embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form.’

⁶¹⁴ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter III, Clause 4, Sub-clause ‘(b) when it is only for altruistic surrogacy purposes;’ and ‘(c) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures.’

⁶¹⁵ In the Introduction to the thesis, give the definitions for altruistic and commercial surrogacy.

⁶¹⁶ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter I, Clause 2, Sub-clause (b). The same in Surrogacy (Regulation) Bill, 2019, 156 of 2019, Chapter I, Clause 2, Sub-clause (b). The Surrogacy Act 2021 includes ‘such other prescribed expenses’ but without further detail.

⁶¹⁷ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter I, Clause 2, Sub-clause (f). The same in Surrogacy (Regulation) Bill, 2019, 156 of 2019, Chapter I, Clause 2, Sub-clause (f). The Surrogacy Act 2021 also includes ‘and such other prescribed expenses incurred’.

⁶¹⁸ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter I, Clause 2, Sub-clause (zb). The same in Surrogacy (Regulation) Bill, 2019, 156 of 2019, Chapter I, Clause 2, Sub-clause (zb). The Surrogacy Act 2021 states the same in sub-clause (zd).

The Surrogacy Bill 2016 provided the following definition for ‘surrogate mother’ and the eligibility criteria set out in the sub-clauses to Section 4. I quote only one criterion that is relevant to the discussion here:

“surrogate mother” means a woman bearing **a child who is genetically related to the intending couple**, through surrogacy from the implantation of embryo in her womb and **fulfils the conditions as provided in sub-Clause (b) of Clause (iii) of section 4**,⁶¹⁹

- (II) no person, other than **a close relative of the intending couple**, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act;⁶²⁰

I will deal with the shift from commercial to altruistic surrogacy and the ‘close relative’ requirement together because they involve the overlapping concerns of exploitation, coercion, and patriarchal power structures. Despite the elimination of exploitation being a stated main aim, the Bill does not provide a definition or examples of the exploitation from which the surrogates need to be protected nor did it define ‘close relative’. The fact that the Bill prohibits commercial surrogacy and not surrogacy per se indicates that the exploitation is considered to be tied to the exchange of money. In the background conditions section of exploitation, I explained that the prohibition of commercial surrogacy by the Indian government follows the assumption that the financial gain incentivises or coerces the women to undertake the arrangement out of desperation and that they would likely not agree otherwise. The solution the Indian government sees is to remove what they consider to be the potential source of coercion, i.e., the money. I also outlined how the first strand of unfair advantage exchange can be compounded by the second strand on background conditions because the surrogates may be offered an unfair price and forced to accept it out of desperation. The third strand is further implicated if they are also subjected to and unable challenge harmful practices for fear of jeopardising

⁶¹⁹ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter I, Section 2, Sub-clause (ze) [emphasis added]. And Surrogacy (Regulation) Bill, 2019, 156 of 2019, Chapter I, Section 2, Sub-clause (zf). More discussion on the other conditions is given in Chapter 3 of this thesis. The Surrogacy Act 2021 has been amended to include ‘intending woman’ and clarified that it is gestational surrogacy from an embryo implantation – see sub-clause (zg).

⁶²⁰ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Chapter III, Section 4, Clause (iii), Sub-clause (b), para. (II) [emphasis added]. The Surrogacy Act 2021 has replaced this with ‘(II) **a willing woman** shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act’. [emphasis added]

the arrangement. A definition of coercion is also not provided in the Bill however it does consider the possibility of women being coerced into commercial arrangements by a third party in the offences and punishment section. Clause 39 provides for an exemption for the surrogate stating that the court shall presume ‘that the woman or surrogate mother was compelled by her husband, the intending couple or any other relative, as the case may be, to render surrogacy services’ notwithstanding anything contained in the Indian Evidence Act, 1872.

While the intention to eliminate the exploitation of surrogate mothers is positive the measures proposed in this Bill are misguided, counterproductive and could in fact increase the risks of exploitation along the three strands earlier defined. Altruistic surrogacy is problematic for several reasons, as I will explore below, and the combination of the ‘close relative’ requirement had the potential to exacerbate the mistreatment of the women due to the patriarchal structures within families and the wider society. Altruistic surrogacy can work to legitimise coercive transactions especially when the woman is not in a strong position to refuse, for example due to familial obligations or debt. It could also amount to ‘forced labour’ violating Article 23 of the Constitution of India,⁶²¹ which provides for the ‘prohibition of traffic in human beings and forced labour.’⁶²² There is also a danger of an unregulated and underground market⁶²³ and the possible trafficking of surrogates, or as described by a stakeholder during their submission to Parliamentary Standing Committee (PSC) the ‘inter-country movement of women’ to jurisdictions that allow for commercial surrogacy.⁶²⁴ Consequently, as another stakeholder

⁶²¹ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, paras 5.8 (March 2021).

⁶²² Article 23, The Constitution of India 1949.

⁶²³ A concern also raised by a representative from the Ministry of Women and Child Development and echoed by Petal Chandok, an advocate at Trust Legal Advocates and Consultants. Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 4.12 (March 2021).

⁶²⁴ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.10 (March 2021). Discussion on how the industry moved to Laos after restrictions were implemented in India and Thailand and the potential for an international convention in Sándor (n 486) 52.

claims, ‘a prohibition of [the] commercial sector is likely to hurt the very people it seeks to protect.’⁶²⁵ The PSC held that while the previous system was exploitative no compensation at all was ‘tantamount to another form of exploitation’⁶²⁶ as the risks and costs involved are so great and only the surrogate is not paid for their contribution. In this sense they are exploited due to an unfair advantage exchange. The Committee also expressed that exploitation could be minimised ‘through adequate legislative norm-setting and robust regulatory oversight.’⁶²⁷ Subsequently, they deemed a compensated surrogacy model⁶²⁸ most appropriate with a fixed amount so that the women are not disadvantaged by a weak bargaining position and that the fee be guaranteed from the start of the arrangement.

The issues with altruistic surrogacy would have been exacerbated by the ‘close relative’ requirement, which was problematic for several reasons. First, the Bill did not define ‘close relative’ and therefore the lack of clarity on the degree of closeness raised concerns regarding potential conflicts of interest in the future over custody, inheritance, and property.⁶²⁹ It could have created greater uncertainty in terms of determining legal parentage which has been a serious issue in surrogacy arrangements in India as evidenced in the key cases in the previous chapter. Secondly, such restrictions would have led to a shortage of eligible women with some commissioning couples not having any suitable relatives in their families. Thirdly, the requirement could have violated the right to privacy of the couple and increased the likelihood of abuse and social shame due to the stigma surrounding infertility in India as it is also

⁶²⁵Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.10 (March 2021).

⁶²⁶ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.20 (March 2021).

⁶²⁷ Dr Kamini Rao also held this position, para. 4.10. And Dr Mrinal Satish echoed the need for a stringent regulatory regime and regulatory body for monitoring compliance, para. 4.16. Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, paras 4.10, 4.16, 5.17 (March 2021).

⁶²⁸ The PSC pointed out that in other jurisdictions altruistic surrogacy is in fact compensated surrogacy as is the case in the UK. They received recommendations from stakeholders for appropriate regulation, compensation for loss of earnings, and labour model for surrogacy with appropriate remuneration, protections and skilled employee status.

⁶²⁹ An MP raised the issue that in Northern Indian kinship customs women would be entitled to inheritance if they were related to the children.

considered grounds for a divorce.⁶³⁰ Yet it is the complete failure to consider women's position within India's socio-cultural context that is most troubling. While the Bill accounts for the possibility of coercion by third parties it failed to see how restricting surrogates to close relatives could expose them to greater risks of coercion. This requirement undermined one of the core aims of the Bill because as the PSC points out it ignores the 'reality that in Indian marital homes the decision making power rarely rests with women.'⁶³¹ As outlined earlier this expectation to reproduce is part of the patriarchal control of women. Sarojini Nadimpally, of SAMA,⁶³² supports the view that due to the patriarchal family structures in India and 'the low bargaining power of women, it can be expected that young mothers will be coerced into becoming surrogates for their socially and economically better-off relatives.'⁶³³

Instead of eliminating the exploitation of women this requirement had the potential to increase its likelihood because the exchange would be unfair, unequal background conditions and familial obligations to act selflessly could be taken advantage of, and the women would be used as a means to an end while undergoing risky and invasive procedures. The Department responsible for the Bill expressed that the eligibility criteria 'has been kept with a view to avoid commercialization of surrogacy.'⁶³⁴ However, restricting arrangements to within families is no guarantee of non-commercial surrogacy.⁶³⁵ The Department's statement reveals the patriarchal expectation placed on women to

⁶³⁰ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.11 (March 2021).

⁶³¹ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.79 (March 2021).

⁶³² A research group for women and health in India.

⁶³³ The Print Team, 'Is the Surrogacy Bill 2019 Unfair to Women by Limiting Their Options?' *ThePrint* (21 November 2019) <<https://theprint.in/talk-point/is-the-surrogacy-bill-2019-unfair-to-women-by-limiting-their-options/324391/>> accessed 16 April 2021.

⁶³⁴ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.75 (March 2021).

⁶³⁵ Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.74 (March 2021); Shri Sushil Kumar Gupta points out in the parliamentary debate at Rajya Sabha that there is a tradition in India of giving gifts to sisters so it is unlikely that no exchanges of cash or otherwise would take place – See Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 361, Session 250, 20 November 2019.

perform gestational care and labour without payment because it is considered to be their role; what they do and should do within the family for free. Furthermore, that it should not be available on the open market and the subject of private contracts. This patriarchal control of women's bodies devalues their labour and dictates where and how it is performed. Contract pregnancy disrupts the traditional expectation of reproduction being confined to the private sphere and therefore the shift to altruistic surrogacy by close relatives only was a move to return reproduction to unpaid labour within the family. The view expressed by the Select Committee, quoted in the previous chapter, on the selflessness of the surrogates illustrates this patriarchal expectation placed on women and illuminates the core concern of this thesis, whether and the extent to which the foetal container model of pregnancy underpins the approaches to surrogacy and its regulation. The model is a metaphysical claim about the maternal-foetal relationship that extends into cultural views of pregnancy which can result in pregnant women being treated first and foremost as foetal containers or baby-makers.

4.4.2 Health risks and safeguards

The aim of this chapter is to critically evaluate the main objective of the Surrogacy Bill, as quoted in the previous chapter, 'to provide altruistic ethical surrogacy to the needy infertile Indian couples.'⁶³⁶ However, 'ethical surrogacy', like 'exploitation', is not defined or discussed. Does the Indian government take altruistic surrogacy to be inherently ethical because it is not subject to open and free market private negotiations like commercial surrogacy? In the previous section I outlined how altruistic arrangements can involve coercion which is clearly unethical. Alternatively, does ethical surrogacy mean that no one is mistreated or harmed, and that the arrangement is safe and fair for all parties?⁶³⁷ The ambiguity surrounding these terms leaves them open to various and possibly conflicting

⁶³⁶ Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, para 2.3 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁶³⁷ Some commentators have spoken about fair-trade surrogacy. See, Casey Humbyrd, 'Fair Trade International Surrogacy' (2009) 9 *Developing World Bioethics* 111.

interpretations. Ethical surrogacy should at the very least require ensuring the health and safety of the surrogates. A great deal of focus and attention has been given to the (im)permissibility of commercial surrogacy, so much so that debates have become polarised on the pros and cons of altruistic versus commercial surrogacy. As a result, other important and serious issues have been overlooked and under considered such as how the surrogate's health is safeguarded during and after the arrangement and the potential for harms to be sustained. Gestational surrogacy involves risks that are tied to the unique nature of the work and the role of regulation must be to provide minimal working conditions.⁶³⁸ The surrogate undergoes highly invasive and risky procedures throughout the pregnancy therefore it is imperative that the practice is safe, and that her long-term health is protected. The following sections will address the case studies outlined in the introduction by assessing how the Surrogacy Bill responds to the risks arising from these invasive procedures through the provisions related to number of surrogacy and IVF cycles, embryo transfers/implantations, foetal reductions, abortions, the delivery, consent, aftercare, and insurance in case of injury or death.

4.4.2.1 Gestational surrogacy only

The definition for 'surrogate mother' quoted earlier establishes that only gestational surrogacy is permitted and despite the added complications of the procedures involved the risks are not mentioned or listed in the Surrogacy Bill. However, the Draft ART Bill, 2010 did acknowledge the potential risks for the mother and the child. The rules section has a list and explanations of potential complications at different stages of the IVF process, such as the possibility of multiple gestation, ectopic pregnancy, spontaneous abortion, and ovarian hyperstimulation syndrome.⁶³⁹ In India women who undertake surrogacy arrangements must have given birth before. This is a requirement of most clinics,⁶⁴⁰ and it

⁶³⁸ Minimal standards and conditions can then protect those who are disadvantaged by unfair market conditions.

⁶³⁹ Indian Council for Medical Research and National Academy of Medical Sciences, Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2010. Para. 6.13.

⁶⁴⁰ Cited in Anil B Pinto and Nona Morgan Swank, 'Gestational Surrogacy' in Gautam Allahbadia, Rita Basuray Das and Rubina Merchant (eds), *The Art and Science of Assisted Reproductive Techniques* (Taylor and Francis 2003) 346. See also SAMA - Resource Group for Women and Health (n 21) 34–37.

is stipulated in the eligibility criteria for the surrogate mothers in the Surrogacy Bill.⁶⁴¹ The reasons include ensuring the surrogate has previous experience of pregnancy to understand what it involves, to reduce the likelihood that she will refuse to relinquish the baby, and in case there are complications that leave her unable to have more children.⁶⁴² A gestational surrogacy pregnancy is more demanding than a ‘natural’ pregnancy, from the increased risks of the IVF procedures in addition to the considerable ones of pregnancy in general. Further, there is evidence from multiple studies that some aspects of the practice in India increase the risks and potential for harm.

Gestational surrogacy involves a hormonal programme to align the surrogate’s cycle with the intended mother’s, to build her uterine lining, and the extraction of her own eggs to avoid her becoming pregnant with her own genetic material.⁶⁴³ It has been reported that in India multiple cycles and embryo transfers are performed to increase success rates,⁶⁴⁴ which increases the risk of ectopic pregnancies and spontaneous abortions. If the implantations result in multiple pregnancies the surrogate will likely undergo a foetal reduction⁶⁴⁵ to improve the survival chances of the remaining foetus(es) at the request of clinic or intended parents.⁶⁴⁶ Finally, she will almost certainly be scheduled a caesarean section delivery as this has become standard practice in India. It allows the doctors to control the timing of the birth and so that the intended parents can be present.⁶⁴⁷ There is even evidence of Dr Patel allowing

⁶⁴¹ See definition given in the following paragraphs.

⁶⁴² As a result of the greater risks associated with this type of pregnancy the surrogates are asked whether they have completed their families in case of complications that result in future infertility or a hysterectomy. See SAMA - Resource Group for Women and Health (n 21) 34–37. In *House of Surrogates* Dr Patel explains to a prospective surrogate the risks of excessive bleeding and potential hysterectomy or death.

⁶⁴³ See SAMA - Resource Group for Women and Health (n 21). There is a detailed list of the medical procedures and medications involved in gestational surrogacy with the possible side-effects and associated health risks.

⁶⁴⁴ An agent interviewed for SAMA’s study indicated that attempts will continue until successful and that it was an expected part of the package offered to the intended parents, *ibid* 65.

⁶⁴⁵ The removal of one or more foetus.

⁶⁴⁶ This is done to improve the survival chances of at least one foetus and because the intended parents may only want one child. More discussion on foetal reductions is given later in the chapter. See also, SAMA, ‘Constructing Conceptions: Mapping of Assisted Reproductive Technologies in India’ (Sama Resource Group for Women and Health 2010) 123. And SAMA - Resource Group for Women and Health (n 21) 65.

⁶⁴⁷ These procedures are described in Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 147. See also, Smerdon (n 17) 20–21. Also described in Jonathan W Knoche, ‘Health Concerns and Ethical Considerations Regarding International Surrogacy’ (2014) 126 *International Journal of Gynecology and Obstetrics* 183, 184.

the intended parents to choose the child's birthday.⁶⁴⁸ I will return to discuss at much greater length the potential harm from these invasive procedures and the use of C-section deliveries in Chapter 6, but I will briefly discuss the relevant provisions below.

4.4.2.2 Invasive procedures: cycles, embryo transfers, foetal reductions, and abortions

The invasive procedures involved in gestational surrogacy are part of the unique nature of the work that requires appropriate protections and conditions to ensure it is safe and ethical. The provisions that relate to these include the eligibility criteria for the surrogates, embryo transfers, foetal reductions, abortions. An 'ever married woman'⁶⁴⁹ between the ages of 25 and 35 will only be able to act as a surrogate once in her lifetime, she must possess an eligibility certificate issued by the appropriate authority on the fulfilment these conditions, and following an assessment for psychological and medical fitness from a registered practitioner.⁶⁵⁰ In response to concerns over the health implications of women undertaking multiple surrogacy arrangements the Surrogacy Bill has limited the number to one. Previous versions of the Draft ART Bill were far more liberal and allowed for up to five pregnancies including the surrogate's own children.⁶⁵¹ However, the Surrogacy Bill does not provide a limit on the number of IVF attempts or cycles the surrogate can undergo and has left it open to be prescribed in the rules section of the Act.

The Bill does not specify a limit on the number of embryo transfers either and indicates it will be as prescribed.⁶⁵² This is a very important issue as the practice of transferring multiple embryos at once

⁶⁴⁸ See, Carney (n 340). And Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 5.

⁶⁴⁹ This term is not defined in the Bill and MPs have asked the Minister of Health and Family during the parliamentary debates for a definition of 'ever married'. I take it to mean either that the surrogate has been married at some point or is currently married. It is another example of where greater clarity is needed especially considering it relates to the eligibility criteria of the surrogate.

⁶⁵⁰ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 4. Also discussed by Nayana Hitesh Patel and others, 'Insight into Different Aspects of Surrogacy Practices' (2008) 11 *Journal of human reproductive sciences* 212, 213.

⁶⁵¹ Draft ART Bill, 2013.

⁶⁵² Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 8. The number of oocytes or embryos to be implanted in the surrogate mother for the purpose of surrogacy, shall be such as may be prescribed.

has been documented. It can result in multiple foetuses developing, which increases the likelihood of the surrogate being subjected to a foetal reduction at the request of the intended parents or clinic.⁶⁵³ The 2014 version of the Draft ART Bill provided for no more than three embryo transfers and many stakeholders have pointed out that standard practice in most countries is no more than two or three. The Department has confirmed that the number of transfers will be as per the rules and regulations and while the PSC supported the need for a prescribed limit to the number of transfers, they did not recommend its inclusion in the main statute.⁶⁵⁴ By not restricting the number of transfers the Department has failed to consider the significance of this aspect of the process and the implication for the health of the surrogates especially as it is linked to the practice of foetal reductions. The rules section of the Bill is subject to change therefore specifying the number in the main statute would offer greater protection of the surrogates' health.

Unlike the previous versions of the Draft ART Bills there are no provisions in the Surrogacy Bill for the procedure of 'foetal reduction', which may still occur under the rules of the Bill as it is not expressly prohibited. In the Rules section to the 2010 version of the Draft ART Bill the consent form contained the following statement:

I will, however, agree to foetal reduction if asked by the party seeking surrogacy, in case I happen to be carrying more than one foetus.⁶⁵⁵

This practice and the effect it can have on the surrogate's mental and physical wellbeing was captured in the previously mentioned documentaries.⁶⁵⁶ There are serious side-effects and complications related to the procedure, which include uterine bleeding and scarring, infection, premature labour, and the loss

⁶⁵³ Tanderup and others (n 196) 497.

⁶⁵⁴ Draft Assisted Reproductive Technology (Regulation) Bill, 2010, section 5.126.

⁶⁵⁵ Found in the Rules section of the Bill 'Form J - Agreement for Surrogacy', p.50.

⁶⁵⁶ In one of the documentaries, we see the surrogate is visibly distressed about having to undergo a 'foetal reduction'. She expresses that she has never even hit a child and now has to agree to end the life of one growing inside her.

of all foetuses.⁶⁵⁷ Some stakeholders have called for the procedure to be prohibited.⁶⁵⁸ The Draft ART Bill, 2014 did at least provide that where a multiple pregnancy occurs as a result of assisted reproductive technology the clinic ‘may carry out foetal reduction after appropriate counselling’.⁶⁵⁹ The Surrogacy Bill does however include provisions for abortions, clause 3(vi) states that an abortion may only be conducted with the written consent of the surrogate and that of an appropriate authority which is subject to and must be in compliance with the Medical Termination of Pregnancy Act, 1971.

Clause 9 provides that:

No person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall force the surrogate mother to abort at any stage of surrogacy except in such conditions as may be prescribed.⁶⁶⁰

It is unclear why the authorisation of an appropriate authority is necessary when the Medical Termination Act and the Indian Penal Code have sufficient restrictions to safeguard pregnant women.⁶⁶¹ The requirement is impractical especially in the case of an emergency as no time period for granting the authorisation has been specified.⁶⁶² However, the PSC could see the benefit of the requirement in case foetal abnormalities are detected.⁶⁶³ They also drew attention to the fact that the Bill is silent on whether the surrogate would be permitted to undertake another arrangement if the first one ended in an abortion.⁶⁶⁴ What is remarkable here in the provisions of the two separate Bills is that

⁶⁵⁷ Cited in SAMA Resource Group for Women and Health (n 90) 27.SAMA, ‘Assisted Reproductive Technologies: For Whose Benefit?’, (2009) vol.44 *Economic and Political Weekly* 18, p.27.

⁶⁵⁸ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.124 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁶⁵⁹ Draft ART Bill 2014, Chapter 4, 49(4)

⁶⁶⁰ These conditions are usually set out in the Rules section of the Bill or final Act.

⁶⁶¹ Stakeholders in Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.96 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁶⁶² Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.96 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021

⁶⁶³ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.98 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁶⁶⁴ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.89 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

there is no accounting for the surrogate to request an abortion or a foetal reduction, which is even more concerning when compounded with the other concerns outlined above. One aspect of the process that has not received any attention in the provisions of the Bill is the delivery. It has been widely documented that C-section deliveries have become almost standard practice in surrogacy arrangements in India, but I will return to discuss this in Chapter 6.

4.4.2.3 Consent

In respect of the seriousness of the risks and potential complications involved in surrogacy it is essential that the surrogates give valid and informed consent. The nature of the procedures which are risky, invasive, and intimate require higher standards for obtaining consent than for procedures which are less so. I will return to assess this in more detail in Chapter 6, but I will set out briefly here what provisions are provided for obtaining consent. They are as follows:

- No person shall seek or conduct surrogacy procedures unless he [sic] has -
- (i) explained all known side effects and after effects of such procedures to the surrogate mother concerned;
 - (ii) obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.⁶⁶⁵

There have been incremental improvements in obtaining the surrogate's consent from the Guidelines, through the amended versions of the Draft ART Bills and the Surrogacy Bill. The Guidelines offered only a general note in the 'Desirable Practices/Prohibited Scenarios' section.⁶⁶⁶ The Draft ART Bill, 2010 had a consent form in English and detailed some of the medical procedures that the surrogates must agree to, but without simple and understandable explanations.⁶⁶⁷ The 2014 version stated that the

⁶⁶⁵ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 6.

⁶⁶⁶ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005) Cl. 3.5.22: 'The consent on the consent form must be a true informed consent witnessed by a person who is in no way associated with the clinic.'

⁶⁶⁷ SAMA (n 646) 40–93. SAMA recorded from their interviews that the surrogates were not properly informed as the contract with the intended parents and a major part of the transaction was conducted in English. The proposed consent form does not give a full account of the extent of the medical processes the surrogates will undergo. Many surrogates also reported, in the same SAMA study, *ibid* 80, that they were not informed about, and did not consent to, the extensive and frequent injections, medications, scans and invasive procedures.

consent form shall be in a local language that is understood by the surrogate.⁶⁶⁸ The requirement in the Surrogacy Bill that consent be obtained in a language that the surrogate understands also demonstrates more consideration for her inclusion and right to exercise autonomy. Yet, it lacks scope as ‘written informed consent’ is not defined and there is no detail on how the consent will be obtained and deemed informed. Some commentators have also expressed concern at the absence of provisions for counselling for the surrogate, especially as such provisions exist in the Draft ART Bill.⁶⁶⁹ The mechanisms for obtaining informed and valid consent from the surrogate could be improved by engaging a competent authority to establish if all side-effects and risks have been communicated and understood and to assess if the consent has been given without coercion.⁶⁷⁰ Further measures could be taken through establishing of a system whereby the surrogates are recruited by the State following comprehensive screening procedures.⁶⁷¹

4.4.2.4 Insurance, compensation, and aftercare

One of the mechanisms used to protect the surrogate’s health has been to provide provisions for insurance cover and aftercare. Although it works to acknowledge the potential for complications and provides some safeguards it cannot replace measures to ensure the overall safety of the practice. Furthermore, the level of insurance, aftercare, and compensation in case of injury or death must reflect the nature and degree of the risks. Clause 2(q) of the Surrogacy Bill defines insurance as follows:

“insurance” means an arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for specified loss, damage, illness or death of surrogate mother during the process of surrogacy;

⁶⁶⁸ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2014 Cl. 47(5).

⁶⁶⁹ Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2014 Cl. 60(28).

⁶⁷⁰ Department-Related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Surrogacy (Regulation) Bill, 2016*, One Hundred Second Report, Para. 5.121 (August 2017), Available at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf accessed 28 September 2021.

⁶⁷¹ This was also a suggestion by the representative from the Ministry of Women and Child Development to the PSC. See, Department-related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, *Report on The Assisted Reproductive Technology (Regulation) Bill, 2020*, One Hundred and Twenty-Ninth Report, para 5.119 (March 2021).

The 2016 version of the Bill did not specify the duration the insurance should cover but following criticism over the provision's lack of detail, clarity, and limited scope the 2019 version allowed for a period of sixteen months covering postpartum delivery complications.⁶⁷² Following the Select Committee recommendations the insurance cover has now been increased to thirty-six months.⁶⁷³ While this is significantly less than the duration of six years suggested by some stakeholders and the calls by the women's rights organisations SAMA and Centre for Social Research for the inclusion of life insurance to cover any potential long-term issues, it is an improvement to the initial conditions.⁶⁷⁴ However, the provision still lacks clear instruction on when the insurance policy should start and it does not adequately account for the long-term health of the surrogates.⁶⁷⁵ There is no mention of life insurance in the case of long-term disability or death of the surrogate as it is limited to the duration of the arrangement.⁶⁷⁶ There also needs to be more clarity regarding who is accountable and responsible for providing the insurance.⁶⁷⁷ Considering the potential for long-term and serious health complications there needs to be a comprehensive aftercare programme with regular check-ups in place to monitor the health of the surrogates and provisions for counselling for the surrogates before, during and after the arrangement. The definition and provisions provided in the Draft ART Bill are more comprehensive and include the possibility of long-term complications.⁶⁷⁸ The practical application of the health or life

⁶⁷² Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 4 (III) an insurance coverage of such amount as may be prescribed in favour of the surrogate mother for a period of sixteen months covering postpartum delivery complications from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999.

⁶⁷³ 'Union Cabinet Approves Surrogacy (Regulation) Bill; Widows, Divorced Women to Also Benefit' (n 330).

⁶⁷⁴ Pink Virani in Department-related Parliamentary Standing Committee on Health and Family Welfare, 'The Surrogacy (Regulation) Bill, 2016 [Report]' (Rajya Sabha Secretariat 2017) 102. Para. 5.55. Following from a suggestion by the stakeholders the Committee supported the inclusion of a provision of social security insurance for the child/children born from the arrangement in the event of the death or the divorce of the commissioning parents. This suggestion appears to respond to the case of Baby Manji where the intended parents divorced before Manji was born and led to a long and complicated legal battle for her father to take her to Japan with him.

⁶⁷⁵ The stakeholders during the PSC meetings pointed out that there is no insurance policy designed to cover surrogacy. Meaning a new type of insurance policy would need to be created with the involvement of the Insurance Regulatory and Development Authority (IRDA), which is a statutory body tasked with regulating and promoting insurance industries in India.

⁶⁷⁶ There should be detailed instructions for the compensation in the case of the surrogate's death and how payment is guaranteed after the baby is relinquished.

⁶⁷⁷ Some stakeholders held that the government should be charged with developing and supplying the correct/appropriate insurance policy/cover for the surrogates.

⁶⁷⁸ Indian Council for Medical Research, Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2014. Chapter 1, 2(w): an arrangement in which a company undertakes to provide guarantee of compensation to the family/

insurance provision could be problematic as the majority of surrogates do not have identity cards or birth certificates, which are required to process the insurance policies.⁶⁷⁹ India has one of the world's highest maternal mortality and morbidity rates,⁶⁸⁰ which means that provisions for ensuring adequate aftercare for the surrogates are even more crucial. Many women who receive little or no medical attention during their own pregnancies are given access to high quality care and facilities when they act as surrogates.⁶⁸¹ This high standard of care should extend after the pregnancy for as long as the surrogate requires it. Yet, the greater concern here is whether surrogacy should be practiced at all in a country with such poor standards of maternal healthcare.⁶⁸²

4.5 Conclusion

In conclusion, to assess whether the main objective of the Surrogacy Bill to eliminate exploitation is achieved we must consider how well it succeeds according to the definitions of exploitation given earlier. I have set out how the surrogates are positioned within the unequal structures of Indian society and the global landscape. While the Indian government's aim to protect women from exploitation is commendable it is questionable whether the correct and appropriate response to commercial surrogacy is to prohibit it outright. Especially, as they have acknowledged that for many women it had become a means of survival. The government's proposal is short-sighted and only goes part way in addressing

nominee/ beneficiary of surrogate mother/ oocytes donor in case of death and the compensation of medical expenses incurred in case of medical emergency to the surrogate and oocytes donor themselves and in case of any complications that have arisen during pregnancy in which are likely to continue for the rest of life of surrogate and oocyte donor.

⁶⁷⁹ Cited in Sreeja Jaiswal, 'Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights' (2012) 16 *Gender, Technology and Development* 1, 20.

⁶⁸⁰ WHO, UNICEF, UNFPA, The World Bank, and United Nations Population Division Maternal Mortality Estimation Inter-Agency Group India, *Maternal mortality in 1990-2013*, available at http://www.who.int/gho/maternal_health/countries/ind.pdf?ua=1 [last accessed 15 September 2015] and UNICEF. (2008). *Progress for children: A report card on maternal mortality*. New York: United Nations Children's Fund. available at https://www.unicef.is/efni/progress_for_children/UNICEF_progress_for_children_7.pdf [last accessed 15 September 2015].

