



## **Navigating the Ethics and Legalities of Surrogacy in India: A Critical Analysis of the Surrogacy (Regulation) Act of 2021**

**Aparna Singh**

Dr. Ram Manohar Lohiya National Law University, Lucknow, India.

Email: [greeneyeaparna@gmail.com](mailto:greeneyeaparna@gmail.com)

**Vidhi Krishnan**

Dr. Ram Manohar Lohiya National Law University, Lucknow, India.

Email: [vidhikrishnan.rmlnlu@gmail.com](mailto:vidhikrishnan.rmlnlu@gmail.com)

### **Abstract**

This paper aims to critically examine the ethical and legal dimensions of compensated surrogacy in India within the context of the enactment of the Surrogacy (Regulation) Act of 2021, which bans commercial surrogacy and allows only altruistic (non-paid) surrogacy. Through a feminist critical approach, this paper explores the tensions between three main perspectives in the surrogacy discourse: abolitionist (calling for a total ban), reformist (advocating for strict regulations), and libertarian (emphasizing individual freedom and market forces). The research method used is a qualitative study based on document analysis and literature review. The author analyzes national legal sources such as the Surrogacy Regulation Act of 2021, and compares India's legal framework with international practices in other countries such as the United States. In addition, the author examines previous studies on the experiences of surrogate mothers, their socio-economic conditions, and the cultural narratives that influence public perceptions of surrogacy. The analysis reveals that a total ban on commercial surrogacy could create new forms of exploitation by disregarding the value of women's reproductive labor and limiting their economic choices. Previous commercial surrogacy practices in India have indeed shown various issues, such as social inequalities between surrogates and intended parents, as well as weak legal protection. However, rather than endorsing a complete ban, this paper advocates for the implementation of a regulated compensated surrogacy model that acknowledges the physical and emotional labor of surrogates while providing adequate legal and ethical protections. In conclusion, the author emphasizes that a balanced regulation, rather than an outright ban, would better address the socio-economic realities of women in India. By offering an approach that combines reproductive autonomy and legal protection, this model creates a realistic middle ground between unlimited commercialization and the altruistic approach that fails to respond to the real needs of surrogate mothers.

**Keywords:** Surrogate, Compensated Surrogacy, Women Rights, Feminist Studies, Reproductive Labor.

## Introduction

Let us consider the case of a Bollywood movie *Mimi*, wherein Mimi, the main character of the movie, was an unmarried girl, coming from a lower middle-class family, who had a dream of becoming an actress, one day agreed to become a surrogate for a foreign couple for a good amount of money in exchange of her service to the intending couple. Thus, depicting a classic case of gestational commercial surrogacy. Though the movie ended on a very emotional note, like any other Bollywood movie does, the pertinent point to note here is that this commercial surrogacy arrangement provided Mimi the opportunity to earn a huge amount of money, which she otherwise would not have gotten in any other form of employment.<sup>1</sup> To the questions like, was there a stigma attached? Yes, there was. Was the consent given by Mimi was an informed consent? No, not in the fullest sense of the term. But, did this surrogacy arrangement give her the power to exercise her reproductive autonomy and choice? Yes, and this is how the commercial surrogacy arrangement gives a chance to the women to monetize on their reproductive capabilities and grants them empowerment.

It is ironical so see that despite the fact that Kriti Sanon, the actress who played the role of Mimi, got a national award for her performance in the film, in the same year i.e., 2021 the legislature put up a blanket ban on commercial surrogacy arrangements by enacting Surrogacy (Regulation) Act, 2021. There is no doubt that commercial surrogacy has the full potential of being exploitative for surrogate woman but the practices as followed in the United States of America which are discussed in the later part of this chapter, are a testament to the fact that commercial surrogacy can be a source of empowerment for women and can be a very viable source of employment as well.

---

<sup>1</sup> “Mimi and the Surrogacy Bazaar of India - India Art Review,” accessed May 6, 2025, <https://indiaartreview.com/stories/mimi-hindi-film-surrogacy-motherhood-controversy-analysis/>.

In the end, it is argued that the Surrogacy (Regulation) Act, 2021 which is a very progressive legislation in terms of it having detailed provisions regarding the rights of the child born out of surrogacy arrangement, informed consent of the surrogate, ensuring registration and accountability of the surrogacy clinics and the formation of regulatory bodies to ensure accountability of the whole process, but the legislation falls short of granting the surrogate woman the rights that would empower them in such a scenario.

### **Research Methodology**

This study employs a qualitative, doctrinal legal research methodology, grounded in feminist legal theory and critical socio-legal analysis. The authors critically analyze statutory provisions, particularly the Surrogacy (Regulation) Act, 2021, alongside case laws, parliamentary debates, and relevant secondary sources including academic articles, media reports, and policy papers. By situating the legal discourse within the broader socio-economic and ethical context of surrogacy practices in India, the research draws upon feminist perspectives—specifically abolitionist, reformist, and libertarian standpoints—to unpack the competing narratives around reproductive autonomy, commodification, and labor rights. The study also adopts a comparative approach by referencing regulatory models from jurisdictions such as the United States to evaluate the viability of compensated surrogacy frameworks. Through this interdisciplinary and interpretive method, the research aims to highlight the gaps in the existing legal structure and propose a rights-based, ethically regulated model for paid surrogacy in India.

### **A Feminist Understanding of Commercial Surrogacy**

Feminist scholars who have written about the ethical and moral paradigm of surrogacy have, more often than not, have grappled with the concerns in surrogacy regarding commodification of female bodies, the public and private divide, liberalism and neoliberalism, agency and autonomy, and informed consent and reproductive rights. However, no feminist scholar shares their position on the growing practice of commercial surrogacy in a holistic

way. Thus, to understand the various perspectives of scholars on commercial surrogacy, the researcher has divided them in three categories i.e., abolitionists, reformists and the libertarians.

