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Special Section:  
Surrogacy Beyond the Carceral: Culture, Law and  
Lived Experience, edited by Maya Unnithan and  
Maria Federica Moscati, pages 229-334

**INTRODUCTION TO  
SURROGACY BEYOND THE CARCERAL:  
CULTURE, LAW AND LIVED EXPERIENCE**

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This special section presents some of the papers and reflections that were delivered during the “Surrogacy Beyond the Carceral: Culture, Law and Lived Experience” Workshop organized by the Centre for Cultures of Reproduction, Technologies and Health (CORTH) and the Department of Liberal Arts, Indian Institute of Technology, Hyderabad, and held at the University of Sussex in June 2024.<sup>1</sup>

CORTH has enabled stimulating and open discussion amongst all its members to create interdisciplinary academic and policy fora and collaboration on sexual and reproductive rights, health and human reproduction. The idea of the special section developed through several conversations and a previous workshop that we had on how anthropology and law could collaborate specifically on surrogacy and on how combined strategies could be developed to influence current legislation and policy beyond the lens of criminalization.<sup>2</sup>

As an area that inherently requires interdisciplinary and transdisciplinary liaison, surrogacy has posed challenges to the law,

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<sup>1</sup> See [full report](#) by Aishwarya Chandran. We wish to thank Dr Anindita Majumdar for her invaluable contribution to the organization of the workshop and all presenters for generously sharing their research.

<sup>2</sup> The literature on the relation between law and anthropology and on how they can collaborate on several aspects of life is vast, and it is outside the scope of this brief introduction to review it. Thus, we signpost the reader to other sources. See, for instance, Veters & Margaria and the literature they review (2024); and Mundy (2002); Moore (2005); Pirie (2013); Moscati (2014); Foster & Ors (2016); Foblets & Ors (2022).

demanding in-depth renewed reflections on legal frameworks concerning the family, reproduction, human rights (including child rights) and ethics (Trimming & Ors 2024). However, legal developments do not keep up with the changes in society and in technology. The law is not only slower but also, in certain legal systems, it is resistant to adaptation. Reasons for such resistance are several, including stigma, a politicized use of law in matters of reproduction, and the possible application of law to limit the rights of specific social groups and their involvement in public life. At the same time, surrogacy encourages rethinking of traditional notions of kinship, parenthood and bodily autonomy while raising profound questions about power, exploitation and agency (Unnithan 2018). Interdisciplinary collaboration is thus necessary to throw a spotlight on such limitations, to protect and enhance the rights and interests of those involved in the surrogacy journey. Attention to historical, contextual, social and cultural detail can inform legislative developments enabling laws and their interpretation to be less influenced by stigma and stereotypes concerning the family, procreation, gender roles and social relations.

Legal systems worldwide take diverse approaches to regulating surrogacy, reflecting differences in societal values, political priorities and ethical norms (Horseley 2024; Fenton-Glynn & Scherpe 2019). Some countries, such as India, have banned commercial surrogacy outright, citing concerns about exploitation and commodification (see in this special section Jana & Kotiswaran; Unnithan & Kothari). Others, like the United States (US), have varying regulations depending on state jurisdictions, with some states allowing commercial surrogacy and others prohibiting it entirely (see Jacobson in this special section). Some others like Ukraine and Russia have become hubs for international surrogacy due to their permissive legal frameworks, attracting intended parents from jurisdictions with stricter laws (Weis 2021). Similarly, surrogacy poses several legal challenges to parental rights, contract enforcement, human rights and nationality issues. For instance, cross-border surrogacy arrangements frequently lead to children being stateless or lacking clear citizenship, as countries differ in their recognition of parental rights (Iliadou 2024).

The acceptability of surrogacy varies widely across cultures. For example, in some societies, surrogacy is seen as an act of altruism within extended families, while, in others, it is viewed as taboo or unethical (Teman 2010; Pande 2014). These perceptions are further shaped by the power dynamics between intended parents and surrogates, coming from different social groups and diverse race, class and nationality

backgrounds. As discussed during the workshop at CORTH, cross-cultural analysis such as that provided by anthropology can offer illuminating comparative insights on family, kinship and motherhood in contexts such as surrogacy where there is a separation between genetic, gestational and social parenthood. In addition, alongside ethnographic insights into the lived experiences of surrogates, intended parents and children born through surrogacy, these narratives question legal generalizations and shed light on the nuanced realities of surrogacy arrangements.

Critical cross-disciplinary feminist perspectives can ensure that ethical considerations, such as informed consent and surrogate autonomy, are integrated into legal frameworks. At the same time, contextually sensitive research can inform policies that address the socio-economic conditions of surrogates, guaranteeing fair compensation and adequate healthcare. Policy-makers can use ethnographically produced empirical data to understand the impact of surrogacy laws on families and communities, creating more inclusive and effective regulations, to develop awareness-raising initiatives that address misconceptions and empower surrogates and intended parents to make informed decisions within the legal and cultural contexts of their arrangements.

