

**COMMERCIAL SURROGACY BAN: PROTECTION OR PATERNALISM**- Sakshi Singh<sup>1</sup>**Executive Summary**

*The prohibition of commercial surrogacy in India through the Surrogacy (Regulation) Act, 2021 marks a major transformation in India's reproductive rights framework. India was once regarded as the global centre for commercial surrogacy because of inexpensive fertility services and the availability of economically vulnerable women willing to act as surrogate mothers. However, concerns regarding exploitation, trafficking, unethical medical practices, and commodification of women's bodies eventually led to legislative intervention.*

*The enactment of the Surrogacy (Regulation) Act, 2021 prohibited commercial surrogacy and allowed only altruistic arrangements where surrogate mothers receive no compensation except medical expenses and insurance coverage. The State justified the prohibition as a measure necessary to protect vulnerable women from exploitation. However, critics argue that the legislation reflects excessive State paternalism because it denies women the autonomy to make decisions concerning their reproductive labour.*

*This article critically examines whether the commercial surrogacy ban genuinely protects women or whether it imposes patriarchal control under the guise of welfare. The paper analyses constitutional principles under Articles 14, 19, and 21 of the Constitution, feminist theories concerning reproductive labour, and important judicial precedents including *Suchita Srivastava v. Chandigarh Administration* and *Justice K.S. Puttaswamy v. Union of India*. The article argues that while exploitation concerns are legitimate, an outright prohibition may not be*

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*constitutionally proportionate. A regulated commercial framework with strong safeguards could better balance autonomy, dignity, and protection.*

**Keywords:** *Commercial Surrogacy, Reproductive Rights, Feminist Jurisprudence, Bodily Autonomy, Constitutional Morality, Exploitation, Paternalism*

## INTRODUCTION

The evolution of assisted reproductive technologies has fundamentally transformed the understanding of family, parenthood, and reproductive rights in contemporary society. Among these technologies, surrogacy has emerged as one of the most controversial legal and ethical issues across jurisdictions. Surrogacy enables an intended parent or couple to have a child through another woman who carries the pregnancy on their behalf<sup>2</sup>. While the practice has provided hope to infertile couples and individuals unable to conceive naturally, it has simultaneously generated debates concerning exploitation, commodification, consent, and reproductive autonomy.

India occupied a unique position in the global surrogacy market for nearly two decades. Following the effective legalization of commercial surrogacy in 2002, India rapidly became a preferred destination for reproductive tourism due to comparatively lower medical costs, advanced fertility infrastructure, and the availability of economically vulnerable women willing to act as surrogate mothers. Fertility clinics flourished in states such as Gujarat, Maharashtra, and Delhi, generating an industry estimated to be worth billions of rupees.

However, the rapid commercialization of surrogacy also exposed serious legal and ethical concerns. Numerous reports emerged highlighting exploitative contracts, lack of informed consent, poor living conditions of surrogate mothers, absence of post-pregnancy care, and the treatment of women as mere reproductive instruments. International surrogacy arrangements further complicated issues relating to citizenship, parentage, and nationality of children born through surrogacy. These developments eventually prompted legislative intervention.

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<sup>2</sup>Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 39.

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The enactment of the Surrogacy (Regulation) Act, 2021 marked a decisive policy shift. The legislation prohibits commercial surrogacy entirely and permits only altruistic surrogacy under stringent conditions. The law was presented as a welfare-oriented measure intended to protect women from exploitation and preserve the dignity of motherhood<sup>3</sup>.

Nevertheless, the legislation has attracted severe criticism from constitutional scholars, feminists, and reproductive rights activists. Critics argue that the law adopts a paternalistic approach by assuming that women are incapable of exercising informed consent regarding reproductive labour. They contend that by prohibiting compensation, the State denies women economic agency while simultaneously controlling female bodies through moral regulation.

This article seeks to critically examine whether the commercial surrogacy ban constitutes a genuine protective measure or whether it reflects unconstitutional paternalism inconsistent with modern constitutional values of dignity, privacy, equality, and autonomy<sup>4</sup>.

## RESEARCH OBJECTIVES

1. To analyse the legal framework governing surrogacy in India.
2. To examine the constitutional validity of banning commercial surrogacy.
3. To study whether the prohibition protects women or restricts reproductive autonomy.
4. To critically evaluate feminist perspectives on reproductive labour.
5. To analyse important judicial precedents concerning surrogacy and reproductive rights.
6. To suggest reforms for a balanced surrogacy framework.

## RESEARCH QUESTIONS

1. Whether the prohibition of commercial surrogacy violates reproductive autonomy under Article 21?
2. Whether the ban is a legitimate protective measure or an instance of State paternalism?