Though the global policy landscape aligns mostly with the abolitionist approach because among the seventy-one countries which have dedicated laws on surrogacy, sixty-three absolutely prohibit commercial surrogacy, India being the newest entrant in this category. Other jurisdictions lack formal policies and legislations on this matter.

In contrast, reformists accept the existence of commercial surrogacy in certain jurisdictions but seek to address its potential abuses. Despite their different approaches, abolitionists and reformists share many concerns about surrogacy practices and their consequences. Abolitionists, who advocate for a complete ban on commercial surrogacy, worry about the commodification of women, their bodies, and children. They also express concerns about the implications for genetic and biological relationships, the reinforcement of gender and racial hierarchies, and the unique form of alienated labour that surrogacy represents. Reformists, who believe regulation is sufficient, share these concerns while also questioning the concepts of choice and agency. They pay close attention to surrogates' everyday experiences and often propose policy solutions. Thus, before discussing these two approaches, let us first discuss the libertarian approach.

### **The Libertarian Approach**

Kimberley Mutcherson<sup>2</sup> argues that there can be no global law on surrogacy because there can never be a global consensus in the countries on the desirability of surrogacy laws. She takes such lack of consensus in a positive manner and states that this would help the liberal states to act as a 'moral safety valve' for example, same-sex couples are not allowed fertility care in Australia so they will move to the US which allows it. Thus, the US will

---

<sup>2</sup> K.M. Mutcherson "Transformative reproduction" 16(1) *Journal of Gender, Race and Justice* 187 (2013).

feel that its policies are justified and productive. She also believes that ARTs will shatter racial hierarchies but this is true only in the case of traditional surrogacy, and not in case of gestational surrogacy.

According to Mutcherson, opportunities for transformation should be appropriately weighed against other valid concerns about the exploitation and subjugation of others. In other words, Mutcherson believes that “some reproductive choices may de-emphasize and de-stabilize mechanisms of reproductive oppression.” To put it another way, regulation needs to be made cautiously.

Judith Daar<sup>3</sup> argues that there is a paucity of legislations regulating ARTs because of its link with the abortion debate which exerts a ‘chilling effect’. She also argues that there is no need to come up with new regulations on ART (in the US) but to strengthen those which are already built. Both Mutcherson and Daar contend that the current regulations are sufficient and that it should be left to free market to regulate it. But many scholars do not agree with this contention and contend that national and international regulation on surrogacy are urgently needed.

### **The Abolitionists**

In the wake of the infamous *Baby M case* and the legal recourse that follows in commercial surrogacy, many feminist writers have averred that commercial surrogacy should be altogether banned. These writers were considered as abolitionists in the legal academia. The themes that regularly arise in abolitionists’ writings are as follows:

### **The Commodification of Women, Reproductive Organs and Babies**

Critics of commercial surrogacy often cite commodification as a key reason for its prohibition. They argue that surrogacy involves a fundamentally different “product” than those typically subject to market forces. Sociologist

---

<sup>3</sup>J.F. Daar (1997) “Regulating reproductive technologies: panacea or paper tiger” 34 *Houston Law Review* 609 (1997).

Barbara Katz Rothman<sup>4</sup> contends that biological motherhood is not a service or commodity, but a relationship. She argues that surrogacy diminishes the value of motherhood by severing a relational (rather than genetic) bond.

Gena Corea,<sup>5</sup> a scholar of reproductive technologies writing in the 1980s, posited that patriarchal structures have led to the commodification of children. She claimed that surrogate mothers (whom she termed “breeder women”) are treated as mere incubators or rented property. In 2013, Swedish journalist Kajsa Ekis Ekman also opposes surrogacy on the grounds of commodification. She argues that in surrogacy arrangements, the market becomes central to the very existence of the child.<sup>6</sup> These perspectives all share the view that commercial surrogacy inappropriately applies market principles to human relationships and reproduction, potentially devaluing the intimate bonds between mother and child and reducing women to their reproductive capacities.

### **Reinstatement of Gender and Race Hierarchies**

Feminist scholars have highlighted how the commercialization of pregnancy is inextricably linked to historical inequities based on gender, race, and citizenship that have been perpetuated by free market systems. Anthropologist Sarah Boone<sup>7</sup> draws parallels between the lack of legal rights slave mothers had over their children and the unclear rights of surrogate mothers. She argues that what she terms “commercialized contract motherhood” (CCM) reinforces multilayered oppression of women and devalues both women and people of colour. Boone contends that CCM creates a hierarchy, dividing women into two categories: “top women” who can afford to purchase surrogacy services, and “bottom women” who serve as

---

<sup>4</sup>B.K. Rothman *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* 238 (Norton, New York, 1989).

<sup>5</sup> G. Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* 214 (Harper & Row, 1985).

<sup>6</sup> Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy & the Split Self* 160 (Spinifex Press, Australia, 2013).

<sup>7</sup> S.S. Boone (1992) “Slavery and contract motherhood: a ‘racialized’ objection to the autonomy arguments” in H.B. Holmes (ed.) *Issues in Reproductive Technology: An Anthology* 349 (New York: Garland).

surrogates. Furthermore, she argues that gestational surrogacy allows predominantly wealthy, likely white individuals to produce genetic heirs, thereby implicitly assigning higher value to their reproduction. This perspective emphasizes how commercial surrogacy can reinforce existing social and economic inequalities, particularly along lines of gender, race, and class. It suggests that the practice may exacerbate power imbalances and contribute to the commodification of certain groups of women, especially those from marginalized communities.