⁶⁸¹ The human right to maternal health care is denied to the surrogates during their own pregnancies but greatly provided when they outsource their reproductive labour. For a more detailed treatment regarding reproductive healthcare for Indian women see, Bailey (n 22) 735.

⁶⁸² This is a question considered by Timms when she asks if commercial surrogacy should be allowed in a country where injustices, inequalities and poorly implemented law place vulnerable women and children at risk. See, Olinda Timms, 'Ending Commercial Surrogacy in India: Significance of the Surrogacy (Regulation) Bill, 2016' (2018) 3 *Indian Journal of Medical Ethics* 99, 99.

the issue of exploitation because of its narrow focus on the coercive background conditions and where the only solution would be to improve these conditions. Consequently, prohibiting the possibility of payment in order that women do not engage in something they would not do if it were not for the money only removes a means of earning much needed money. If the government truly wanted to protect the women, then they would address the conditions that lead women to commercial surrogacy by providing for these basic needs and therefore removing the desperation. As Imrana Qadeer argues it is ‘an economic problem... because the country is not able to create jobs, give minimum wages, provide free education for children or provide adequate housing.’⁶⁸³ She contends that surrogacy is a socio-economic and political issue that requires engagement with understanding the reasons why women undertake these arrangements.⁶⁸⁴ We have seen that the prohibition of commercial surrogacy does not solve the problem because it simply moves the practice elsewhere. Nepal and Cambodia have become new locations for surrogacy arrangements and Kenya has become a source of recruiting women to act as surrogates.⁶⁸⁵ It also risks the practice going underground with women being moved to other jurisdictions and out of the purview of regulations. The intermediary alternative is to regulate the practice so that it is fair, safe, and ethical.

The Surrogacy legislation has been thoroughly scrutinised by the Group of Ministers during the consultation stage and two parliamentary committees plus many stakeholders but there is still scope for improvement as many aspects do not provide adequate protections for the rights and interests of the surrogates. The measures taken to eliminate the exploitation of the surrogates are ineffective and short-sighted. If the surrogates are exploited because they are coerced into the arrangement due to their poverty, then the solution should be to alleviate the poverty by providing better economic options which are, if not as remunerative as surrogacy, enough to sustain them. Instead, the approach has been

⁶⁸³ Marwah and Nadimpally (n 485) 220.

⁶⁸⁴ *ibid* 205.

⁶⁸⁵ Rudrappa, ‘Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015’ (n 301) 1091–1092.

to simply take away this avenue of income. It is also possible to remove or minimise the problematic or exploitative elements of commercial surrogacy while continuing to compensate surrogates. It could involve applying a compensated professional model of surrogacy as argued by Ruth Walker and Liezl van Zyl⁶⁸⁶ rather than allowing the arrangements to be private contracts.

The Indian government's objective is also not fully realised because of its failure to acknowledge the other ways in which surrogates experience exploitation and harm. This occurs because the underlying assumptions about pregnancy influencing the regulation, which I argue are based on a foetal container model, are not recognised. The consequences of this model are that it facilitates the mistreatment of and harm to the surrogates because it treats them first and foremost as foetal containers and enables treatment that includes fungibility, disposability, violability, inertness, and a denial of autonomy and subjectivity which overlaps with the features of objectification. Therefore, to treat a pregnant woman as merely a foetal container is to objectify her.

The focus on eliminating exploitation through prohibiting commercial surrogacy has resulted in insufficient controls and regulation on other aspects of the practices that can be physically and mentally harmful and exploitative along the objectification strand such as the invasive procedures and controlling practices that infringe on the autonomy and bodily integrity of surrogates. The failure to adequately address these issues and make the practice safer reveals that the thinking underpinning the approaches to surrogacy and its regulation is based on certain assumptions about pregnancy and expectations of pregnant women that in turn result from the cultural dominance of the foetal container model. This model is problematic in part because it can facilitate and contribute to the treatment of the surrogates as interchangeable and disposable. Due to the moral complexities of surrogacy whether in

⁶⁸⁶ Ruth Walker and Liezl van Zyl, *Towards a Professional Model for Surrogate Motherhood* (Palgrave Macmillan 2017).

India or elsewhere, but perhaps particularly in India where it remains stigmatised, the foetal container model of pregnancy provides a conception of the practice and phenomenon that renders it more acceptable in that the surrogate is not considered to be selling or relinquishing her own child. In India there is a long tradition of child-sharing, and therefore surrogacy arrangements, at least altruistic ones,⁶⁸⁷ can be aligned with this practice and be seen in a more positive light. The following chapter will set out in detail this model, showing how it is embedded in the language used, and propose an alternative view that could change our understanding of pregnancy and surrogacy and offer a better approach to its regulation.

⁶⁸⁷ Where the aim is to help a childless family.

5 Models of Pregnancy

*'For the surrogates it's mostly the character of the womb we are interested in.'*⁶⁸⁸

*'To convince the women I often explain to them that it's like renting a house for a year. We want to rent your womb for a year, and Doctor Madam will get you money in return.'*⁶⁸⁹

*'[T]he woman's body is seen as neither container nor separate entity from the fetus. Until the baby is born the fetus is the female body. It is part of her body/self.'*⁶⁹⁰

5.1 Introduction

In this chapter I will deal with the core question of the thesis, which is whether a reconceptualisation of pregnancy will lead to a better understanding of surrogacy and approaches to its regulation in India. I will do this by addressing its main assumption; that a particular view or model of pregnancy underpins the conceptualisation and approaches to regulating surrogacy, and that this view is the foetal container model. I aim to reveal how the foetal container view is not the only possible, and not necessarily the most suitable, conceptualisation of pregnancy but how it is also a culturally constructed idea. This is to say that the dominant cultural understandings of this phenomenon do not necessarily hold true on metaphysical, or physiological and biological levels and that alternative views exist. I will do this by attempting to trace the origins of the foetal container view, and how it has evolved from the writings of Aristotle to become culturally dominant not only in Western thinking as seen in contemporary language use but in the cultural understandings of pregnancy in India as well. And consequently, how the view underpins the approaches to the practice and regulation of surrogacy in India, which is the case study of the thesis.

By attempting to locate the origins of the foetal container view and illustrate how it continues to operate in cultural understandings and representations of pregnancy, this investigation involves uncovering

⁶⁸⁸ These are the words of Dr Desai at Dr Patel's clinic in Anand observed by Pande. Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 135.

⁶⁸⁹ These are the words of Vimla, a broker and matron of another surrogacy hostel in Anand observed by Pande. *ibid* 140.

⁶⁹⁰ Karpin (n 81) 325.

and challenging deeply embedded assumptions surrounding pregnancy. It aims to demonstrate that before addressing and tackling issues arising from the practice of surrogacy we must first consider and establish how pregnancy, and subsequently surrogacy, are understood. This in turn relies on the exact view of pregnancy that is adopted and believed. The application of a metaphysical lens is not necessarily in order to arrive at a definitive conclusion about the nature of the maternal-foetal relationship but rather to enrich and advance our understanding of this relationship when examining the legal and ethical questions surrounding surrogacy. In other words, it is the ways in which the exploration of the metaphysics of pregnancy can add to, enhance, and inform our knowledge when assessing the legal reforms of the practice of surrogacy.

It is important to note that the position taken here is that pregnancy and the relationship between the pregnant woman and the foetus is unique, and therefore unlike any other state or relationship. This is equally true when attempting to characterise and categorise the nature of surrogacy because it is not like any other form of ‘work’, and therefore does not fit neatly and easily into pre-existing concepts of labour.⁶⁹¹ As very few, if any, other jobs require a 24/7 engagement for nine months with little or no means of resigning after a certain point.⁶⁹² Even other types of care work, which might align most closely to surrogacy, do not involve the same level of intensity and invasiveness. In Chapter 4 I explained how the unique nature of the work requires appropriate working conditions that are tied to and reflect the level and intensity of the risks and demands involved and that it is the role of the regulation to ensure these necessary provisions. It is also pertinent and relevant here to question whether the nature of the maternal-foetal relationship changes in a surrogacy pregnancy, and in such a way that the pregnant woman is treated differently and has different duties and obligations toward

⁶⁹¹ As expressed by Nivedita Menon quoted in the previous chapter. In the surrogacy arrangement the woman is both raw material and worker making the nature of the work unique. I add to this and analyse how she is also the ‘machine’. Marwah and Nadimpally (n 485) 212–213.

⁶⁹² While the nature of the agreement will dictate some of these conditions this point is referring to the conditions of the law surrounding abortions.

the foetus. In the following chapter I will explore this further through aspects of the practice in India and with reference to the experiences of women in India through the interviews conducted by ethnographers.

5.1.1 Chapter Outline

I will begin by constructing a definition of the foetal container model through an exploration of the metaphysics of pregnancy and the language used to describe this phenomenon. Then I will illustrate how this view of pregnancy is implicitly presupposed and assumed in the practice of surrogacy, and the approaches to its regulation in India. In Chapter 6 I will investigate the extent to which this model of pregnancy is operating in the legislative reforms and the paralegal debates presented and discussed in Chapters 3 and 4. Furthermore, I will show how surrogacy relies on and reinforces this model of pregnancy which can work to facilitate the harms sustained by the surrogates. Finally, I will present and evaluate an alternative view of pregnancy, which is the parthood view.

5.2 What is the foetal container model?

A foetal container view of pregnancy relies on the belief or assumption that the foetus is contained within the body of the pregnant woman but not part of it, and that subsequently the woman and foetus are two (completely) separate entities. This model sees the foetus as a self-standing organism, that is surrounded by (but not part of) the pregnant woman, such that the pregnant woman is a foetal container.⁶⁹³ Or that pregnancy is merely a state of containment. There are different ways of interpreting this view; one is through metaphysics, which examines the nature of the world. However, a purely metaphysical interpretation does not tell us anything about how this view operates within different cultures and societies, as it is solely concerned with the reality of the relationship between

⁶⁹³ By this I mean in relation to the foetus and not a global claim about the nature of the woman or women in general. Suki Finn discusses some of these ideas in her piece Suki Finn, 'Bun or Bump? Does the Mother Contain the Foetus or Is It a Part of Her? On the Metaphysics of Pregnancy, and Its Ethical Implications' (*Aeon*, 27 July 2017) <<https://aeon.co/essays/is-the-mother-a-container-for-the-foetus-or-is-it-part-of-her>> accessed 30 July 2017.

the pregnant woman and the foetus. To further clarify, it is not a moral or ethical claim. To state that the pregnant woman is a ‘foetal container’ in metaphysical terms is not to suggest that that is *all* she is because she is clearly first and foremost a human being. It is a metaphysical claim about her mereological⁶⁹⁴ or topological relationship to the foetus during pregnancy, and within this metaphysical claim there are a number of different questions about the nature of pregnancy, the nature of women, and the nature of foetuses. For instance, claims about the nature of women are not the same as claims about the nature of women during pregnancy as they do not intend to reduce women to their biological and reproductive potential. How we determine the relationship between the foetus and the pregnant woman will have consequences for how we approach the regulation of the practice of surrogacy.

This thesis extends this metaphysical interpretation into cultural understandings of pregnancy to demonstrate how this container view of pregnancy is operating within the practice and regulation of surrogacy. How this view then works to influence the treatment of women during pregnancy and surrogacy arrangements will be dealt with in greater detail in the following chapter with reference to ethnographies conducted in India and the legal reforms to the practice.⁶⁹⁵ There are numerous ethical questions to explore in relation to the issues arising from surrogacy in India that have been raised in the previous chapters of this thesis. A distinction will be drawn here between what can be categorised as a metaphysical claim about pregnancy, which will hereafter be termed the ‘containment view’⁶⁹⁶ and the cultural understanding, which will be referred to as the ‘foetal container model.’ This distinction is relevant to the discussion here because as previously explained a purely metaphysical view is not a moral or ethical claim about the nature the individuals or entities involved in the pregnancy or about a cultural understanding or social practice. The metaphysical ‘containment’ view

⁶⁹⁴ Mereology is the nature of part-whole relations.

⁶⁹⁵ The term ‘foetal container’ has been used by others precisely to describe how women are treated during pregnancy particularly in the medico-legal context. See Annas (n 475); George J Annas, ‘Protecting the Liberty of Pregnant Patients’ (1987) 316 *North England Journal of Medicine* 1213; Purdy (n 475).

⁶⁹⁶ For a detailed discussion on the containment view see, Kingma, ‘Were You a Part of Your Mother?’ (n 86) 613–621.

has however influenced cultural conceptions of pregnancy, social and legal practices, and approaches to pregnancy and surrogacy especially when it is implicitly assumed as *the* view or understanding, as will be demonstrate throughout this chapter.

Laura Purdy in her 1990 article asks the question '[a]re pregnant women fetal container?', she answers in short in the opening sentence that 'yes, pregnant women are fetal containers.'⁶⁹⁷ She explains that they are insomuch that 'they have fetuses in their bodies.'⁶⁹⁸ However, as she elaborates, that is not the key issue but rather it is the implication of such a view that reduces women to 'nothing but cheap clay pots supporting infinitely precious flowers.'⁶⁹⁹ The implications and consequences of this position will be explored in greater detail later in this chapter. In the very next paragraph Purdy offers a contradictory statement, which is greatly relevant to this work that explores alternative views and models of pregnancy. She proposes that '[w]omen carry fetuses in their bodies, it is true. It is equally true, however, that fetuses are part of women's bodies.'⁷⁰⁰ A definitive answer to this question is not important for Purdy, but rather it is the consequences that follow from these positions.

The following case provides an example of how models of pregnancy are operationalised in the legal context, and furthermore, the law's inability to account for the intertwined nature of pregnancy. Karpin refers to the case of *Lynch v. Lynch and Another*⁷⁰¹ where the court held that the child had the right to sue the mother for injuries sustained during a car accident when the child was still a foetus. Karpin explains that the rationale of the decision hinged on the ability to simultaneously hold that the mother and foetus are separate; enough to assign legal personhood in the case of negligence and, as she expresses, 'power in the form of legal sovereignty against the mother.'⁷⁰² Yet, also fundamentally

⁶⁹⁷ Purdy (n 475) 273.

⁶⁹⁸ *ibid.*

⁶⁹⁹ *ibid.*

⁷⁰⁰ *ibid.*

⁷⁰¹ A.T.R. (CCH) 81-117, at 69,090 (1991) (Austl.)

⁷⁰² Karpin (n 81) 329.

connected, and therefore not entirely separate, as the injuries were sustained ‘through’ the mother’s body. Karpin proclaims that here the inseparability is ‘[t]o [the] extent [that] she is the fetus.’⁷⁰³

An investigation into the nature and different possible views of pregnancy provokes many questions regarding the nature of the relationship between the pregnant woman and the foetus. On a metaphysical level, such questions involve a mereological exploration to determine whether the pregnant woman and the foetus are entirely separate entities, or if the foetus is in fact a (proper) part of the pregnant woman, or alternatively if this changes and transforms as the foetus develops. It is on this question concerning the relationship between parts that the alternative view of pregnancy, that will be presented later in this chapter, challenges the foetal container model, through adopting an opposing mereological position. The ‘parthood’ view, as the name suggests, claims that the pregnant woman and foetus are not two completely separate entities but rather that the foetus is a part of the pregnant woman. This challenge to the dominant containment view of pregnancy is conducted in part through exploring the maternal-foetal relationship on the biological and physiological level. The aim of investigating these different views of pregnancy is to uncover what is hidden in our conceptualisation of pregnancy and to reveal the consequences that the received view of pregnancy has on the treatment of the pregnant woman. In terms of the case study of this thesis it is also to analyse how this view of pregnancy impacts the treatment of surrogates in the practice and regulation of these arrangements in India. Subsequently, the adoption of a different model of pregnancy will also have an impact on how the nature of the transaction or exchange involved in a surrogacy arrangement is perceived and characterised i.e., does it become a sale or donation of a body part? The next section will begin by tracing the origins of the foetal container view.

⁷⁰³ *ibid.*

5.2.1 The origins of the foetal container view

The foetal container view of pregnancy can be found in or rather constructed from the writings of Aristotle, although he did not explicitly refer to it as such. According to Aristotle's view, the female body merely provides the environment for the male 'seed' to grow, and it is passive in contrast to the active and effective male.⁷⁰⁴ In his work *On the Generation of Animals* Aristotle explores the contributions of the male and female to the creation of a new being. He is clear that it is the male who contributes the form of the new individual, and asserts that:

If, then, the male stands for the effective and active, and the female, considered as female, for the passive, it follows that what the female would contribute to the semen of the male would not be semen but material for the semen to work upon. This is just what we find to be the case, for the catamenia⁷⁰⁵ have in their nature an affinity to the primitive matter.⁷⁰⁶

We can conclude that for Aristotle the male provides the form of the individual and the female is the environment for that to take shape. What is meant by 'active male' and 'passive female' in relation to the notions of 'the seed' and 'the environment' is that the 'seed' brings the essence and acts upon the 'matter' in the environment by imposing the 'form' onto it to create the substance of the new being. While, according to this view, the female contributes to the creation of the new being through providing the matter it is not considered particularly interesting and remarkable or 'active' in the same sense of the male and is subsequently seen as effectively fungible (interchangeable). For this conceptualisation of pregnancy, it is the contribution of the male that make things as they are and as a result is dominant. This view of the female's contribution begins to construct the image of the female as a passive container, which is also found in the cultural understandings of pregnancy presented in this chapter. Vora claims that 'the socially embedded notion of the passive femininity of pregnancy' facilitates us in imagining an artificial uterus for gestating a human embryo and by extension enables

⁷⁰⁴ Aristotle, 'On The Generation of Animals' in Richard McKeon (ed), Arthur Platt (tr), *Basic Works of Aristotle* (Random House 1941) 675. *ibid* 676.

⁷⁰⁵ By this term Aristotle is describing females in reference to menstruation.

⁷⁰⁶ Aristotle (n 704) 657.

‘the logic of renting the uterus of a female human being for the same purpose.’⁷⁰⁷ There is evidence in Pande’s studies of this view that sees the pregnant woman as a passive environment and separate from the foetus when she documents clinic staff claiming that ‘the surrogates are merely a vessel.’⁷⁰⁸ The language used by the clinic staff will be returned to and discussed at greater length later in this chapter.

This duality of ‘active male’ and ‘passive female’ has been powerful and pervasive throughout the history of Western philosophy and Aristotle’s thinking continues to extend into contemporary understandings or conceptualisations of the female and the pregnant body. A notable example exists in the story of the creation of Jesus Christ, where Mary through a virgin birth bears the son of God. Mary provides the ‘environment’ for the ‘form’ given by God to take material shape. It has been established through scientific discoveries that both the female and male contribute an equal amount of nuclear genetic material, which determines the characteristics of the offspring.⁷⁰⁹ The notion of the ‘male seed’ and the essence and form has been replaced with this knowledge of genetic material and significantly the discovery of the female egg. Yet, this early conceptualisation of the female as the environment for the developing ‘male seed’, with the addition of several biblical stories of conception and those found in Indian mythology, persists, and has formed and shaped the dominant view of pregnancy that gives rise to the foetal container model. Here, the female is ‘the container’ for the developing foetus. Although now it is understood that the male and female contribute equally to the ‘seed’ after conception the female is still considered a (mere) container. Rothman argues that modern technology has forced us to recognise the egg as a seed as well, where the importance of the seed, a central concept in patriarchy, is extended to women and thus modifying a system of ‘women’s “rights”’

⁷⁰⁷ Vora, ‘Re-Imagining Reproduction: Unsettling Metaphors in the History of Imperial Science and Commercial Surrogacy in India’ (n 217) 92.

⁷⁰⁸ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 132–135.

⁷⁰⁹ For more discussion on the legacy of the ‘male seed’ in conception see, Rothman, ‘Motherhood: Beyond Patriarchy’ (n 158) 482–483. See also Rothman, ‘The Legacy of Patriarchy as Context for Surrogacy: Or Why Are We Quibbling Over This?’ (n 480); Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (n 478).

to their children [that] are based on the unique relationship of pregnancy.’⁷¹⁰ Rebecca Kukla discusses how philosophers over millennia have applied ‘passive receptable imagery’ to pregnancy but argues that the understanding of pregnancy as a passive process has been transformed into ‘work’ that involves the carefully designed cultivation and growing of the foetus under a regime of self-discipline and self-management mediated through medical authority and the public sphere.⁷¹¹ This observation is particularly relevant to the context of commercial surrogacy arrangements in India, which I will return to in Chapter 6. What Aristotle’s writings offer is a metaphysical view of pregnancy and one that has been influential in shaping how pregnancy has been understood.

This is especially so in the thinking surrounding gestational surrogacy, where embryos created from the genetic material of the intended parents are implanted in the surrogate. The embryos are conceptualised as already ‘complete’ and pre-determined by the genetic material and are therefore only in need of a site or environment for nourishment and growth. The embryos are also considered the property of the intended parents through the genetic link. This view requires and reinforces the foetal container model of pregnancy and is explicitly evident in the practice of surrogacy and approaches to its regulation in India. In the background notes to the Surrogacy (Regulation) Bill, 2019 the Department of Health Research, who are responsible for drafting this piece of legislation, describe surrogacy as ‘an arrangement where a woman (the surrogate) offers to carry a baby through pregnancy on behalf of a couple and *then return the baby* to the intended parent(s) once it is born.’⁷¹² Surrogates are clearly told that the baby is not theirs and that they are only taking care of it until it is returned to the ‘rightful owners’. Surrogates are very aware of this as observed by Pande and as seen in this quote

⁷¹⁰ Rothman, ‘Motherhood: Beyond Patriarchy’ (n 158) 483. See also Barbara Katz Rothman, ‘Reproductive Technologies and Surrogacy: A Feminist Perspective’ (1992) 25 Creighton Law Review 1599.

⁷¹¹ See, Rebecca Kukla, *Mass Hysteria: Medicine, Culture, and Mothers’ Bodies* (Rowman and Littlefield 2005) 134. Susan Feldman argues that pregnant women have been taken as passive and undergoing a process out of their control and suggests that they should see pregnancy as an active process of ‘growing’ a baby. See, Susan Feldman, ‘From Occupied Bodies to Pregnant Persons’ in Jane Kneller (ed), *Autonomy and Community: Readings in Contemporary Kantian Social Philosophy* (State University of New York 1998).

⁷¹² Department-related Parliamentary Standing Committee on Health and Family Welfare (n 674). Para 1.5. [emphasis added].

from one of the surrogates called Hetal: ‘We know the baby is not ours; they are investing so much money, on my food, my medicines. *It’s their property.*’⁷¹³ This phrasing by the Department of Health Research also works to draw some kind of equivalent status between an embryo and a baby, at least in the sense that the embryo is seen as identical to the later baby and by being considered an already ‘complete’ and pre-determined individual. It seems bizarre to describe the process of a surrogacy pregnancy arrangement as the return of a baby that did not exist before the pregnancy. By this description, the fact that the embryo is implanted into the body of a third party does not appear to interfere with the ownership rights, or confer them onto the surrogate,⁷¹⁴ as the intended parents maintain ownership throughout. It does force us to question if this understanding of ownership over the foetus can even stand at all, and to consider whether the foetal container model of pregnancy is facilitating it because would it stand with a view of pregnancy that sees the foetus as a part of the pregnant woman? It seems far more difficult to imagine and apply ownership rights over a part of another person’s body while it is still within that body. Therefore, we must conclude that it is a foetal container model of pregnancy that underpins the thinking that leads to the kind of description of surrogacy by the Department for Health Research.

5.2.2 Cultural understandings of pregnancy

In the previous section a distinction was drawn between what can be described as a purely metaphysical containment view and a cultural understanding of pregnancy that derives from this position. This next section will explore how the cultural and social understandings of pregnancy are created and have given rise to the foetal container model. Examples will be drawn from multiple sources to illustrate not only how pervasive the view is but how deeply it is presupposed in the ideas,

⁷¹³ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 282. [emphasis added]

⁷¹⁴ This is a tricky issue because the surrogate is expected to take care of the foetus as though it is her own only up to the point that it beneficial for the health and wellbeing of the foetus, but she must not form an attachment to the foetus in the same way as she would with a genetically related foetus that she would also raise as her own child.

understandings, and images of pregnancy. It will begin with an explanation of the use of metaphor and analogy and an exploration of the language used to describe pregnancy and surrogacy.

5.2.2.1 Metaphor, analogy, and imagery

Metaphors allow us to understand and experience one kind of thing in terms of another.⁷¹⁵ They work by relating these two worlds through highly sensory images, sounds and sensations, and as a result are more likely to embed into one's consciousness than abstract language and ideas. They do not only reflect thoughts and attitudes but also help to shape and frame them.⁷¹⁶ It is through an analysis of the metaphors used that we are able to explore beliefs, attitudes, and assumptions. An examination of the metaphors and imagery surrounding pregnancy is therefore not only illuminating but crucial in revealing the ideas held about the nature of pregnancy, and subsequently how the foetal container model operates within culture and society. In fact, it is through the use of metaphor and the imagery this use of language creates that the foetal container model is most often articulated. The view of pregnancy presented above, through the writings of Aristotle, is an example of a metaphor.

Analogies work much like metaphors in relating two things but by showing or highlighting their similarities for the purpose of providing an explanation or clarification. Metaphors, and analogies, are based on a 'structural alignment that allows the "jump" from one semantic field to another.'⁷¹⁷ The important aspect of (structural) alignment across domains that is relevant to the discussion here, is how the linking of the two domains can alter our views on either or both domains and enable inferences about the target domain.⁷¹⁸ That is to say that through metaphor and analogy new similarities are created. I employ this explanation to demonstrate how metaphors and analogies alter our understanding

⁷¹⁵ George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980) 5.

⁷¹⁶ Michelle LeBaron, 'Is the Blush off the Rose? Legal Education Metaphors in a Changing World' (2016) 43 *Journal of Law and Society* 144, 146.

⁷¹⁷ Angela Condello, 'Metaphor as Analogy: Reproduction and Production of Legal Concepts' (2016) 43 *Journal of Law and Society* 8, 13.

⁷¹⁸ *ibid* 14.

of certain ideas, attitudes, and behaviours. Relating to the discussion here on the views of pregnancy they are significant in terms of how they can give rise to the foetal container model of pregnancy. Phrases that describe the pregnant woman as ‘carrying’ the baby, and that surrogacy is ‘renting a womb’ are metaphors that strongly reinforce the containment view of pregnancy.

5.2.2.1.1 ‘A bun in the oven’ or ‘a tub of yogurt inside your refrigerator’?⁷¹⁹

Numerous idioms exist in the popular and common language used to describe pregnancy. A very well-known example used in the UK in the English language is ‘a bun in the oven’.⁷²⁰ This expresses the notion of the pregnant woman and foetus as separate and different types of entities. Where one entity is performing a particular and important function i.e., ‘baking the bun’. It also works to reinforce the idea that the ‘bun’ is the goal, and that the ‘oven’ is the instrument. Despite the extent to which the foetal container model and containment view of pregnancy is presupposed in our understanding and approaches to pregnancy there are very few examples where this conceptualisation is explicitly argued and supported. One example can be found in the work Smith and Brogaard who describe the maternal-foetal relationship as ‘tenant-niche’⁷²¹ and offer the analogy of the foetus being inside the woman in the same way as ‘a tub of yogurt is inside your refrigerator.’⁷²² This description of the maternal-foetal relationship establishes and reinforces the belief that the pregnant woman and foetus are two entirely separate and different entities. Where the pregnant woman provides the environment for the foetus and the foetus simply inhabits that space. A deeper analysis of the symbolism of this analogy leads us to understand the fridge as a container that performs a function but unlike the ‘oven’ that turns the ‘dough’ into a ‘baked bun’ the fridge operates to maintain or preserve the state of its contents. It is important

⁷¹⁹ Smith and Brogaard (n 79) 74.

⁷²⁰ There is evidence of the cross-cultural use of this type of metaphor where Ivry and Teman document an Israeli surrogate describing herself as an oven, that the ingredients are already mixed and that they just need to be heated up to become bread. See, Tsipy Ivry and Elly Teman, ‘Pregnant Metaphors and Surrogate Meanings: Bringing the Ethnography of Pregnancy and Surrogacy into Conversation in Israel and Beyond’ (2017) 32 *Medical Anthropology Quarterly* 254, 264.

⁷²¹ Smith and Brogaard describe a ‘niche’ as ‘a part of reality into which an object fits, and into and out of which the object can move.’ See Smith and Brogaard (n 79) 70.

⁷²² *ibid* 74.

to clarify here that the view held and defended by Smith and Brogaard is strictly metaphysical, and the analysis of the symbolism extracted from their choice of analogy was not necessarily intended. However, we can conclude with more certainty that they claim that the nature of the spatial or topological and mereological relationship between the tub of yoghurt and the refrigerator is exactly like that between the foetus and the pregnant woman.

5.2.2.1.2 Rooms and spaces

Another analogy employed by Smith and Brogaard is ‘an astronaut leaving her spaceship’⁷²³ but this time they use it as a means of describing birth. They argue that birth simply constitutes a change of environment. This claim will be interrogated further in the final section on an alternative view of pregnancy. The imagery that this analogy conjures up works as a powerful mechanism for creating and sustaining the foetal container view and can be located in other depictions of pregnancy, at least through similar conceptual metaphors. The analogy of the house and rooms, presented later, is further extended and merges with the notions and imagery of space and void. ‘The womb is just a room’⁷²⁴ is how Katrine Marçal interprets the infamous work of Swedish photographer Lennart Nilsson that graced the covers of *LIFE* magazine in 1965, in which a foetus appears to be floating freely in space.⁷²⁵ Nilsson had been experimenting with electron microscopes since 1953 and later published a book of the images called *A Child Is Born*, a project which had taken twelve years.⁷²⁶ Marçal proposes that chapter thirteen, of her work *Who Cooked Adam Smith’s Dinner?* is the place ‘*In which we see the uterus isn’t a space capsule*’, which I will discuss below. Alexander Tsiaras’ work *From Conception*

⁷²³ *ibid* 65.

⁷²⁴ Katrine Marçal, *Who Cooked Adam Smith’s Dinner?* (Portobello Books 2015) 148.

⁷²⁵ The images of this foetus as portrayed by Nilsson have been hugely influential with similar representations appearing in many contexts, e.g., 2001: *Space Odyssey* film, and thus turning the foetus into a recognisable visual identity and a type of icon.