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<sup>3</sup>Baby Manji Yamada v. Union of India (2008) 13 SCC 518.

<sup>4</sup>Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (*Law Com No 228, 2009*) 51.

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3. Whether altruistic surrogacy effectively addresses exploitation concerns?
4. Whether regulation would be more effective than prohibition?

## RESEARCH METHODOLOGY

This article adopts a doctrinal and analytical approach. The study relies upon primary sources including statutes, constitutional provisions, parliamentary debates, judicial decisions, and Law Commission reports. Secondary sources include journal articles, feminist scholarship, commentaries, and academic literature relating to reproductive rights and constitutional law.

## EVOLUTION OF SURROGACY LAW IN INDIA

India became a major centre for international surrogacy after commercial surrogacy was effectively legalized in 2002<sup>5</sup>. The absence of comprehensive regulation enabled fertility clinics to operate with minimal oversight.

Commercial surrogacy was often defended on the ground that it created economic opportunities for poor women while helping infertile couples achieve parenthood<sup>6</sup>. However, reports gradually exposed exploitative practices including:

- coercive contractual conditions;
- lack of informed consent;
- confinement of surrogate mothers;
- inadequate healthcare facilities;
- abandonment of children;
- trafficking concerns.

The Indian government eventually introduced legislative proposals aimed at regulating the industry<sup>7</sup>. After several drafts and parliamentary debates, the Surrogacy (Regulation) Act, 2021 was enacted.

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<sup>5</sup>Baby Manji Yamada v. Union of India (2008) 13 SCC 518.

<sup>6</sup> Law Commission of India (n 3) 62.

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## THE SURROGACY (REGULATION) ACT, 2021

The Act prohibits commercial surrogacy while permitting altruistic surrogacy subject to statutory conditions.

### OBJECTIVES OF THE ACT

The legislation seeks:

- to prohibit commercialization of surrogacy;
- to prevent exploitation of surrogate mothers;
- to regulate fertility clinics;
- to prevent unethical practices;
- to protect children born through surrogacy.

#### A. Ban on Commercial Surrogacy and Women's Economic Rights

**The Surrogacy (Regulation) Act, 2021** prohibits commercial surrogacy in India to safeguard women against exploitation. While the law addresses genuine concerns regarding unethical practices, it undermines women's autonomy by presuming that all compensated surrogacy is inherently exploitative<sup>8</sup>. This approach overlooks the reality that many women may choose surrogacy as a legitimate means of livelihood. By removing this option, the law risks perpetuating economic dependence and reinforcing patriarchal<sup>9</sup> control over women's bodies and decisions. Thus, although the intention is protective, the outcome may disempower women. A more nuanced approach is needed that respects women's agency and economic rights.

#### 1. Reproductive Autonomy and the Right to Choose

The ban on commercial surrogacy represents excessive State intrusion into personal reproductive decisions. It undermines women's reproductive autonomy by prohibiting payment and imposing

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<sup>7</sup> Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 *Signs* 969.

<sup>8</sup> Martha Nussbaum, *Women and Human Development* (Cambridge University Press 2000) 115

<sup>9</sup> Silvia Federici, *Revolution at Point Zero* (PM Press 2012) 17.

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moral authority over their choices<sup>10</sup>. This autonomy is intrinsically linked to the right to privacy and dignity under Article 21<sup>11</sup> of the Constitution, as affirmed by the Supreme Court in **Justice K.S. Puttaswamy (Retd.) v. Union of India**, which recognized privacy as including personal decision-making. Restricting commercial surrogacy not only limits women's economic opportunities but also infringes upon constitutional freedoms. A balanced regulatory framework is therefore essential to prevent exploitation while preserving women's liberty to make informed choices.

## 2. Economic Empowerment and Feminist Critique of State Control

From a feminist perspective, the ban on commercial surrogacy may harm women's economic opportunities rather than protect them. Economically disadvantaged women often relied on surrogacy as a source of significant income to support education, marriages<sup>12</sup>, or debt repayment. Many exercised agency by negotiating terms and improving their circumstances, rather than remaining passive victims. The law, however, treats all compensated surrogacy as exploitative and promotes unpaid altruistic<sup>13</sup> arrangements, thereby imposing moral judgments on women's choices. This reflects economic paternalism that undermines women's capacity for informed decision-making and devalues their reproductive labour.