### **The Logic of Alienated Labour and Market**

Many scholars advocating for the prohibition of commercial surrogacy criticize the application of wage labour logic to human reproduction, drawing parallels to Marx's theory of alienated labour. They argue that surrogate mothers, like factory workers, are expected to remain emotionally detached from the product of their labour. However, they contend that the nine-month gestation period inevitably creates an intimate bond that cannot be easily dismissed.

These critics point out that pregnancy involves a woman's entire body continuously for 24 hours a day, without breaks or respite. Yet, a surrogate must constantly remind herself that the foetus she carries is not her own. Ekman argues that this process turns a part of the surrogate's self into "something else" belonging to "someone else," effectively denying women their full humanity.<sup>8</sup>

Abolitionists find this enforced split consciousness deeply problematic. They argue that surrogacy creates a unique form of alienated labour that is particularly intense and psychologically challenging due to the intimate nature of pregnancy and childbirth. This perspective emphasizes the potential psychological and emotional toll of surrogacy on the women who undertake it, suggesting that the practice fundamentally conflicts with human dignity and emotional well-being.

---

<sup>8</sup>*Supra* note 6 at 191.

## The Reformists' Perspective

Feminist scholars like Amrita Pande and Preeti Nayak suggest that while surrogacy showcases certain ethical pitfalls, but as it is currently practiced, it could be beneficial for all the parties if it is properly regulated by state or international bodies. What the reformists focus on is that how the 'choice' of the surrogates is framed based on their lived realities.<sup>9</sup> The three key aspects of the reformists position on commercial surrogacy can be classified as follows:

### Choice and Agency

The reformists believed that though the women's decisions must be honoured but they should be analysed in the context of their 'lived reality.' The decision to become a commercial surrogate is intrinsically linked to broader societal pressures stemming from ongoing sexism, racism, and economic struggles. Viewing surrogacy as a straightforward yes-or-no decision oversimplifies the issue and fails to acknowledge the multifaceted nature of such choices. The reality is that these decisions are shaped by a complex interplay of social, economic, and cultural factors that cannot be easily disentangled from the individual's circumstances.

In her ethnographic study, Amrita Pande notes that commercial surrogacy is increasingly becoming a financial survival tactic for certain impoverished women in rural areas. For these women, the income from a single surrogate pregnancy can often equal about five years' worth of their entire family's earnings. In this context, surrogacy represents a logical economic decision. However, in less severe financial circumstances, the option to become a surrogate would likely not be contemplated or chosen.

---

<sup>9</sup> Sheela Saravanan, *A Transnational Feminist View of Surrogacy Biomarkets in India* 90 (Springer, Singapore, 2018).



This highlights how economic necessity, rather than free choice, often drives the decision to become a surrogate.<sup>10</sup>

Preeti Nayak critiques the emphasis on 'choice' in discussions about surrogacy, calling it a misleading 'trap'. She argues that framing surrogacy in terms of individual choice distracts from the core issues at stake. Instead, Nayak contends that surrogates' ability to make truly free decisions is severely limited by what she terms "crushing constraints." This perspective suggests that the concept of choice in surrogacy is often illusory, obscuring the powerful social and economic forces that shape surrogates' decisions.<sup>11</sup>

Sayantani DasGupta and Shamita Das Dasgupta<sup>12</sup> analyse online discussions among intended parents engaged in cross-border commercial surrogacy and find echoes of imperialist and colonialist attitudes. These parents often frame their actions as "helping" women in developing countries, which the authors interpret as "a reenactment of India's colonial past." Notably, the voices of the surrogates themselves are missing from these online conversations. They highlight a paradox in how Indian surrogates are portrayed: they are simultaneously presented as autonomous individuals making their own choices, yet their perspectives are excluded from dialogues about their own experiences. This contradiction underscores the power imbalances and complex dynamics at play in transnational surrogacy arrangements.

### **The Lived Realities of Surrogates**

While both abolitionists and reformists express numerous concerns about commercial surrogacy, reformists tend to emphasize the everyday

---

<sup>10</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 48 (ColumbiaUniversity Press, New York, 2014).

<sup>11</sup> Preeti Nayak, "The Three Ms of Commercial Surrogacy in India: Mother, Money and Medical Market" in Sayantani DasGupta and Shamita Das Dasgupta (eds.), *Globalization and Transnational Surrogacy in India Outsourcing Life* 12 (Lexington Books, United Kingdom, 2014).

<sup>12</sup> Sayantani DasGupta and Shamita Das Dasgupta, "Shifting sands: transnational surrogacy, e-motherhood, and nation building" In: Sayantani DasGupta and Shamita Das Dasgupta (eds.) *Globalization andTransnational Surrogacy in India:Outsourcing Life* 67 (Lexington Books, United Kingdom, 2014).

realities of surrogates' lives. They particularly focus on the pre-existing disadvantages that influence women's decisions to become surrogates. Generally, women who choose surrogacy face limited economic opportunities and often live in poverty. For these women, surrogacy may be seen as a preferable alternative to factory work or domestic labour. Reformists acknowledge that surrogacy might be the "lesser evil" in many cases. They point out that the social stigma associated with surrogacy may not be significantly different from that experienced by domestic workers.<sup>13</sup> In this context, reformists argue that choosing a contract pregnancy can be viewed as a logical decision, given the limited options available to these women. This perspective emphasizes the importance of understanding surrogacy within the broader socioeconomic circumstances of the women involved.