⁷²⁶ Lennart Nilsson, *A Child Is Born: The Drama of Life before Birth in Unprecedented Photographs: A Practical Guide for the Expectant Mother* (Dell 1966).

to *Birth* very much follows the same aesthetic developed and engineered by Nilsson, of an embryo that develops into a free-floating foetus decontextualised and detached from the woman's body.⁷²⁷

Nilsson's images, which were of great interest to the public and led to eight million copies of the magazine being sold in the first four days, captured, and revealed in great and colourful detail the private and 'hidden' space shared by the pregnant woman and foetus. In these images the foetus has become detached and decontextualised. It is important to note that Nilsson used aborted fetuses, apart from in one case, and therefore almost all these photographs were only possible due to the fact that the fetuses were no longer within the women's bodies and the connection between the women and the fetuses no longer existed. He was not in fact depicting the inner world of the pregnant woman's body but rather trying to create that illusion, and in creating the images Nilsson was influencing how the relationship could be depicted and subsequently understood.

With the development and addition of the use of ultrasound scans it has become customary and common place to see the foetus in this way: free-floating and decontextualised. Margarete Sandelowski claims that 'fetal sonography depicts the fetus as if it were floating free in space: as if it were already delivered from or existed outside its mother's body.'⁷²⁸ In these grainy images the outer boundary of the pregnant woman's body is passed through and transgressed revealing the private space within, through focussing in the woman's body is blurred out and pushed into the void. Her body is rendered permeable and transparent. As such it can become a somewhat disembodied experience for the pregnant woman who is seeing the inside of her body captured on screen⁷²⁹ and subsequently she

⁷²⁷ Alexander Tsiaras, *From Conception to Birth: A Life Unfolds* (Doubleday Books 2002). A Ted talk of Tsiaras talking about the work and a film of the images can be found here Alexander Tsiaras, 'Conception to Birth -- Visualized' (*Ted*, December 2010) <https://www.ted.com/talks/alexander_tsiaras_conception_to_birth_visualized?language=en> accessed 17 March 2017. Alexander Tsiaras worked with Paul C. Lauterbur to develop MRI imaging.

⁷²⁸ Margarete Sandelowski, 'Separate, but Less Unequal: Fetal Ultrasonography and the Transformation of Expectant Mother/Fatherhood' (1994) 8 *Gender and Society* 230, 240.

⁷²⁹ Sandelowski talks of the strange situation pregnant women are in through seeing themselves 'inside out and from a distance.' *ibid* 239.

develops a third-person relationship to her insides.⁷³⁰ There has been much feminist critique of the effects of sonography that ‘open up’ the pregnant woman’s body as a spectacle for others,⁷³¹ how it can simultaneously work to enhance the non-pregnant partner’s experience of the pregnancy but attenuate the pregnant woman’s,⁷³² how it can disrupt the pregnant woman’s privileged relationship with the foetus,⁷³³ and worse still how it works ‘to make pregnant women so transparent as hardly to be seen at all.’⁷³⁴ Despite the shared effect and result of removing or reducing the pregnant woman’s presence ultrasound images are very different to those produced by Nilsson, not only in their aesthetic and the quality of detail, but because in the case of the ultrasound scans the foetus is still within the pregnant woman’s body. Ultrasound scans also render the inside of the pregnant woman’s body visible and open to inspection and intervention.⁷³⁵ The effect of which has been the increased surveillance and control over the pregnant woman in medical and legal contexts.⁷³⁶ Furthermore, it has created a two-patient model that transforms the foetus into a fully separate patient whose rights might conflict with those of the pregnant woman.⁷³⁷

Evoking the analogy by Smith and Brogaard, Marçal explains that in Nilsson’s images ‘the baby floats, [as] an independent astronaut...[whereas] the mother doesn’t exist. She has become a void...’⁷³⁸ Yet,

⁷³⁰ Kukla (n 711) 112.

⁷³¹ Rosalind Petchesky, ‘Fetal Images: The Power of Visual Culture in the Politics of Reproduction’ (1987) 13 *Feminist Studies* 263.

⁷³² Sandelowski (n 728) 231–232.

⁷³³ Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (n 478) 90.

⁷³⁴ Sandelowski (n 728) 240. For other works on the effects of sonography see, Lisa M Mitchell, *Baby’s First Picture: Ultrasound and the Politics of Fetal Subject* (University of Toronto Press 2001). And Janelle S Taylor, *The Public Life of the Fetal Sonogram: Technology, Consumption, and the Politics of Reproduction* (Rutgers University Press 2008). And Julie Palmer, ‘Seeing and Knowing. Ultrasound Images in the Contemporary Abortion Debate’ (2009) 10 *Feminist Theory* 173.

⁷³⁵ Kukla discusses the notion of ‘foetal perfectionism’, the recommendations for pregnant woman and how they are held responsible for wide ranging effects on the foetus: Kukla (n 711) 126. Rothman has argued that prenatal monitoring has worked to create a state of tentative pregnancy for the pregnant woman. See, Barbara Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* (Viking 1986). See also Rayna Rapp, *Testing Women, Testing the Fetus: The Social Impact of Amniocentesis in America*. (Routledge 1999).

⁷³⁶ George Annas talks of the implications of the law’s interference into the relationship between the pregnant woman and foetus. See, Annas (n 475); Annas (n 695). Also discussed by Kukla (n 711) 108.

⁷³⁷ There is a great deal of work on this but an early piece is by Susan Mattingly, ‘The Maternal-Fetal Dyad: Exploring the Two-Patient Obstetric Model’ (1992) 22 *Hastings Centre Report* 13. See also, Monica J Casper, *The Making of the Unborn Patient: A Social Anatomy of Fetal Surgery* (Rutgers University Press 1998).

⁷³⁸ Marçal (n 724) 148.

she asserts that this is merely a depiction and not reality. In fact, she proclaims that ‘few things could be further from the truth. The foetus grows out of the mother, in the mother and in constant contact with the mother...you can’t really tell where the mother ends and the foetus begins.’⁷³⁹ Marçal further states that Nilsson’s depiction was ‘dropped into our collective imagination and there it stayed.’⁷⁴⁰ Barbara Duden described Nilsson’s pictures as ‘part of the mental universe of our time.’⁷⁴¹ It is important to point out that Marçal is Swedish and Duden is German, therefore claims to a shared collective imagination can be and should be interpreted as being Western. It is of interest here whether this collective imagination can be located elsewhere and specifically in India.

5.2.2.1.3 Metaphors in everyday use

It is important to remember that metaphors and analogies are partial and imperfect; they do not tell the whole, or even an accurate, story and they can also work to (over) simplify complex ideas and phenomena. Yet, their use pervades our everyday language to such an extent that we become so accustomed to expressing ideas in this way that we do not even recognise that we are using metaphors at all.⁷⁴² As such, many commonly used metaphors become ‘unmarked’; where they are so embedded in our vocabularies that they pass unnoticed.⁷⁴³ These unmarked metaphors hiding in plain sight can operate in hegemonic ways and influence how certain ideas, beliefs, and experiences are framed and understood.⁷⁴⁴ They do this by establishing and maintaining a dominant system of ideas, values, and ethics. The significance of ‘marked’ and ‘unmarked’ metaphors and how they limit, restrict, and control the scope of understanding and progress will be explored in the following sections.

⁷³⁹ *ibid* 149.

⁷⁴⁰ *ibid*.

⁷⁴¹ Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn* (Harvard University Press 1993) 14. The influence of these images is also discussed by Kukla, see Kukla (n 711) 112.

⁷⁴² See Lakoff and Johnson (n 715) 5–6.

⁷⁴³ LeBaron (n 716) 146.– quoting Lakoff and Johnston.

⁷⁴⁴ *ibid* 150.

George Lakoff and Mark Johnson explain in their work *Metaphors We Live By* that while most people think of metaphor as ‘a device of poetic imagination and the rhetorical flourish’ they are in fact ‘pervasive in everyday life, not just in language but in thought and action.’⁷⁴⁵ The significance and power of metaphor, in its everyday use, is not that it simply offers a comparison for something else it is through the ways in which it becomes a substitution.⁷⁴⁶ As seen in the metaphor of ‘a bun in the oven’ offered above. The metaphors and imagery that shape and underpin the foetal container model view of pregnancy rely on whether and how we take phrases like ‘a bun in the oven’ to offer an accurate or appropriate comparison and so much so that they become a substitution for describing and understanding the phenomenon. The use of the phrase ‘a bun in the oven’ is so commonplace that this metaphor has become unmarked. It passes unnoticed and continually re-establishes this container view of pregnancy. This aspect of how metaphors operate, by becoming substitutions and unmarked, is important and relevant to the discussion in this chapter as we will see in more detail when the metaphors used in the practice of surrogacy are examined.

According to Lakoff and Johnson conceptual systems govern the way we think and act in our everyday lives and are fundamentally metaphorical.⁷⁴⁷ These concepts influence what we perceive, how we operate in society, and how we relate to other people.⁷⁴⁸ As we go about our daily lives, we are largely unaware of these conceptual systems and how they are influencing our thoughts and actions. One way in which we can uncover them is to look at language, because communication is based on the same systems that influence and determine our thoughts and actions. Language then provides the evidence for these conceptual systems. What is meant here is that metaphors are not simply a matter of language but that thought processes are metaphorical in nature. Thoughts and experiences are expressed through metaphors precisely because they already exist as metaphors in a person’s conceptual system. If almost

⁷⁴⁵ Lakoff and Johnson (n 715) 3.

⁷⁴⁶ David Gurnham, ‘Law’s Metaphors: Introduction’ (2016) 43 *Journal of Law and Society* 1, 1.

⁷⁴⁷ Lakoff and Johnson (n 715) 3–6.

⁷⁴⁸ *ibid.*

anything and everything can be expressed metaphorically then the challenge is uncovering which metaphors are most pertinent, influential, and problematic. An analysis of ‘marked’ and ‘unmarked’ metaphors, in other words the metaphors that are noticed and those that are not, would aid this exercise.

5.2.2.1.4 An example of a common (unmarked) metaphor

If we take for example the very well-known and frequently used metaphor in English ‘time is money’ we can begin to understand how this metaphor influences and structures our perception and actions. Phrases such as ‘you are wasting my time’, ‘I invested a lot of time’, ‘you are running out of time’, and ‘thank you for your time’ reveal how time is perceived and experienced i.e., as a valuable commodity and limited resource. Time can be spent, wasted, or invested. Another way in which ‘time is money’ is experienced is in relation to work, this is particularly true in industrialised societies where it is common practice to pay people by the hour, the week, or the month. If time was not metaphorically equated with money, then we would perceive it differently and then experience it differently. There are cultures where time is not conceptualised through this capitalistic lens and therefore not experienced in this way.⁷⁴⁹

5.2.2.2 The ‘seed’ and the ‘soil/earth/field’ metaphor and imagery in India

There are, however, some cross-cultural metaphors which appear to be pervasive and widespread, such as those used to describe and understand a particular conceptualisation of reproduction. They evoke the Aristotelian view of pregnancy and employ the same conceptual metaphors of the ‘male seed’ and ‘female environment’. This notion of the ‘male seed’ and ‘female environment’ is therefore not exclusive to Western thinking as the very same metaphors are used in South Asia. An analogy based on the metaphors of ‘seed’ and ‘earth’ can be found in the ancient Hindu text of *Garuda Purana*: ‘The

⁷⁴⁹ For more on this see *ibid* 7–9.

husband who put his semen into his wife, is indeed a farmer sowing his ground.’⁷⁵⁰ Anthropologists studying different societies and cultures across South Asia, and particularly in India, observe that ‘the contributions of mother and father in biological reproduction are expressed in terms of body fluids—semen, blood and milk.’⁷⁵¹ Kamala Ganesh claims that the metaphor of the ‘seed’ and ‘field/earth/soil’ for the respective contributions of the male and female to reproduction continues to be widespread and deep-rooted in contemporary India.⁷⁵² Pushpesh Kumar claims that it pervades everyday use to the extent that it is used as a ‘paralegal reference point during family crises – death, divorce and property divisions.’⁷⁵³

Kumar further explains that, as follows in Aristotle’s view, ‘[t]he ‘seed’ contained in semen is the essence for the creation of offspring’ and importantly in Ayurveda understanding, the indigenous system of medicine in India, ‘semen is understood as derived from blood.’⁷⁵⁴ The contribution of the male is elevated by this understanding and association because blood plays a central role in forming kinship ties in India and in patrilineal communities it is exclusively passed along the male line. Leela Dube in *Anthropological explorations in gender: Intersecting fields* proposes that the cultural understandings surrounding the maleness and femaleness of blood can explain a great deal about patriliney.⁷⁵⁵ As it is believed that the blood line stops with the female child it is therefore only the male and not the female who shares their blood with the offspring. The male can transmit the same blood line to the next generation but the female has ‘to join a man of another blood line and produce children

⁷⁵⁰ *Garuda Purana* II: 32.17, in Filippi 1996: 39 quoted in Monika Böck and Aparna Rao (eds), *Culture, Creation, and Procreation: Concepts of Kinship in South Asian Practice* (Berghahn Books 2001) 8.

⁷⁵¹ Pushpesh Kumar, ‘Gender and Procreative Ideologies among the Kolams of Maharashtra’ (2006) 40 *Contributions to Indian Sociology* 279, 280.

⁷⁵² Kamala Ganesh, ‘Maps for a Different Journey: Themes in the Work of Leela Dube’ in Leela Dube (ed), *Anthropological explorations in gender: intersecting fields* (Sage Publications 2001) 21.

⁷⁵³ Kumar (n 751) 281–282. See also, Ganesh (n 752).

⁷⁵⁴ Ganesh (n 752) 281.

⁷⁵⁵ Leela Dube, *Anthropological Explorations in Gender: Intersecting Fields* (Sage Publications 2001) 21.

for him.⁷⁵⁶ Others have observed that in patrilineal cultures where the blood is defined as male the ‘women are expected to behave like “earth”, as the mere receptacles of male seed...and give back the fruit, preferably male children.’⁷⁵⁷ As a result, women are seen to play a passive role in this process and as Dube expresses a woman is limited to ‘augment[ing] what the womb has received through her own blood which provides warmth (incubation) and nourishment...’⁷⁵⁸ Other anthropologists have remarked that in classical Hindu and Buddhist theory the ‘woman is the mere “field” in which the seed is sown, not an active partner in the process.’⁷⁵⁹ These views are not limited to Hindu and Buddhist theories as the same are found in Islamic texts.⁷⁶⁰

Pande also attests that in the textual and oral traditions of India there is a greater emphasis on the father’s contribution.⁷⁶¹ She also observed a surrogate using the word ‘seed’ in their understanding of the process. Parvati says, ‘The small seed swells up like this [she mimics a balloon being inflated by a pump] and in nine months is ready to be out.’⁷⁶² However, in her conversations with the surrogates we can see how this is often resisted and reimagined through the way they see their blood as creating and nourishing the foetus they are gestating for someone else.⁷⁶³ They also remark on and emphasise the absence of the male/father in the process because of their understanding that the pregnancy occurs

⁷⁵⁶ Leela Dube, ‘Seed and Earth: The Symbolism of Biological Reproduction and Sexual Relations of Production’ in Leela Dube, Eleanor Leacock and Shirley Ardener (eds), *Visibility and Power: Essays on Women in Society and Development* (Oxford University Press 1986) 22.

⁷⁵⁷ Kumar (n 751) 281. Kumar Pushpesh, ‘Gender and Procreative Ideologies among the Kolams of Maharashtra’ (2006) 40 *Contributions to Indian Sociology* 279, 281. See also, Lina Fruzzetti and Ákos Östör, *Kinship and Ritual in Bengal: Anthropological Essays* (South Asian Publishers 1984); TN Madan, ‘For a Sociology of India’ (1981) 15 *Contributions to Indian Sociology* 405; Claude Meillassoux, *Maidens, Meal and Money Capitalism and the Domestic Community* (Cambridge University Press 1981) 43.

⁷⁵⁸ Dube (n 756) 22.

⁷⁵⁹ Wendy O’Flaherty, *The Origins of Evil in Hindu Mythology* (University of California Press 1980) 29. See also, Dube (n 756). Hildegard Diemberger, ‘Blood, Sperm, Soul and the Mountain. Gender Relations, Kinship and Cosmvision among the Khumbo’ in Teresa del Valle (ed), *Gendered Anthropology* (Routledge 1993) 108. And Kenneth David, ‘Until Marriage Do Us Part: A Cultural Account of Jaffna Tamil Categories for Kinsman’ (1973) 8 *Royal Anthropological Institute of Great Britain and Ireland* 521.

⁷⁶⁰ Böck and Rao (n 750) 7–8.

⁷⁶¹ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 271.

⁷⁶² *ibid* 279.

⁷⁶³ *ibid*.

through medicine.⁷⁶⁴ It should be noted that while in patrilineal communities the blood line flows through the male only the opposite is true in matrilineal societies.

If we take the Aristotelian view, that relies on the ‘seed’ and ‘soil’ metaphor, to provide the foundation for the foetal container model of pregnancy then based on these shared metaphors we can locate its existence in the social and cultural understandings of pregnancy and surrogacy in India and it can provide a useful framework for understanding Indian regulatory discourses. There is further evidence of this model of pregnancy and historical representations of surrogacy in ancient Hindu mythology meaning that it is not uniquely Western.

5.2.2.3 Historical representations of surrogacy in India

In Chapter 2 of this thesis the development of Assisted Reproductive Technologies and surrogacy in India was presented. Although IVF and gestational surrogacy were not possible until the technological advancements of the 1980s the notion of gestational surrogacy can be found in ancient Hindu texts and mythologies. The significance of the stories in the *Bhagavata Purana*⁷⁶⁵ surrounding Krishna’s relationship with his maternal figure Yashoda, the prevalence of iconography relating to him, and the story of Vishnu, Devaki and Rohini, which involves a depiction resembling that of gestational surrogacy were also introduced. Yashoda did not give birth to Krishna but raised and nurtured him as her own son, and their mother-son relationship is widely celebrated and captured in devotional songs, prayers, and paintings. Yashoda is held as the image of foster-mother and nurturer of someone else’s child. The story of Vishnu, Devaki and Rohini is closely related to Krishna because Rohini, through what could be loosely described as reflecting gestational surrogacy, gives birth to Balarama the elder brother of Krishna. Rohini is one of Vasudeva’s wives, he is also married to Devaki and both Vasudeva

⁷⁶⁴ *ibid* 283.

⁷⁶⁵ This is an ancient Indian text of Hindu mythologies. For a detailed analysis of the significance of this story see, Krishnan (n 162). See also Edwin F Bryant, ‘Krishna in the Tenth Book of the Bhagavata Purana’ in Edwin F Bryant (ed), *Krishna: A Sourcebook* (Oxford University Press USA 2007).

and Devaki are imprisoned by Devaki's brother Kansa because soon after Devaki and Vasudeva's marriage a divine prophesy predicted Kansa's death by Devaki's eighth son. All of Devaki's previous sons are killed but Vishnu on hearing Vasudeva's prayers transfers an embryo from Devaki's womb to Rohini's who then gives birth to Balarama.

The fact that these stories, involving the notion of surrogacy and the fostering, nourishing, and caring for another's child, surround central figures in Hinduism influences how the practice is perceived, at least in terms of maternal devotion and sacrifice. Pande observed that the surrogates were very aware of this tale and remarked that 'not surprisingly, the surrogates regularly invoke this particular mother-son relationship.'⁷⁶⁶ She also documented that there were pictures of Krishna hanging on the walls of the hostels.⁷⁶⁷ Even from this story of Rohini and Balarama we can see the notion and workings of the foetal container model where Vishnu simply transfers the embryo from one womb to another. When we return to the use of language in the practice of surrogacy, we can further see how the foetal container model is created and articulated through metaphor and analogy, and how they are effective and powerful in influencing perception and conceptual systems. The next section will examine how a housing analogy is applied to pregnancy and surrogacy.

5.2.2.4 Housing analogy

Another way of capturing how the foetal container model constructs this relationship is to employ a housing analogy, which understands the woman's body as a house, the womb as a room or the extension of the house and the foetus as a tenant in the room or extension. The housing analogy is essentially another way of describing, explaining, and understanding the foetal container model by offering a visual metaphor for this view of pregnancy. This analogy is drawn from the way that

⁷⁶⁶ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 164. The relationship of Yashoda and Krishna.

⁷⁶⁷ *ibid* 144.

descriptions of pregnancy are extended, adapted, and applied to the practice of surrogacy. It is particularly apt as housing terminology is often used to describe the relationship between the surrogate and the foetus, and her role. The terms ‘hosts’⁷⁶⁸ or ‘gestational hosts’ are frequently used to referred to surrogates.

The analogy of housing and the surrogate as a host can also be found during the interactions Dr Patel, who I presented in Chapter 2, has with prospective surrogates at her clinic in Anand as observed by Pande during her studies at the clinic. Pande documents Dr Patel explaining to the woman that ‘It’s not your baby. You are just providing it a home in your womb for 9 months because it doesn’t have a house of its own.’⁷⁶⁹ Dr Patel’s use of this analogy during the initial interaction is fundamental in framing the experience for the surrogate. Furthermore, this view of surrogacy as an act of housing is widely adopted at Dr Patel’s clinic as Pande also documented it being articulated by other employees. Vilma, who is a broker and hostel matron is quoted saying the following: ‘To convince the women I often explain to them that it’s like renting a house for a year. We want to rent your womb for a year, and Doctor Madam will get you money in return.’⁷⁷⁰ The use of the word ‘rent’ further establishes the association with housing; we rent a house or a space (and make use of the facilities). This is further illustrated by the fact that surrogacy is often labelled as ‘womb renting’. What is important to point out here is that Vilma, in her role as broker and hostel matron, would work very closely with the surrogates therefore her mode and frame of communication would be very influential in directing how the surrogates experience the arrangement. The use of this analogy is highly effective in controlling how the surrogates understand the arrangement because it offers a comparison that can be easily

⁷⁶⁸ The concept of a host can exist in relation to housing, in that you host someone at your house, but it also conjures up the image of a host/parasite relationship. This idea has been expressed elsewhere and is beyond the scope of this work. See, Judith Jarvis Thomson, ‘A Defense of Abortion’ (1971) 1 *Philosophy and Public Affairs* 47. The term ‘gestational host’ is the preferred term in the USA.

⁷⁶⁹ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 978. As explained in Chapter 2 that although Pande does not name Dr Patel directly it is clear that she conducted her study at her clinic.

⁷⁷⁰ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 140.

understood by them. The wider adoption by other clinic staff renders it an unmarked metaphor and if frequently used it would work to limit and restrict the scope of how surrogacy is understood.

Metaphors are also useful and powerful because they capture our attention by directing it to what is most important. In other words, they offer a fixed and focussed frame of perception.⁷⁷¹ However, they can in this same way function to conceal certain aspects by foregrounding others and are controlled by who decides what is most important. We can see in the examples from the language used by the clinic staff that they are dictating the narrative and therefore framing the experience. Yet, it is the capacity to capture and reveal what is most important that also makes the use of metaphor an effective means of articulating something that is almost inexpressible such as complex, painful, or traumatic experiences and experiences which are not widely shared.⁷⁷² They offer a mechanism for describing something unfamiliar through something familiar, tangible or common.⁷⁷³ Hence, why the housing analogy used by Dr Patel and her clinic staff is considered appropriate by them because a house is a concept that is familiar and tangible to the surrogates.

The capacity of metaphors and imagery to influence conceptualisations of pregnancy is also explored by Marçal when she considers why the depiction captured by Nilsson has been so appealing. Her analysis concerns the notion of ‘economic man’ and our fascination with the ‘individual’. Although she is making an argument about economics there is a great deal that is relevant here in terms of this depiction of the beginning of a human life. The human obsession with the individual and what that represents permeates every aspect of our existence. The problematic effect of Nilsson’s photographs arises because here ‘the foetus is a free individual, and the women’s body doesn’t exist. The mother is

⁷⁷¹ LeBaron (n 716) 148.

⁷⁷² Jeannette Littlemore and Sarah Turner discuss the use of metaphor by people who have experienced pregnancy loss. See, Jeannette Littlemore and Sarah Turner, ‘What Can Metaphor Tell Us about Experiences of Pregnancy Loss and How Are These Experiences Reflected in Midwife Practice?’ (2019) 4 *Frontiers in Health Communication* 1–17.

⁷⁷³ *ibid* 2.

a space that the foetus is renting.⁷⁷⁴ This description links to the housing analogy discussed above. In the case of surrogacy arrangements, it is not just the foetus who is seen to be ‘renting’ a space in the woman’s body, but the intended parents are as well. Another relevant aspect to Marçal’s analysis to mention here, of significance to the idea of the individual, is that the individual has categorically been understood as male. This is apparent through one of its most important characteristics, which is the indivisibility of the individual, and yet as she explains ‘half of humanity’s most significant distinguishing feature is precisely that it is divisible.’⁷⁷⁵ Contrary, to the belief that humans only formed societies because it occurred to us that having relationships with others would be beneficial for our survival, from our very beginning we exist in a relationship of dependency.

5.2.2.5 Machine/instrument

In the previous chapter I used the metaphor of the machine when discussing the unique nature of the work of surrogacy where the woman is the ‘raw material’, the ‘worker’, and ‘instrument’ that produces the end ‘product’. At the start of the discussion in this chapter on the idioms and the language used to describe pregnancy I explained how such phrases are employed to capture the process of pregnancy and that the woman’s body is seen as an instrument. Anthropologist Emily Martin also discusses the use of metaphors in medicine that conceive of the uterus as a machine and the pregnant woman as labourer who produces the baby.⁷⁷⁶ In the following chapter, I will evaluate how these constructions of the pregnant woman’s body as a foetal container contribute to mistreatment and harm in surrogacy arrangements, but I will briefly discuss here how the use of such metaphors are problematic. In analysing the words of Department of Health Research I revealed how gestational surrogacy, even more so than traditional surrogacy, creates a situation where the intended parents are seen to retain ownership over the embryo and the foetus during its gestation by the surrogate and how it continues

⁷⁷⁴ Marçal (n 724) 150.

⁷⁷⁵ *ibid* 154.

⁷⁷⁶ Emily Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* (Beacon Press 2001) 63.

to be considered their 'property'. However, there is another way to understand the concept property in this arrangement, which sees the surrogate herself as a 'piece of property' or more precisely as a 'rental space' or 'machine'. Rudrappa remarks that the elements of the practice that she witnessed demonstrated:

how women were converted into machines, explicitly describing the complete takeover of a surrogate mother's body, converting her into rental property to manage her fecundity, control her birthing processes through caesarian [sic] surgeries, and finally, regulate her body's ability to sustain life through lactation, harvesting her milk in order to bottle feed the very babies she had just birthed.⁷⁷⁷

There are numerous examples of housing and rental metaphors and analogies throughout the language used to describe surrogacy as I describe above. There are even frequent references in the parliamentary debates on the legislation. The terms 'rent-a-womb' or 'womb-rental' are commonly employed, predominantly by those who are opposed to surrogacy or at least to commercial surrogacy arrangements, I will return to discuss this further below. With the foetus considered as a 'temporary tenant' and the surrogate a 'rental space' it leads us to question how this framing of the relationship impacts on the surrogate's relationship with her own body, because it forces the illusion of a separation between the surrogate and her womb and attempts to deny the embodied nature of the experience. Hochschild also discusses the use of language by the clinic staff that reinforces the necessary emotional detachment from the foetus that the surrogates have to perform and how they should consider themselves as 'carriers' or 'prenatal babysitters', which she believes must be a difficult task in such a pronatalist culture.⁷⁷⁸ The analogy of the foetus renting a space links to Smith and Brogaard's metaphysical claims about the niche-tenant nature of the relationship. If we take this housing and tenancy analogy further, we can see that there are concerns about the characteristics and qualities of 'house' – evidenced in Dr Desai admission that it is the character of the womb they are interested in as quoted below. Conversely, Barbara an intended mother in *House of Surrogates* makes it explicit

⁷⁷⁷ Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (New York University Press 2015) 155.

⁷⁷⁸ Hochschild (n 189) 45.

while assessing the physical suitability of a prospect surrogate for her second arrangement that she is more comfortable with a Christian like her and that the woman ‘is a good enough size...if it was twins’ and then again ‘she is good and solid enough to handle. You know, some of the surrogates are so tiny, so petite and with our structures we like to make sure...’⁷⁷⁹ Barbara’s desire for a Christian surrogate reveals that she feels that the surrogate does influence the foetus in some ways, so she wants them to be aligned in terms of faith.

5.2.2.6 ‘Wombs-for-rent’: metonymy and synecdoche

In the previous chapter I drew attention to the use of ‘womb’ as a stand in for the surrogate and ‘womb rental’ as a description of surrogacy. I will now elaborate on the effects of this use of language and how it becomes examples of metonymy and synecdoche that are reductive, depersonalising, and even dehumanising. A metonym is a word, name, or expression that is used as a substitute for something else with which it is closely associated, e.g., Bollywood for the Indian film industry.⁷⁸⁰ A synecdoche is a figure of speech in which a part is made to represent the whole or vice versa, e.g., ‘my wheels’ to refer to my car.⁷⁸¹ The use of phrases such as ‘womb rental’, including several other of its variations, are found throughout the literature and journalistic reports on surrogacy. I noted in the previous chapter how it was used as the title for the segment on the Oprah Winfrey Show. It is also highly prevalent in the transcripts of the parliamentary debates on the legislation for surrogacy and ARTs, it appears in many of the questions submitted by MPs in the Indian Parliament,⁷⁸² and it can be found in the

⁷⁷⁹ *House of Surrogates* (n 29).

⁷⁸⁰ Metonymy definition: 1 The substitution of a word denoting an attribute or adjunct of a thing for the word denoting the thing itself, an instance of this. 2 A thing used or regarded as a substitute for or symbol of something else. *Shorter Oxford English Dictionary* (6th edn, Oxford University Press 2007) 1768.

⁷⁸¹ Synecdoche definition: A figure of speech in which a more inclusive term is used for a less inclusive one or vice versa, as a whole for a part or a part for a whole. *ibid* 3151.

