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With this thought, we hereby present to you

SURROGACY LAWS AND THE RIGHTS OF SURROGATE MOTHERS.

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ABSTRACT

Surrogacy, as a contemporary reproductive practice, presents complex legal, ethical, and policy questions, particularly regarding the rights and welfare of surrogate mothers. This research investigates the legal frameworks regulating surrogacy, with a central focus on the status, autonomy, and entitlements of surrogate women within both domestic and international contexts. Using doctrinal and comparative methodologies, the paper explores how jurisdictions such as India, the United Kingdom, the United States, Ukraine, and Australia regulate or restrict surrogacy arrangements—commercial and altruistic alike.

In India, the legal trajectory from an unregulated surrogacy market to the enactment of the Surrogacy (Regulation) Act, 2021, and the Assisted Reproductive Technology (Regulation) Act, 2021 marks a significant shift. While intended to prevent exploitation and safeguard ethical practices, these statutes have raised constitutional concerns regarding reproductive autonomy under Article 21 of the Indian Constitution and gender equality under Article 14. Through an analysis of leading case law including *Baby Manji Yamada v Union of India*, *Jan Balaz v Anand Municipality*, and *K. Kalaiselvi v Union of India*, the paper critiques the limited recognition afforded to surrogate mothers' rights.

The study draws upon feminist legal theory and international human rights instruments—such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and reports of the UN Special Rapporteur on trafficking—to argue that surrogate mothers are often treated as facilitators of reproductive labor rather than rights-bearing individuals. It highlights how global inconsistencies in surrogacy regulation exacerbate vulnerabilities in cross-border arrangements, risking legal limbo for children and exploitation of women in developing nations.

The paper advocates for a rights-based legal framework that places the surrogate mother at the centre of surrogacy discourse, ensuring her agency, health, dignity, and post-natal protections. It concludes with policy recommendations aimed at harmonizing domestic laws with international obligations while ensuring equity, autonomy, and justice in reproductive technologies.

Keywords : Surrogacy Law; Reproductive Rights; Surrogate Mothers; Human Dignity; Feminist Jurisprudence; Commercial Surrogacy; Altruistic Surrogacy; India; CEDAW; Comparative Law; Bioethics.

CHAPTER I: INTRODUCTION TO SURROGACY AND LEGAL CONTOURS

Surrogacy, as a legal and social phenomenon, occupies a unique intersection of reproductive autonomy, contractual arrangements, and family law. It refers to an arrangement in which a woman agrees to bear and give birth to a child for another person or couple, who will become the child's parent(s) after birth. This arrangement, though rooted in deeply personal experiences of infertility and kinship, is fraught with legal complexities, particularly concerning the rights of the surrogate mother. The term “surrogate” originates from the Latin word *subrogare*, meaning to substitute. Surrogacy, therefore, implies substitutional motherhood—raising fundamental questions about legal parentage, reproductive agency, bodily autonomy, and gendered labor.

Surrogacy is generally categorized based on genetic involvement and financial consideration: **Traditional Surrogacy** involves the surrogate’s own egg and artificial insemination. She is the biological mother of the child. **Gestational Surrogacy** uses the egg and sperm of the commissioning couple or donors. The surrogate has no genetic link to the child. **Commercial Surrogacy** entails financial compensation beyond medical and pregnancy-related costs. **Altruistic Surrogacy** involves no monetary reward, based solely on voluntary participation. These classifications have direct implications for legal recognition, enforceability of contracts, and protection of surrogate rights.

Legal Ambiguities and Emerging Challenges, Despite advances in assisted reproductive technology (ART), the law has struggled to keep pace. The core legal ambiguities surrounding

surrogacy arrangements include: Determination of legal parentage, Consent and contractual enforceability, Protection of surrogate mothers' rights, Cross-border surrogacy and citizenship issues, Exploitation commodification, and trafficking concerns. Case Illustration: In *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518, the Supreme Court of India was confronted with a surrogacy dispute involving Japanese nationals and an Indian surrogate. The case highlighted the urgent need for regulatory mechanisms in India to address the rights of surrogate mothers and the status of children born through surrogacy.

Feminist scholars remain divided on surrogacy. One school views it as empowering—allowing women to exercise control over their reproductive capacities. Another views it as exploitative, especially in economically stratified societies where poor women are recruited to serve the reproductive interests of the wealthy. Martha A. Field, in her seminal work *Surrogacy and the Law* (Harvard Law Review, 1990), noted that the key concern is not merely the legality of the transaction but its power dynamics—whether the surrogate's informed consent is genuine or coerced by economic compulsion. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), while not directly addressing surrogacy, underscores the state's obligation to prevent exploitation in all forms of labor, including reproductive labor.