### **Proposed Policy Solutions**

Reformists propose a middle ground between libertarian non-intervention and abolitionist prohibition of commercial surrogacy. While they generally advocate for state or interstate regulation, their proposals often lack specific policy details. Pande opposes banning surrogacy in India, instead favouring policies based on surrogates' actual experiences. Legal scholar Sonia Allan (2015) outlines several key recommendations for regulating surrogacy:

- a) Mandatory independent legal advice and counselling for all parties;
- b) Transparent and uniform payment structures;
- c) Regulation of surrogacy brokers, potentially prohibiting payments to them;
- d) Clear screening and eligibility criteria;
- e) High standards for medical professionals involved in surrogacy;
- f) Legal frameworks for contract validity and enforcement;

---

<sup>13</sup>V Madge, "Gestational surrogacy in India: the problem of technology and poverty" in Sayantani DasGupta and Shamita Das Dasgupta (eds.) *Globalization and Transnational Surrogacy in India: Outsourcing Life* 55 (Lexington Books, United Kingdom, 2014).

g) Guaranteed record-keeping and information sharing.<sup>14</sup>

Allan's recommendations aim to address the inequality driving the surrogacy market. She emphasizes that regulation must go beyond just addressing legal parentage and child nationality. Instead, it must prioritize human rights issues and confront the structural inequalities and market forces that fuel commercial surrogacy. This approach seeks to create a more ethical and equitable framework for surrogacy practices.

In conclusion, the reformist perspective on commercial surrogacy offers a nuanced approach that acknowledges the complex realities surrounding this practice. By recognizing the economic and social factors that influence women's choices to become surrogates, reformists advocate for regulations that protect all parties involved while still allowing surrogacy to exist. This approach aims to address the ethical concerns raised by abolitionists while avoiding the potential pitfalls of an outright ban. By focusing on the lived experiences of surrogates and proposing concrete policy solutions, reformists seek to create a more equitable and ethical framework for surrogacy. This balanced stance offers a pragmatic way forward in addressing the challenges posed by commercial surrogacy in a globalized world.

## **What Went Wrong with Commercial Surrogacy in India?**

### **Inequality Between Rights of Surrogates and the Intended Parents**

Surrogate mothers in India had significantly fewer rights compared to those in developed countries like the UK, USA, and Canada. In the USA, surrogates receive comprehensive support including social groups, insurance, maternity benefits, psychological support, compensation, and legal representation. These benefits are largely absent in India. In the US, both surrogates and intended parents can choose each other and then enter into a contract, while in India, these decisions are typically made by IVF clinics. US surrogates have more options, including a grace period to relinquish the baby

---

<sup>14</sup> S Allan, "The surrogate in commercial surrogacy: legal and ethical considerations" in P Gerber and K O'Byrne (eds.) *Surrogacy, Law, and Human Rights* 113 (Aldershot: Ashgate).

and the ability to choose an ongoing relationship with the child and intended parents. In contrast, Indian surrogates often don't receive copies of their contracts, limiting their legal recourse.<sup>15</sup> Indian surrogates lacked insurance coverage and medical support ended after childbirth. They were expected to sign away all rights to the child at the outset and bear full responsibility for pregnancy complications. Unlike in the US, poverty is a primary criterion for selecting surrogates in India.

Indian surrogates face additional hardships, including confinement in surrogate homes throughout pregnancy, restricted movement, and family contact, and forced overfeeding.<sup>16</sup> These practices violate basic human rights as outlined in Articles 1,2 2,3 9,4 and 145 of the Universal Declaration of Human Rights (UDHR) and The Universal Declaration on Bioethics and Human Rights. While gender bias exists globally, surrogates in developed countries receive significantly more medical and legal support than those in India. Indian surrogates have no say in medical decisions, including the number of embryos implanted or selective reductions in multiple pregnancies. These disparities highlighted the stark differences in surrogate rights and treatment between India and more developed countries, raising serious ethical concerns about the practice in India.

The experiences of surrogate mothers in India revealed severe restrictions on their personal freedom and autonomy. One surrogate requested permission to visit her ill mother, only to be told she must return within a few days. Another surrogate expressed frustration at the constant surveillance, stating, "They don't trust us, fearing we might run away home." A third surrogate in Mumbai reported being unable to visit home for three months.<sup>17</sup>

These accounts highlight the strict control exerted over surrogates' movements and personal lives during their pregnancies. Brokers play a

---

<sup>15</sup>Sheela Saravanan, *A Transnational Feminist View of Surrogacy Biomarkets in India* 88 (Springer, Singapore, 2018).

<sup>16</sup>*Id.*

<sup>17</sup> SAMA - Resource Group for Women and Health, "Birthing A Market: A Study on Commercial Surrogacy" New Delhi (2012).

significant role in this system, monitoring the surrogate's relationship with the child and using various tactics - including persuasion, financial coercion, and legal threats to weaken any maternal bond that might develop.<sup>18</sup> Dr. Nayna Patel's description of her fertility centre as a "one-stop shop" that manages everything from embryo transfer to baby handover<sup>19</sup> further underscores the commodified and controlled nature of the surrogacy process in India. This approach treats surrogacy as a streamlined service, potentially at the cost of the surrogate mothers' rights and well-being.

### **Appalling Condition of Surrogate Homes**

The practice of confining surrogate mothers to "surrogate homes" in India violated their basic human rights, limiting their participation in public life and personal aspirations. These facilities imposed strict medical and social control over the surrogates' diet, behaviour, mobility, and daily activities. This confinement prevents women from fully engaging in their personal lives, education, occupation, and social functions, effectively reducing them to mere "means to an end."

While scholars like Amrita Pande and Sharmila Rudrappa argue that these homes facilitate networking and bonding among surrogates,<sup>20</sup> this perspective may obscure the larger structural inequalities and injustices at play. Some former surrogates even become part of the exploitative system, recruiting other vulnerable women into surrogacy. The surrogacy industry often targets women already involved in other forms of body commodification, such as drug trials, gamete donation, or prostitution. Poor, fertile young women are seen as ideal candidates for surrogacy, often viewed as a way to prove their dedication to their families. Many women willingly participate, seeing it as a lucrative option for quick money.