⁷⁸² Rajya Sabha Debates, The Surrogacy (Regulation) Bill, 2019 369, 371-375 Session 250, 20 November 2019, Comments by Dr. Ameer Yajnik, Shree Veer Singh, Shri Kanakamedala Ravindra Kumar, Shi Binoy Viswam, LT. Gen (Dr) D.P. Vats (Retd) available at <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>.

committee reports on the Bills.⁷⁸³ Dr Ameer Yajnik an MP for Gujarat in her submission during the Rajya Sabha debates on the Surrogacy Bill, 2019 questions what kind of advertisement is being prohibited when ‘we already have a \$2bn economy of rent-a-womb or baby trade? We are calling them baby factories. My state is leading in that.’⁷⁸⁴ In her description and criticism of the surrogacy industry in India she repeatedly uses phrases such as ‘baby factories’, ‘rent-a-womb’, and ‘baby boom’ but argues that such words are derogatory to women. Other MPs frequently refer to surrogacy as ‘renting a womb’ or ‘hiring a womb’ but others even describe surrogates as ‘selling their wombs’ due to ‘utter poverty in the country’. One MP who supported the Bill, on the basis that regulation was needed to control the exploitation of women, described the Baby Manji case as ‘a Japanese couple hired a womb, got divorced and discarded baby and pregnancy!’⁷⁸⁵ Although this is not an accurate account of the case the most striking aspect to the description is that the surrogate is referred to merely as ‘a womb’. It seems that this language is used as a means of criticising surrogacy and the conditions of its practice rather than to deliberately disrespect and discount the full humanity of the surrogates. Yet, instead of referring to her as a full human being she is interchanged with her body part. Opponents of surrogacy, at least commercial surrogacy, might argue that this is in fact a consequence of the practice, where women are reduced to their reproductive capacities and no longer treated as full human beings. I would argue that it is also symptomatic of a wider trend in viewing pregnant women in terms of the function they perform during pregnancy and that it becomes even more explicit in surrogacy. The effects of referring to a surrogate as a womb is that she is seen as interchangeable with other women and therefore other wombs. It is no longer the person, and their unique characteristics, who is important but rather what a part of her body can provide. To refer to surrogacy as womb rental is to completely obscure the

⁷⁸³ The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019* Available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf accessed 28 September 2021.

⁷⁸⁴ Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 369, Session 250, 20 November 2019, *Comments by Dr. Ameer Yajnik* available at <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>

⁷⁸⁵ Rajya Sabha Debates, *The Surrogacy (Regulation) Bill, 2019* 375 Session 250, 20 November 2019, *Comments by (Dr) D.P. Vats (Retd)* available at <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>.

fact that the womb is part of the woman's body. A surrogacy arrangement entails more than the renting or hiring of a body part and as such this language works to erase the labour and investment made by the (whole) woman and deny her embodied experience. Vora also notes the way the surrogate's body is imagined as an empty space or an object separate from her body, and how phrases like 'womb-for-rent' are used interchangeably for the surrogate, such that she is erased as a medical subject other than as a 'gestational carrier' where decisions about her body are limited by the contractual restrictions.⁷⁸⁶ She further argues, by drawing on the work of feminist anthropologists and science studies scholars, that the 'metaphors through which we conceive of the body and its processes tie into the formation of social and power relationships. Technologies and their refiguring of bodies are never neutral, and in fact the metaphorising of the body embeds it with histories of power and invests it with empowered worldviews.'⁷⁸⁷ I will now explain why the foetal container model is relevant and instructive in analysing surrogacy.

5.3 Foetal container model in surrogacy

In the following chapter I will examine in detail how and to what extent the foetal container model is underpinning the approaches to the legal reforms in India, but in this section, I will argue why an analysis of this model is relevant to the practice of surrogacy. This thesis is concerned with the treatment of the women who agree to act as surrogate mothers for arrangements in India and how the Indian government has responded to the issues arising from the practice through legal reform. Chapters 2, 3, and 4 deal with some of the social, ethical, and legal challenges of the practice, including examples of the mistreatment of the surrogates, and offer a detailed examination of the legislation. While this section will explore and demonstrate how the foetal container model is relevant and problematic in the practice of surrogacy, it does not claim that it is the sole cause of all the poor treatment of the women

⁷⁸⁶ Vora, 'Re-Imagining Reproduction: Unsettling Metaphors in the History of Imperial Science and Commercial Surrogacy in India' (n 217) 93.

⁷⁸⁷ *ibid* 92.

and the neglect of their interests. It will argue that it does however facilitate and contribute to it. The foetal container model is operating with other factors such as the patriarchal control of women and their bodies, a history of coercive state policies on reproduction, discrimination on the grounds of gender, class, race, and caste, low levels of education, and limited economic options, as I discussed in detail in Chapter 4.

5.3.1 The foetal container model and its relevance to surrogacy

The foetal container model is relevant to the practice of surrogacy because it leads to assumptions about the nature of the practice and the role of the surrogate. These assumptions in turn influence how the practice is conducted, experienced, legally represented, and regulated. Viewing pregnancy as a state of containment allows us to see the foetus as an already self-contained individual that existed prior to implantation and who is simply ‘housed’ within in the surrogate. This view works to shift our focus towards the foetus and away from the woman gestating it, which in turn leads the surrogate and her contributions being rendered secondary and invisible. In some cases, this can lead to a conflict of interests between the foetus and surrogate, or other interested parties such as the intended parents, clinic staff, or doctors and the surrogate, and the reduction or removal of the surrogate’s rights and agency in decisions about the medical procedures and her healthcare. The foetal container model that views the foetus as merely being housed in the surrogate’s body enables the exertion of rights or says over the foetus by the other interested parties. This is because the model allows us to conceive of the embryo as transferrable from place to place without changing its nature, and while it is already considered to be the baby and continues to be ‘owned’ by the intended parents. The result of which is the reduction of the surrogate to her labour as a ‘service’ or ‘facility provision’.

Pande observed that the clinic staff regularly emphasised that the surrogates were considered merely vessels.⁷⁸⁸ To describe the surrogate as merely a vessel or incubator is dehumanising and, in this

⁷⁸⁸ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 134–135.

respect, we can see how it overlaps with the features of objectification, as I defined it in the previous chapter. It facilitates in undervaluing the surrogate's investment and the hard work she performs, and it also works to view her as fungible and disposable – only valuable until the baby is born and given to the intended parents. The unique characteristics of each individual woman are not seen as important when they are viewed as mere 'vessels' because in this case 'any (healthy) womb will do' as proclaimed by Dr Desai at the clinic in Anand; 'For the surrogates it's mostly the character of the womb we are interested in.'⁷⁸⁹ The disposability of the surrogates is evident from the fact that the baby is usually handed over to the intended parents immediately after the birth. It is also apparent in the cases of poor and inadequate aftercare that have resulted in the deaths of surrogates, as described in the key cases section of Chapter 3. The disregard for the surrogate's rights and interests is also clear from the conditions of the surrogacy contract, which is enforceable. They must submit to invasive procedures; blood tests, injections, foetal reductions, and C-sections and controlling practices such as a strictly prescribed diet and the requirement that they reside in the surrogacy clinic or hostel for the duration of the pregnancy. Although the main aim of the Surrogacy Bill is to eliminate the exploitation of the women who act as surrogates by criminalising commercial surrogacy and failing to acknowledge the other ways surrogates experience harm, it can in fact exacerbate the exploitation along the three strands that I defined in Chapter 4, through inadequate compensation and under accounting for the potential risks and complications of the procedures. This section has explained the relevance of the foetal container model of pregnancy in analysing surrogacy, the next section will explore an alternative view of pregnancy.

5.4 An alternative view: Parthood and the Part/Whole Model

The central question of this thesis considers whether a reconceptualisation of the nature of pregnancy and the maternal-foetal relationship is key to a better understanding of surrogacy and its regulation in

⁷⁸⁹ *ibid* 135.

India. In order to answer this, we must first explore what an alternative view of pregnancy would be and how it would look. In the introduction to this thesis and in earlier chapters the Part/Whole Model of pregnancy was introduced and presented. This alternative model relies on a parthood view of pregnancy, which is also a metaphysical claim that attempts to describe the reality of the maternal-foetal relationship.

5.4.1 What is the parthood view of pregnancy?

Now to return to the mereological question raised earlier in this chapter. This view of pregnancy developed and defended by Kingma proposes that ‘fetuses – just like kidneys, blood or hair – are a part of the maternal organism up until birth’.⁷⁹⁰ In other words, the pregnant woman includes the foetus as one of her proper parts. Therefore, they are not two distinctly separate entities, where one is surrounded by the other, but two non-separate entities where the woman is the whole and the foetus is one of many parts of that whole. Again, just as in the case of the containment view, the parthood view does not make any moral claims over the nature of the part/foetus. Parts differ; kidneys and hair are very different, and so are fetuses, which are neither like kidneys, nor like hair.⁷⁹¹ Consequently, the foetus can be held as a part with a special moral status. Kingma clarifies that the ‘part of’ claim is based on a common-sense understanding of part-whole relations and uses the examples of a kidney being part of a dog or an engine being part of a car.⁷⁹² Despite the dominance of the containment view and the foetal container model there are others who share a parthood view of pregnancy, such as Karpin who claims that ‘the woman's body is seen as neither container nor separate entity from the fetus. Until the baby is born the fetus *is* the female body. It is part of her body/self.’⁷⁹³ Iris Marion Young who

⁷⁹⁰ Kingma, ‘Lady Parts: The Metaphysics of Pregnancy’ (n 82) 167.

⁷⁹¹ Kingma, ‘Were You a Part of Your Mother?’ (n 86) 637.

⁷⁹² *ibid* 611.

⁷⁹³ Karpin (n 81) 326. [emphasis in the original] It should be noted that some may argue that there is a distinction between the notion of the ‘body’ and that of the ‘self’, and it appears here that Karpin is taking them to be the same thing. It is not clear that Karpin is making any greater claim other than that the body of the pregnant woman is connected to her sense of self.

talks of her child as once being a ‘part of me’⁷⁹⁴ and Mellor who claims that ‘severing a new-born child’s umbilical cord makes the child cease to be a part of its mother.’⁷⁹⁵ Drucilla Cornell, when commenting on ‘right-to-lifers’ who believe that pro-choice feminists have no concern for the foetus, explains that such a position relies on a foetal container model of pregnancy because she claims:

Explicitly or implicitly, this assumption demands a vision of the pregnant mother and her fetus that artificially separates the two. Without this view of the pregnant women and the fetus, it would be obvious that the “life” of the fetus was inseparable from the physical and mental well-being of the woman of whose body it is a part.⁷⁹⁶

Yet, the containment view and the foetal container model of pregnancy continue to be the received view. The absence of significant discussion on the maternal-foetal relationship reveals that this view is widespread and simply assumed.⁷⁹⁷

The containment view and the foetal container model, which hold that a foetus is merely contained within the pregnant woman’s body, may appear to be perfectly reasonable and logical, and hence its prevalence but this account relies on other significant questions and assumptions which the alternative view presented here challenges. One such question concerns when a human being/human organism comes into existence. Although a thorough exploration of this question is beyond the scope the thesis it does deserve some attention here as it is relevant to these models of pregnancy and is useful in exploring the distinct features of each model. Kingma in defending the parthood view of pregnancy explores this question in her work ‘Lady Parts: The Metaphysics of Pregnancy’⁷⁹⁸ and ‘Nine Months’.⁷⁹⁹ More precisely and crucially the question is whether human beings come into existence at birth or at some earlier defined point during gestation.⁸⁰⁰ In ‘Lady Parts’ Kingma explores two options;

⁷⁹⁴ Iris Marion Young, ‘Pregnant Embodiment: Subjectivity and Alienation’ (1984) 9 *Journal of Medicine and Philosophy* 45, 50.

⁷⁹⁵ DH Mellor, ‘Micro-Composition’ (2008) 62 *Royal Institute of Philosophy Supplements* 65, 67.

⁷⁹⁶ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge 1995) 32. [emphasis in the original]

⁷⁹⁷ In Chapter 6 I will develop this with reference to discussion on theories of embodiment.

⁷⁹⁸ Kingma, ‘Lady Parts: The Metaphysics of Pregnancy’ (n 82).

⁷⁹⁹ Elseijn Kingma, ‘Nine Months’ (2020) 45 *Journal of Medicine and Philosophy* 371.

⁸⁰⁰ Smith and Brogaard (n 79) 69.

either humans come into existence at birth or they exist prior to birth which means that they can be a part of another human.⁸⁰¹ Tied into this question is another regarding whether the developing foetus can be classified as a human being, based on a set of characteristics held to define human beings. These questions will be explored in further detail in the following sections. In explaining the parthood view of pregnancy Kingma uses the term ‘gravida’ for the ‘pregnant organism’⁸⁰² and ‘foster’ for anything that the gravida can be pregnant with from early embryo to full-term foetus.⁸⁰³ She also clarifies that this view of pregnancy can apply to all placental mammals.⁸⁰⁴

5.4.2 Features of the parthood view of pregnancy

First and foremost, can a human being be a part of another human being?⁸⁰⁵ If we conclude that it cannot, do we simply accept the containment view of pregnancy? Or if we accept the parthood view of pregnancy⁸⁰⁶ does it then direct us to question whether we consider a foetus to be a human being? These questions will be unpacked further below. While Kingma explores in detail different ways we can consider how the foetus is a part of the pregnant woman, by drawing in large part on the physiological and biological processes involved in pregnancy, the following sections will focus largely on the criterion of topological continuity and connectedness. The other criteria Kingma explores, in her work ‘Were You a Part of Your Mother? The Metaphysics of Pregnancy’, include homeostasis and physiological autonomy, metabolic and functional integration, and immunological tolerance.⁸⁰⁷ Kingma argues that these features combined provide a strong case for the parthood model especially as they all change at birth; the topical connection ceases, the baby is no longer in direct contact with

⁸⁰¹ Kingma, ‘Lady Parts: The Metaphysics of Pregnancy’ (n 82) 167.

⁸⁰² The term ‘pregnant woman’ will be used here to avoid the need to explain and define complex distinctions in terminology unless quoting or referencing directly.

⁸⁰³ Kingma, ‘Were You a Part of Your Mother?’ (n 86) 611.

⁸⁰⁴ *ibid* 610.

⁸⁰⁵ Assuming that we believe foetuses to be human.

⁸⁰⁶ That the foetus is a part of the pregnant organism.

⁸⁰⁷ Kingma, ‘Were You a Part of Your Mother?’ (n 86) 633 and 636.

the maternal immune system and it is its own physiological, homeostatic, and metabolic unit.⁸⁰⁸ Considering the spatio-temporal boundaries between the pregnant woman and the foetus is an effective way to visualise and conceptualise the differences between the parthood and containment views. This aspect is also useful when applied to surrogacy pregnancies which, as is argued here, are often and widely conceptualised in terms of containment, i.e., a genetically unrelated embryo, and therefore a self-standing and already separate entity, is placed inside the surrogate to gestate as opposed to a view that sees the developing foetus as being a part of her.

To answer whether a human can be a part of another human we need to establish what we consider a human to be, and then whether foetuses fall into that category. If we take every cohesive clonal product of a human zygote to be a human then the foetus is human.⁸⁰⁹ This view forces us to shift our thinking away from rigid notions of humans that rely on a type of ‘standardised’ adult human, because even if adult humans are not part of other humans, it does not mean that some humans are not or cannot be at some point. Humans are seen as self-standing individuals, and it is precisely this understanding of humans that contributes to the way the foetus is conceptualised in the foetal container model.

A major challenge with the attempts to define the maternal-foetal relationship is the reliance on and the adoption of constructions and notions that were developed and established outside of the context of pregnancy and without pregnancy in mind, which make them somewhat ill-fitted. As an example, we can take Katherine Hawley’s well-known work on maximality i.e., ‘no cat is a proper part of a cat.’⁸¹⁰ Briefly, the maximality principle limits the type of entity that can be a part of the whole to exclude the same type of entity as the whole. This principle claims that a thing cannot be a proper part

⁸⁰⁸ Elseijn Kingma, ‘Is the Fetus a Resident or a Body Part?’ (*OUP Blog*, 18 June 2020)

<<https://blog.oup.com/2020/04/is-the-fetus-a-resident-or-a-body-part/>> accessed 6 March 2021.

⁸⁰⁹ This is not to say that the foetus is a human being with full legal personality. The discussion here is within a philosophical context and not a legal one.

⁸¹⁰ Katherine Hawley, *How Things Persist* (Oxford University Press 2004) 166.

of the same type of thing, i.e., a cat cannot be a proper part of a cat and as follows in this context a human cannot be a proper part of a human. If the maximality principle holds then the parthood view would have to claim that the foetus is not the same type of thing as the pregnant woman. However, as Kingma argues, this principle was developed without the consideration that the cat could be pregnant. Pregnancy can therefore work as a counterexample when it is viewed within its own context and without the importation of and the reliance on principles or theories that have been designed and established without it in mind.

5.4.2.1 Topological connectedness and continuity

As suggested above, understanding the maternal-foetal relationship through exploring topological connectedness and continuity gives us the means and language to visualise and comprehend the nature of parts in this context. How do we understand the topological connectedness and continuity between the pregnant woman and the foetus? Perhaps this question can be asked in a different way – is there a clearly defined boundary between the two? Kingma convincingly argues and demonstrates that there is not. If we were to consider that there is a clearly defined boundary, where could it be drawn? Smith and Brogaard claim that the foetus is within the pregnant organism's body but that they are not topologically connected because the foetus has a 'complete, connected external boundary'.⁸¹¹ The following section will examine this claim.

In applying the substance metaphysics framework developed by Smith and Brogaard and their categorisation of organisms Kingma proposes three options in attempting to locate the boundary. Namely, (1) the future baby (meaning where the foetus comprises only the parts that emerge as the future baby e.g. skin) and stopping at the umbilicus or some way along the umbilical cord; (2) baby with placenta – includes 'future baby' plus umbilical cord and placenta, and (3) the chorionic content

⁸¹¹ Smith and Brogaard (n 79) 47.

– includes ‘future baby’, umbilical cord and placenta with the addition of the chorionic and amniotic membranes and all their contents.⁸¹² This follows on from Smith and Brogaard’s characterisation of the foetus and maternal organism as being in a tenant-niche relationship, which is defined by three features that they believe apply to foetuses; (a) they do not overlap or have parts in common, (b) they do not share an external boundary and (c) they must be separated from each other by some liquid or fluid-filled cavity.⁸¹³ They maintain that the foetus and maternal organism are in a tenant-niche relationship despite stating that a niche ‘is a part of reality into which an object fits, and into and out of which the object can move’.⁸¹⁴ Even a very basic understanding of pregnancy is sufficient to know that a foetus cannot be moved out of the pregnant woman’s body without major connections being severed and that birth is an irreversible process and state.⁸¹⁵ Another important aspect in the quest to locate a clearly defined boundary between the pregnant woman and foetus is the concept of fiat boundaries, which are boundaries that do not have physical discontinuities e.g., postal districts etc. Kingma’s rejection of Smith and Brogaard’s tenant-niche relationship claim involves demonstrating that for each explored possibility there is merely a fiat boundary and not a hard one. To summarise, in response to the above categories (1)-(3) Kingma concludes that (1) is an example of a fiat boundary as a hard boundary only exists after the umbilical cord is cut and until then it is an example of topological connection. In the case of (2) again there is no clearly defined boundary here because the placenta does not have a smooth surface but is made of both maternal and foetal tissue. It is another example of the topological connection between the foetus and pregnant woman. With regards to (3) the foetus still has a fiat boundary with the placenta which is part of the chorion.⁸¹⁶ To conclude, the foetus does not exist in the tenant-niche relationship with the pregnant woman as proposed by Smith and Brogaard

⁸¹² Kingma, ‘Lady Parts: The Metaphysics of Pregnancy’ (n 82) 171–172.

⁸¹³ Smith and Brogaard (n 79) 70.

⁸¹⁴ *ibid.*

⁸¹⁵ There have been reports of surgical procedures on foetuses with Spina Bifida that involve removing the foetus from the womb for the procedure and replacing it for the remainder of the pregnancy. See, Toyin Owoseje, ‘Baby Operated on Outside of Womb for Ground-Breaking Operation’ *Independent* (11 February 2019) <<https://www.independent.co.uk/news/uk/home-news/baby-operation-womb-mother-spina-bifida-bethany-simpson-a8774081.html>> accessed 25 September 2020.

⁸¹⁶ Kingma, ‘Lady Parts: The Metaphysics of Pregnancy’ (n 82) 173.

because features (a)-(c) do not hold; they share overlapping parts and an external boundary, and the foetus is not fully but only partially surrounded by a fluid-filled cavity. In fact, what makes a foetus unique and different to a baby is precisely the topological connections described here. Does it then follow that the foetus is a part of the pregnant woman? It is possible that an alternative account to Smith and Brogaard's, of the organism and the tenant-niche relationship, might be explored and defended but it is beyond the scope of this thesis to attempt that task.

5.4.3 Parthood and Personhood

Even if the parthood view is convincing on a physiological and biological level as outlined above it does contend with what people will intuitively believe, or not - that a human being cannot be a part of another human being. The implicit acceptance of the containment view and the language surrounding pregnancy illustrates that most people do not conceive of pregnancy in this way but rather as a necessary temporary process before the complete and individual human is born. Foetuses, at least after a certain point, are thought of as fully formed humans/individuals or potential humans/individuals. Kingma clearly points out that even if it holds that a foetus is a part of the pregnant woman it does not mean that they are not a person in their own right.⁸¹⁷ She also explains that the fact that foetuses can experience a future separateness does not preclude their connection and parthood relationship with the maternal organism.⁸¹⁸

5.4.3.1 Environment

In the opening paragraph of this section the question of when a human comes into existence was introduced and in the following section, I will return to this question through exploring the conceptual links between pregnancy and environment. Earlier in this chapter I presented the analogy of an

⁸¹⁷ Kingma, 'Were You a Part of Your Mother?' (n 86) 610.

⁸¹⁸ *ibid* 635.

‘astronaut leaving her spaceship’⁸¹⁹ as an explanation of birth. This analogy leads us to question whether birth is merely a change of environment, as imagined by Smith and Brogaard. According to their view birth is a process of relocation as opposed to in the parthood view that would see birth as the separation of a part, and where the foetus undergoes a substantial change into becoming a baby. Kingma argues that if the view held is that a human cannot be a part of another human then a human comes into existence at birth and not at 16 days after conception as Smith and Brogaard claim.⁸²⁰ If it is held that a human can be a part of another human then the foetus can already be a human long before birth. Subsequently, birth is a case of the pregnant woman losing a part and where that part goes from being a part of another human (and being a human) to being a human that is not a part of another human.

On topological continuity and connectedness, the parthood view of pregnancy contrasts significantly with the containment view because the latter works to de-emphasise the foetus’ connection to the pregnant woman. Smith and Brogaard’s analogy that reduces birth to simply a change of environment relies on a containment view of pregnancy and the belief that the foetus is an already separate individual/entity. This view arises in part to due to an emphasis on the physical resemblance and continuity between human foetuses and babies.⁸²¹ An alternative approach would be to view birth as a transformative event where the foetus changes status to become a baby. While the physical resemblance between the foetus and baby remains the connection between the pregnant woman and foetus would have greater focus and significance. Instead of understanding the foetus as an already formed and separate individual waiting to leave one ‘environment’ for another, birth would mark a change of state where the foetus is no longer a part of the pregnant woman. The idea of a changing

⁸¹⁹ Smith and Brogaard (n 79) 65.

⁸²⁰ Kingma, ‘Lady Parts: The Metaphysics of Pregnancy’ (n 82) 187.

⁸²¹ Kingma, ‘Were You a Part of Your Mother?’ (n 86) 613–614.

state and birth being the transformative event allows us to understand the continuity between the foetus and the baby.

5.4.4 Parthood view and surrogacy

An important question to pose here would be if the parthood view of pregnancy equally applies in a surrogacy pregnancy where the embryo was created outside of the surrogate's body and then implanted. Knowledge of the processes involved in gestational surrogacy, which relies on IVF, can inadvertently work to reinforce the foetal container view of pregnancy because it is correct that genes come from the sperm and egg, and that they determine the embryo which can then be implanted in a woman's body to gestate. Does the parthood view of pregnancy still hold true when the embryo has been implanted in the surrogate's body rather than 'originating' from there? Based on the explanation of the criterion of topological continuity and connectedness discussed above it can be safely argued that after the point of implantation the same applies to a surrogacy arrangement pregnancy as the pregnant woman's body undergoes the same process. The foetus being understood as a part of the pregnant woman does not interfere with the genetic links to the genetic parents.

5.4.4.1 Part/Whole Model: features

If a parthood view of pregnancy were to replace the current view dominated by the foetal container model what would the parthood or part/whole model of pregnancy comprise? Subsequently, how would that influence the conceptualisation of surrogacy and its regulation? One potential impact of the part/whole model would be a change in the nature of the arrangement and the exchange. If the foetus was considered a part of the pregnant woman, would the transaction amount to the trade of a body part, as is the case with organ donation? Also, would it then follow that the arrangement is not the rendering of 'gestational services' but in fact the sale of babies? This would be deeply problematic because the sale of human beings is prohibited and considered morally repugnant. There would also

be consequences for the way ownership is understood and enacted in the arrangement. As earlier discussed, the foetus is considered to be ‘owned’ by the intended parents throughout the arrangement this is evidenced in the words of the Department of Health Research who claim that at the end of the pregnancy the surrogate will ‘return the baby’. This idea of ownership is disrupted by the parthood view because it calls into question whether you can own a part of another person’s body while it is still within that body. It also impacts ideas of kinship and the importance of blood in conferring kinship ties as articulated by the surrogates who claim it is their blood that creates and nourishes the baby.⁸²² Another consequence of this view might be that the pregnant woman is not considered so easily interchangeable if the foetus is a part of her, which could result in a positive outcome for the surrogates in light of the issues of fungibility and disposability mentioned earlier. These questions will be explored at greater length in the following chapter.

5.5 Conclusion

In this chapter I have presented two opposing models of pregnancy and explored how the foetal container model is culturally dominant and presupposed in understandings of pregnancy. The prevalence of this view of pregnancy has been traced through the use of metaphor, analogy, idioms, metonymy, and synecdoche in the language and communication surrounding pregnancy and surrogacy. I have demonstrated how influential the housing analogy and its associated terminology is in framing surrogacy in India. I have also shown that surrogacy relies on and reinforces the foetal container model of pregnancy. In Indian cultures an enormous amount of significance is assigned to the genetic link between parents and children, this is one of the reasons why only gestational surrogacy is permitted and why the practice has thrived there. It enables the intended father to pass on his genes and the continuation of patrilineal family lines. Mala Ramanathan argues that genetic determinism is

⁸²² Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 272; *ibid* 283.

inextricably linked to ‘the *brahmin-ized* ethos of India’s growing middle class’⁸²³ and as Rothman claims the importance of genetic ties ‘draws deeply on a traditional patriarchal understanding of familial relationships.’⁸²⁴ In the previous chapters I highlighted the significance of Hindutva ideology on the regulation of surrogacy through the restrictions on the eligibility criteria for the intended parents. The practice of gestational surrogacy relies on a foetal container model of pregnancy not only because it allows for the separation of the genetic link between the surrogate and foetus, for the reasons highlighted above but also because it works to make the whole transaction more morally palatable and legally acceptable. In the sense that the foetus and then child is considered to ‘belong’ to the intended parents from the start of the arrangement and throughout. When the surrogate believes that the baby is not hers due to the absence of a genetic tie, she does not see it as the sale of her own child. Meena, one of the surrogates in Pande’s studies, talks of the pain of relinquishing the baby and how it would be different if she had to part with her own child claiming ‘we would never give away any of our real children. Only we know how we have raised them, taken care of them. I don’t understand how people can do that.’⁸²⁵ According to this understanding and view of pregnancy in a gestational surrogacy arrangement the surrogate is only the container, the temporary home for the embryo to grow into a foetus and therefore it does not involve the sale of a child because it was not considered to be hers in the first place.

The presentation of the parthood view of pregnancy allows for an alternative view and an opportunity to evaluate whether a different conceptualisation is more appropriate for understanding the practice of surrogacy. The following chapter will now closely examination the legal reforms in India to determine the extent to which the foetal container model of pregnancy is operating in the practice of surrogacy and the approaches to its regulation. Additionally, it will consider how the model might be facilitating

⁸²³ Marwah and Nadimpally (n 485) 221.

⁸²⁴ Rothman, ‘The Legacy of Patriarchy as Context for Surrogacy: Or Why Are We Quibbling Over This?’ (n 480) 36.

⁸²⁵ Pande, ‘Not an “Angel”, Not a “Whore”’: Surrogates as “Dirty” Workers in India’ (n 92) 158.

or contributing to the issues arising from the practice presented here and in the previous chapters and the harms sustained by the surrogates, and whether an alternative view offers a different and potentially better approach to regulation.

6 The foetal container model in the practice and legal reforms

[W]omen suffer harms of *invasion* not suffered by men; emotionally, women suffer greater harms of *separation* and isolation than do men; psychically, women suffer distinctive harms to their subjectivity, or sense and reality of *selfhood* that have no correlate in men's lives; and politically, women suffer distinctive harms of patriarchal *subjection* that again have no correlate in men's lives.⁸²⁶

6.1 Introduction

This chapter will revisit and closely re-examine the legal reforms, presented in Chapters 3 and 4, to evaluate the model of pregnancy, developed and analysed in Chapter 5, underpinning the conceptualisation of surrogacy in the Indian context as described in Chapter 2. To answer the main research question, on whether a reconceptualisation of pregnancy is the key to better regulation, requires establishing the conceptualisation in use, which is made possible by the exploration of the models of pregnancy in the previous chapter. In Chapter 4 I argued that the legal reforms do not adequately address the challenges arising in surrogacy because of a failure to consider that a model of pregnancy underpins the practice and its regulation. In acknowledging the influence of underlying assumptions about pregnancy we can identify the foetal container model, locate where and how it operates, and evaluate its implications for the surrogates and legal reforms. Thus, providing the necessary framework for recognising the harms done to pregnant women both generally and specifically in surrogacy. I will argue that this view of pregnancy, that is dominant within and across cultures and jurisdictions, facilitates the potential harm sustained through the invasive and controlling aspects of surrogacy, as presented here and in the previous chapters. The aim of this chapter is therefore to explain how and why the foetal container model of pregnancy is problematic in the context of surrogacy in India and that the knowledge and awareness of the consequences of this model can lead to better and more effective regulation.

⁸²⁶ West (n 88) 100.

To build on the arguments in Chapter 5 surrounding the foetal container model I will use the concept of ‘gendered harm’ to illustrate how women are especially vulnerable to sustaining harm during pregnancy. In constructing an account of gendered harm, I will draw from the work of Robin West, and others, on the concept of harm.⁸²⁷ West argues that women suffer unique harms that have no correlation in the lives of men and further institutional harms from the failure of legal systems to recognise and redress these harms, which results in their legitimisation.⁸²⁸ Integral to this concept of gendered harm is an understanding of the patriarchal cultures and structures that cause harm. While West developed this concept in a Western context it has applicability to the practice of surrogacy in India due the patriarchal nature of Indian society and how some of the provisions of the Bills have been approached and drafted. Applying this concept enables a critique of the structural, institutional, and legal frameworks that give rise to and legitimate harms. In this case, how surrogacy is practiced and regulated in the medico-legal context. It further aids and enriches the analysis of the conditions and inequalities of the background context to the surrogacy arrangements described in Chapters 2 and 4.