Legal systems struggle to address disputes over parental rights, citizenship and the commercialization of surrogacy, while ethical concerns about exploitation, commodification and cultural appropriateness persist. Thus, a collaboration between feminist ethicists, anthropologists and the law can also positively impact on the resolution of disputes that arise during the surrogacy journey, where their insights can help courts, mediators, arbitrators and lawyers to resolve conflicts by considering the cultural values and social norms of all parties involved. By showing that families take different shapes and procreation occurs in diverse ways, including through surrogacy, our collaborative research helps to dispel the moral panic felt by many legislators and judges of going against nature and encourages legal developments towards protection (Moscati 2010).

## [A] BEYOND THE CARCERAL

Over the past decades, the regulation of surrogacy has largely been shaped by a carceral logic—a reliance on restrictive laws, criminalization and punitive frameworks aimed at controlling surrogates, intended parents and the surrogacy sphere itself. As demonstrated by the participants at the CORTH workshop, and by the articles in this special section, while

such approaches are often justified as mechanisms to protect vulnerable parties, they frequently reproduce inequalities and reinforce systems of surveillance and coercion.

Critical social science insights reveal that law is not neutral or universal; it is the product of specific cultural, political and economic forces (Palmer 2024). This is true for surrogacy too. For example, as suggested by the contributors to this special section, carceral regulation often assumes a nuclear, heteronormative family ideal while marginalizing or stigmatizing alternative family structures, such as those embraced by queer couples or communities with collective approaches to child-rearing or single women. Thus, academic disciplines which emphasize and celebrate cultural difference and see value in the lived experiences of individuals can provide the law with complementary tools to navigate on-the-ground complexities.

Feminist and anthropological literatures have long illuminated the manner in which laws surrounding reproduction reflect and reinforce societal norms about family, gender and economic value (Browner & Sargeant 2011). Similarly, at the heart of carceral approaches to surrogacy lies a complex interplay between legal frameworks and the cultural constructions of kinship, labour and morality. In fact, in many jurisdictions, surrogacy laws are shaped by anxieties about commodification, exploitation and morality that are deeply rooted in cultural and historical contexts (see Unnithan & Kothari in this special section), and, in such circumstances, nuanced interpretations of kinship and motherhood would equip law with the necessary sensitive and ethically robust approaches necessary to address the diverse realities of surrogacy.

The workshop “Surrogacy Beyond the Carceral” brought together legal scholars, practitioners, feminists, anthropologists and sociologists working on surrogacy who discussed the social and cultural ideas that underpin the concepts, language and practice of surrogacy legislation in a variety of legal systems and their legal cultures. Drawing on notions of reproductive governance, access to justice, human rights and critiques of the carceral propensity of the law, the workshop addressed the following questions:

- 1 What are the ways in which cultural and religious ideologies shape what is illegal/legal regarding surrogacy in the law?
- 2 How is altruism configured in this discourse?
- 3 What are the alignments/misalignments between surrogacy law and human rights?

- 4 How does this play out in the context of arguments regarding the best interests of the child in queer reproduction?
- 5 What forms of existing legal interventions inspire laws on surrogacy?

The workshop moved beyond the narrow frameworks of prohibition and punishment to explore alternative, transformative approaches to surrogacy. By examining surrogacy through critical, interdisciplinary and decolonial lenses, the participants in the workshop interrogated the assumptions underpinning carceral approaches to imagine more equitable and inclusive ways to understand and govern this practice. To move beyond the carceral, the participants raised additional questions for further investigation such as: how can legal frameworks better account for the diverse cultural practices and values that inform surrogacy? What role can ethnographic research play in shaping policies that prioritize the well-being, autonomy and dignity of all parties involved? How can social science perspectives challenge and transform legal narratives that perpetuate inequalities?

Integrating legal and cross-disciplinary perspectives, a new path toward rethinking surrogacy governance, policy and practice can be drawn. Community-based, contextual and feminist models of surrogacy regulation that emphasize mutual aid (Bailey 2011), collective decision-making and shared responsibility emerge as viable alternatives to punitive approaches. These models draw on anthropological and other insights into the importance of social networks, cultural reciprocity and care economies in shaping reproductive labour. Through such a lens, decriminalizing and destigmatizing surrogacy becomes not just a legal project but a cultural one, and above all we are encouraged to face the challenge to think beyond static legal categories and to envision surrogacy as a dynamic practice embedded in relationships of trust, solidarity and shared meaning.

This introduction to “Surrogacy Beyond the Carceral” calls for a fundamental rethinking of how we understand and engage with surrogacy. Rather than relying on punitive measures that criminalize and constrain, we advocate for approaches that promote reproductive freedom, equity and justice. Such an agenda requires us to confront uncomfortable truths about privilege, power and exploitation, while also envisioning new possibilities for care, connection and collaboration in reproductive practices.