---

<sup>18</sup>*ibid.*

<sup>19</sup>Neha Thirani, "A Controversial Ban on Commercial Surrogacy Could Leave Women in India With Even Fewer Choices" *The Time* (Jun. 30, 2021) available at <https://time.com/6075971/commercial-surrogacy-ban-india/> (last accessed on Jul. 10, 2024).

<sup>20</sup> Amrita Pande, *Wombs in Labor Transnational Commercial Surrogacy in India* (Columbia University Press, New York, 2014).

The surrogacy market in India represented a neocolonial reproductive market with stratified yet interchangeable positions. Consumers of reproductive biomaterial included medical practitioners, agents, and various service providers. However, fertility clinic owners were the primary beneficiaries, aiming to optimize the “bioavailability” of surrogate mothers in a competitive market. This system perpetuated and exacerbated existing social and economic inequalities, raising serious ethical concerns about the commodification of women’s bodies and reproductive capabilities in India.<sup>21</sup>

### **Surrogacy Used as a Hobby by the Rich**

Sheela Saravanan’s study revealed that surrogacy is sometimes motivated by frivolous reasons. One surrogate mother, Shama, reported that her intended mother chose surrogacy due to fear of pregnancy and delivery. The intended father was a well-off businessman and they had a lot of money. This case highlights how surrogacy can be used as a convenience by affluent individuals, raising ethical concerns about the exploitation of poorer women.

The trend of celebrities using surrogacy despite already having biological children was also seen. Examples include Bollywood stars Shahrukh Khan and Aamir Khan, who opted for surrogacy despite having teenage biological children. India’s External Affairs Minister, Sushma Swaraj, noted that surrogacy has become “a hobby of sorts” for some celebrities. This also raised concerns about the use of sex selection in surrogacy, noting that several male celebrities had male children through surrogacy. It questioned whether this is coincidental or if sex-selective technology was used, given India’s patriarchal culture.<sup>22</sup>

### **Legal Battles Regarding Parentage and Nationality**

India experienced its own version of the *Baby M case* with the widely publicized *Baby Manji v. Union of India*.<sup>23</sup> This case was an unusual custody

---

<sup>21</sup>*Supra* note 14 at 90.

<sup>22</sup>*Supra* note 14 at 96.

<sup>23</sup> (2008) 13 SCC 518.

battle which involved a Japanese biological father seeking custody of a baby girl whom no one else wanted. The Japanese couple had contracted a surrogate mother in India, using an anonymous egg donor. However, the couple separated a month before Manji's birth. When the ex-wife refused to accompany him, the intended father travelled to India alone. Indian authorities denied him custody, citing the Guardianship and Wards Act, 1890, which prohibits single men from adopting girls in India. The situation escalated, with the Japanese grandmother arriving to plead for custody of her granddaughter. Manji was labelled the first surrogate orphan. The case eventually reached a positive resolution when the Indian Supreme Court intervened, instructing the government to issue Manji a travel certificate for Japan. This case highlighted the complex legal and ethical issues surrounding international surrogacy arrangements. The Court for the first time recognised commercial surrogacy in India however it called for a legislation to regulate the same. The Court also recognised that intended parents can be single male or a male homosexual couple.<sup>24</sup>

Another such incident happened in the case of *Jan Balaz v. Anand Municipality*<sup>25</sup> highlighted the complex legal issues surrounding international surrogacy, particularly regarding citizenship and statelessness. A German couple commissioned a surrogacy in India, resulting in twins born in 2008. The children faced statelessness when Germany refused to recognize their Indian birth certificates due to surrogacy being illegal in Germany.

The case went through multiple legal stages in India. Initially, the surrogate mother was listed as the children's mother on revised birth certificates, allowing for Indian passports to be issued. However, this decision was challenged, leading to a complex legal battle involving questions of citizenship, parentage, and the legal status of surrogacy in India. The Gujarat High Court ultimately ruled that the children were Indian citizens by birth, entitled to Indian passports. However, this decision was challenged by the

---

<sup>24</sup>*Ibid.*, at para 11.

<sup>25</sup>*Jan Balaz v. Anand Municipality* 2009 SCC OnLine Guj 3913.

Indian government in the Supreme Court. The case was eventually resolved through a non-judicial avenue, with the German couple adopting the twins and Germany granting travel documents. This resolution took over two years from the children's birth. Thus, this case highlighted the urgent need for comprehensive legislation on surrogacy in India to address issues of citizenship and parentage in international surrogacy arrangements.

Around the time of October 2015, India's surrogacy market had really peaked, generating between \$500 million and \$2.3 billion annually. Cities like Anand in Gujarat had transformed into international surrogacy hubs, with foreign nationals accounting for up to 90% of hotel occupancy. The majority of surrogacy cases involved foreigners which led previous governments to adopt liberal policies favouring the market and to foster the so called "medical tourism."

As surrogacy issues peaked, advocate Jayashree Wad filed a Public Interest Litigation (PIL) in 2015.<sup>26</sup> The petition sought to ban transnational commercial surrogacy for foreigners in India, citing exploitation of poor Indian women and questioning the legality of importing embryos as "goods." The petitioner argued that surrogates lacked informed consent and faced exploitation and adverse health consequences.

Simultaneously, a new government took office at the Centre. Internationally, neighbouring countries like Cambodia and Nepal also imposed bans on surrogacy. When the Supreme Court asked the new government to clarify its stance, it declared in October 2015 that it did not support commercial surrogacy and would only allow infertile Indian couples to access altruistic surrogacy. This shift in policy led to the Surrogacy (Regulation) Bill of 2016, which banned commercial surrogacy and restricted embryo imports to research purposes only. Even altruistic surrogacy was limited to needy and infertile couples, subject to multiple checks and balances. Advocate Wad's petition played a significant role in highlighting the need for a regulatory

---

<sup>26</sup>Jayashree Wad v. Union of India, (Writ Petition 95 of 2015).



framework for surrogacy in India, ultimately influencing the development of the 2016 Surrogacy Bill and then to the consequent passing of the Surrogacy (Regulation) Act, 2021.