### B. Altruistic Surrogacy and Moral Control

The Surrogacy (Regulation) Act, 2021 promotes an altruistic model of surrogacy, restricting surrogates to close relatives and allowing only medical expenses and insurance coverage. Presented as an unpaid "gift" rooted in family and emotional bonds, the model aims to eliminate the exploitation associated with commercial surrogacy. However, it reinforces traditional ideologies of motherhood and familial obligation, potentially pressuring women<sup>14</sup> to participate out of duty rather than free will. By denying compensation, the Act disregards the substantial

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<sup>10</sup>Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

<sup>11</sup>Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1.

<sup>12</sup>Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 74.

<sup>13</sup>Nivedita Menon, *Seeing Like a Feminist* (Zubaan 2012) 84.

<sup>14</sup>Convention on the Elimination of All Forms of Discrimination Against Women art 11.

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physical and emotional costs of surrogacy. This approach conflicts with CEDAW Article 11, which recognizes reproductive labour as work deserving economic recognition and protection<sup>15</sup>.

### **1. Familial Obligation and the Illusion of Consent**

The assumption that family ties automatically ensure genuine consent in altruistic surrogacy is flawed. Limiting surrogates to close relatives can generate coercion within patriarchal family structures, making participation feel obligatory rather than voluntary. This undermines informed consent, which is central to reproductive rights and personal liberty under Article 21. The Supreme Court in **Suchita Srivastava v. Chandigarh Administration (2009)** held that a woman's<sup>16</sup> autonomy over her body is fundamental. Independent counselling mechanisms could strengthen safeguards and ensure consent remains free from familial or societal pressure.

### **2. Devaluation of Reproductive Labour and Gendered Morality**

The altruistic model fails to recognize the substantial physical, emotional, and temporal labour involved in surrogacy. It frames the surrogate's contribution as a natural "gift" tied to motherhood rather than as legitimate work deserving compensation<sup>17</sup>. This devaluation aligns with broader patterns in family law where women's reproductive labour is treated as a selfless duty. Scholars such as Amrita Pande have critiqued this as state-imposed morality that aligns women's bodies<sup>18</sup> with patriarchal expectations. Recognizing surrogacy as remunerated labour could better advance gender equality and equal opportunities.

### **3. Ethical and Social Narratives Surrounding Altruistic Surrogacy**

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<sup>15</sup>Margaret Radin, *Market-Inalienability* (Harvard University Press 1987) 189.

<sup>16</sup>Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1.

<sup>17</sup> Silvia Federici, *Revolution at Point Zero* (PM Press 2012) 26.

<sup>18</sup>Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 101.

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The Surrogacy (Regulation) Act, 2021 seeks to prevent exploitation by permitting only altruistic surrogacy. However, its restrictive provisions have revealed several limitations. The Act limits surrogacy primarily to heterosexual married couples, excluding LGBTQ+ persons, single individuals, widows, and divorcees in many cases. It also requires surrogates to be married women who already have at least one child. These conditions reflect conventional family norms and raise concerns about autonomy and exclusion. Judicial interventions in 2025, including Supreme Court rulings on age restrictions and frozen embryos, have highlighted the link between reproductive choice and Article 21 rights. Feminist scholars argue that altruism can mask coercion in patriarchal settings, while the law's heteronormative bias raises equality concerns under Article 14. Altruistic surrogacy thus remains a contested site balancing protection, autonomy, and inclusion.

## CONSTITUTIONAL ANALYSIS

The constitutional validity of the commercial surrogacy ban must be examined under Articles 14, 19, and 21 of the Constitution<sup>19</sup>.

## ARTICLE 21 AND REPRODUCTIVE AUTONOMY

Article 21 guarantees the right to life and personal liberty. Judicial interpretation has expanded its scope to include dignity, privacy, bodily integrity, and reproductive choice<sup>20</sup>.

In **Suchita Srivastava v. Chandigarh Administration**, the Supreme Court recognized reproductive autonomy as a dimension of personal liberty under Article 21. The Court observed that a woman's right to make reproductive choices is an aspect of personal liberty, dignity, and bodily integrity<sup>21</sup>.

Similarly, in **Justice K.S. Puttaswamy v. Union of India**, the Supreme Court recognized privacy as a constitutionally protected fundamental right encompassing decisional autonomy and intimate personal choices.

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<sup>19</sup>Maneka Gandhi v. Union of India AIR 1978 SC 597.

<sup>20</sup>Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1.

<sup>21</sup>Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

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The commercial surrogacy ban raises important constitutional concerns because it interferes with:

- bodily autonomy
- decisional privacy
- reproductive choice
- economic agency.

The legislation assumes that women cannot voluntarily engage in compensated reproductive labour without being exploited. Such an assumption may undermine the constitutional value of autonomy recognized under Article 21.