I will argue that how the foetal container model of pregnancy is enshrined in law, culture, and society results in gendered harms because it facilitates the mistreatment of the surrogates through considering them as foetal containers first and foremost. Subsequently, they are at risk of harm through the invasive procedures (e.g., embryo transfers, foetal reductions, and the standard use of C-section deliveries) and controlling practices, which are explored in detail later in this chapter. There is clear evidence of the foetal container model at work in these procedures, where harm is experienced through violations of privacy, autonomy and bodily integrity and the absence of informed and valid consent, and through

⁸²⁷ West (n 88). See also, Joanne Conaghan, *Law and Gender* (Oxford University Press 2013). Joanne Conaghan, ‘Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment’ (1996) 16 *Oxford Journal of Legal Studies* 407. And Fionnuala Ni Aolain, ‘Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies’ (2009) 35 *Queen’s Law Journal* 219.

⁸²⁸ West (n 88) 96.

how ‘ownership’ over the embryo/foetus is conferred during the arrangement. The model also enables a treatment of the surrogates as fungible, disposable and invisible,⁸²⁹ which overlaps with the features of objectification defined in Chapter 4. The framework of the foetal container model allows us to better comprehend the extent of the harms sustained by pregnant women, which the model exacerbates, generally in maternity care and specifically in surrogacy in India and therefore to assess the effectiveness of the regulatory reforms.

To further explain the scope of these harms I will explore theories of embodiment to define the key concepts of autonomy, bodily integrity, and consent. Theories of embodiment can be applied in different cultural contexts, because while embodied experiences with social institutions differ, everybody is impacted by medical and legal systems. As Dietz et al. note ‘[b]odies... cannot be understood outside of, or as separate to, their medical and legal contexts.’⁸³⁰ Hence why assumptions about certain phenomena such as pregnancy, illustrated by the foetal container model, are so powerful because they influence experiences and are inescapable.

6.1.1 Chapter outline

I will begin with a brief recap of the foetal container model and its relevance to the legal reforms of surrogacy in India before providing definitions and examples of harm and gendered harm. I will then explore theories of embodiment and their relationship with gendered harm. After establishing this framework, I will apply it to the legal reforms in India focussing on key aspects of the practice and provisions which include the permissibility of only gestational surrogacy, notions of ownership, enforceable contracts, and the invasive procedures outlined above. This chapter will also consider, where relevant, whether the parthood view also presented in Chapter 5, offers a different and

⁸²⁹ For more discussion on this see, Piyali Mitra, ‘Invisible Women in Reproductive Technologies: Critical Reflections’ (2018) 3 *Indian Journal of Medical Ethics* 113.

⁸³⁰ Chris Dietz, Mitchell Travis and Michael Thomson, *A Jurisprudence of the Body* (Palgrave Macmillan 2020) 8.

potentially better approach to understanding surrogacy and its regulation. I will conclude by arguing that the foetal container model underpins the practice and approaches to the regulation of surrogacy in India, which is problematic as it facilitates the potential harm of the surrogates. However, creating this awareness can lead to more effective regulation that centres the rights and interests of the surrogates.

6.2 Foetal Container Model: The Law and Harm

The main concern of this thesis is how the regulatory reforms to surrogacy impact the surrogates in India and the focus in this chapter is to analyse how the foetal container model operates within these reforms. In Chapter 5 I argued through an exploration of the metaphors and analogies used to describe pregnancy, and specifically the practice of surrogacy in India, that the foetal container model *is* the dominant conception of pregnancy. A critical review of the language employed to describe pregnancy in Western and Indian contexts further revealed frequently and commonly used phrases that involves words such as *oven*, *refrigerator*, *house*, *seed*, and *soil*. The housing analogy employed by Dr Patel at her clinic in Anand to describe the process of surrogacy to the prospective surrogates and the general use of rental metaphors are also significant in terms of how they frame and construct the practice of surrogacy.⁸³¹ The image of the foetus as free floating akin to an astronaut in space was also observed to be a powerful visual representation of the nature of the maternal-foetal relationship due in part to the use of sonography.⁸³² The widespread and frequent use of these metaphors and analogies works to establish and reinforce the foetal container model of pregnancy within multiple and various contexts because of how effective they are in creating similarities and ‘leaps’ between different conceptual domains. These figures of speech allow one idea to be expressed in terms of another, usually something

⁸³¹ Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91) 978. As explained in Chapter 2 that although Pande does not name Dr Patel directly it is clear that she conducted her study at her clinic. Equating the process of surrogacy with ‘housing’ has become Dr Patel’s standard method of explanation, as there is further evidence of Dr Patel using this analogy in the documentaries *House of Surrogates* and *Outsourcing Surrogacy*.

⁸³² Sandelowski (n 728) 240. See other references given in Chapter 5 on this issue.

more tangible and recognisable, and not only reveal ideas, attitudes, and assumptions but also help shape them.

It was made clear that the metaphysical claim, of the containment view, is not an ethical claim about the nature of the individuals. However, the way in which this view extends into cultural and legal practices does have implications for the ethical treatment and the potential harm of *all* pregnant women,⁸³³ and not only those involved in surrogacy arrangements.⁸³⁴ I will argue that it is structural, institutional, and implicitly presumed in legal understandings and approaches to reproduction and pregnancy as shown through the case of surrogacy in India. The consequences of this presumption will be explored and critiqued through examining the legal reforms and important legal cases related to pregnancy and reproduction in India. The concept of gendered harm accounts for structural and institutional harms and therefore provides a useful framework within which to understand how harm is sustained, and further exacerbated by intersecting discrimination. The combination of the foetal container model and the concept of gendered harm therefore provides a more focussed lens through which to understand the embodied experiences of the surrogates. The latter sections in this chapter dealing with the formulation of the provisions of the Surrogacy Bill and the ART Bill, and the paralegal discussions will offer a detailed analysis of the harms experienced by the surrogates through this lens. In the following section I will outline this concept of harm, by explaining how it manifests through an interaction with the law and legal culture and provide some examples of practices in India that constitute gendered harm.

⁸³³ For discussion on how pregnant women are treated as public property through the moralisation of their behaviour see, Berkhout (n 537) 103.

⁸³⁴ For some discussion of the impact on all pregnant women of a 'two-person dichotomous model' see, Munro (n 19).

6.2.1 Concepts of harm

As outlined above, the concept of gendered harm provides an instructive and appropriate framework for understanding how the surrogates experience harm. Gendered harms occur on multiple levels; where women experience harms that are unique to women and then as result of the inadequate legal responses to redressing these harms, which work to legitimate them. As West explains:

Women suffer harms...that are different from those suffered by men. And partly because they are different, they often do not “trigger” legal relief in the way that harms felt by men alone or by men and women equally do. As a result women are doubly injured: *first by the harm-causing event itself, and second by the peculiarity or nonexistence of the law's response to those harms.*⁸³⁵

Joanne Conaghan suggests that the concept of gendered harm is one way of acknowledging that injury has a social as well as individual dimension. She elaborates to explain that:

people suffer harm not just because they are individuals but also because they are part of a particular class, group, race or gender. Moreover, their membership of that particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain. The problem with law then is its failure to recognize that social dimension.⁸³⁶

West asks what the point of law is and proclaims that if it is an instrument designed to minimise harms then an understanding of what constitutes a harm should be central to jurisprudence. However, she argues, a great deal more effort has been given to using law as a means to redress harm than to answering the fundamental questions of what harms us and how much.⁸³⁷ If the law is to be used as an effective tool in redressing harms, then sufficient attention must be given to defining harm and those harms which are uniquely and predominantly experienced by women. Fionnuala Ní Aoláin asserts that a feminist theory of harm is crucial for women to ‘re-conceptualize how and what they experience on their own terms, and then to translate this knowledge into a legal form, which respects the gendered subject and her experience’.⁸³⁸ West points out that the law often fails to capture the gendered nature

⁸³⁵ West (n 88) 96. [emphasis added]

⁸³⁶ Conaghan (n 827) 408.

⁸³⁷ West (n 88) 94.

⁸³⁸ Ni Aolain (n 827) 222.

of harms and only addresses harms which resemble those sustained by men.⁸³⁹ Conaghan also remarks that the gendered nature of social harms results in a critique of the law's capacity to respond to these harms to women as they are 'not traditionally recognized or redressed by the legal system'.⁸⁴⁰ I argued in Chapter 4 that the focus on the elimination of exploitation, and the absence of its definition, in the Surrogacy Bill is an example of a failure to adequately define and recognise the full scope of harms experienced by surrogates. Therefore, the surrogates are experiencing gendered harms due to the legal reforms because while surrogacy is being regulated certain harms that happen within the practice are not recognised and are subsequently legitimated.

6.2.2 Gender-specific harms

In defining gender-specific harms West explains that '[w]omen sustain *physical, emotional, psychic,* and *political* harms in daily life—indeed, for many women, on a daily *basis*—which have no or little counterpart in men's lives.'⁸⁴¹ She groups these harms under Harms of Invasion, which includes the examples of unwanted pregnancy and sexual assault. As only women can become pregnant these harms 'are central and even defining harmful experiences for women in ways that have no correlate in men's daily lives'.⁸⁴² West explains that the gender-specific harm of sexual assault is the combination of unwanted and painful sexual penetration with the experience of terror and the shattering of the security of privacy both within the body and the home because although men suffer violence and threats of violence women far more than men suffer this from intimates.⁸⁴³ In the case of unwanted pregnancy the physical invasion of the body by the pregnancy is in itself a harm as well as the fact that the 'woman finds herself in an *involuntarily nurturant* position'.⁸⁴⁴ I will build on this concept of harms of invasion by exploring theories of embodiment and the violations of autonomy and embodied

⁸³⁹ West (n 88) 139.

⁸⁴⁰ Conaghan (n 827) 407–408.

⁸⁴¹ West (n 88) 100. [emphasis in the original]

⁸⁴² *ibid* 101. To be understood as females here and throughout this section on gendered harm.

⁸⁴³ *ibid* 102.

⁸⁴⁴ *ibid* 105. [emphasis in the original]

integrity in surrogacy arrangements.⁸⁴⁵ Harms sustained in maternity care fall into this category and are experienced exclusively by women which includes surrogates. However, the surrogates also experience additional harms that are not experienced by other pregnant women.

Harms of Private Altruism - where women are expected to be more altruistic than men in their private and intimate lives and to subordinate their own interests, desires, and pleasures to those with whom they are intimate.⁸⁴⁶ This is true for some of the Indian women who become surrogates as discussed in Chapter 4 on the cultural expectation on women to put others before themselves and to perform unpaid reproductive labour. The legal reforms to surrogacy, which whether commercial or not still involves a significant amount of altruism, require the women to be even more altruistic due to the prohibition of payments other than expenses. While acting altruistically is not a harm in itself, and is in fact something to be respected and even admired, it is the motivations behind these acts when they, as West argues, 'stem neither from self-interest nor from a caring instinct but, rather, from fear'.⁸⁴⁷ This can be expanded to include coercion and familial and/or societal pressure, which is a major concern regarding the 'close relative' requirement and altruistic surrogacy in general. The foetal container model also operates here in terms of how the pregnant woman's role of 'containing' and nurturing the foetus is considered her primary function. It becomes the most important feature and task, and therefore must take precedence while her other interests, desires, and pleasures are subordinated.

Harms of Separation - while West acknowledges that everyone experiences painful separations at some point in their lives, she asserts that women and girls undergo separations that are 'distinctively different and of greater intensity than those which boys and men undergo'.⁸⁴⁸ In explaining these harms West

⁸⁴⁵ In this work Annas explains that the treatment of women as foetal containers renders them 'unequal citizens', which is an example of gendered harm because only women/females can become pregnant and be treated as foetal containers. See, Annas (n 475) 14.

⁸⁴⁶ West (n 88) 109.

⁸⁴⁷ *ibid* 114.

⁸⁴⁸ *ibid* 127.

draws on the differences between women and men in child-rearing. Due to the biological differences in reproduction women invest a significant amount more of ‘their material, physical, bodily resources in the development of fetal life... [and] must endure the physical pain of breaking that material bond when the baby is born... [which] is always painful, sometimes injurious, and until very recently often lethal’.⁸⁴⁹ She further argues that the traditionally greater investment in the nurturing of the children made by the mother results in potential psychological harm when separations occur due to returning to work or when the grown children leave home.⁸⁵⁰ On the subject of surrogacy West criticises a lack of acknowledgement for the pain experienced by the surrogate through separating from the new-born baby and the absence of the emotional harm from the (judicial) calculation of the ‘costs’ borne by the woman.⁸⁵¹ The harms of separation which are unique to surrogates include the separation when the baby is relinquished but more specific to the practice in India is the birth via C-section which has become standard practice. I will return to discuss this further in section 6.4.

Patriarchal Harms, are the gender-specific harms which ‘women sustain... because they live as political inferiors, or subordinates, within a patriarchal culture’.⁸⁵² West takes ‘patriarchy’ to refer to the ways that men’s interests are prioritised over women’s in social life and then constitute the harms experienced by women ‘as inevitable, trivial, or desirable, and for whatever reason, not eradicable’.⁸⁵³ While she recognises that in some cultures patriarchy is encoded in legal norms she argues that it is most often enforced through ‘extra-legal forces’. One being largely unregulated private violence such as rape, domestic violence and sexual harassment and another is the ‘promulgation of a distinctively patriarchal *culture*’.⁸⁵⁴ In this culture there are rules and standards which determine our behaviour and

⁸⁴⁹ *ibid.*

⁸⁵⁰ *ibid* 128–129.

⁸⁵¹ *ibid* 149. Carole Pateman describes how patriarchy works in contract: ‘The original pact is a sexual as well as a social contract: it is sexual in the sense of patriarchal – that is; the contract establishes men’s political right over women- and also sexual in the sense of establishing orderly access by men to women’s bodies... Contract is far from being opposed to patriarchy; contract is the means through which modern patriarchy is constituted.’ Pateman (n 68) 2.

⁸⁵² West (n 88) 132.

⁸⁵³ *ibid.*

⁸⁵⁴ *ibid* 133. [emphasis in the original]

influence how we regard ourselves and our fate. It is so deeply ingrained that ‘it is in effect a part of us rather than noticed by us. It is inseparable from us.’⁸⁵⁵ One example of the harms perpetuated by patriarchal culture that I discussed in Chapter 4 is the expectation on women to perform unpaid reproductive labour and which is a key and contentious feature of the legal reforms to surrogacy in India. Later in this section I will deal with another harm of patriarchal culture, which is the practice of sex-selective abortions. Each of these categories offers insights into the harms sustained by women and have applicability to several aspects of the practice of surrogacy, which I will draw on where relevant.

6.2.3 The non-recognition and legitimization of gender-specific harms

The other fundamental aspect of gendered harm is the response of legal systems to these gender-specific harms. The law’s complicity in, and in some respects perpetuation of, gendered harms occurs through a non-recognition of these gender-specific harms⁸⁵⁶ and therefore their legitimization.⁸⁵⁷ However, West argues that it is legal culture rather than legal sanctions such as fines and imprisonment that exerts a huge influence over our behaviour, how we think of ourselves, of others, and of the larger society.⁸⁵⁸ The consequence of the non-recognition of these harms, she argues, is the objectification of women which results in the diminishing of a woman’s sense of selfhood and subjectivity.⁸⁵⁹ Thus, augmenting the definition of objectification given in Chapter 4 and adding another dimension of harm sustained by this treatment. The legitimization of the harms denies the victim of the harm legal recourse and convinces them that they were not even harmed, which then works to erase the existence of the harm.⁸⁶⁰ West explains that even the women who sustain these harms do not perceive them as harms

⁸⁵⁵ *ibid* 136.

⁸⁵⁶ *ibid* 143.

⁸⁵⁷ *ibid* 151.

⁸⁵⁸ *ibid*.

⁸⁵⁹ *ibid* 146.

⁸⁶⁰ *ibid* 152.

due their legitimation by the legal culture and the larger culture.⁸⁶¹ Conaghan also supports this understanding and explains that ‘harm is socially constructed and legally constituted; unless harm is recognized as such by society and by law, it is not *experienced* as such.’⁸⁶²

Purewal asserts that in India the state, as well the family and the community, has been ‘the most significant advocate and purveyor of patriarchy...[and] projected a hierarchical regime that obliges men and women to fit into a system of social organisation accordingly’.⁸⁶³ Erin Moore a legal anthropologist who studied the systems of dispute management in rural Northern India observed that:

In many cases women are silenced, deprived of equal rights before law, and returned to their male guardians. In this way law contributes to the making of cultural hegemony by legitimating and enforcing a particular vision of the social order. This is the law’s patriarchy.⁸⁶⁴

Many feminist scholars have observed and argued that women are far more likely to experience harms within the home and at a significantly higher rate than men.⁸⁶⁵ As Ní Aoláin attests and further notes these spaces which most legal and social systems consider to be the private domain are ‘frequently outside the circle of notice and accountability’.⁸⁶⁶ A legal culture that supports a firm distinction between the public and private worlds renders the private sphere outside the bounds of regulation and furthermore, West argues, considers it as beneficial to all those who live within it.⁸⁶⁷ The non-recognition of these harms in the private sphere creates what West has term a ‘separate sovereignty’ where women must acquiesce to the sovereignty of the state and ‘the *men* whose violence they rationally fear.’⁸⁶⁸ The legal culture therefore can work to facilitate the non-recognition of gendered harms and their legitimation but also create a hierarchy in the distribution of rights and powers that

⁸⁶¹ *ibid.*

⁸⁶² Conaghan (n 827) 429. [emphasis in the original]

⁸⁶³ Purewal (n 226) 24.

⁸⁶⁴ Erin P Moore, *Gender, Law, and Resistance in India* (The University of Arizona Press 1998) 4.

⁸⁶⁵ Pateman talks about the division between private and public spheres and how it impacts women within both domains. See, Pateman (n 68).

⁸⁶⁶ Ni Aolain (n 827) 242.

⁸⁶⁷ West (n 88) 153.

⁸⁶⁸ *ibid* 143. [emphasis in the original]

lead to their occurrence.⁸⁶⁹ This distinction between the public and private and how it is governed establishes a societal structure that harms women. In Chapter 4 I discussed the major criticisms of the provisions of the Surrogacy (Regulation) Bill concerning the definition of surrogacy and the previous eligibility criteria for surrogates, that required the surrogate to be close relative of the commissioning parents, which results from the lack of acknowledgement of the societal structures and hierarchies within the private sphere that harm women.

6.2.4 Gendered harms in India: mass sterilisation drives and sex-selective abortions

Conaghan states, as quoted earlier, that harm has a social as well as individual dimension and the nature and degree of harm sustained is shaped by membership to a particular class, group, race, or gender. The following examples of gendered harm in India attest to this claim. The state sanctioned mass sterilisation programmes that were used as a population control strategy, as discussed in detail in Chapter 2, provide a very clear example of gendered harm as it targeted and continues to target women from certain demographics. Rudrappa observed that many of the women who had been operated on through the sterilisation programmes were also the same demographic of women recruited into surrogacy arrangements.⁸⁷⁰ In fact, SAMA found that the surrogate's 'eligibility was bolstered if she had undergone the sterilization process after the birth of her children.'⁸⁷¹ Pande further discovered that the community health workers who facilitated the sterilisation operations also became surrogacy recruiters due to their extensive networks of suitable candidates.⁸⁷² Rudrappa remarks on the lack of recognition among Indian legislators that transnational surrogacy, in a country that has pushed a strong anti-natalist agenda on certain demographics, is 'a classic case of stratified reproduction that results in unequal transactions because these are exchanges between already unequal social actors'.⁸⁷³ It is crucial

⁸⁶⁹ *ibid* 151.

⁸⁷⁰ Rudrappa, *Discounted Life* (n 777) 24.

⁸⁷¹ Sarojini Nadimpally and others, 'Surrogacy: Information Brief' (Sama Resource Group for Women and Health 2014) 6.

⁸⁷² Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 187.

⁸⁷³ Rudrappa, *Discounted Life* (n 777) 40.

to view surrogacy against this backdrop of a history of coercive policies, and harmful and invasive treatments. In the following sections I will explore theories of embodiment and the links with gendered harm. However, it is pertinent to acknowledge here how the Indian women who are subjected to state sanctioned or promoted sterilisation programmes, and also then recruited into surrogacy, are not treated as fully embodied persons. As Rudrappa argues, these women are considered as ‘inert material whose reproductive organs are meant to be manipulated for population management purposes, profit making in fertility tourism, and finally, through altruistic surrogacy, harnessed for the reproduction of upper-middle-class heterosexual, nuclear families’.⁸⁷⁴

There are other examples of gendered harm in India that are embedded within the (patriarchal) culture and traditions and that have been met with strong feminist resistance.⁸⁷⁵ One is the long-standing preference for sons, which has given rise to the practice of sex-selective abortions of female foetuses. The prevalence of this practice, made possible by technological developments in prenatal diagnosis techniques and ultrasound scans, led to its criminalisation through the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT) (1994) and its follow-up, the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003 (PCPNDT). Purewal notes that despite this Act there continues to be an imbalance in the sex ratio in India against females and that there have been few if any cases involving legal action.⁸⁷⁶ The enactment of legislation and legal sanctions have failed to end the cultural preference for sons suggesting that despite the legal recognition of the harm the patriarchal culture and traditions have a stronger force, and it also points to a problem of enforcement. The issue of abortions and foetal reductions in surrogacy arrangements is significant considering the background and intention of the PCPNDT Act.

⁸⁷⁴ Rudrappa, ‘Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015’ (n 301) 1088.

⁸⁷⁵ For more on feminist resistance in governance see, Janet Halley and others (eds), *Governance Feminism: An Introduction* (University of Minnesota Press 2018); Janet Halley and others (eds), *Governance Feminism: Notes from the Field* (University of Minnesota Press 2019). Also, Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1988) 30 *Feminist Review* 61.

⁸⁷⁶ Purewal (n 226) 30.

Although ultrasound scans were not developed and are not used exclusively to determine the sex of the foetus the fact that it can be discovered during this process means that the use of this technology assists the patriarchal culture and its preference for male offspring.⁸⁷⁷ Purewal claims that sex-selective abortions in India highlight the fact that reproductive technologies have created ‘tighter connections across structures of violence and dispossession, making the relationship between gender violence and technology one of co-construction rather than a simplified convergence’.⁸⁷⁸ She posits that sex-selective abortions must be viewed as a form of structural violence rather than a discriminatory practice.⁸⁷⁹ In order to understand the structural dimension of this gendered harm or violence, she asserts that, it is essential to acknowledge what underpins the exercise of political, social, and economic power and control, and argues that, ‘[n]eoliberalism and Hindutva provide the ideological means by which to shape and utilise patriarchy at all levels.’⁸⁸⁰ Purewal’s claim also applies to the treatment of surrogates in terms of the harms arising from the ideological forces underpinning the practice and legal reforms, part of which derives from the foetal container model, but the model also works in concert with neoliberalism, Hindutva, and patriarchy. A few other examples of gendered harms in India that are rooted in the culture despite being prohibited by law include daughters being precluded from inheriting land,⁸⁸¹ dowry,⁸⁸² and ‘honour’ violence and killings but detailed discussion on these issues is beyond the scope of this thesis. Purewal captures so succinctly how these gendered harms are perpetuated and reproduced due to the multi layers and spheres of patriarchal culture and power in India in the following quote:

‘Good daughters’ at the state level of patriarchy are therefore those who make no demands on the state for ‘rights’ or entitlements but who are also workers to be

⁸⁷⁷ For a discussion on feminist critiques of technology and specifically related to reproductive technology see, Keith Grint and Steve Woolgar, ‘On Some Failures of Nerve in Constructivist and Feminist Analyses of Technology’ (1995) 20 *Science, Technology, and Human Values* 286.

⁸⁷⁸ Purewal (n 226) 33.

⁸⁷⁹ *ibid* 20.

⁸⁸⁰ *ibid* 22.

⁸⁸¹ Despite the Hindu Succession Amendment Act, 2005, 2005. Act No. 39 of 2005, which gives women the legal right to inherit ancestral property, dowry is still considered women’s inheritance.

⁸⁸² Despite legislation, Dowry Prohibition Act, 1961, prohibiting aspects of the practice of dowry it continues in some forms. The culture of ‘gift’ and ‘protection’ surrounding women and their relationships with their male relatives contributes to this, see generally, Purewal (n 226).

offered up for neoliberal production or potential births to be eliminated. This highlights how the neoliberal state requires the compliance and malleability of the family unit and, as such, mirrors the structures and symbolisms of the patriarchal family unit in its expressions of state patriarchy at all levels.⁸⁸³

The initial ‘close relative’ clause and the move to altruistic surrogacy are therefore even more troubling and alarming with this understanding of how patriarchy operates within the family as well as the state and the cultural expectation on women to be altruistic and to subordinate their own interests. Despite opening the criteria to ‘a willing woman’ the prohibition of commercial arrangements means that relatives are more likely to be called on or even coerced into the arrangement because of these cultural expectations and patriarchal power structures.

6.2.5 Harms within the surrogacy arrangement

The examples of gendered harm discussed above provide important context within which to consider the practice of surrogacy in India, the potential for harm, and how the patriarchal culture and structures can maintain and legitimate these harms. The harms sustained by the surrogates can include physical, psychological, and/or financial mistreatment where their rights and interests are discarded and involve exploitation along the strands outlined in Chapter 4. Harms are also perpetuated by the structural and institutional frameworks that underpin the legal reforms to surrogacy. How the (potential) harms manifest in surrogacy arrangements will be discussed in section 6.4 with reference to the practice and examples of the legal response to these issues. The surrogates are predominately at risk of direct harm-causing events at the clinics, hostels, and hospitals at the hands of the doctors, clinic and hostel staff, and the intended parents but also within their community and the wider society. I argue that the surrogates are at greatest risk of experiencing physical and psychological harm through the invasive procedures and controlling practices they are subjected to as their rights to privacy, autonomy, bodily

⁸⁸³ *ibid* 30.

integrity, and to give informed consent can be violated.⁸⁸⁴ However, harm can also occur because of the nature of the arrangement that involves relinquishing the baby, over which some surrogates have expressed pain and regret.⁸⁸⁵ In the following sections I will explore theories of embodiment to define the key concepts of autonomy and bodily/embodied integrity, and how they relate to the foetal container model and gendered harm.

6.2.6 Embodiment and the law

The concept of gendered harm, as defined above, captures how harm has both an individual and social dimension. In the latter, harm occurs through an interaction with institutions such as healthcare systems and the law, which have a huge influence in shaping our understanding of bodies and how they are regulated. Theories of embodiment reveal how the body is central to ‘understanding how and where legal phenomena are enacted and the impact that this has on both the individual and groups’.⁸⁸⁶ They also aid in comprehending the extent of the harms that are enacted on the individual body as defined by the harms of invasion. This section will explore how the law fails to acknowledge the importance of the body and embodied experiences, and furthermore, to account for the embodied experiences of pregnant women and the consequences of the foetal container model of pregnancy, which influences the (mis)treatment of pregnant women and surrogates within the medico-legal context. Despite the fundamental link between health and embodiment (i.e., how the condition of the body and acts upon it affect our well-being) the body has not always been given the consideration and importance that it deserves in the law.⁸⁸⁷ Assumptions about the body and various types of bodies underpinning medico-legal thinking impact how these bodies are constituted, constructed, and regulated. As the main argument of this thesis sets out; assumptions about the pregnant female body and the nature of

⁸⁸⁴ Werner-Felmayer remarks on how ‘changing reproductive health care within high-income countries [is] leading to a risk of overusing ART and to establishing a practice of using risky and invasive procedures for growing target groups without even understanding side effects and long-term outcome’. See, Werner-Felmayer (n 181) 14.

⁸⁸⁵ Rudrappa, *Discounted Life* (n 777) 60.

⁸⁸⁶ Dietz, Travis and Thomson (n 830) 7.

⁸⁸⁷ *ibid* 1.

maternal-foetal relationship direct the way pregnancy and in turn surrogacy are conceptualised and regulated.

Dietz et al. chart the relationship between the body and the law from the traditional Western jurisprudential approaches that failed to consider ‘either the impact of law on bodies or the effect of bodies on their relationships with law’⁸⁸⁸ to a liberal position that sees bodies as interchangeable in their interactions with the law and healthcare systems and ‘the supposed universality of the human body.’⁸⁸⁹ This assumed interchangeability of the body works to privilege a particular type of body, namely white, male, able-bodied and inherently wealthy.⁸⁹⁰ Ngaire Naffine captures the significance of this through explaining that:

the rational subject must be a fully individuated and integrated physical being before he can begin to assert his will against all other subjects. An explicit biological assumption is therefore that this individual is a rational adult human; a tacit assumption is that this rights-asserting competent legal actor is individuated and therefore sexed (at least in the sense of never pregnant, because this compromises individuation).⁸⁹¹

This legal actor is afforded ‘material anonymity’ or ‘invisibility’ through virtue of sharing the characteristics of masculinity, whiteness and able-bodiedness, while those who do not are marked as ‘other’. Consequently, this leads to a standardisation of the white, heterosexual, able-bodied male experience.⁸⁹² In response attempts have been made to re-contextualise bodies in relation to medical and legal institutions to account for embodied diversity.⁸⁹³ The development of theories of embodiment can remedy this supposed universality and standardisation of the body by accounting for the diversity of bodies and their relationship to their environments and experiences. Crucially, work on embodiment

⁸⁸⁸ *ibid* 3.

⁸⁸⁹ *ibid* 4.

⁸⁹⁰ See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004). Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution*. (Zone Books 2015).

⁸⁹¹ Ngaire Naffine, ‘Who Are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66 *Modern Law Review* 346, 364.

⁸⁹² Dietz, Travis and Thomson (n 830) 5.

⁸⁹³ *ibid* 2.

has revealed ‘the impossibility of separating the material body from its institutional and cultural contexts’.⁸⁹⁴ The theories of embodiment discussed here are applicable across different cultures because while interactions and embodied experiences with social institutions such as the medical care and legal systems differ between individuals, they are ultimately unavoidable. The same can be said of cultural understandings of pregnancy, which shape and influence the experiences of women in the medico-legal context and are inescapable.