### **What does the Current Framework Allow?**

When introducing the Surrogacy Bill in Parliament, Health and Family Welfare Minister Jagat Prakash Nadda emphasized that the Act's intention was to preserve 'Indian ethos'. He said, "All sections of society, and practically every political party are of the opinion that commercial surrogacy should be immediately stopped and altruistic surrogacy should be the only way on ethical grounds. Keeping the Indian ethos in mind, trying to stop the exploitation of mothers, and see to it that the children are not abandoned and foreigners do not get away over surrogacy, we have decided to come with this Surrogacy Bill 2016 to regulate it."

The 2021 Surrogacy Act in India defines and prohibits "commercial surrogacy," which involves any form of payment or benefit to the surrogate mother or her representatives, except for medical expenses and prescribed insurance coverage. The Act forbids conducting, promoting, or availing of commercial surrogacy, as well as advertising or storing embryos or gametes for this purpose. Violations can result in up to 10 years imprisonment and fines up to 10 lakh rupees. The Act only permits "altruistic surrogacy," where no charges or incentives are given to the surrogate mother beyond medical expenses and insurance coverage. This definition includes "other prescribed expenses" based on recommendations to account for various challenges surrogates face, such as loss of work and post-partum depression. The Act aims to cover post-partum complications through insurance but may not fully compensate for all losses a surrogate experience. Violating the altruistic surrogacy mandate can lead to up to 5 years imprisonment and fines up to 5 lakh rupees. The legislation assumes that altruistic surrogacy will not be exploitative due to the absence of monetary benefits. However, this approach is criticized for being based on unrealistic moral assumptions rather than

scientific evidence. It potentially deprives impoverished potential surrogates of the economic benefits that commercial surrogacy previously offered.

### **Altruistic Surrogacy: A Pathway for Further Exploitation**

While commercial surrogacy is illegal in many countries including Australia, China, Japan, the UK, and most of Europe, there are arguments against an outright ban, particularly in the Indian context. This debate involves complex interactions between a paternalistic state and its belief about women's autonomy and bodily ownership, and neoliberal market forces. In India, impoverished women often turn to surrogacy for financial reasons, but are vulnerable to exploitation due to their socio-economic status, which may compromise their ability to give free consent. However, banning commercial surrogacy could be seen as unfair to these women, depriving them of an opportunity to support their families.<sup>27</sup> Moreover, such restrictions may violate the Indian Constitutional protection of women's physical autonomy and right to earn a living.<sup>28</sup>

Thus, the researcher argues that blanket bans often lead to system failures, as seen in the cases of sex work and unregulated abortions. Criminalizing these practices doesn't eliminate them but can drive them underground. Following India's ban on commercial surrogacy, some countries like Bangladesh have reported an increase in surrogacy arrangements with foreign intended parents.<sup>29</sup>

The Surrogacy Act reinforces traditional patriarchal norms by assigning no economic value to women's reproductive labour, potentially infringing on women's fundamental rights to reproductive autonomy under Article 21 of the Indian Constitution. The altruistic surrogacy model unrealistically expects women to undergo the physical and emotional challenges of childbirth solely

---

<sup>27</sup>Aishwarya Chandran, "Valuing women's labour: some notes on the 'compensated' model of surrogacy" 17(2) *Journal of South Asian Development* 195 (2022).

<sup>28</sup>Sneha Banerjee and Prabha Kotiswaran. "Divine labours, devalued work: The continuing saga of India's surrogacy regulation" 5(1) *Indian Law Review* 85 (2021).

<sup>29</sup> Sharon Bassan, "Different but same: A call for a joint pro-active regulation of cross-border egg and surrogacy markets" 28(1) *Health Matrix* 323 (2019).

out of compassion, ignoring real-world motivations and reinforcing societal control over reproductive autonomy. Banning commercial surrogacy eliminates a legitimate income source for potential surrogates, likely reducing the number of willing participants. This indirectly limits options for couples seeking parenthood through surrogacy as well.

Altruistic surrogacy presents its own challenges. Using a friend or relative as a surrogate can lead to emotional complications for all parties involved, including the resulting child, and may risk damaging existing relationships. It also limits the pool of potential surrogates, as few relatives may be willing to undergo the process. The absence of third-party involvement in altruistic surrogacy removes a layer of support and mediation. In commercial arrangements, third parties often ensure that intended parents cover medical and miscellaneous expenses and help navigate the complex surrogacy process. This support structure is typically missing in altruistic surrogacy arrangements. Banning commercial surrogacy may drive these activities underground, making them more dangerous and unregulated. This lack of oversight could lead to increased child abandonment and exploitation of financially vulnerable women, due to risky medical procedures and an unregulated market.<sup>30</sup>

Thus, instead of an outright ban, the researcher argues for laws that protect the economic and health interests of surrogate women. The current 2021 Act is criticized for prioritizing a form of moral conservatism over the actual interests of stakeholders, including intended parents and women who could benefit from surrogacy while maintaining their rights to bodily autonomy and livelihood. The expectation that a woman, related or not, should carry a child for nine months without compensation or recognition of the physical and emotional toll it takes on her is unreasonable. Altruistic surrogacy among relatives is still seen as exploitative, potentially more so without compensation. Hence in the next section the researcher suggests

---

<sup>30</sup> Soumya Kashyap and Priyanka Tripathi, "The Surrogacy (Regulation) Act, 2021: A Critique" 15(5) *Asian Bioethics Review* 18 (2023).

exploring alternatives like compensatory surrogacy, which could protect vulnerable stakeholders without compromising their bodily autonomy and right to earn. This approach is presented as a middle ground between unrestricted commercial surrogacy and unrealistic altruistic surrogacy.