#### **ARTICLE 14: EQUALITY AND NON-ARBITRARINESS**

Article 14 prohibits arbitrary classification and guarantees equality before law.

The earlier legislative framework excluded:

- LGBTQ+ persons
- single individuals
- unmarried couples
- foreign nationals.

Such exclusions reflected a narrow and heteronormative conception of family. The legislation appeared inconsistent with constitutional morality and evolving jurisprudence recognizing diverse family structures<sup>22</sup>.

The Supreme Court in *Navtej Singh Johar v. Union of India* emphasized dignity, equality, and sexual autonomy. Excluding LGBTQ+ individuals from surrogacy rights may therefore raise constitutional concerns<sup>23</sup>.

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<sup>22</sup>*Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

<sup>23</sup>*Joseph Shine v. Union of India* (2019) 3 SCC 39.

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**ARTICLE 19(1)(g): RIGHT TO OCCUPATION**

Commercial surrogacy may also be viewed as a form of labour involving reproductive services. By prohibiting compensation, the State restricts women from engaging in a particular form of economic activity.

While reasonable restrictions are permissible under Article 19(6)<sup>24</sup>, a complete prohibition may fail the test of proportionality if regulation could achieve the same objective with lesser

**THE CONCEPT OF REPRODUCTIVE LABOUR**

The debate on commercial surrogacy extends beyond medical and contractual issues. It must be understood through the lens of reproductive labour. Feminist scholars argue that pregnancy<sup>25</sup> involves significant emotional, physical, and psychological labour that has historically remained invisible and uncompensated within traditional economic frameworks. Reproductive labour encompasses gestation, childbirth, caregiving, and related domestic responsibilities, which are predominantly performed by women without adequate recognition or reward.

Commercial surrogacy converts this reproductive labour into a contractual and compensated service<sup>26</sup>. This raises a core constitutional question: whether women have the autonomy to economically benefit from their reproductive capacities. Critics of the ban contend that the State recognises other forms of physically demanding labour but selectively prohibits reproductive labour simply because it is linked to the female body.

A surrogate mother undergoes hormonal treatments, embryo implantation, physical pain, medical risks, emotional stress, social stigma, and potential long-term health consequences<sup>27</sup>. Despite these realities, the altruistic model expects women to undertake pregnancy solely for emotional or familial reasons without any financial compensation. This reflects deeply gendered notions of motherhood and sacrifice.

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<sup>24</sup>Modern Dental College v. State of Madhya Pradesh (2016) 7 SCC 353.

<sup>25</sup> Silvia Federici, *Revolution at Point Zero* (PM Press 2012) 24.

<sup>26</sup> Sama Resource Group for Women and Health, *Constructing Conceptions: The Mapping of Assisted Reproductive Technologies in India* (2012) 56.

<sup>27</sup> Richard Arneson, 'Commodification and Commercial Surrogacy' (1992) 21 *Philosophy and Public Affairs* 132.

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Moreover, the prohibition overlooks the socio-economic conditions of many surrogate mothers. Numerous women previously viewed commercial surrogacy as a means for financial advancement, children's education, housing security, or debt repayment<sup>28</sup>. The complete denial of compensation may therefore create economic injustice.

### THE DOCTRINE OF PATERNALISM AND STATE CONTROL

Paternalism refers to State interference in individual autonomy on the pretext of protecting individuals' welfare. Constitutional democracies allow limited paternalism to prevent coercion or exploitation. However, excessive paternalism becomes problematic when it restricts competent adults from making voluntary decisions about their own bodies and lives<sup>29</sup>.

The commercial surrogacy ban rests on several paternalistic assumptions:

1. Women cannot give informed consent, particularly if they are economically vulnerable.
2. Motherhood must remain altruistic and non-commercial.
3. The State is best placed to determine what is morally acceptable in family and reproductive matters<sup>30</sup>.

Such assumptions may conflict with the constitutional principle of decisional autonomy protected under Article 21. In **Joseph Shine v. Union of India**,<sup>31</sup> the Supreme Court held that constitutional morality must prevail over regressive social and patriarchal norms. The same principle applies to reproductive choices.

### COMMERCIAL SURROGACY AND THE QUESTION OF EXPLOITATION

A major justification for the ban is the prevention of exploitation of economically vulnerable women. Unregulated commercial surrogacy did witness serious issues such as one-sided

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<sup>28</sup> Janice Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (Spinifex Press 1993) 87.

<sup>29</sup> Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (New York University Press 2015) 64.

<sup>30</sup> Anil Malhotra and Ranjit Malhotra, *The Law and Practice of Surrogacy in India* (Universal Law Publishing 2016) 91.