In this chapter I show how exercising and protecting rights to bodily integrity and autonomy vary according to the type of body in question, namely the pregnant body and specifically the surrogate. Feminist scholars working on the place of law in social, political, economic, and cultural life have revealed the gendered way that the law and legal concepts are constructed through the lack of attention given to the female and pregnant body because of a focus on the male.⁸⁹⁵ Echoing West’s arguments on the law’s non-recognition and legitimation of gender-specific harms. Susan Bordo in her work *Unbearable Weight: Feminism, Western Culture, and the Body* dedicates a chapter to the question ‘Are Mothers Persons?’ where she explores the subjectivity of pregnant women. She explains that ‘despite an official rhetoric that insists on the embodied subjectivity of all persons - Western legal and medical practice concerning reproduction in fact divides the world into human subject (fetus and father) and “mere” bodies (pregnant women).’⁸⁹⁶ It is this ‘othering’ of the female body, due its potential to produce another human being against the ‘neutral’ and unchanging or constant male default, that has resulted in and allowed for significant harms against women.⁸⁹⁷ The following

⁸⁹⁴ *ibid* 7.

⁸⁹⁵ For example, Susan Bordo, *Unbearable Weight: Feminism, Western Culture and the Body* (University of California Press 1993). Lynn M Morgan, ‘Imagining the Unborn in the Ecuadoran Andes’ (1997) 23 *Feminist Studies* 322. Iris Marion Young, *Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory* (Indiana University Press 1990).

⁸⁹⁶ Bordo (n 895) 14.

⁸⁹⁷ The cases of court-ordered Caesarean sections mentioned in the introduction of the thesis provide clear evidence of the foetal container model at work and constitute gendered harm through violations of the women’s rights to autonomy and bodily integrity regarding decisions about their treatment. For commentary on some of these cases see, McGuinness (n 80).

exploration of these concepts will expand our understanding of harm, both within the framework of gendered harm and in relation to the foetal container model.

6.2.7 Bodily integrity and autonomy

The aim of this section is not to provide a full and comprehensive account of the notions of bodily integrity and autonomy, and how they operate and interact in the medico-legal context but rather to establish some guiding principles and features of these concepts. In fact, some have argued that ‘it is very hard to find any definitive legal definition of the concept [of bodily integrity].’⁸⁹⁸ It does, however, hold strong rhetorical power and has been described by Margaret Brazier as a ‘core legal value’ underpinning health law.⁸⁹⁹ Yet, Marie Fox and Michael Thomson claim that ‘it is problematic to position bodily integrity as conventionally understood as a core legal value given its indeterminacy and cultural contingency, as well as the gendered and racialized ways it operates in practice.’⁹⁰⁰

Conventional understandings of bodily integrity are based on the right to be free from physical interference⁹⁰¹ and violations of bodily integrity are usually understood in terms of invasion,⁹⁰² ‘unwanted physical intrusion’,⁹⁰³ or trespass on the body.⁹⁰⁴ According to Christyne Neff bodily integrity is seen (by the courts) as ‘sacred, inviolable, inalienable and fundamental’.⁹⁰⁵ Bodily integrity is often understood in conjunction with privacy, autonomy, self-ownership, and self-determination. I will outline in sections 6.3.1 and 6.3.2 how these same principles are found in Indian medical law and

⁸⁹⁸ Jonathan Herring and Jesse Wall, ‘The Nature and Significance of the Right to Bodily Integrity’ (2017) 76 Cambridge Law Journal 566, 566.

⁸⁹⁹ Margaret Brazier, ‘Introduction: Being Human: Of Liberty and Privilege’ in Stephen Smith and Ronan Deazley (eds), *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Routledge 2009) 7.

⁹⁰⁰ Marie Fox and Michael Thomson, ‘Bodily Integrity, Embodiment, and the Regulation of Parental Choice’ (2017) 44 Journal of Law and Society 501, 502.

⁹⁰¹ David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002) 241.

⁹⁰² Kristin Savell, ‘Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law’ (2004) 49 McGill Law Journal 1093, 1124.

⁹⁰³ Christyne L Neff, ‘Woman, Womb, and Bodily Integrity’ (1990) 3 Yale J. of Law & Feminism 327, 338.

⁹⁰⁴ Fox and Thomson (n 900) 521.

⁹⁰⁵ Neff (n 903).

the landmark Indian legal cases on reproductive rights that reaffirm the protections given to the rights to privacy, bodily integrity, and autonomy under the Indian Constitution.⁹⁰⁶ According to Jonathan Herring and Jesse Wall, autonomy occupies a central role in the medical context, in terms of consenting to or equally refusing treatment, but it differs from the right to bodily integrity and respect for a person's right to refuse treatment. A person can consent to treatment but not demand it therefore to refuse to give treatment to a patient who wishes it only interferes with their autonomy but to give unwanted treatment interferes with their autonomy and right to bodily integrity. As Herring and Wall clarify, '[b]odily autonomy therefore protects a person's capacity to make his or her own decisions *in relation to his or her body*.'⁹⁰⁷ Bodily integrity 'is seen as enhancing and giving a special strength to an autonomy claim, making it particularly hard to justify an interference'.⁹⁰⁸ Essentially, the right to bodily integrity protects against unwanted and unconsented to interventions on one's body and 'safeguards the physical parameters of a person'.⁹⁰⁹ The same principles should apply to actions 'within' the body. For example, the case of *in utero* interventions or surgeries on the foetus at the same time demonstrates the importance of respecting the physical integrity of the woman and problematises the simplistic boundary conception of bodily integrity. The pregnant woman's body is transgressed to 'access' the perceived 'separate' and 'self-contained' foetus and therefore in effect creates a scenario of 'competing'⁹¹⁰ rights to bodily integrity between the two entities. The notion of separate and competing entities results from the foetal container model of pregnancy that sees the foetus as merely contained within the pregnant woman's body as opposed to a part of it and constructs a two-patient model. In the practice of surrogacy this becomes even more apparent due to how this model allows for other interested parties to exert rights over the entity (foetus) which is within the physical parameters

⁹⁰⁶ K.S. Puttaswamy v. Union of India; Devika Biswas v. Union of India; Srivastava v Chandigarh Administration (2009)

⁹⁰⁷ Herring and Wall (n 898) 575. [emphasis in the original]

⁹⁰⁸ *ibid* 568.

⁹⁰⁹ Neff (n 903) 328.

⁹¹⁰ By 'competing' I simply mean that the pregnant woman and the foetus are seen as two distinct entities where the pregnant woman's physical integrity can be compromised in order to make interventions on the foetus as seen for example in the practice of foetal reductions, and which in some cases can create a conflict. For an alternative model of pregnancy that refutes the 'conflict' model see, Mary Ford, 'A Property Model of Pregnancy' (2005) 1 *International Journal of Law in Context* 261.

of the surrogate's body e.g., by requesting foetal reductions. The application of the parthood view would alter this because it considers the pregnant woman as one patient/one entity and the foetus as one of her many parts.

6.2.8 Embodied integrity

Fox and Thomson contend that the conventional understanding of bodily integrity has significant limitations due to its focus on external boundaries and advance an embodied integrity model which shifts focus to the lived experiences of embodied beings. This redirection would 'understand bodies both as a constitutive part of human identity and as existing at the intersection of the material, the institutional and the symbolic'.⁹¹¹ In the legal context there has been a reductive approach to bodily integrity based on respect for autonomy and a mind-body dualism.⁹¹² An embodied integrity approach accounts for the physical and mental connections and aspects of bodily integrity which constitute our sense of self.⁹¹³ Nicolette Priaux supports 'the fundamental importance of bodily integrity as a most basic psychological need'.⁹¹⁴ And further posits that bodily integrity 'is a sense of self, a stable platform for pursuing one's plans, rather than an actual descriptor of our physicality'.⁹¹⁵ Likewise for Cornell, the body cannot be separated from the mind, therefore to protect bodily integrity involves protecting a person's ability to see the self as a whole.⁹¹⁶ The concept of embodied integrity also challenges the notion of a fixed and static body which is reinforced by the boundary metaphors employed in the language used to articulate bodily integrity. Fox and Thomson argue that the full realisation of the

⁹¹¹ Fox and Thomson (n 900) 521.

⁹¹² This is a principle in the work of Martha Nussbaum on bodily integrity. See, Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000); Martha C Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services" (1998) 27 *The Journal of Legal Studies* 693.

⁹¹³ See, Gillian Bendelow and Simon J Williams, *Emotions in Social Life: Critical Themes and Contemporary Issues* (Gillian Bendelow and Simon J Williams eds, Routledge 1997). Fox and Thomson (n 900). Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Indiana University Press 1994). Herring and Wall (n 898). Nancy Scheper-Hughes and Margaret M Lock, 'The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology.' (1987) 1 *Medical Anthropology Quarterly* 6.

⁹¹⁴ Nicolette Priaux, 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) 16 *Medical Law Review* 169, 179.

⁹¹⁵ *ibid* 187.

⁹¹⁶ Cornell (n 796) 4–5.

potential of bodily integrity discourse requires more complex and nuanced notions than those ‘rooted in spatial conceptions of property, boundaries, and self/parental ownership of the body’.⁹¹⁷ They also warn that the focus on protecting physical corporeal boundaries in the conventional model of bodily integrity creates a ‘propensity to justify intrusive and paternalistic state regulation in opening up all bodies to increased surveillance’.⁹¹⁸ Ruth Miller argues that ‘the elaboration of consent and bodily integrity as rights central to modern citizenship... has turned women’s bodies into space...[such that] their bodies have become subject to more extensive searches and to further regulation.’⁹¹⁹ Surrogates in India have had to submit to the surveillance of the staff at the hostels and the invasive monitoring of their bodies through transvaginal scans, which I will discuss in section 6.4. Fox and Thomson further highlight that the law’s conception of a ‘distinct, individuated body’ renders it and the conventional integrity model ‘ill-equipped to cope...[with] common forms of conjoined embodiment, notably the pregnant body’.⁹²⁰ In the case of pregnancy an understanding of the changeability and plasticity of the body is therefore crucial in developing our conception of embodied integrity. The idea of the body and self as an ever-evolving state is also found in Cornell’s work, who sees ‘the person as involving an endless process of working through’.⁹²¹ She cautions that ‘[t]o separate the woman from her womb or to reduce her to it is to deny her the conditions of selfhood that depend on the ability to project bodily integrity.’⁹²² Further, her vision of bodily integrity ‘demands that women’s bodies are respected, treated as if they have equivalent worth and cannot be violated’.⁹²³ Another key feature of Cornell’s conception

⁹¹⁷ Fox and Thomson (n 900) 531. For further reading on the notion of property in the body see, Rosalind Petchesky, *Property in the Body: Feminist Perspectives* (Cambridge University Press 2007); Rosalind Petchesky, ‘The Body as Property: A Feminist Re-Vision’ in Faye D Ginsburg and Rayna Rapp (eds), *Conceiving the New World Order: The Global Politics of Reproduction* (University of California Press 1995). Also Donna Dickenson, *Property, Women and Politics* (Polity Press 1997).

⁹¹⁸ Fox and Thomson (n 900) 517.

⁹¹⁹ Ruth A Miller, *The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective* (Routledge 2007) 15.

⁹²⁰ Fox and Thomson (n 900) 516.

⁹²¹ Cornell (n 796) 5.

⁹²² *ibid* 46–47.

⁹²³ *ibid* 9.

of bodily integrity is how it is constituted in relation to others, and that the law is one of these ‘symbolic Other(s)’.⁹²⁴ Mervi Patosalmi articulates this aspect of Cornell’s theory in the following quote:

the personality is a process that is dependent on others, the state and the legal system should also be understood as confirming or denying the person's wholeness, and that those entities are also involved in the construction of the personality.⁹²⁵

According to Cornell bodily integrity involves a person’s ability to imagine and project a sense of their whole self into the future as well as the conditions necessary to guarantee that.⁹²⁶ The state and legal systems, which regulate bodies also then construct how the body is imagined by the individual.⁹²⁷ To protect bodily integrity, in line with this embodied integrity view, consists of protecting the individual’s idea of their whole and future self, which in turn demands more than mere non-interference with the physical body. The harms arising from the combination of invasive procedures and controlling practices further captures how the mistreatment of the surrogates impacts the interconnected physical and mental aspects of the embodied integrity of the women. The surrogacy arrangement is an embodied experience for the surrogates with no separation between the mind and the body. The concept of embodied integrity advances our understanding of the harms sustained due to the foetal container model because of how it works to deny the embodied integrity of the surrogates. The analysis developed in Chapter 5, on how this model is constructed in the language surrounding pregnancy and surrogacy, e.g., ‘bun in the oven’ and ‘wombs-for-rent’, demonstrates how the illusion of a separation is created between the pregnant woman and her body which can result in treatment that fails to consider her as a fully embodied person and therefore results in a disembodied experience for the surrogate. In section 6.4 I will show how these harms occur through violations of the rights to privacy, autonomy and bodily integrity, the absence of informed consent, and how the foetal container model enables these interventions. In addition, I will analyse how the law has responded to the issues arising from the practice, and in some instances worked to legitimate or compound the harm.

⁹²⁴ *ibid* 43.

⁹²⁵ Mervi Patosalmi, ‘Bodily Integrity and Conceptions of Subjectivity’ (2009) 24 *Hypatia* 124, 133.

⁹²⁶ Cornell (n 796) 67–68.

⁹²⁷ Patosalmi (n 925) 131.

6.3 Reproductive rights, privacy, autonomy, and bodily integrity in India

Having provided a substantive account of the framework for analysis that I am drawing on I will now (i) show the relevance and importance of these concepts in Indian law and (ii) critique the legal reforms with reference to these concepts. I will outline below how the principles of autonomy, bodily integrity and consent are guaranteed and protected through a combination of statute and case law. The landmark legal cases discussed below reveal the importance granted to the protection of these principles under the Indian Constitution within the wider context of reproductive rights.

During the consultations on the Bills by the committees and the MPs in both houses of the Indian Parliament there were frequent references made to the potential violations of the rights to privacy. The main concern was for the rights to privacy of the intended parents, due to the requirement for a certificate of proven infertility to be issued by an appropriate authority and the initial eligibility criteria for the surrogate to be a ‘close relative’ of the commissioning couple. Yet, during the arrangement the surrogate must relinquish a large part of her rights to privacy, autonomy, and bodily/embodyed integrity. She is required to submit to practices that are deeply intimate, intrusive, and traumatic both mentally and physically – during the embryo transfers and egg retrieval, physical examinations, transvaginal ultrasound scans, and then the inevitable C-section delivery but also in terms of her personal life – no sexual relations with husband, expected to live at the hostel in a shared dormitory in order for the staff to monitor her,⁹²⁸ even residing under the scrutiny of a CCTV system,⁹²⁹ and follow a strictly controlled and prescribed diet and vitamin regime.⁹³⁰ The following sections will explore

⁹²⁸ Daisy Deomampo documented that the surrogates she studied in Mumbai recounted stories of loneliness, isolation, ‘spatial imprisonment’ and powerlessness where they experienced ‘high levels of stress and anxiety because of the restrictions on their mobility and the separation from their families’. See, Daisy Deomampo, ‘Gendered Geographies of Reproductive Tourism’ (2013) 27 *Gender and Society* 514, 526.

⁹²⁹ Rudrappa, *Discounted Life* (n 777) 95.

⁹³⁰ See, Deomampo (n 928) 526. Also, Hochschild (n 189) 44. Hochschild documents that: ‘The women are brought nutritious food on tin trays, are injected with iron supplements (a common deficiency), and are kept away from prying in-laws, curious older children, and lonely husbands, with whom they are, for nine months, allowed no visits home or sex.’ There is even evidence of surrogates being blamed for miscarriages and payments being withheld – see, *Can We See the Baby Bump Please?* (n 175). While this might not be the same as the cases of foetal neglect in America it is troubling and

Indian medical law principles on consent, the wealth of Indian case law on the right to privacy, and how various judgments have affirmed the rights to reproductive autonomy, such as the protection against court-ordered abortions and the right to decide how many times you reproduce, under Article 21 of the Constitution of India.

6.3.1 Indian medical law principles on consent

The right to make decisions regarding one's health and healthcare, which includes giving informed consent to treatment and equally to refusing it, are fundamental features of exercising autonomy and bodily integrity in the medical context. Harm occurs when interventions are made without a person's consent, which results in the violation of these rights. Provisions and guidelines on obtaining informed and valid consent are therefore crucial in safeguarding patients from harm and protecting their rights to autonomy and bodily integrity. In the medical context intrusions or interventions on a person such as physical examinations and treatments are legally permitted on the condition of obtaining (prior, informed, real, or valid) consent. For a person to consent to a treatment there are conditions that must be met. The person must be competent in accordance with the Indian Majority Act, 1875 which requires that they have reached the age of 18, are of sound mind, and are not disqualified by any law to which they are subject to.⁹³¹

The Medical Council of India (replaced by the National Medical Commission since 25 September 2020) established the (Professional Conduct, Etiquette and Ethics) Regulations, 2002, which gained statutory force under The Code of Medical Ethics Regulations. The Regulations came into force on 11th March 2002 and are created by the Central Government under the Indian Medical Council Act, 1956. The Act was amended in 2016 through the Indian Medical Council (Amendment) Act, 2016 and

draws our attention to the comparisons with confining women to a controlled environment and the conditions in *The Handmaid's Tale*. For more discussion on the cases of foetal neglect see, Annas (n 475).

⁹³¹ Omprakash V Nandimath, 'Consent and Medical Treatment: The Legal Paradigm in India' (2009) 25 *Indian Journal of Urology* 343, 345.

again in 2020.⁹³² These Regulations relate to the ‘Professional Conduct, Etiquette and Ethics for registered medical practitioners’ in India and deal with the duties of physicians in general, to their patients, in consultations, to each other, the public and paramedics, as well as unethical acts and professional misconduct. The Regulations also provide for punishment and disciplinary action for professional misconduct. A physician is liable for disciplinary action for professional misconduct for any acts of commission or omission as envisaged by the Regulations. There are at least three instances that refer to the requirement of obtaining consent or informed consent. The first relates to the requirement of obtaining written consent in the case of an operation,⁹³³ and the second sets out that:

No act of invitro fertilization or artificial insemination shall be undertaken without the informed consent of the female patient and her spouse as well as the donor. Such consent shall be obtained in writing only after the patient is provided, at her own level of comprehension, with sufficient information about the purpose, methods, risks, inconveniences, disappointments of the procedure and possible risks and hazards.⁹³⁴

The elements of informed consent in IVF/artificial insemination procedures are clearly set out in the regulation. Informed consent must be obtained in writing, after providing the patient with sufficient information, and at the level of the patient’s own level of comprehension. These are also present in the provisions for consent in the Surrogacy (Regulation) Bill detailed in Chapter 4 of this thesis. The third instance relates to clinical trial and research and the conditions of consent set out in the Indian Council for Medical Research guidelines.⁹³⁵ The Indian Council of Medical Research has revised the *Ethical Guidelines for Biomedical Research on Human Participants* policy document several times since it was first brought out in 1980. The Guidelines were revised and reissued in 2000, 2006 and 2017 and there are several sections dedicated to informed consent. The ICMR Guidelines for ART procedures also provide for informed consent, section 3.2.4 states:

⁹³² Indian Medical Council (Amendment) Act, 2016, 29 of 2016; The Indian Medicine Central Council (Amendment) Act, 2020, 25 of 2020.

⁹³³ Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002. Regulation 7.16

⁹³⁴ Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002. Regulation 7.21

⁹³⁵ Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002. Regulation 7.22.

Before starting treatment, information should be given to the patient on the limitations and results of the proposed treatment, possible side-effects, the techniques involved, comparison with other available treatments, the availability of counselling, the cost of the treatment, the rights of the child born through ART, and the need for the clinic to keep a register of the outcome of a treatment.⁹³⁶

An important development in the guiding principles on consent resulting from case law is the requirement that the consent not only be informed but also prior to the treatment and the restriction on proxy consent given by relatives, a parental authority, or an attendant.⁹³⁷ This development is a response to a paternalistic approach to treatment and a ‘doctor knows best’ culture within the Indian medical profession. As captured in this submission from the *V.P. Shantha* case:

38. In India, [the] majority of citizens requiring medical care and treatment fall below the poverty line. Most of them are illiterate or semi-literate. They cannot comprehend medical terms, concepts, and treatment procedures. They cannot understand the functions of various organs or the effect of removal of such organs. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission for want of beds or patients waiting for days on the roadside for an admission or a mere examination, is a common sight. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctor's experience or intuition is acceptable and welcome so long as it is free or cheap; and *whatever the doctor decides as being in their interest, is usually unquestioningly accepted*. They are a passive, ignorant and uninvolved in treatment procedures.⁹³⁸

6.3.2 Reproductive rights and the right to privacy in Indian case law

The guiding principles of consent in medical ethics in India are evidenced in the Regulations discussed above. However, the primacy given to the rights to privacy, autonomy, bodily integrity as well as consent is more clearly documented through the judgments in the following landmark legal cases on reproductive rights in India. These rights are framed and protected under Article 21 of the Constitution of India, which provides:

21. Protection of life and personal liberty
No person shall be deprived of his life or personal liberty except according to procedure established by law

⁹³⁶ National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005) Section 3.2.4.

⁹³⁷ See *Nandimath* (n 931) 345–346.

⁹³⁸ *Indian Medical Association v V.P. Shantha and Others*, 1995, p. 666. [emphasis added]

6.3.2.1 *B.K. Parthasarathi v Government of Andhra Pradesh*⁹³⁹

B.K. Parthasarathi v Government of Andhra Pradesh concerned a challenge to the constitutional validity of section 19(3) of the *Andhra Pradesh Panchayat Rai Act, 1994* which disqualifies persons having more than two living children after a prescribed date from holding certain positions in public office. It was held by the Court that: ‘The personal decisions of the individual about the birth and babies called “the right of reproductive autonomy” is a facet of a “right of privacy”.’⁹⁴⁰ However, they also held that the right was not absolute, and that the disqualification described and provided in Section 19(3) of the Act ‘does not directly curtail or directly interfere with the right of any citizen to take a decision in the matter of procreation. It only creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act.’⁹⁴¹

6.3.2.2 *Srivastava v Chandigarh Administration (2009)*⁹⁴²

This case concerned a young woman with mental developmental issues who became pregnant following an alleged rape that took place while she was a resident at a government-run welfare institution located in Chandigarh.⁹⁴³ The Chandigarh Administration approached the High Court of Punjab and Haryana seeking approval for a termination on the basis that in addition to her level of mental development she was also an orphan and therefore did not have the familial support to take care of her or the child. The Court ruled that it was in her best interests to undergo a termination despite the findings of the Expert Body, consisting of medical experts and a judicial officer who had been constituted to conduct an inquiry into the facts, that the woman had expressed a willingness to continue with the pregnancy and keep the child.

⁹³⁹ *B.K. Parthasarathi v Government of Andhra Pradesh* [2000] 1 ALD 199.

⁹⁴⁰ *B.K. Parthasarathi v Government of Andhra Pradesh* [2000] 1 ALD 199 para.14.

⁹⁴¹ *B.K. Parthasarathi v Government of Andhra Pradesh* [2000] 1 ALD 199 para. 22.

⁹⁴² *Srivastava v Chandigarh Administration* (2009) 14 SCR 989.

⁹⁴³ *Suchita Srivastava & Anr vs Chandigarh Administration* on 28 August, 2009 para. 2.

An appeal was made to the Supreme Court where a stay on the High Court orders was granted thereby ruling against the termination. During the reasoning important discussion on women's reproductive rights were had and important principles were set out. The decision of the Supreme Court relied on two broad considerations, the first being whether it was correct of the High Court to direct a termination without the consent of the woman. The judges consulted The Medical Termination of Pregnancy Act, 1971 which 'clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any "mental illness".'⁹⁴⁴ The Court explained that there is a clear distinction between mental illness and mental developmental issues such that the woman in question had and therefore she was of sound mind. The second consideration concerned the appropriate standards of the Court to exercise 'Parens Patriae' jurisdiction when the woman was assumed to be incapable of making an informed decision. Considering that the woman was 19 weeks pregnant at the time of the hearing they did not hold that a late-term abortion, which can endanger the health of the woman, was in her best interests.

The Court reasserted that 'a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India.'⁹⁴⁵ Of relevance to this thesis on surrogacy is the following statement: 'It is important to recognise that *reproductive choices can be exercised to procreate* as well as to abstain from procreating. The crucial consideration is that *a woman's right to privacy, dignity and bodily integrity should be respected*.'⁹⁴⁶ In the same paragraph they also referred to a woman's right to freely choose a birth-control method such as sterilisation and then later that the provisions of The Medical Termination of Pregnancy Act clearly state that 'obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination

⁹⁴⁴ *Suchita Srivastava & Anr vs Chandigarh Administration* on 28 August, 2009 para. 4 This follows the conditions set out for consent mentioned above.

⁹⁴⁵ *Suchita Srivastava & Anr vs Chandigarh Administration* on 28 August, 2009 para. 11.

⁹⁴⁶ *Suchita Srivastava & Anr vs Chandigarh Administration* on 28 August, 2009 para. 11 [emphasis added].

of a pregnancy.⁹⁴⁷ They warned against any dilution of this requirement as it would be ‘an arbitrary and unreasonable restriction on the reproductive rights of the victim’ and ‘liable to be misused in a society where sex-selective abortion is a pervasive social evil.’⁹⁴⁸ The issues surrounding the use of abortions and foetal reductions during a surrogacy arrangement will be returned to in more detail in the subsequent sections.

6.3.2.3 *Devika Biswas v. Union of India*⁹⁴⁹

This case concluded a five-year challenge to mass sterilisation drives where women between 15 and 29 years of age were sterilised. The judgment noted the evidence of poor-quality care and hygiene standards that led to the death of several women from States including Chhattisgarh, Uttar Pradesh, Kerala, Rajasthan, Madhya Pradesh, and Maharashtra. The Supreme Court again recognised the right to reproduction as an important component of the ‘right to life’ under Article 21 and that the respondents had violated two components of Article 21 of the Constitution (Protection of Life and Personal Liberty), namely the fundamental right to health and reproductive rights.

6.3.2.4 *K.S. Puttaswamy v. Union of India*

In 2017, the nine-judge bench of the Supreme Court passed a historic judgment in *K.S. Puttaswamy v. Union of India* by unanimously affirming that ‘Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.’⁹⁵⁰ In *Justice K S Puttaswamy v Union of India* 2012a⁹⁵¹ the judges specifically recognised women’s constitutional rights under Article 21 to make reproductive choices. They drew

⁹⁴⁷ Suchita Srivastava & Anr vs Chandigarh Administration on 28 August, 2009 para. 15.

⁹⁴⁸ Suchita Srivastava & Anr vs Chandigarh Administration on 28 August, 2009 para. 15.

⁹⁴⁹ AIR 2016 SC 4405, 2016 (4) RCR 461 (Civil), 2016 (8) SCALE 707, 2016 (10) SCC 726.

⁹⁵⁰ *K.S. Puttaswamy(Retd) vs Union Of India* on 26 September, 2018 para.318.

⁹⁵¹ *Justice K S Puttaswamy v Union of India* 2012a: para 72, 2012b: para 46, 2012c: para 38.

from the position adopted by the judges in the case of *Suchita Srivastava v Chandigarh Administration* (2009) regarding a woman's statutory right to abortion by stating that 'The statutory recognition of the right is relatable to the constitutional right to make reproductive choices which has been held to be an ingredient of personal liberty under Article 21.'⁹⁵² Of relevance to the discussion in this chapter on the gendered harm sustained by pregnant woman as a result of the violation of bodily integrity the judges further affirmed that 'The Court deduced the existence of such a right from a woman's right to privacy, dignity and bodily integrity.'⁹⁵³ Furthermore, they acknowledged the physical and mental aspects of the right to privacy stating that 'these interests are broadly classified into interests pertaining to the physical realm and interests pertaining to the mind.'⁹⁵⁴ Women's reproductive rights are further affirmed under privacy rights with reference to bodily integrity, therefore intrusions into the body are violations of privacy. The judges stated that 'Concerns of privacy arise when the State seeks to intrude into the body of SUBJECTS... A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.'⁹⁵⁵ In the same paragraph they recognised the right to work as protected under Article 19 of the Constitution of India; 'Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision-making process.'⁹⁵⁶

These cases demonstrate the importance given in Indian case law to the principles of privacy, consent, autonomy, and bodily integrity, how they are linked in medico-legal decision-making in India, and how they are guaranteed under the Indian Constitution. They provide evidence of the standards required in medical practice against which we can assess how well they are upheld in the practice of

⁹⁵² Justice K S Puttaswamy v Union of India 2012a: para 72.

⁹⁵³ Justice K S Puttaswamy v Union of India 2012a: para 72.

⁹⁵⁴ Justice K S Puttaswamy v Union of India 2012b: para 46.

⁹⁵⁵ Justice K S Puttaswamy v Union of India 2012c: para 38.

⁹⁵⁶ Justice K S Puttaswamy v Union of India 2012c: para 38.

surrogacy and its regulation. In the following sections I will show how adherence to these standards falls short during the practice of surrogacy and the approaches to its regulation.

6.4 Critical re-evaluation of the practice and legal reforms

In this section I will illustrate how the foetal container model operates in the practice and legal reforms through the provisions of the Bill and how it facilitates harms to the surrogates. The analysis here will draw on the concepts of gendered harm and embodiment that demonstrate the importance of understanding how harms have an individual and social dimension and how bodies interact with and are shaped by medical and legal systems, including the need to shift to an embodied understanding of integrity. As West claims, legal systems can legitimate harms that are experienced exclusively or predominantly by women.⁹⁵⁷ Sheelagh McGuinness asserts that ‘we must recognise how law’s manipulation of women and their (potential) reproductive choices shapes social norms and expectations.’⁹⁵⁸ The comments of the Select Committee of Rajya Sabha on the Surrogacy Regulation Bill, 2019 reveal a great deal about the social norms and expectations on women in India in terms of motherhood in general and in ‘altruistic’ surrogacy arrangements.⁹⁵⁹ The concept of gendered harm therefore provides an appropriate framework for evaluating and critiquing the way the Indian Government has responded to the practice of surrogacy through the legal reforms and how the practice facilitated by the current legal framework, based on a foetal container model of pregnancy, gives rise to potential harms.

⁹⁵⁷ West (n 88) 151.

⁹⁵⁸ McGuinness (n 80).

⁹⁵⁹ Quoted in Chapter 3 of this thesis the Committee spoke of how the surrogate could be an example ‘a model woman in the society’ which echoes the narratives surrounding the surrogate in the depictions in Bollywood films on the ‘virtuous woman’.