We hope this special section inspires critical dialogue and collective action toward a future where surrogacy is no longer a site of contestation and control but a realm of possibility and empowerment. Collaboration

between our disciplines can lead to more inclusive, just and culturally sensitive approaches to surrogacy, addressing the diverse realities of this practice in a globalized world. Future efforts should focus on joint research, cross-disciplinary education and the integration of contextually informed insights into legal reforms, ensuring that surrogacy arrangements respect the rights and dignity of all parties involved.

## [B] THE SPECIAL SECTION

By adopting a comparative and interdisciplinary approach, the special section showcases five articles that address a variety of issues concerning social and legal developments of surrogacy regulations and their impact on a variety of legal systems and their cultures.

Heather Jacobson opens the special section with her analysis of commercial surrogacy in Texas. Drawing upon empirical data, Jacobson emphasizes how a neoliberal pro-industry stance in a state with a strong evangelical base enables legislative support for surrogacy and shapes the experience of Texas reproductive work. However, Jacobson rightly questions how the current precarity of abortion care in the US has the potential to disrupt the surrogacy industry in new ways.

Brian Tobin follows with an account of recent legal developments on domestic and international surrogacy in Ireland through the Health (Assisted Human Reproduction) Act 2024. In particular, Part 7 of the Act introduces a restrictive model of domestic surrogacy regulation, particularly surrounding the requirement for the surrogate's consent to a parental order. This model, Tobin argues, appears to be based on Irish policy-makers' misunderstanding of a judgment of the Supreme Court concerning surrogacy arrangements and the principle of *mater semper certa est* (ie motherhood is certain). In doing so, this model of surrogacy regulation undermines the rights and interests of the intended parents and their surrogate-born children, infringing upon children's rights, and familial rights and the state's concomitant obligations in relation to same, under the Constitution of Ireland.

With a focus on child rights, Lottie Park-Morton then examines the extent to which the best interests of the child, as protected under Article 3 of the United Nations Convention on the Rights of the Child 1989, has been adopted when developing legislative responses to surrogacy. By comparing the legal systems of Sweden, England and Wales, and California the author argues that the concept of the best interests carries a significant risk of being a term of empty rhetoric and

seeks to reinforce the value of using child's-rights impact assessments to ensure a child-centric approach to surrogacy regulation.

Two articles focusing on India then follow. Madhusree Jana and Prabha Kotiswaran analyse the legislative framework on women's reproductive labour in India and examine the Assisted Reproductive Technology (Regulation) Act 2021 and the Surrogacy (Regulation) Act 2021. By drawing on empirical data, the authors argue that such legal frameworks, by prohibiting commercial surrogacy and allowing only altruistic surrogacy, undermine the reproductive autonomy of the women involved. Their findings underscore the resilience of women involved in reproductive labour and reveal that the widening demand–supply gap as a result of the restrictive laws potentially fosters an underground economy where reproductive services are rendered with exploitative repercussions for the women, which demands urgent reworking of the law.

Maya Unnithan and Jayna Kothari close the special section with an account of the marginalization of “single”, unmarried women in the Indian Surrogacy (Regulations) Act 2021. Analysing legal petitions filed in the Indian Supreme Court by single, unmarried women and by transgender persons and drawing on insights from legislative mobilization post-2021, the authors suggest that the current legislation in India limits the reproductive autonomy of single women. The reasons for these limits are to be found in gender biases and patriarchal concepts of marriage and personhood which frame the contexts in which the law is enacted.

## [C] A VISUAL NOTE ON OUR COLLABORATION: A FEMINIST ENDEAVOUR!

To conclude this Introduction, we wish to share some final thoughts on how, in practice, our collaboration across the law and anthropology departments at Sussex has unfolded over the past 10 years, greatly facilitated through CORTH.

It has been a feminist endeavour; preserving relations, creating space for all voices involved, nurturing collaboration by addressing power imbalances and being adaptable to change were the terms of this project. We supported each other, we cheered each other on; of course, we made mistakes throughout, but we were able to overcome those by honestly and gently telling the truth to each other. We put ourselves fully into this project, overcoming limited funding, illness and logistic issues—the



picture above, where we together climbed up on the table to adjust the blinds to set up the room for the workshop, is an apt reflection of this. Drawing upon *Dance in Law, Politics and Sociology*, a dance-practice initiative developed by Maria Moscati, we are further planning to have a CORTH dance workshop on the theme of surrogacy. We approached our project with the curiosity and eagerness to learn from each other and from all the amazing colleagues that contributed to the workshop and the special section. Thanks to them for the joy they brought.

Enjoy your reading and we look forward to seeing you at CORTH!

### **About the authors**

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## Legislation, Regulations and Rules

Assisted Reproductive Technology (Regulation) Act 2021 (India)

Health (Assisted Human Reproduction) Act 2024 (Ireland)

Surrogacy (Regulation) Act 2021 (India)

United Nations Convention on the Rights of the Child 1989