<sup>31</sup> Brenda Cossman, 'Gender, Reproduction and the Law' (2018) 30 *Canadian Journal of Women and the Law* 202.

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contracts, inadequate medical care, confinement, lack of post-delivery support, and absence of counselling<sup>32</sup>.

However, the existence of exploitation does not automatically justify a total ban. Constitutional jurisprudence favours regulation over prohibition when individual autonomy is at stake. Labour exploitation is addressed through labour laws, not by banning work. Similarly, exploitative practices in surrogacy could have been tackled through strict regulation, including fair<sup>33</sup> compensation norms, mandatory informed consent, healthcare standards, independent counselling, and government oversight.

### **THE IMPACT OF THE BAN ON WOMEN**

The prohibition has significantly affected economically marginalised women who relied on surrogacy as a source of income<sup>34</sup>. For many, it provided funds for buying homes, educating children, achieving financial independence, or clearing debts. The ban removed this avenue without offering viable alternatives.

Consequently, the legislation may symbolically protect women while practically disempowering them. It has also pushed some arrangements underground, where women face greater risks due to the absence of legal protections and medical safeguards<sup>35</sup>. The ban may thus worsen the very exploitation it sought to eliminate.

### **LGBTQ+ RIGHTS AND SURROGACY**

The Surrogacy (Regulation) Act, 2021 has been criticised for its exclusionary approach towards LGBTQ+ individuals and non-traditional families. By limiting surrogacy primarily to heterosexual married couples, the law reinforces a narrow view of family and parenthood<sup>36</sup>.

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<sup>32</sup>Law Commission of India (n 3) 68.

<sup>33</sup>Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 94.

<sup>34</sup>Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 102.

<sup>35</sup>Nivedita Menon, *Seeing Like a Feminist (Zubaan 2012)* 97.

<sup>36</sup>Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

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In *Navtej Singh Johar v. Union of India*, the Supreme Court emphasised that constitutional morality demands protection of dignity and autonomy irrespective of sexual orientation. Excluding LGBTQ+<sup>37</sup> persons from surrogacy rights potentially violates Articles 14, 15, and 21. Modern constitutional jurisprudence views the family as a dynamic institution. Restricting surrogacy to traditional heterosexual marriages appears inconsistent with transformative constitutionalism.

## TRANSFORMATIVE CONSTITUTIONALISM AND REPRODUCTIVE JUSTICE

Transformative constitutionalism requires the Constitution to be interpreted in a manner that dismantles structures of inequality and promotes substantive freedom<sup>38</sup>. Reproductive justice goes beyond mere choice and includes access to healthcare, freedom from coercion, socio-economic equality, and dignity in reproductive decision-making.

A transformative approach to surrogacy demands respect for women's agency, strong safeguards against coercion, and protection from exploitation without criminalising their choices<sup>39</sup>.

## COMPARATIVE ANALYSIS WITH FOREIGN JURISDICTIONS

- **UNITED STATES** Several states recognise and regulate commercial surrogacy through enforceable contracts that ensure compensation<sup>40</sup>, healthcare protections, and clear parental rights. This model balances contractual autonomy with safeguards.
- **UNITED KINGDOM** The UK prohibits commercial surrogacy but allows altruistic arrangements. However, the restrictive regime<sup>41</sup> has driven many citizens to seek surrogacy services abroad.
- **UKRAINE** (pre-conflict) Ukraine emerged as a major surrogacy destination due to its clear legal recognition of compensated surrogacy under regulatory oversight<sup>42</sup>.

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<sup>37</sup>Supriyo v. Union of India 2023 SCC OnLine SC 1348.

<sup>38</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

<sup>39</sup> Gautam Bhatia, *Transformative Constitutionalism* (HarperCollins 2019) 214.

<sup>40</sup>Surrogacy Arrangements Act 1985.

<sup>41</sup>Israel regulates surrogacy through State-approved committees.

<sup>42</sup>Ukraine previously recognised regulated commercial surrogacy.

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- **ISRAEL** Israel permits regulated surrogacy under strict state supervision, with agreements requiring approval from a statutory committee to ensure fairness and informed consent<sup>43</sup>.

## NEED FOR A RIGHTS-BASED REGULATORY FRAMEWORK

India needs a balanced, rights-based framework that avoids both unregulated commercialisation and absolute prohibition. Such a model should include:

1. Mandatory psychological and legal counselling for surrogate mothers.
2. Transparent and regulated fair compensation standards.
3. Independent legal representation for surrogates.
4. Comprehensive health and insurance coverage.
5. Judicial or regulatory oversight of agreements.
6. Inclusion of diverse family structures, including single persons and LGBTQ+ individuals.