6.4.1 Examples of the foetal container model in the practice and provisions

The following sections will deal with specific aspects of the practice of surrogacy in India that reveal and rely on the foetal container model. Through these examples, I aim to illustrate how this model of pregnancy is also underpinning, at least implicitly in some cases, the approaches to regulating surrogacy and how the surrogates experience a form of gendered harm as a result. The examples include the permissibility of only gestational and altruistic surrogacy, ownership rights, the conditions and enforceability of the contract, and the invasive procedures. In assessing these aspects of the practice and the government's approach to regulating them, I will argue that the surrogates' rights to privacy, autonomy, bodily integrity, and to give informed consent are not sufficiently protected therefore resulting in harm. The evidence for these claims is drawn from the work of the previous chapters on the examination of ethnographic studies and documentaries involving interviews with the stakeholders; surrogates, doctors, clinic staff, hostel staff, brokers, intended parents, as well as the ART Bill, Surrogacy (Regulation) Bill, the Standing Committee and Select Committee reports, and background notes produced by the Ministry responsible for the Bills. The use of language in these sources will also be critically reviewed.

6.4.1.1 Gestational surrogacy only

The first aspect of the practice and regulation I will address is the permissibility of only gestational surrogacy.⁹⁶⁰ This type of surrogacy relies on, reinforces, and provides a clear example of the foetal container model of pregnancy and it allows us to see how the model works in practice. The central feature of this model allows for the embryo to be seen as a separate and self-standing entity that can be transferred from place to place without changing its nature. In gestational surrogacy the self-contained entity (embryo) that originates from outside the surrogate's body is transferred to her body

⁹⁶⁰ The Surrogacy (Regulation) Bill, 2016, 257 of 2016, in Clause 4(iii)(b)(III) states that 'no woman shall act as a surrogate mother by providing her own gametes.'

to grow, it is seen as belonging to or at least ‘of’ the intended parents and not to or ‘of’ her before it is then ‘returned’ to the intended parents at birth. Moreover, it is considered to already be a baby and therefore ‘owned’ by the intended parents throughout. This view is evident in the words of the doctors, clinic and hostel staff, intended parents, and the Bills quoted throughout the thesis that take the process to consist of a ‘self-standing and already baby’ embryo, and then foetus, who is only being temporarily located in the body of the surrogate before its ‘return’ to the rightful ‘owners’.⁹⁶¹

Veronica, a Russian woman, who visits Dr Patel’s clinic with her British husband as seen in *House of Surrogates* confirms this when she says:

The littles ones for me, they are already life. They are waiting for that moment when they can be placed in a place to grow. And then they can be taken out and then say, “Hello Mummy!”⁹⁶²

Veronica’s description of the arrangement and the processes involved consist of a personification of the embryos and a dehumanisation of the surrogate that sees her, and her role, as simply a ‘place’ and not as an embodied person and active agent. The use of language evokes the ‘bun in the oven’ idiom and conjures up a machine-like function of the surrogate’s body. Furthermore, it works to erase the surrogate and her involvement by rendering her invisible. Rudrappa observed similar behaviour in the intended parents she interviewed who when announcing the pregnancy on their blogs would fail to mention the surrogate at all and would thank everyone but the surrogate for their involvement. By claiming the pregnancy as their own not only did they establish themselves as the authentic parents, but they in effect made the surrogate disappear.⁹⁶³ This way of thinking reduces the surrogate’s role,

⁹⁶¹ Helena Ragoné found that in cases of gestational surrogacy the surrogate was more likely to be seen as a vessel whereas in traditional surrogacy the surrogate was seen as giving a part of herself. See, Helena Ragoné, ‘The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism’ in Rachel Cook, Shelley Day Sclater and Felicity Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003).

⁹⁶² *House of Surrogates*, 2007 19.17mins.

⁹⁶³ Rudrappa, *Discounted Life* (n 777) 126. This same behaviour was observed in a very well-known surrogacy case in India, when Bollywood actors Aamir Khan and Shahrukh Khan, who had children through surrogacy, tweeted the news and expressed gratitude towards everyone except the surrogate. See Marwah and Nadimpally (n 485) 208.

investment, and labour to simply and merely a ‘service’ or ‘facility provision’, which as was highlighted in Chapter 4 facilitates a treatment of the surrogate as fungible, disposable, and invisible and aligns with the definition of objectification.

Additionally, by removing the genetic link between the surrogate and the child the rights of the surrogate over the child are also removed.⁹⁶⁴ Dr Patel attests to this in her interview described in Chapter 2 and in the *House of Surrogates* documentary when discussing the attractiveness of India as a destination for surrogacy arrangements, in comparison to countries like the UK where the birth mother remains the legal mother until parental rights are transferred to the intended parents. She explains:

There are many factors making India the surrogacy hub of the world. First, is the medical technology. Second, the cost. Third, the guidelines that are favourable. *The surrogate has no rights over the baby or no duties towards the baby.* So that makes it easier. Whereas in the Western World the birth mother is considered as the mother. And the birth certificate will have her name.⁹⁶⁵

Rudrappa encountered a couple during her investigation who admitted that they had chosen India precisely because the surrogate had no rights over the baby or legal recourse to claim the child as her own which in turn strengthened their parental rights.⁹⁶⁶

Despite the attractiveness and advantages of gestational surrogacy to those commissioning the arrangement there are serious health risks for the surrogates, as described in Chapter 4. These potential risks lead us to question whether it is ethical to treat the surrogate in this way, to prevent her from claiming rights over the child and so that the intended parents can control the genetic origin of the

⁹⁶⁴ As discussed by Rudrappa: ‘This form of surrogacy...is most common in India and elsewhere because babies are not genetically descended from surrogate mothers, and as a result they exercise very few legal rights over the babies.’ Rudrappa, *Discounted Life* (n 777) 3.

⁹⁶⁵ *House of Surrogates* (n 29). [emphasis added].

⁹⁶⁶ Rudrappa, *Discounted Life* (n 777) 128.

child.⁹⁶⁷ Reducing the surrogate's claim over the child is one of the ways that she is treated as merely a container. The absence of a genetic link minimises 'interference' from her both genetically and in terms of claiming parentage rights afterwards. It also works to create an alienation between her and the foetus during the pregnancy and the child afterwards. SAMA claim that the restriction to gestational only is a patriarchal premium for having a genetically related child and an essentialising of motherhood.⁹⁶⁸ This brings us to the next aspect of the practice, and the corresponding provisions, that constitutes another example of the foetal container model of pregnancy at work, which is ownership rights.

6.4.1.2 Property and ownership over the foetus

The notions of 'property' and 'ownership' and how they are conferred in the arrangement develop from the analysis on gestational surrogacy above and provide another example of how the foetal container model operates within the practice of surrogacy and the legal reforms. As mentioned in Chapter 5 the Department of Health Research in the background notes to the Surrogacy (Regulation) Bill, 2019 describe surrogacy as 'an arrangement where a woman (the surrogate) offers to carry a baby through pregnancy on behalf of a couple and *then return the baby* to the intended parent(s) once it is born.'⁹⁶⁹ That the surrogate is to return a baby that did not exist prior to the pregnancy illustrates that the baby and the embryo are being equated and regarded as the same thing, and that the intended parents are considered to retain ownership throughout. It is evident that genetics trump gestation here, and that the surrogate is required to give back to the intended parents what is genetically and what was always theirs. It is clear evidence of the foetal container model. It evokes the Aristotelian view of

⁹⁶⁷ SAMA express that the desire for a genetic link with the child in order to avoid conflicts over the parentage trumps the concerns over the health of the surrogate. Nadimpally and others (n 871) 14.

⁹⁶⁸ Sarojini Nadimpally, Deepa Venktachalam and Sneha Banerjee, 'Regulating the Surrogacy Industry - a Feminist Perspective' (SAMA) <<https://kafila.online/2016/08/28/regulating-the-surrogacy-industry-a-feminist-perspective-sarojini-nadimpally-deepa-venktachalam-and-sneha-banerjee/>> accessed 20 April 2021.

⁹⁶⁹ Described in The Surrogacy (Regulations) Bill, 2019, Rajya Sabha, *Report of the Select Committee of the Surrogacy (Regulation) Bill, 2019* Available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf accessed 28 September 2021. Para 1.5 [emphasis added].

pregnancy where the ‘seed’ is ‘planted’ in the ‘environment’ and that the gestation does not impact on the genetic origin or ‘ownership’ of the foetus. Further, this strict compartmentalisation affirms the surrogate’s role as that of a container or incubator who has no effect on the characteristics of the child and reinforces her, or more precisely her womb’s, perceived fungibility. Rudrappa and Pande both observed how the surrogates challenged this through emphasising their connection with the foetus and then future child. Roopa, a surrogate in Rudrappa’s study, believed that they were part of each other and spiritually connected, and because the child had grown in her womb, she would have her character and values.⁹⁷⁰

Several crucial questions are provoked by this notion of ownership in surrogacy. Can you ‘own’ a foetus, can you ‘own’ a foetus inside someone else’s body, and do the answers depend on how you understand the foetus i.e., an entirely separate entity or a proper part of the woman’s body? Subsequently, how does that compare or contrast with other body parts or substances such as organs, blood, tissue, bone marrow or of more relevance here eggs and sperm? The description of the arrangement as a process of the baby being returned after the surrogate has offered to ‘carry’ it clearly indicts that the foetal container model of pregnancy is implicitly assumed and underpinning the thinking. The surrogate is seen as temporarily ‘housing’ the ‘baby’ that belongs to someone else throughout. The application of a parthood view of pregnancy would challenge the belief that at the end of the arrangement the baby is being returned even if the ‘part’ was originally created outside of the surrogate’s body.

6.4.1.3 Alienation, separation, and disembodiment

The way that the foetal container model operates in gestational surrogacy is related to the notion of ownership which together work to create a sense of alienation, separation, and disembodiment for the

⁹⁷⁰ Rudrappa, *Discounted Life* (n 777) 60.

surrogate. This occurs from how the surrogates are consistently reminded and trained to think of the foetus as not belonging to them.⁹⁷¹ While this could be considered good practice in the sense that it is preparing the women for relinquishing the baby shortly after the birth it creates an alienation and separation between the surrogate and the foetus that would not be so easily achieved, if at all, in the parthood view of pregnancy. Dr Patel admits that it is ‘*how you train them—that is what makes surrogacy work*’⁹⁷² as she tells the surrogates that ‘it’s not your baby... because it is someone else’s.’⁹⁷³ In this same conversation she also talks of how the surrogate will love and take care of the child even more than their own, which reveals how they must behave in the arrangement by being the ‘perfect mother-worker’.⁹⁷⁴ They must simultaneously consider the foetus as not theirs but still devote their maternal love and affection to an even greater degree than to their own children, thus creating a paradoxical experience.

Dr Kanshul Kadam, another fertility doctor who appears in *Made in India*,⁹⁷⁵ also employs this approach. She reveals:

It is when I educate them [the surrogate and her husband] and inform them that look the eggs are not hers. The baby is not hers. I’m just going to prepare a baby outside and just put it into her uterus. I only need her uterus. That is when they are able to understand.⁹⁷⁶

Dr Kadam’s admission is an even more explicit expression of how the foetal container model of pregnancy underpins her understanding and explanation of surrogacy. She is likely explaining it in this way to assuage any concerns the husband has regarding how his wife becomes pregnant and to make it clear that no sexual relations are involved. Yet, it reveals how the surrogate, and her body can be figuratively split and separated, and that the process is not understood as an embodied experience.

⁹⁷¹ Documented by Rudrappa, see *ibid* 119.

⁹⁷² Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 136. [emphasis in original]

⁹⁷³ *ibid*.

⁹⁷⁴ A term developed by Amrita Pande. See, Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (n 91).

⁹⁷⁵ *Made in India* (n 29).

⁹⁷⁶ *ibid*. at 19.40mins.

Dr Patel's training is effective in convincing the surrogates of the 'true owners' of the foetus because, as earlier quoted, Hetal a surrogate in Pande's study expresses: 'We know the baby is not ours; they are investing so much money, on my food, my medicines. It's their property.'⁹⁷⁷ Pinki another surrogate at Dr Patel's clinic explains that: 'People tell me what I'm doing is wrong. To keep someone else's child in your womb. Some say that I'm selling the child. Then I have to explain that I'm not selling my baby because it's not my baby.'⁹⁷⁸ Munni, a surrogate who is interviewed by SAMA in their documentary *Can we see the baby bump please?* also claims that: 'Whatever it is, that was someone else's child not mine...It was only my womb it was their seed. It was theirs. They took care of their own.'⁹⁷⁹ These quotes from the surrogates provide evidence of the effectiveness of the training that ensures that they have internalised the foetal container model of pregnancy, even using the word 'seed' to describe the embryo transfer. This could be in part because establishing the baby as someone else's makes the practice more morally acceptable as alluded to by Pinki in her admission quoted above. They also document the emotional labour that the women must perform to disengage from the foetus in order to fulfil the terms of the contract,⁹⁸⁰ they are even told not to look at the baby after relinquishment,⁹⁸¹ and the emotional boundaries they have created.⁹⁸² Hochschild remarks that surrogates perform a significant amount of emotional labour to suppress feelings that would interfere with the process and for the babies they give birth to.⁹⁸³ She recounts how a surrogate Anjali explained to her that she tried to 'detach herself from her baby, her womb, and her clients' which led Hochschild to contemplate 'how she reordered the parts of herself that she claimed and disclaimed, and what emotional labour that might require her to do'.⁹⁸⁴ Here we can see a different type of harm of separation than that described by West. She accounts for the harm of separation between the surrogate and the

⁹⁷⁷ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 282.

⁹⁷⁸ *Outsourcing Surrogacy* (n 176).

⁹⁷⁹ *Can We See the Baby Bump Please?* (n 175). At 24.19mins.

⁹⁸⁰ Rudrappa, 'Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015' (n 301) 1095.

⁹⁸¹ Lamba and Jadvva (n 501) 185.

⁹⁸² *ibid* 186.

⁹⁸³ Hochschild (n 189) 43.

⁹⁸⁴ *ibid* 45.

new-born when the baby is relinquished, which has also been observed in the studies on surrogates in India.⁹⁸⁵ The enforceability of the contract means that the surrogate despite being the birth mother is not considered the legal mother and that she must relinquish the baby shortly after the birth.⁹⁸⁶ This condition relies on a compartmentalised view of the process with no interference from or intertwining with the surrogate and her body and reinforces how the surrogates are considered fungibility. Yet, more than emphasising the women's interchangeability it reveals their disposability and the transience of their role. Pande observed that this 'disposability is reiterated at every stage of the process, even though in reality the demand for surrogates is greater than the supply'.⁹⁸⁷ The provision responds to the cases of abandoned children and the ambiguity surrounding the legal parentage of the children. The intention is to ensure that the intended parents assume their parental responsibility to the child(ren) and the legislation includes punishments for child abandonment. However due to how the foetal container model of pregnancy influences these arrangements there is (potential) harm when the surrogate must attempt to create a separation between a part of herself and her own body. Thus, resulting in a disembodied experience that undermines her embodied integrity. The following sections on the invasive procedures will demonstrate to a greater degree how the surrogate's rights to autonomy, bodily/embodied integrity and to give informed consent can be violated, which relates to the features of objectification outlined in Chapter 4.

6.4.1.4 Invasive procedures and controlling practices

In this section I will address the harm-causing events experienced through the invasive procedures and controlling practices that the surrogates are subjected to, which can violate their rights to privacy,

⁹⁸⁵ Vijaya, one of the surrogates interviewed by Rudrappa spoke of the pain she feels every day because of giving up the baby. Nagu, another surrogate, explained that: 'The money disappears, *akka*. It is gone in months. But that pain? I live with it every single day.' She wishes she could repay the money so she could get her baby back. See, Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 60.

⁹⁸⁶ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl.7.

⁹⁸⁷ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 134.

autonomy, and embodied/bodily integrity.⁹⁸⁸ These harms are uniquely experienced by the surrogates and relate to the harms of invasion set out in the gendered harm definition. The surrogates themselves refer to the *himse*, which mean harms, injury, or violence, that they endured through the medical interventions.⁹⁸⁹ Rudrappa observed that although physical harm was caused by the bodily intrusions it was the psychological injury from these invasions that was most acutely felt. The harm was made worse by the lack of consent to some of these interventions and that the shame and humiliation the surrogates endured was grossly underestimated.⁹⁹⁰ Although some efforts are made to obtain the consent of the surrogates before they agree to the arrangement, as outlined in Chapter 4, there remains serious doubt over whether the consent is informed and valid.

The signing of the contract provides an opportunity to obtain the surrogate's valid and informed consent, but Rudrappa discovered from her interviews that there was a lack of informed consent as none of the women had received information on the medical interventions they were to undergo.⁹⁹¹ Tanderup et al. found that the surrogates were not provided with essential information on the procedures and risks, were unable to explain what procedures they had undergone, and appeared to be absent from the decision-making process.⁹⁹² The women did not feel empowered to ask further questions because they perceived the doctors to be too busy and that it would be inappropriate.⁹⁹³ This confirms, as I highlighted earlier, that there is a culture of not questioning the doctor's authority and that it is common for doctors not to provide detailed information on medical procedures to patients in India.⁹⁹⁴ This points to the wider problem of the discrepancies between the formal standards codified in the medical ethics for practitioners and established by the Supreme Court judgments and what

⁹⁸⁸ Werner-Felmayer indicates that there are 'several layers of complexity pertaining to invasive procedures that manipulate gametes, embryos and women's bodies and the disruption of social and cultural norms by some of the procedures.' See, Werner-Felmayer (n 181) 13–14.

⁹⁸⁹ Rudrappa, *Discounted Life* (n 777) 114.

⁹⁹⁰ *ibid* 117.

⁹⁹¹ Rudrappa, 'Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015' (n 301) 1091.

⁹⁹² Tanderup and others (n 196) 494.

⁹⁹³ *ibid*.

⁹⁹⁴ Also articulated by Tanderup et al., see *ibid*.

happens in practice. Considering the surrogates' economic and educational backgrounds there is a huge disparity in power and knowledge, which makes it even more important that the doctors take the necessary time to explain the procedures and risks to the surrogates. They are in a vulnerable position and the need for money from a commercial arrangement would prevent them from questioning the doctor's authority in case it jeopardised the arrangement. The nature of the interventions and the area of the body that they take place also demand more stringent standards for obtaining informed consent and greater respect for autonomy and bodily integrity.⁹⁹⁵

One aspect of the significant harm experienced by the surrogates occurs through the management of their reproductive organs. Rudrappa observed that submitting to transvaginal ultrasound scans was extremely traumatic and excessively invasive for the surrogates. Some of the women remarked that 'they had consented to surrogacy, which they assumed was carrying, birthing, and giving up babies while living separately from their own families. But *they had not consented to the routine instrumental intrusions into their bodies*, which felt like a series of sexual assaults.'⁹⁹⁶ It is clear that the surrogates had not understood the nature of the arrangement and the full series of acts that would be done to their bodies. Herring and Wall submit that a misunderstanding of the nature of the act means that a person is no longer in control of the use of their body which 'is wrongful at an exceptional level as it bypasses a person's subjectivity and reduces the body to a mere object'.⁹⁹⁷ This is reaffirmed by George Annas who asserts that '[b]efore birth, we can obtain access to the fetus only through its mother, and in the absence of her informed consent, can do so only by treating her as a fetal container, a non-person without rights to bodily integrity.'⁹⁹⁸ This constitutes a harm of invasion and is evidence of the objectification of the surrogate which treats her first and foremost as a foetal container.

⁹⁹⁵ For more discussion on this in relation to maternity care in general see, Elselijn Kingma, 'Harming One to Benefit Another: The Paradox of Autonomy and Consent in Maternity Care' (2021) 35 *Bioethics* 456.

⁹⁹⁶ Rudrappa, *Discounted Life* (n 777) 117. [emphasis added].

⁹⁹⁷ Herring and Wall (n 898) 582.

⁹⁹⁸ Annas (n 695) 1214.

The psychological harm sustained by the surrogates is another area that has been not sufficiently considered in the provisions of the legislation.⁹⁹⁹ Nishtha Lamba and Vasanti Jadva studied the psychological impact of undertaking a surrogacy arrangement on Indian women and found that they were suffering from higher rates of depression compared to the group of expectant mothers in their study.¹⁰⁰⁰ They found that the circumstances which were unique to transnational surrogacy in India left the women more vulnerable to psychological problems.¹⁰⁰¹ The surrogates' experiences of harm during the arrangement attest to the embodied understanding of integrity set out earlier in this chapter. The social stigma attached to surrogacy in India also contributes to the psychological harm or distress of the surrogates due to the fact that they feel forced to keep their pregnancies a secret from family members, friends, and neighbours.¹⁰⁰² The surrogacy hostels as well as allowing the doctors and staff to monitor the women offer the surrogates a place to hide and within this environment, they are able to form support networks with the other women who share their situation. The psychological issues usually arise when the women return to their lives but have to maintain the secrecy surrounding the arrangement and as a result have little or no social support.¹⁰⁰³

The absence of binding regulation has meant that there has been no standard practice for consistent and comprehensive screening. The provisions of the Surrogacy legislation, on the eligibility criteria of the surrogates, aims to remedy this with the requirement of a certificate issued by the appropriate authority following an assessment for psychological and medical fitness from a registered practitioner.¹⁰⁰⁴ However, the ability to adequately screen the women's medical records and for health

⁹⁹⁹ There needs to be provisions for counselling and long-term aftercare for mental health support. Dr Patel also dismisses the psychological impact when she says that the surrogates are sad for about 10 days but after that they are fine. Long-term studies are needed to assess the long-term impact of the arrangement on the surrogates psychological well-being.

¹⁰⁰⁰ Lamba and Jadva (n 501) 185.

¹⁰⁰¹ *ibid* 184. I discussed some of these in Chapter 4 which included lack of counselling, that the surrogates did not usually meet the intended parents or even the new-born after the birth, and the stigma of surrogacy in India.

¹⁰⁰² *ibid* 193.

¹⁰⁰³ *ibid*.

¹⁰⁰⁴ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 4 and Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl. 4.

issues would be challenging as many of the surrogates do not have medical records.¹⁰⁰⁵ There have been reports of prospective surrogates not disclosing all their previous pregnancies for fear of being precluded from undertaking the arrangement,¹⁰⁰⁶ bringing another relative in place of their husband if he refused to give his required consent, and even lying about their age.¹⁰⁰⁷ The surrogates are taking huge risks with their health by submitting to the highly invasive procedures that involves hormonal preparation for IVF, a pregnancy with potentially multiple foetuses resulting in foetal reductions, and then a C-section delivery. I will now discuss the harms arising from these procedures and the related provisions.

6.4.1.4.1 Embryo transfers, foetal reductions, and abortions

In this section I will further develop the evaluation of the provisions relating to embryo transfers, foetal reductions, and abortions in Chapter 4 by applying the foetal container model described in Chapter 5. Serious concerns were identified regarding the potential for a lack of informed and valid consent, and the health risks for the surrogates arising from these procedures. I also described the processes involved in preparing the surrogate's body for the pregnancy.¹⁰⁰⁸ It has been common practice in India to transfer multiple embryos at once to increase the success rate, when more than one embryo develops into a foetus but only one child is desired the surrogate undergoes 'foetal reductions', and then to align the birth with the arrival of the intended parents, amongst other reasons, the surrogate must submit to a Caesarean section requiring more recuperation time.¹⁰⁰⁹ Tanderup et al. heard from the doctors they interviewed that in some cases they would transfer up to seven embryos, which clearly contravened the ICMR's Guidelines.¹⁰¹⁰ Sayani Mitra was told by doctors in the clinic she observed that they would

¹⁰⁰⁵ Vora, 'Experimental Sociality and Gestational Surrogacy in the Indian ART Clinic.' (n 190).

¹⁰⁰⁶ Deomampo (n 194).

¹⁰⁰⁷ Saravanan (n 195).

¹⁰⁰⁸ Also described here, Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (New York University Press 2015) 3.

¹⁰⁰⁹ Rudrappa documented the common practice of transferring up to 4 embryos to increase success rates and then 'selective reductions' if the intended parents only want one to two children. See also, Tanderup and others (n 196) 496.

¹⁰¹⁰ *ibid* 495.

transfer up to five embryos but only document the transfer of two in the surrogate's file and that they would not inform the surrogate of the multiple transfers.¹⁰¹¹ This is evidence of clinical malpractice involving the violation of the surrogate's rights to give informed consent, autonomy and bodily integrity. Tanderup et al. report one doctor explaining that the reasons for multiple embryo transfers were to increase the success rate but also to reduce the cost for the commissioning parents, stating that: 'The CPs cannot afford any decrease in the success rates though the risk of medical complications is higher.'¹⁰¹²

In the Statement of Objects and Reasons of the ART Bill, 2020 Dr Harsh Vardhan, who was the Minister for Health and Family Welfare and responsible for the ART and Surrogacy Bills claimed that: 'Multiple embryo implantation needs to be regulated and children born through ART need to be protected.' Yet, the opportunity to provide a maximum number of transfers and cycles has been missed. The legislation provides that the number of embryo transfers 'shall be such as may be prescribed'.¹⁰¹³ The Department for Health Research confirmed during the consultations with the Parliamentary Standing Committee that the number of embryo transfers will be included in the Rules section of the Act, which is a supplementary document providing more detail on the provisions. This is a concern that the legislators have failed to seriously consider and by not including the number in the main statute they have left it open to ambiguity and subject to change as is the case with the number of permitted cycles. Who will ultimately decide the appropriate number? Dr Patel during the webinar 'Troubling Gifts: Revisiting the Indian ART and Surrogacy Bills' which took place on 16 October 2020 expressed frustration at the interference in prescribing the number of egg retrievals and transfers as she believed it should be decided by the medical professional conducting the procedures and between the doctor

¹⁰¹¹ Sayani Mitra, 'Disruptive Embodiments: An Ethnography of Risks and Failures during Commercial Surrogacy in India.' (PhD, University of Göttingen, 2017).

¹⁰¹² Tanderup and others (n 196) 495. Veronica, the intended parent quoted earlier is observed pressurising Dr Patel to transfer two embryos instead of just the one as she was going to do and after some little persuasion Dr Patel agrees.

¹⁰¹³ The Surrogacy Regulation Bill, 2019 Chapter III clause 8 provides that: 'The number of oocytes or human embryos to be implanted in the surrogate mother for the purpose of surrogacy, shall be such as may be prescribed.'

and patient. However, there needs to be a limitation on the number of transfers and the number of repeated cycles as both have serious health implications for the surrogate.

The number of embryo transfers is linked to the practice of foetal reductions which has significant health risks and consequences for the surrogate and impacts her embodied integrity. This disregard for her health reveals that the foetal container model is operating because her primary function here is to ‘contain’ the embryos while they develop into foetuses and that the pursuit of a successful and cost-effective pregnancy is given more importance. Tanderup et al. also found that two of the surrogates they interviewed who were pregnant at the time, one with twins and the other with triplets, had not been made aware of the multiple embryo transfers and foetal reduction procedures.¹⁰¹⁴ They also observed that the surrogate is usually completely excluded from the decision-making process regarding whether foetal reductions are performed. They recount a Dr Madhu saying that: ‘The SM knows that more than one embryo can be implanted. She doesn’t have anything to say in the decision on fetal reduction—of course not, as she is not a parent.’¹⁰¹⁵ They also document a Dr Swati claiming that the surrogate has rented out her womb to someone else for nine months, by signing the contract she is agreeing to all the risks and complications, therefore she is not entitled to make decisions over the number of foetuses but that they offer her the assurance that ‘nothing will go wrong’.¹⁰¹⁶ This position requires that the surrogate contracts out her rights to autonomy and bodily integrity during the arrangement which should not be permitted as it contravenes the protections given to reproductive rights under the Indian Constitution and the principles enshrined in Indian medical law. The assurance that nothing will go wrong which cannot be guaranteed calls into question the validity of the surrogate’s consent.

¹⁰¹⁴ Tanderup and others (n 196) 495.

¹⁰¹⁵ *ibid* 497.

¹⁰¹⁶ *ibid* 498.

Clause 6 section (2) of the Surrogacy Bill and Act provide for the surrogate to withdraw her consent before the implantation:

Notwithstanding anything contained in sub-section (1), the surrogate mother shall have an option to withdraw her consent for surrogacy before the implantation of human embryo in her womb.

Clause 9 in the initial Surrogacy Bill and clause 10 of the Act provide that:

No person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall force the surrogate mother to abort at any stage of surrogacy except in such conditions as may be prescribed.

The legislation offers some basic provisions on withdrawing consent before implantation and protecting the surrogate from forced abortions, but it is completely silent on the issue of foetal reductions. The absence of provisions surrounding foetal reductions raising some important questions as does the provision relating to abortions. Can the surrogate request an abortion within the legal limitations? Or is it assumed that the surrogate will not want to abort the foetus? There are provisions for the surrogate to withdraw prior to implantation but what about before the limit on terminations? Will the surrogate be required or requested to undergo a foetal reduction as previously termed in the ART Bill? Can the surrogate refuse to undergo a foetal reduction? Will the surrogate be informed that she might be asked to undergo a foetal reduction or an abortion at the point of agreeing to undertake the arrangement? There are provisions for requiring the surrogate's written consent for an abortion, is a foetal reduction assumed to be the same for the purposes of this provision? Again, the wording of clause 9 including the 'conditions as may be prescribed' creates a great deal of ambiguity, leaves several important questions unanswered, and demonstrates the many missed opportunities to protect the health and safety of the surrogate.

Clause 3 provides that:

no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist, intending couple or any other person shall conduct or cause abortion

during the period of surrogacy without the written consent of the surrogate mother and on authorisation of the same by the appropriate authority concerned:

Provided that the authorisation of the appropriate authority shall be subject to, and in compliance with, the provisions of the Medical Termination of Pregnancy Act, 1971;¹⁰¹⁷

The rules for abortions are governed by the Medical Termination of Pregnancy Act, 1971 which according to section 3 requires the authorisation of one medical practitioner if the pregnancy is less than 12 weeks and the authorisation of two practitioners if the pregnancy is between 12 to 20 weeks. After 20 weeks, section 5 applies and allows for a termination only if it is necessary to save the woman's life. While the above clause provides that the surrogate's consent must be sought for a termination of the pregnancy the legislation governing abortions means that in fact the ultimate decision rests with medical practitioners and not the woman seeking the termination. The decision over an abortion is therefore doctor-centric and another example of how the agency of a pregnant woman is reduced and diminished rendering her in this instance to a foetal container. Thus, adding to the myriad ways in which the surrogate must submit to the authority and control of the medical practitioners and increasing her powerlessness in decisions over her body and health. Taking the final decision out of the hands of the woman and placing it in those of the medical practitioners prevents the woman from fully exercising her right bodily integrity and autonomy. According to the judgment of the Supreme Court of India in the *Justice K S Puttaswamy v Union of India 2012a* case the right to reproductive freedom was reaffirmed as a fundamental constitutional right protected under the rights to privacy.