### **Bringing in the Concept of Compensated Surrogacy**

Compensated surrogacy is an arrangement in which a woman carries and gives birth to a child for someone else in exchange for money and such an arrangement intimately affects women.<sup>31</sup> The idea of compensated surrogacy is embedded in the fact that the surrogate mother goes a lot of pain and suffering, mentally and physically, during and after the gestation period. The Parliamentary Standing Committee had also observed that, the 2019 bill allows only altruistic surrogacy, and thus it is in the nature of “forced labour” because no compensation is granted to the surrogate mother.<sup>32</sup> Thus, the 2021 Act assumes that a woman’s inherent role is to conceive children.<sup>33</sup>

The current altruistic surrogacy model may cause more harm than good without regulated compensation. There are risks of exploitation, as seen in cases where surrogates were underpaid or coerced by family members. While intended parents and doctors will benefit from this process, surrogates would lose out.<sup>34</sup> Arguments against compensating surrogates assume that payment itself leads to exploitation. However, lack of compensation can be more exploitative. Since clinics charge high fees for IVF services, not compensating

---

<sup>31</sup> Sara L. Ainsworth, “Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States” 89(4) *Washington Law Review* (2014).

<sup>32</sup> Department-Related Parliament Standing Committee, *supra* note 48, 11.

<sup>33</sup> Dr. Mrinal Satish, “National Law University, Delhi, Memorandum on The Surrogacy (Regulation) Bill, 2016” (2017) available at <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/2/7529/files/2017/08/CLPG-NLU-Delhi-Cornell-Memorandum-on-Surrogacy-Bill-2016-1s985d1.pdf> (last visited on Jul.10, 2024).

<sup>34</sup> Alok Prasanna Kumar, *Rethinking the Surrogacy Bill*, (Aug. 19, 2017), available at [https://www.epw.in/journal/2017/33/law-and-society/rethinkingsurrogacybill.html?0=ip\\_login\\_no\\_cache%3D42df720d0e0b3d641cfeffd587985597](https://www.epw.in/journal/2017/33/law-and-society/rethinkingsurrogacybill.html?0=ip_login_no_cache%3D42df720d0e0b3d641cfeffd587985597) (last visited October 24, 2019).

surrogates seems paternalistic. Data shows that commercial surrogacy often improved surrogates' economic situations.<sup>35</sup>

Banning compensation entirely may drive the surrogacy market underground, as seen in countries like China, Cambodia, and Thailand. Some experts propose regulated compensation models instead.<sup>36</sup> Studies show that women who offer paid gestational surrogacy services usually make well-considered decisions within economic constraints.<sup>37</sup> Banning compensation removes this choice and reinforces the notion of vulnerable poor women. Given the physical and emotional demands of surrogacy, compensation is arguably justified.

While Amrita Pande raises concerns about “coercive compensation” in such a scenario, where poor women will be dazzled by such a huge sum of money and their choice would not then be actual rational choice.<sup>38</sup> Thus, it is required that the legislature sets a particular pedestal for compensation which is uniform for all. A fair compensation model, coupled with strong regulations and enforceable contracts, could protect all stakeholders' rights while acknowledging sacrifices of the surrogates. This approach aims to balance ethical concerns with practical realities in surrogacy arrangements. Moving forward, policymakers should consider the lived experiences of surrogates, the need for reproductive autonomy, and the socioeconomic factors driving surrogacy arrangements. A nuanced regulatory framework that balances ethical considerations with practical realities could pave the way for a more equitable and transparent surrogacy system in India.

---

<sup>35</sup>*Supra* note 32.

<sup>36</sup> Sharmila Rudrappa, “India outlawed commercial surrogacy - clinics are finding loopholes” (Oct. 24, 2017), *available at* <http://theconversation.com/india-outlawedcommercial-surrogacy-clinics-are-finding-loopholes-81784>

<sup>37</sup>Gargi Mishra, “Our notions of motherhood” (Aug. 9, 2019), *available at* <https://indianexpress.com/article/opinion/columns/surrogacy-regulation-bill-laws-in-indiacommercial-surrogacy-5890510/>

<sup>38</sup>Julie Shapiro, “For a Feminist considering surrogacy, is compensation really the key question?” 89 *Washington Law Review* 1345 (2011).

## Conclusion

This paper critically examines the ethical and legal landscape of compensated surrogacy in India within the context of the Surrogacy (Regulation) Act, 2021, which bans commercial surrogacy and allows only altruistic arrangements. The findings suggest that while the legislation aims to protect surrogate women from exploitation, it may inadvertently perpetuate new forms of injustice by denying women the right to receive compensation for their reproductive labor. This denial not only undervalues the significant physical and emotional burden borne by surrogates but also restricts their ability to make autonomous economic decisions—particularly impacting women from marginalized and economically disadvantaged backgrounds who often see surrogacy as a viable means of financial support. Viewed through a feminist critical lens, the paper emphasizes that reproductive labor is indeed labor—worthy of recognition, protection, and compensation. By idealizing altruistic surrogacy as a morally superior alternative, the current legal framework overlooks the complex socio-economic conditions that influence women's choices, and fails to engage with the nuanced power dynamics between surrogates and intended parents. The altruistic-only approach can mask unequal relationships and further diminish the agency of women by limiting their choices to only unpaid surrogacy, often without adequate safeguards or acknowledgment of their lived realities. In response to these issues, the paper advocates for a regulated model of compensated surrogacy—one that neither commercializes surrogacy in an exploitative free-market manner nor imposes a rigid altruistic ideal that denies women fair recompense. A regulated compensated model would involve clear legal protections, enforceable rights for surrogates, ethical oversight mechanisms, and transparent agreements that recognize the surrogate's contributions and autonomy. Such a model strikes a balance between protecting women from coercion and exploitation, while also empowering them to make informed and autonomous decisions about their reproductive labor. Ultimately, this approach would reflect a more just and pragmatic understanding of surrogacy

in India—one that affirms both women's reproductive rights and their socio-economic agency, moving the discourse beyond moral panic to a framework of dignity, equity, and choice.