Surrogacy law varies widely on the Global Regulatory Landscape Surrogacy: In Permissive Jurisdictions the Countries like Ukraine and Georgia allow commercial surrogacy and actively promote fertility tourism, In Prohibitive Jurisdictions the countries like Germany and France ban all forms of surrogacy, citing ethical concerns. In Regulated Altruistic Models: The UK, Canada, and Australia permit altruistic surrogacy under tightly controlled conditions. Such diversity poses challenges for international surrogacy arrangements, leading to inconsistent outcomes in custody, nationality, and enforceability. Example: In *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), the UK High Court dealt with a couple who entered into a commercial surrogacy arrangement in Ukraine. The court emphasized the importance of the child's welfare while navigating ethical constraints under UK law, which prohibits commercial surrogacy.

Surrogate Mothers and the Question of Rights, While much legal debate centers around the commissioning parents and the child's legal status, the rights of surrogate mothers are often under-theorized. Key concerns include: Right to health and insurance coverage , Psychological

well-being and post-delivery support , Autonomy over decisions during pregnancy ,Legal protection from coercion or abandonment ,Legal frameworks often treat the surrogate as a means to an end, rather than an autonomous rights-holder. The challenge lies in crafting a system where the surrogate is recognized as a central stakeholder entitled to dignity, compensation, and informed agency.

Objective and Scope of the Study ,this study aims to: Examine national and international legal frameworks governing surrogacy, Analyze how current laws affect the rights and welfare of surrogate mothers, Explore comparative jurisprudence from multiple jurisdictions ,Recommend legal and policy reforms rooted in a rights-based framework. The central thesis is that any surrogacy law must place the surrogate mother at the heart of the legal discourse, acknowledging her bodily autonomy, reproductive labor, and human dignity.

CHAPTER II: EVOLUTION OF SURROGACY LAWS IN INDIA

India's journey in regulating surrogacy has undergone a dramatic transformation over the past two decades—from a thriving hub of international commercial surrogacy to the recent shift towards a restrictive altruistic-only model under the Surrogacy (Regulation) Act, 2021. This evolution reflects a complex interplay between judicial intervention, socio-cultural values, international pressure, and ethical considerations. Understanding this trajectory is essential to critically examine the extent to which the current legal framework addresses or neglects the rights and welfare of surrogate mothers.

Early Legal Vacuum and Contractual Surrogacy, Until the late 2000s, India had no specific legislative framework regulating surrogacy. The practice grew rapidly in the absence of statutory control, supported largely by private fertility clinics and contractual arrangements. These contracts, often drafted unilaterally by commissioning parents and clinics, lacked uniformity and enforceability, leaving surrogate mothers legally and financially vulnerable. This unregulated environment raised serious concerns about exploitation, consent, and the commodification of women's reproductive labor, especially among economically disadvantaged women in India. The lack of standardised medical protocols and legal remedies further compounded the problem.

The Indian Council of Medical Research (ICMR) Guidelines, In 2002, the ICMR issued

guidelines for assisted reproductive technologies (ARTs), including surrogacy. These guidelines, though non-binding, were the first attempt to regulate the conduct of clinics and safeguard participants in surrogacy arrangements. Key features included: Requirement for informed consent, Regulation of donor anonymity, Prohibition of sex-selective ART, Guidelines for parentage determination. However, the guidelines lacked legal force and were not uniformly followed, as observed by scholars and later judicial commentary. Clinics continued to operate autonomously, often prioritizing the interests of commissioning parents over those of the surrogate mothers.

Judicial Interventions: Shaping the Legal Discourse

In this landmark case of *Baby Manji Yamada v Union of India*, (2008) 13 SCC 518, it was brought that International attention to India's surrogacy sector. A Japanese couple commissioned a surrogate in Gujarat but divorced before the child's birth. The Supreme Court permitted the child's travel to Japan with the grandmother, acknowledging the legal vacuum surrounding commercial surrogacy in India. Though the Court refrained from adjudicating on the merits of commercial surrogacy, it emphasized the need for legal regulation. This case triggered widespread debate and policy concern over the booming international surrogacy industry in India. Another case was as

In case of *Jan Balaz v Anand Municipality*, (2009) Guj 21., The Gujarat High Court dealt with the issue of citizenship for children born through surrogacy to German parents. The Court ruled that the children were Indian citizens by birth, given the nationality of the surrogate mother. This decision revealed the complexity of nationality and parentage in cross-border surrogacy and highlighted the absence of international coordination in such arrangements.