## JUDICIAL APPROACH TO SURROGACY IN INDIA

The Indian judiciary has played a significant role in addressing issues relating to surrogacy and protecting the interests of surrogate mothers and children. In 2002, the Government of India permitted commercial surrogacy, which soon transformed the country into a global “surrogacy hub,” often described as the “womb on rent<sup>44</sup>.”

### **Baby Manji Yamada v. Union of India (2008)**

The most landmark judgment on surrogacy in India is **Baby Manji Yamada v. Union of India**. The case arose in Anand, Gujarat. A Japanese couple, Dr. Ikufumi Yamada and his wife, entered into a surrogacy arrangement with an Indian surrogate mother. However, the couple separated before the birth of the child<sup>45</sup>. The wife returned to Japan, and the husband’s visa expired. On 25 July 2008, a baby girl named Manji was born. The surrogate mother refused to accept the child,

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<sup>43</sup>NALSA v. Union of India (2014) 5 SCC 438.

<sup>44</sup>Baby Manji Yamada v. Union of India (2008) 13 SCC 518.

<sup>45</sup>Jan Balaz v. Anand Municipality AIR 2010 Guj 21.

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while the biological father wished to take custody. The child was cared for by her paternal grandmother.

The case exposed major legal gaps in surrogacy regarding citizenship, parentage, and international arrangements. Japanese law did not recognise surrogacy and treated the surrogate as the legal mother, leading to refusal of a passport for the child. The baby effectively became stateless. After prolonged legal proceedings, the Supreme Court recognised commercial surrogacy as a legitimate practice in the absence of any prohibiting law<sup>46</sup>. The Court noted the emergence of surrogacy as an industry driven by advanced medical facilities, economic needs of women, and global demand. It highlighted concerns of exploitation and commodification but held that regulation was necessary. This judgment brought national attention to the issue and paved the way for subsequent legislative efforts, including the Assisted Reproductive Technology (Regulation) Bill, 2010<sup>47</sup>.

### **Suchita Srivastava v. Chandigarh Administration (2009)**

In **Suchita Srivastava v. Chandigarh Administration**, the Supreme Court held that a woman's right to reproductive choice is an integral part of her personal liberty under Article 21 of the Constitution<sup>48</sup>. The Court emphasised that decisions concerning a woman's body must respect her autonomy, dignity, and privacy.

Critics rely on this judgment to argue that the complete ban on commercial surrogacy infringes upon women's reproductive autonomy. Since the right to personal liberty includes the freedom to decide how to use one's body, prohibiting monetary compensation for surrogacy may amount to an unjustified restriction<sup>49</sup>. The judgment underscores that any regulation must balance protection from exploitation with respect for women's informed choices<sup>50</sup>.

### **Jan Balaz v. Union of India**

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<sup>46</sup>H. Siddharaju v. Union of India 2023 SCC OnLine Kar 112

<sup>47</sup>Indian Young Lawyers Association v. State of Kerala (2019) 11 SCC 1.

<sup>48</sup>Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1.

<sup>49</sup> Gautam Bhatia, *Transformative Constitutionalism* (HarperCollins 2019) 201.

<sup>50</sup> Vrinda Narain, 'Reproductive Autonomy and Constitutionalism in India' (2020) 12 *NUJS Law Review* 88.

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In *Jan Balaz v. Union of India*, a German couple faced severe legal complications after twins were born through surrogacy in Gujarat<sup>51</sup>. Germany did not recognise surrogacy, while Indian law created confusion regarding citizenship and parentage. The children remained stateless for nearly two years<sup>52</sup>. The case highlighted the conflicts arising in international surrogacy arrangements and the urgent need for clear legal provisions on parental rights, citizenship, and child welfare<sup>53</sup>. The Court stressed that the welfare of the child must be the paramount consideration.

#### **H. Siddaraju & Anr. v. Union of India & Others (Karnataka High Court)**

In this case, the Karnataka High Court evolved the “triple test theory” to grant permission for surrogacy where the intending father exceeded the prescribed age limit under the Surrogacy (Regulation) Act, 2021<sup>54</sup>. The Court applied genetic, physical, and economic tests while considering the couple’s special circumstances. It also questioned the logic of requiring a genetic link in altruistic surrogacy and urged legislative amendments. However, the Court refrained from striking down the provisions as the constitutional validity<sup>55</sup> of the Act was pending before the Supreme Court.