6.4.1.4.2 Caesarean section deliveries

The scheduling of Caesarean section deliveries has become standard practice in surrogacy arrangements in India, as first highlighted in Chapter 2 in the discussion on the HARDTalk interview

¹⁰¹⁷ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl. 3(iv) and Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl. 3(vi).

with Dr Patel. Sackur, the interviewer, expressed concern over the high percentage of C-section deliveries in surrogacy arrangements at Dr Patel's clinic compared to non-surrogacy pregnancies. Dr Patel defended its use and downplayed its prevalence stating that C-sections account for 70% of the deliveries at her clinic whereas the national average for IVF births is 80%.¹⁰¹⁸ However, there is a culture of C-section overuse in India where these deliveries have increased from 8% in 2005 to 17% in the last 10 or so years.¹⁰¹⁹ This trend has led to a Public Interest Litigation case at the Delhi High Court by NGO Independent Thought¹⁰²⁰ and at the Supreme Court of India to demand clear guidelines for the procedure.¹⁰²¹ Activists working on this issue refer to it as 'unnecaesarean' and have a petition signed by 391,664 people calling on the Ministry of Women and Child Development to issue an advisory to the Medical Council of India to mandate that all hospitals declare the number of C-sections they perform at their front desk, to conduct an enquiry into high C-section rates, and to frame clear guidelines for conducting C-sections.¹⁰²² This culture of C-section overuse provides some important context for the practice in surrogacy and can perhaps account for why most surrogate mothers are expected and scheduled to undergo the procedure. Some have argued that it is a symptom of the marketisation and commercialisation of birth in India, of which surrogacy is a part.¹⁰²³

¹⁰¹⁸ In the documentary *Outsourcing Surrogacy*, which is also filmed at Dr Patel's clinic, the first scene at the hostel shows Dr Patel sat on one of the beds with the surrogates and saying: 'You will all have had your C-sections by then.'

¹⁰¹⁹ Mrigesh Bhatia and others, 'Assessment of Variation in Cesarean Delivery Rates Between Public and Private Health Facilities in India From 2005 to 2016' [2020] *Jama Network Open* 1.

¹⁰²⁰ 'Unwarranted C-Sections Harmful for Mother and Baby: HC' *Outlook The News Scroll* (New Delhi, 13 February 2018) <<https://www.outlookindia.com/newscroll/unwarranted-csections-harmful-for-mother-and-baby-hc/1252474>> accessed 8 July 2021.

¹⁰²¹ 'SC Dismisses Plea for Guidelines on Cesarean Deliveries, Fines Litigant' *The Economic Times* (New Delhi, 3 August 2018).

¹⁰²² Subarna Ghosh, who started the change.org petition calling on hospitals to declare the number of C-Sections they perform, claims that the increase in these types of deliveries is motivated by money making 'off unsuspecting women'. https://www.change.org/p/make-it-mandatory-for-all-hospitals-to-declare-number-of-caesarean-deliveries-safebirth?use_react=false [last accessed 8 July 2021]

¹⁰²³ Mari Marcel Thekaekara, 'Why Don't India's Feminists Call out Doctors Doing Unnecessary C-Sections?' *The Guardian* (8 March 2017) <<https://www.theguardian.com/commentisfree/2017/mar/08/india-feminists-doctors-unnecessary-c-sections-caesareans>> accessed 8 July 2021.

In *Made in India* Aasia, while confined at the surrogacy hostel, states that: ‘They told me the delivery is on 2nd July. I feel a little scared. But there is a God above who helps out.’¹⁰²⁴ Pande documents that the surrogates expressed a great deal of fear, discomfort, and reluctance about the use of ‘the scissors’ as they called it.¹⁰²⁵ They could not understand why it was necessary when they had not needed it for their previous pregnancies. Payal, one of the surrogates interviewed by Rudrappa, explained how she was experiencing ongoing back pain from the epidural and had not seen a doctor due to the absence of aftercare.¹⁰²⁶ Two of the surrogates interviewed in *House of Surrogates* talk about their experiences of the deliveries and how they had not even seen the baby, as they were taken away immediately after the birth. Vasanti states: ‘This is the first Caesarean, so the experience wasn’t good. I’m in a lot of pain.’ She also expresses how she never wants her daughter to be surrogate mother. Papiya is another surrogate who delivered via C-section, she is visibly distressed and claims: ‘But then they took him straight away. I must have seen him for 5 seconds.’¹⁰²⁷ Pande observed the clinic staff indicating that the baby would be taken away immediately after delivery.¹⁰²⁸ While the women were aware that they would have to hand over the babies to the intended parents they were not prepared for the process to be so immediate and brutal. The manner in which the surrogate and baby are separated clearly contributes to the psychological suffering of the women as demonstrated by Papiya and Aasia, who is kept in the hospital for 12 days following the delivery. She also complained that she has not been paid the full amount that she was promised.¹⁰²⁹

C-section deliveries are sometimes necessary, if medically indicated or preferred by the surrogates, but their use becomes highly problematic when it is imposed on the women without informing or consulting them prior the surgery. Pande, Rudrappa, and Tanderup et al. all document the surrogates

¹⁰²⁴ *Made in India* (n 29).

¹⁰²⁵ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 218.

¹⁰²⁶ Rudrappa, *Discounted Life* (n 777) 116.

¹⁰²⁷ *House of Surrogates* (n 29).

¹⁰²⁸ Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (n 141) 134–135.

¹⁰²⁹ *Made in India* (n 29).

expressing a preference for a vaginal delivery with many being fearful of the surgery and having been excluded from the decision-making process.¹⁰³⁰ Rudrappa observed that almost all the surrogates she interviewed had delivered via C-section or were scheduled for the procedure between weeks 36 and 38 of their pregnancies, despite all but two of the women having delivered their own babies through vaginal births. Many of the women she interviewed were unaware that they would be expected to undergo the procedure.¹⁰³¹ Tanderup et al. also found that the women had not been informed of the high likelihood of a C-section delivery.¹⁰³² They documented that the decision was usually taken by the doctors who decided based on medical indications¹⁰³³ but in some cases the intended parents would request and exert pressure on the doctors to perform a C-section delivery.¹⁰³⁴ One doctor they interviewed claimed that: ‘No one wants to risk a vaginal delivery when it is such a wanted child. We also leave very little to chance.’¹⁰³⁵ It is clear from statements like this that the procedure is done for the best interests of the intended parents and not for the sake of the surrogate. It is also evidence of the surrogate’s exclusion from the decision-making process, that denies her the opportunity to question it, and her inability to exercise her rights to autonomy, bodily integrity and to give informed consent. Furthermore, the failure to provide adequate and appropriate aftercare for the surrogates has resulted in long-term health issues and suffering for a number of the women and in some cases their death, which demonstrates how the women are treated as disposable after the arrangement.

The preference for this type of delivery partly results from a foetal container model view, where the ‘product’ of the pregnancy is given greater value and importance than the health of the surrogate.¹⁰³⁶

¹⁰³⁰ Tanderup and others (n 196) 499.

¹⁰³¹ Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (n 123) 115.

¹⁰³² Tanderup and others (n 196) 495.

¹⁰³³ *ibid* 498.

¹⁰³⁴ *ibid*.

¹⁰³⁵ *ibid*.

¹⁰³⁶ There has been much written about the cases of forced or court-ordered C-section in the UK and the USA. These cases provide evidence for the systemic harm done to women and the violations of their reproductive rights through the law, not only in the judgment themselves but also through the reasoning surrounding them. They effectively and perfectly illustrate the foetal container model of pregnancy at work in medical and legal decision-making and practices. In the case of surrogacy arrangements as discussed here while they are not court-ordered they are in effect forced because

According to Rudrappa, C-sections are used to allow the doctors and clinics to have complete control of the birthing process and to coordinate the time of arrival with the schedules of the intended parents.¹⁰³⁷ The foetal container model is apparent in how the doctors decide when the ‘contents’ (that were initially placed there by them) of the ‘container’ are ready to be removed and the most convenient time. This evokes the metaphor of the ‘bun in the oven’ now being ‘baked’. Excluding the surrogate from the decision-making process and performing a C-section for the convenience of the doctors and intended parents works to prioritising their needs over hers. It reinforces the primacy of her role as a container or incubator and elevates the status of the foetus. The practice of requiring the surrogates to undergo a C-section causes them harm in a several ways. The postpartum recovery is longer and can involve complications such as infections, and therefore impacts their ability to return to their previous lives and resume their usual household, family, and work responsibilities. It also causes psychological harm because of the traumatic way in which the surrogate and baby are separated and leaves a permanent scar as a reminder. This practice that excludes the women from the decision-making process is another way in which surrogates in India experience harms of invasion and separation¹⁰³⁸ and it constitutes an example of gendered harm as defined by West especially as it has not received any attention by the legislators.

Considering the high prevalence of C-section deliveries in surrogacy arrangements and the resulting harms there should be provisions in the legislation to protect the surrogates. It is a tricky area to regulate due to the contested background regarding the risks and benefits of the procedure and that it would be impossible to enforce restrictions in the delivery room, but attempts could be made to limit

the surrogates have very little choice and are unable to question the authority of the medical professionals. For more discussion on forced c-sections see, Munro (n 19) 27–29. Annas discusses how pregnant women may be forced to consent to interventions for the interests of the foetus, see, Annas (n 475) 14.

¹⁰³⁷ Rudrappa, *Discounted Life* (n 777) 115.

¹⁰³⁸ Rudrappa also describes the C-sections birth as a ‘violence of separation. Not only was flesh separated from flesh in that process of birth bathed in maternal blood, the babies literally being cut out of the mothers’ wombs, but additionally the newborns were removed from that one presence, that of the surrogate mothers, they had known best.’ *ibid* 122.

its use to cases of a medical need or emergency only if the surrogate has indicated that she does not want to undergo the surgery. A consultation with the surrogate over her preferred method of delivery to reach a joint decision should also be a standard part of the practice and accounted for in the provisions of the legislation as this would help ensure her rights to autonomy, embodied integrity and to give informed consent are better protected.

6.5 Conclusion

Setting out the background context in Chapter 2, describing the legal reform journey in Chapter 3, analysing the failures and inadequacy of the reforms in Chapter 4, and presenting the models of pregnancy in Chapter 5, has enabled me to show in this chapter how the foetal container model operates in surrogacy and facilitates the harms experienced by the surrogates. These harms are integrally linked to the concept of objectification developed in Chapter 4. I have argued and revealed that this model is the dominant conception of pregnancy in the practice and regulation of surrogacy in India through the case studies of the permissibility of only gestational surrogacy, the conditions and enforceability of the contract, and the invasive procedures. I have further argued that this model facilitates potential harms to the surrogates that occur due to violations and inadequate protections of their rights to autonomy, embodied/bodily integrity and to give informed consent. The concept of gendered harm and theories of embodiment provide useful frameworks for understanding the unique nature of the harms sustained by the surrogates, the scope of these harms, and how harms are experienced not only through the direct harm-causing events but also from the institutional and legal structures that fail to recognise them which results in their legitimation. These are harms that can and should be addressed through the legislation, but the relevant provisions discussed above do not go far enough in providing adequate measures and protections. The awareness of the potential harms to surrogates enabled by the exploration of the model underpinning the practice and regulation allows for the opportunity to design

better and more effective regulation that places the surrogates at the centre, as the focus is directed at the unique relationship between the pregnant woman and foetus.

The discussion on the invasive procedures demonstrates how the surrogates are excluded from the decision-making process and the unquestioned authority the doctors exercise over the women who put complete trust in their judgement. The surrogates are in a highly vulnerable position because they are the ones who put their bodies and lives at risk and have the least amount of knowledge and power in the arrangement. It is unethical to take advantage of this situation by using the surrogate as a means to increase success rates and to satisfy the wishes of the intended parents and by making decisions that go against her best interests. The fact that some clinics feel that they are competing for the intended parents' business and therefore must cater to their demands and desires by offering and attempting higher success rates reveals the dangers of a commercially driven environment. Yet, a ban on commercial surrogacy does little to influence this practice or improve the conditions for the surrogate because she is the only person not being paid and is the one bearing all the risks. Additionally, even if the total cost might be reduced as the surrogate will no longer receive a fee, she was only being paid a very small percentage in the first place.

Considering the nature and risks of the procedures involved in surrogacy valid and informed consent is paramount. However, it does not replace the need for safe and ethical practices. Dr Patel's reliance on the housing analogy to explain the process to the surrogates is completely insufficient. Each step of the gestational surrogacy process must be fully explained including details on the number of injections, tablets, blood tests, the use of transvaginal scans, the multiple embryo transfers and cycles, the possibility of foetal reductions and the C-section delivery, and the side-effects of these procedures as well as the expected restrictions on movement and diet. Securing the surrogate's informed consent before each procedure must be ongoing throughout the arrangement as well as providing ongoing

counselling before, during and after the arrangement. Otherwise, she is at risk of being rendered a mere foetal container. If the surrogate is unable to comprehend and assess the risks involved in the procedures, then it raises serious doubts over whether it is ethical to engage her in the arrangement as these are not life-saving emergency treatments which can rely on the usual 'doctor knows best' approach.

7 Thesis conclusion

This thesis has explored whether a reconceptualisation of pregnancy is the key to a better regulation of surrogacy in India. To answer this question, it was first necessary to establish which conceptualisation of pregnancy is underpinning how surrogacy is practiced and regulated, and more importantly to discover the consequences of that particular view for the surrogates and the legal reforms. The original and core contribution of this research is uncovering the hidden assumptions about pregnancy that are based on the foetal container model and revealing how its influence can be problematic in the context of surrogacy arrangements in India. The foetal container model therefore provides the necessary framework for comprehending how the surrogates are harmed in these arrangements. The main research question stems from the position that in order to address the complex challenges of surrogacy we must begin by questioning how we conceive of pregnancy, how it impacts surrogacy, and whether an alternative view of pregnancy would significantly transform the approaches to its practice and regulation. However, this is not to say that a reconceptualisation of pregnancy will resolve all the ethical and legal issues that arise in surrogacy arrangements but that a greater awareness of the implications of the dominant conception of pregnancy can lead to more effective regulation that places the surrogates at the centre of law, practice, and regulation.

In the introduction to this thesis, I explained why India, and its long journey in regulating surrogacy, provides a pertinent case study for this investigation. The regulation of surrogacy has been a live issue over the last two decades and with the introduction of the Surrogacy (Regulation) Bill in 2016 the debates and amendments were ongoing throughout the research for this thesis. Furthermore, there is clear evidence of the foetal container model at work in the practice and regulation of surrogacy in India as shown in Chapter 6. The Surrogacy (Regulation) Bill, 2016 proposed the most radical change to international commercial surrogacy in India through prohibiting international and commercial arrangements and setting penalties for those found guilty of involvement in commercial arrangements.

It also attempted to restrict surrogacy to within families through initially permitting only close relatives of the commissioning parents to act as surrogates and to control the recruitment of surrogates by establishing eligibility criteria to be fulfilled by prospective surrogates and prohibiting intermediaries. The Bill also called for the practice to be overseen by a National Surrogacy Board and for the functions of surrogacy clinics to be monitored by an Appropriate Authority, which is similar to the regulation of surrogacy in Israel.¹⁰³⁹ Some of the advantages of the state-appointed committee in Israel is the clarification of parentage before the arrangements are undertaken and that surrogates are recruited by the committee after undergoing comprehensive screening.¹⁰⁴⁰ A similar function in India would be beneficial considering the long and complex cases of Baby Manji and the Balaz twins and the deaths of surrogates who in some cases had undiscovered or undisclosed health problems. A competent authority could assess the validity of the surrogate's consent to ensure it is properly informed in a language she understands and that she has not been coerced into the arrangement. The legislation includes provisions for an order concerning the parentage and custody of the child to be passed by a court of the Magistrate on an application made by the intending couple and surrogate mother,¹⁰⁴¹ which demonstrates the government's efforts to address the problems over determining the legal parentage of the children born via surrogacy.

In Chapter 2 I gave a detailed description of the landscape of surrogacy in India and drew out some of the major ethical and legal challenges arising from the practice. It is important to locate the practice within its specific cultural, political, and societal context because debates surrounding surrogacy and

¹⁰³⁹ Surrogacy (Regulation) Bill, 2016, 257 of 2016, opening paragraph; Cl.14; Cl.32.

For more about the state involvement and regulation of surrogacy in Israel, see Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (University of California Press 2010) 12–15. Also, Teman (n 2) 62. In Israel, surrogacy is state controlled and it appears to be promoted through a pronatalist agenda – see, Teman 29–30.

¹⁰⁴⁰ Teman explains that in Israel parental orders are obtained before the arrangement is undertaken and issued by the National Surrogacy Board, see, Teman (n 1039) 12.

¹⁰⁴¹ Surrogacy (Regulation) Bill, 2016, 257 of 2016, Cl.4 (II) 'an order concerning the parentage and custody of the child to be born through surrogacy, have been passed by a court of the Magistrate of the first class or above, on an application made by the intending couple and surrogate mother'. Same in final Act: Surrogacy (Regulation) Act, 2021, 47 of 2021, Cl.4.

the feminist responses to it vary from country to country. It is also a necessary part of a researcher's reflexivity, especially when they are situated outside the geographical and cultural context of the area being researched and when they are looking at issues arising from globalisation and post-colonialism because of the complexities of historical power relations. India had become a global centre for transnational commercial surrogacy arrangements because of the loose regulation, availability of willing women, skilled ART specialists, world class technology and infrastructure, high standards of medical care during the arrangements and for medical tourists, governmental incentives through the promotion of medical tourism and tax breaks, widely spoken English, lower costs than elsewhere, and enforceable contracts. I argued that to fully understand how India came to dominate the global fertility industry it was necessary to locate it within its colonial legacies, neoliberal economic development, promotion of medical tourism and bio-economies, history of coercive state policies on population control through mass sterilisation programmes, and the dynamics of globalisation and feminisation of survival. Part of India's colonial legacy is its establishment as an attractive location for outsourcing, where resources are extracted from the land and human bodies, in the form of raw materials and through (embodied) labour as is the case with surrogacy. The neoliberal economic strategy and free market approach enabled the establishment of the medical tourism industry of which commercial surrogacy was an important part and turned it into a bioeconomy where the 'latent value' held in biological material is transformed into profit. In line with the dynamics of globalisation where the site of production is relocated in order to cut costs and maximise profits, the fertility industry in India draws on the country's abundance of cheaper labour and highly skilled medical professionals to offer, as the slogan by India's tourism ministry claims, 'First-World treatment at Third-World prices.'¹⁰⁴² The state's anti-natalist agenda and mass sterilisation programmes provide important context for understanding the development of surrogacy in India as it is part of the wider historical control of

¹⁰⁴² This phrase comes from the title of a medical tourism conference sponsored by India's tourism ministry. Cited in Abhiyan (n 22).

women and their bodies through reproduction. The patriarchal power structures manifest in the control of women and their bodies in myriad ways from the expectations and demands placed on women to sacrifice themselves for the benefit of their families, to a culture that equates womanhood with motherhood but at the same time devalues reproductive labour.

Following a doctrinal analysis and critical examination of the regulatory reforms to surrogacy in Chapters 3 and 4, I concluded that despite some improvements they fail to sufficiently respond to the issues and challenges arising from the practice. These issues relate to protecting the health of the surrogates and their rights to autonomy, bodily integrity and to give informed consent, access to adequate aftercare, insurance, and compensation in the case of injury or death, and risks of exploitation and coercion. In addition to these aspects is the patriarchal control of the surrogate and her body that devalues and denies her contribution and investment and treats her as separate from the foetus, which results in her alienation from the ‘product’ of her labour. Other concerns involve the commodification of children, and the risk of their abandonment, statelessness and being left without legal parents. I argued that one of the main objectives of the legislation to protect the surrogates from exploitation fails on its own terms. I further claimed that this is due, at least in part, to a failure by the legislators to recognise that surrogacy and its regulation is underpinned by the foetal container model of pregnancy.

In Chapter 4 I further developed the feminist critique of surrogacy and provided a definition of exploitation along three strands; 1. unfair advantage exchange, 2. exploitation of background conditions, and 3. objectification and degrading treatment. Through developing this account of exploitation, I showed that the legislators’ narrow focus on one definition of exploitation, i.e., that unfair background conditions coerce the women into undertaking an arrangement that they would not do otherwise, limits the government’s ability to acknowledge and respond to the other harms and

mistreatment sustained by the surrogates. Harms that are due to the operation of the foetal container model and the way it objectifies the women. Meaning that exploitation can still occur along the third strand relating to objectification and degrading treatment because of how this model influences the practice in treating the surrogates first and foremost as foetal containers. West also argues that a woman's subjectivity is denied when a harm is not recognised or redressed by the legal system. The implicit assumption of this model adds a deeper dimension to our concerns as it is not limited to surrogacy but is widespread in maternity care and the regulation of reproduction in general and therefore affects all pregnant women and not just surrogates.

In Chapter 5 by adopting a critical-philosophical approach I constructed a detailed account of the foetal container model through exploring metaphysical claims about the nature of pregnancy and how they extend into culture and society by reviewing the language used to describe pregnancy and surrogacy in Western and Indian contexts. The central strand of the foetal container model is that the pregnant woman and foetus are two separate entities where the foetus is surrounded by the pregnant woman but not part of her. I provided an explanation of the alternative parthood view of pregnancy developed by Kingma to enhance my critique of the foetal container model and by way of contrast. The parthood view considers the foetus to be one of the many parts of the pregnant woman, this is based in part on their topological continuity and connectedness and the absence of a hard boundary between the two entities.

Metaphors, analogies, and other figures of speech such as metonymy and synecdoche are frequently and widely employed when referring to pregnancy and surrogacy. The use of expressions such as 'bun in the oven', that the pregnant woman is 'carrying' the baby, and that surrogacy is 'renting a womb' are all metaphors that strongly reinforce the containment view of pregnancy. The housing analogy and the related activity of renting a 'space' or 'room' are significant in the context of surrogacy

arrangements in India as their use was documented at one of the most well-known clinics in Anand. The discourse analysis of the language used to describe pregnancy and surrogacy revealed how these phrases and conceptual positions work in the arenas of debate, policymaking, and legislation and therefore takes us beyond the abstract philosophical claims. We saw how the use of phrases such as ‘wombs-for-rent’ and its variations to describe commercial surrogacy, as observed during the Indian parliamentary debates and questions, relies on a foetal container model of pregnancy. It was argued that the consequence of which is that the embodied experience of pregnancy for the surrogates and their embodied integrity is downplayed and denied. The notion of ‘womb rental’ creates the impression that the body can be divided up between its parts and the whole and that the womb being ‘rented’ is some abstract and detached entity or part. This use of language also suggests that only a part of the surrogate’s body is being used. Yet, the body cannot be separated in this way, figuratively or otherwise. The reproductive organs are intimately integrated within the body and to refer to the surrogate as a womb is depersonalising and dehumanising. Pregnancy requires and affects the whole body as such it is impossible to ‘rent’ only one part of the woman during this process and arrangement. Hence, why the surrogates are confined to the hostel. It is because they and their daily activities can be carefully monitored and strictly controlled. The parthood view of pregnancy is integrally linked to embodiment as it accounts for the embodied nature of pregnancy and refutes the notion of a detached and separate container. Additionally, if commercial surrogacy leads to the surrogates being referred to as wombs, then it indicates a need to change the model of surrogacy and that a professional model of surrogacy would be more appropriate considering that altruistic surrogacy is also problematic. A professional model could also work to de-stigmatise surrogacy in India and remove the label of ‘dirty work’, as Pande described it, where it is seen as undesirable or unpleasant work that is delegated or outsourced to others.

In Chapter 6 I returned to identify where the foetal container model is operating in the practice of surrogacy and the legal reforms. I used the framework of gendered harm and theories of embodiment to analyse the nature and scope of the harms to the surrogates and argued that gendered harms are a consequence of how the foetal container model is operating within the practice and regulation. Further to this, I showed that the Indian government's focus on eliminating exploitation not only fails because altruistic surrogacy can give rise to coercive arrangements, and the initial close relative requirement had the potential to further exacerbate the mistreatment and exploitation of the surrogates, but that it constitutes a gendered harm. I argue this because it results in other aspects of the practice that can cause harm to the women to remain unrecognised and unaccounted for, and therefore insufficiently addressed in the legislation. Central to this argument is that the view of pregnancy influencing the practice and the reforms is unacknowledged. This model facilitates the mistreatment of and harms to the surrogates as it causes them to be treated first and foremost as containers where their interests and rights are secondary to the primary function of gestating the foetus. In providing a detailed account of the foetal container model of pregnancy and applying it to the practice of surrogacy and the legal reforms in India I have shown how it can take different forms and have various effects. The critique of the invasive procedures and the related provisions illustrates one aspect of the problematic ways in which the model operates, i.e., through the harms that can occur in the (medical) treatment of the surrogate. The accounts of the controlling practices serve to demonstrate how the model can contribute to the neglect of the holistic health of the surrogate.

The Indian government has now passed legislation to regulate surrogacy in the form of the Surrogacy (Regulation) Act, 2021. This thesis has examined in detail some of the weaknesses of the government's response to surrogacy and the development of the approaches to its regulation. Further research, using socio-legal tools on enforcement and regulation, is required to assess whether there is the will to enforce the Act as restrictions on sex-selective abortions are circumvented, which demonstrates how

difficult it is to radically alter or dismantle an established practice. The intensive medical intervention necessary in surrogacy makes it harder to continue without detection and the likely outcome is that women will be taken to more permissive jurisdictions or that the ART specialists will themselves move to establish clinics elsewhere. There is some cause for optimism with the Surrogacy (Regulation) Act, as the provisions for insurance and aftercare are stronger than in the previous draft ART Bills and the health risks over repeat arrangements has been addressed by limiting the number of times a woman can act as a surrogate to one. The Guidelines of the ICMR were non-binding, liberal in terms of the procedures by allowing several cycles, and more favourable to the clinics and intended parents. However, the Guidelines and the previous draft ART Bills did permit compensation beyond medical expenses to the surrogates which was more favourable to the women undertaking the arrangements for financial reasons. One of the most striking aspects of the Indian journey in regulating surrogacy is the development from a liberal approach to a restrictive one that prohibits commercial arrangements and limits the eligibility criteria of intended parents to married heterosexual couples between 23 to 50 years for the female and between 26 to 55 years for the male and to widowed or divorced Indian women between 35 and 45. The initial close relative requirement was also an outcome of this approach and was perhaps an attempt to end or significantly scale back the practice because the pool of eligible women would be hugely reduced.

I argued that this shift could be attributed to the traditional conservative values and Hindutva ideology of the BJP government and premiership of Narendra Modi. The development of a global fertility industry in India and its dominance as a provider of international commercial surrogacy and the subsequent move to shut it down reveals an inconsistency in the treatment of women involved in surrogacy. Purewal observes that neoliberal patriarchy ‘not only draws upon women’s non-autonomous subjecthood in capitulating to the authority and structures of “tradition” ... but also reshapes them in order to extract paid and unpaid labour in regulating women’s mobility, activity and

positionality within social and economic structures.’¹⁰⁴³ However, it is the protectionist agenda of the government that is most apparent in the approaches to the regulation of surrogacy. Purewal further explains that there is an inherent contradiction in terms of how ‘neoliberalism in India has seen the “pulling” of women out into the market as workers, producers, development project targets and consumers... [while] there has been a “pushing back” of women through the discourse of “safety” through moral policing, patrimony and patriarchal gender “norms” as non-inheriting, domesticated and territorialised bodies.’¹⁰⁴⁴ The main objective of the legislation as discussed in Chapter 4 of this thesis concerns the protection of women from exploitation and thus echoes the state agenda highlighted by Purewal. This ideological position can also explain why the potential problems with the close relative requirement, and the shift to altruistic surrogacy, that result from the social and patriarchal structures and inequalities experienced by the surrogates were not recognised by the legislators.

The foetal container model operates in law, practice, and society and is endemic in the medical care of (pregnant) women and in how the legal system regulates reproduction. While establishing an alternative model of pregnancy is a difficult task, that requires rewriting all relevant legislation and fundamentally changing deeply rooted ideas in the wider and legal culture, the case study of surrogacy in India allows us to see where a reconceptualisation would alter its practice and regulation. In setting out this alternative view I have illustrated that there are other available metaphysical models of pregnancy. Throughout the thesis I have indicated the many issues and areas where this alternative view of pregnancy could result in a different outcome or treatment of the surrogate and the kinds of questions it raises, which I will recap below, but further future work is required to thoroughly apply the model.

¹⁰⁴³ Purewal (n 226) 27.

¹⁰⁴⁴ *ibid.*

The parthood view of pregnancy has implications for the nature of the transaction and at first glance could work to align it more with organ donation. Yet, this could also be problematic as the arrangement would be seen as an exchange of a ‘product’ as opposed to a ‘service’. Crucially, there are fundamental differences in the nature of the ‘parts’ because a foetus becomes a whole, separate human being at birth and is not fungible like a kidney, where the origin is less important than its healthy functioning and compatibility with the recipient. In this respect the foetal container model makes (commercial) surrogacy more morally palatable and legally acceptable as it is not considered the sale of a baby but instead a service.

The parthood view also raises questions over the ‘ownership’ of the embryo and then foetus during the pregnancy, i.e., can you own another person’s body part while it is still within their body? Would this model make it harder to claim ownership rights over the foetus during the pregnancy? The delineation of ownership in organ donation is clear; the organ is the donor’s while it is within their body but when it is extracted, donated, and transplanted, it belongs to the receiver. It suggests that the kind of partial and pre-ownership that is facilitated by the foetal container model in surrogacy would be less likely with the parthood view but perhaps not impossible as the genetic link between the embryo/foetus and the intended parents could continue to denote ownership. The enforceability of the contract and the cases relating to the challenges in determining the legal parentage would necessitate the continuity of this notion of ‘ownership’ or least a firm intention to assume parental responsibility of the children born as a result of the arrangement.

The implications of this notion of ownership are important because it relates to the claims and rights exercised over the surrogate and her body during the arrangement. If the foetus were considered to be a part of the woman and not merely contained within her then it would strengthen her rights over her own body and to autonomy, embodied integrity and to give informed consent. It would also reduce

potential conflicts between her rights and interests and those of the foetus and intended parents. The result of which for the surrogate would be a greater say in terms of the invasive procedures and controlling practices and her inclusion in the decision-making process on the number of embryos transfers, the foetal reductions and abortion, and the delivery method. Thus, allowing the surrogate to retain more control over her body. The outcome of this reconceptualisation of the maternal-foetal relationship would be a reduction in the harms that the surrogate sustains through being objectified and treated first and foremost as a foetal container.

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Figure 1. Timeline of regulatory interventions and key events

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