## Bibliography

B.K. Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* 238 (Norton, New York, 1989).

Banerjee, Sneha, and Prabha Kotiswaran. "Divine labours, devalued work: The continuing saga of India's surrogacy regulation" 5(1) *Indian Law Review* 85 (2021).

Chandran, Aishwarya, "Valuing women's labour: some notes on the 'compensated' model of surrogacy" 17(2) *Journal of South Asian Development* 195 (2022).

Department-Related Parliament Standing Committee, *supra* note 48, 11.

Ekman, Kajsa Eki, *Being and Being Bought: Prostitution, Surrogacy & the Split Self* 160 (Spinifex Press, Australia, 2013).

G Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* 214 (Harper & Row, 1985).

J.F. Daar (1997) "Regulating reproductive technologies: panacea or paper tiger" 34 *Houston Law Review* 609 (1997).

Jan Balaz v. *Anand Municipality* 2009 SCC OnLine Guj 3913.

Jayashree Wad v. *Union of India*, (Writ Petition 95 of 2015).

Kumar, Alok Prasanna, *Rethinking the Surrogacy Bill*, (Aug. 19, 2017), available at [https://www.epw.in/journal/2017/33/law-and-society/rethinkingsurrogacy-bill.html?0=ip\\_login\\_no\\_cache%3D42df720d0e0b3d641cfeffd587985597](https://www.epw.in/journal/2017/33/law-and-society/rethinkingsurrogacy-bill.html?0=ip_login_no_cache%3D42df720d0e0b3d641cfeffd587985597) (last visited October 24, 2019).

"Mimi and the Surrogacy Bazaar of India - India Art Review," accessed May 6, 2025, <https://indiaartreview.com/stories/mimi-hindi-film-surrogacy-motherhood-controversy-analysis/>.

Mishra, Gargi, "Our notions of motherhood" (Aug. 9, 2019), available at <https://indianexpress.com/article/opinion/columns/surrogacy-regulation-bill-laws-in-indiacommercial->

- Mutcherson, K.M. "Transformative reproduction" 16(1) *Journal of Gender, Race and Justice* 187 (2013).
- Nayak, Preeti, "The Three Ms of Commercial Surrogacy in India: Mother, Money and Medical Market" in Sayantani DasGupta and Shamita Das Dasgupta (eds.), *Globalization and Transnational Surrogacy in India Outsourcing Life* 12 (Lexington Books, United Kingdom, 2014).
- Pande, Amrita, *Wombs in Labor Transnational Commercial Surrogacy in India* (Columbia University Press, New York, 2014).
- S Allan, "The surrogate in commercial surrogacy: legal and ethical considerations" in P Gerber and K O'Byrne (eds.) *Surrogacy, Law, and Human Rights* 113 (Aldershot: Ashgate).
- S.S. Boone (1992) "Slavery and contract motherhood: a 'racialized' objection to the autonomy arguments" in H.B. Holmes (ed.) *Issues in Reproductive Technology: An Anthology* 349 (New York: Garland).
- SAMA - Resource Group for Women and Health, "Birthing A Market: A Study on Commercial Surrogacy" New Delhi (2012).
- Sara L. Ainsworth, "Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States" 89(4) *Washington Law Review* (2014).
- Saravanan, Sheela, *A Transnational Feminist View of Surrogacy Biomarkets in India* 90 (Springer, Singapore, 2018).
- Satish, Mrinal, "National Law University, Delhi, Memorandum on The Surrogacy (Regulation) Bill, 2016" (2017) available at <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/2/7529/files/2017/08/CLPG-NLU-Delhi-Cornell-Memorandum-on-Surrogacy-Bill-2016-1s985d1.pdf> (last visited on Jul.10, 2024).
- 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* 67 (Lexington Books, United Kingdom, 2014).
- Shapiro, Julie, "For a Feminist considering surrogacy, is compensation really the key question?" 89 *Washington Law Review* 1345 (2011).
- Sharmila Rudrappa, "India outlawed commercial surrogacy - clinics are finding loopholes" (Oct. 24, 2017), available at <http://theconversation.com/india-outlawedcommercial-surrogacy-clinics-are-finding-loopholes-81784>



Sharon Bassan, "Different but same: A call for a joint pro-active regulation of cross-border egg and surrogacy markets" 28(1) *Health Matrix* 323 (2019).

Soumya Kashyap and Priyanka Tripathi, "The Surrogacy (Regulation) Act, 2021: A Critique" 15(5) *Asian Bioethics Review* 18 (2023).

Thirani, Neha, "A Controversial Ban on Commercial Surrogacy Could Leave Women in India With Even Fewer Choices" *The Time* (Jun. 30, 2021) available at <https://time.com/6075971/commercial-surrogacy-ban-india/> (last accessed on Jul. 10, 2024).

V Madge, "Gestational surrogacy in India: the problem of technology and poverty" in Sayantani DasGupta and Shamita Das Dasgupta (eds.) *Globalization and Transnational Surrogacy in India: Outsourcing Life* 55 (Lexington Books, United Kingdom, 2014).