#### **Recent Supreme Court Observations**

In February 2024, the Supreme Court heard petitions challenging the exclusion of unmarried single women from surrogacy under the 2021 Act. The Court observed that marriage remains the accepted norm for parenthood in Indian society and expressed concerns about the welfare of the child. It decided to examine the constitutional validity of various provisions of the Surrogacy (Regulation) Act, 2021, including restrictions based on marital status and age. The Court has

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<sup>51</sup>Jan Balaz v. Anand Municipality AIR 2010 Guj 21.

<sup>52</sup>Anil Malhotra and Ranjit Malhotra, *The Law and Practice of Surrogacy in India* (Universal Law Publishing 2016) 91.

<sup>53</sup>Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* (Law Com No 228, 2009) 71.

<sup>54</sup>H. Siddaraju v. Union of India 2023 SCC OnLine Kar 1123.

<sup>55</sup>Aparna Chandra and Mrinal Satish, ‘Testing the Constitutionality of Restrictions on Personal Liberty’ (2017) 9 *Indian Journal of Constitutional Law* 5

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consistently recognised reproductive autonomy as part of fundamental rights under Article 21 while balancing it with child welfare and societal values.

### **ANALYSIS OF THE COMMERCIAL SURROGACY BAN**

The prohibition of commercial surrogacy under the Surrogacy (Regulation) Act, 2021 reflects the Indian State's attempt to address exploitation, trafficking<sup>56</sup>, and unethical practices in the surrogacy industry. However, the legislation raises serious constitutional and feminist concerns regarding bodily autonomy, reproductive liberty, and State paternalism<sup>57</sup>.

At its core, the law rests on the assumption that commercial surrogacy inherently leads to exploitation. The State justified the ban by arguing that economically vulnerable women are often compelled into surrogacy due to poverty and social inequality<sup>58</sup>. There is substantial evidence of exploitative practices in India's previously unregulated surrogacy market, including restrictive contracts, inadequate medical care, and limited decision-making<sup>59</sup> power for surrogate mothers. The State's concern regarding exploitation is therefore not entirely unfounded.

However, the constitutional issue lies in the State's response. Instead of introducing robust regulation through labour protections, healthcare safeguards, counselling, and oversight mechanisms, the legislation imposed a blanket prohibition<sup>60</sup> on compensated surrogacy. This approach treats all surrogate mothers as passive victims incapable of giving informed consent. Such an assumption undermines women's agency and reinforces patriarchal stereotypes that women need State supervision for reproductive decisions.

The legislation also fails to recognise reproductive labour as labour. Pregnancy involves substantial physical pain, emotional stress, health risks, and long-term bodily consequences. Denying compensation while expecting women to bear these burdens under an altruistic model

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<sup>59</sup>Surrogacy (Regulation) Act, 2021 s 4(ii).

<sup>60</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 94.

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appears inconsistent with constitutional values of dignity and equality. The law romanticises motherhood by keeping reproductive labour outside economic recognition.

A further constitutional concern is proportionality. Under Indian jurisprudence, restrictions on fundamental rights must satisfy the proportionality test laid down in cases such as *Modern Dental College v. State of Madhya Pradesh*<sup>61</sup>. The State must show that the objective is legitimate, the measure is suitable, less restrictive alternatives are unavailable, and there is a proper balance between rights and public interest.

The legislation also reflects a moralistic and heteronormative understanding of family. By excluding LGBTQ+ individuals, unmarried persons, and live-in couples in its earlier framework, it reinforces a narrow conception of parenthood. Such exclusions appear inconsistent with constitutional morality as recognised in *Navtej Singh Johar v. Union of India* and *Justice K.S. Puttaswamy v. Union of India*<sup>62</sup>.

Moreover, the ban may produce unintended consequences. Prohibition often drives activities underground. By criminalising<sup>63</sup> compensated surrogacy, the law may encourage illegal arrangements where surrogate mothers lack medical and legal protections, potentially leading to greater exploitation<sup>64</sup>.

Thus, while the legislative objective is valid, the means adopted by the State remain deeply problematic. The prohibition appears to prioritise moral paternalism over reproductive autonomy and constitutional liberty<sup>65</sup>.

## CRITICISMS OF THE SURROGACY (REGULATION) ACT, 2021

1. **Excessive State Paternalism** The Act adopts a paternalistic approach by assuming that women cannot independently decide whether to engage in compensated reproductive labour.

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<sup>61</sup> Joel Feinberg, *Harm to Self* (Oxford University Press 1986) 15.

<sup>62</sup> *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

<sup>63</sup> *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

<sup>64</sup> Nivedita Menon, *Seeing Like a Feminist* (Zubaan 2012) 97.

<sup>65</sup> Joel Feinberg, *Harm to Self* (Oxford University Press 1986) 15.

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This undermines bodily autonomy and infantilises women by treating them as incapable of informed consent<sup>66</sup>.

2. **Denial of Reproductive Autonomy** The prohibition interferes with decisional autonomy protected under Article 21. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court recognised reproductive choice as part of personal liberty. By criminalising compensated<sup>67</sup> surrogacy, the State restricts women's freedom to make decisions about their reproductive capacities.
3. **Failure to Recognise Reproductive Labour** Pregnancy involves physical, emotional, and economic sacrifice. Denying compensation devalues reproductive labour and reinforces patriarchal expectations that motherhood must remain self-sacrificial and unpaid<sup>68</sup>.
4. **Unrealistic Dependence on Altruism** The altruistic model assumes women will willingly undergo pregnancy without compensation. In reality, surrogacy involves medical risks, emotional burden, social stigma, and loss of employment opportunities. Expecting women to bear these burdens purely for altruistic reasons is unrealistic<sup>69</sup>.
5. **Possibility of Underground Surrogacy Markets** Complete prohibition may push surrogacy underground. Illegal markets are more likely to expose women to trafficking, coercion, unsafe medical conditions, and contractual abuse<sup>70</sup>. The ban may therefore worsen the exploitation it sought to eliminate.
6. **Exclusionary and Heteronormative Framework** The legislation privileges heterosexual married couples while excluding diverse family structures<sup>71</sup>. Such exclusions appear inconsistent with constitutional morality and equality jurisprudence developed in *Navtej Singh Johar v. Union of India* and *Joseph Shine v. Union of India*<sup>72</sup>.

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<sup>67</sup> Silvia Federici, *Revolution at Point Zero* (PM Press 2012) 29.

<sup>68</sup> *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1.

<sup>69</sup> Martha Nussbaum, *Women and Human Development* (Cambridge University Press 2000) 119.

<sup>70</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press 2014) 119.

<sup>71</sup> *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

<sup>72</sup> *Joseph Shine v. Union of India* (2019) 3 SCC 39.

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7. **Lack of Socio-Economic Rehabilitation Measures** The Act bans commercial surrogacy without addressing the socio-economic conditions that drove women into the industry. No alternative employment or welfare <sup>73</sup>measures were introduced for those affected by the ban.

## CONCLUSION

The prohibition of commercial surrogacy under the Surrogacy (Regulation) Act, 2021 represents a major shift in India's reproductive rights jurisprudence. The legislation was enacted with the objective of preventing exploitation, trafficking, and commercialization of women's reproductive capacities. Given the absence of regulation in the earlier surrogacy industry, the State's concern regarding unethical practices and the abuse of economically vulnerable women cannot be ignored. Commercial surrogacy in India had often developed into a profit-driven industry where surrogate mothers faced unequal bargaining power, medical exploitation, and inadequate legal protection. However, despite these legitimate concerns, the complete prohibition of compensated surrogacy raises significant constitutional and feminist issues. The legislation assumes that women participating in commercial surrogacy are incapable of exercising informed consent due to economic vulnerability. Such reasoning reflects a paternalistic understanding of women's autonomy and undermines the constitutional principles of dignity, privacy, and decisional freedom recognised under Article 21 of the Constitution.

The ban also fails to recognise reproductive labour as legitimate labour deserving legal and economic recognition. Pregnancy involves immense physical pain, emotional burden, medical risks, and social consequences. Denying compensation while expecting women to undertake surrogacy purely on altruistic grounds reinforces patriarchal assumptions that motherhood must remain self-sacrificial and outside the framework of economic value. Furthermore, the legislation adopts a restrictive and heteronormative understanding of family by imposing limitations on who may access surrogacy. Such exclusions appear inconsistent with evolving constitutional morality and judicial recognition of individual autonomy and equality. An outright prohibition may also prove counterproductive. Criminalization often drives economic activities underground. Illegal and unregulated surrogacy arrangements are more likely to expose women to trafficking,

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<sup>73</sup> Gautam Bhatia, *Transformative Constitutionalism* (HarperCollins 2019) 214.

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coercion, unsafe medical conditions, and contractual abuse. Thus, the ban may unintentionally worsen the exploitation it seeks to eliminate.

The constitutional challenge lies in balancing protection against exploitation with respect for reproductive autonomy. A democratic constitutional framework must empower women rather than deny them agency under the guise of protection. The State has a constitutional obligation to prevent coercion and abuse, but it must do so without completely eliminating women's reproductive choices. While the objective of the legislation is constitutionally legitimate, the method adopted by the State appears excessively restrictive and paternalistic. A regulated commercial surrogacy framework with strict safeguards would better reconcile dignity, autonomy, equality, and reproductive justice.

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