In case of *K. Kalaiselvi v Union of India*, (2019) SCC OnLine Mad 7642., The central government employee who was denied maternity leave after commissioning a surrogate. The Madras High Court ruled in her favour, affirming that commissioning mothers are entitled to maternity benefits under the *Maternity Benefit Act, 1961*. The Court recognized surrogacy as a legitimate mode of parenthood and emphasised gender-sensitive interpretation of maternity rights. However, the judgment did not delve into the surrogate mother's rights, again reflecting a judicial focus on commissioning parents.

In 2015, the Government of India introduced a draft Surrogacy (Regulation) Bill aiming to ban commercial surrogacy and promote altruistic surrogacy for Indian heterosexual couples. The

Bill reflected growing ethical concerns, particularly after reports of exploitation and child abandonment. The Bill proposed: A ban on foreign commissioning couples, Mandatory altruistic surrogacy, Eligibility criteria for intending couples and surrogate mothers. Though not passed in Parliament, it marked a decisive policy shift and laid the groundwork for the 2021 legislation.

The Surrogacy (Regulation) Act, 2021 and the ART (Regulation) Act, 2021 were enacted to provide a comprehensive framework for regulating reproductive technologies. Key features: Permits only altruistic surrogacy for Indian married heterosexual couples, Restricts surrogate eligibility to close relative, aged 25–35, with at least one biological child, Requires medical and psychological screening, insurance coverage, and national registration of clinics, Prohibits commercial surrogacy, single parent surrogacy, and surrogacy by LGBTQ+ individuals or foreign nationals. The Surrogacy (Regulation) Act, 2021, No. 47 of 2021. The Assisted Reproductive Technology (Regulation) Act, 2021, No. 42 of 2021. While these Acts aim to curb exploitation, critics argue that the overly restrictive provisions violate reproductive rights, discriminate against non-traditional families, and reduce women's agency to mere compliance. Critical Commentary on The transformation from a permissive commercial model to a restrictive altruistic regime marks a profound legal and ideological shift. However, several concerns remain: Autonomy and Consent: Restricting surrogacy to close relatives may coerce women into surrogate motherhood under familial pressure, Equality and Inclusion: The exclusion of single persons, LGBTQ+ individuals, and foreigners contravenes evolving interpretations of Article 14 and 21 of the Constitution, Lack of Surrogate-Centric Framework: Despite its regulatory intent, the law fails to centre the surrogate mother's experience—her rights, health, post-delivery support, and socio-economic rehabilitation. As Justice D.Y. Chandrachud observed in *Suchita Srivastava v Chandigarh Administration*, (2009) 9 SCC 1 reproductive choices are a dimension of personal liberty under Article 21.

In Conclusion, India's legal journey on surrogacy reflects a gradual progression from unregulated contractual arrangements to an overly restrictive altruistic model. While the 2021 Acts are a step toward safeguarding ethical surrogacy, they inadequately address surrogate mothers' rights and bodily autonomy. Judicial pronouncements have contributed to the discourse but remain largely focused on commissioning parents. A balanced and inclusive legal framework, informed by constitutional values and international human rights norms, is urgently required to restore dignity and justice to surrogate motherhood in India.

CHAPTER III: THE SURROGACY (REGULATION) ACT, 2021: PROVISIONS, GAPS, AND CHALLENGES.

The enactment of the Surrogacy (Regulation) Act, 2021 marks a watershed moment in India's legal history concerning reproductive rights and assisted reproduction technologies (ART). Enacted alongside the Assisted Reproductive Technology (Regulation) Act, 2021, the statute seeks to eliminate exploitative commercial practices and standardize ethical surrogacy. However, a closer analysis of the provisions reveals significant gaps and unintended consequences, particularly concerning the autonomy and welfare of surrogate mothers. This chapter dissects the key provisions of the Act, critically examines its inconsistencies, and evaluates its alignment with constitutional and international human rights principles.

The Salient Provisions of the Act, The Act defines surrogacy as an “arrangement” where a woman agrees to bear a child for intending parents, subject to a set of stringent conditions: **Altruistic Model of Surrogacy:** Section 2(b) and Section 4(iii)(b)(IV) of the Act explicitly prohibit commercial surrogacy, allowing only altruistic surrogacy—wherein no monetary compensation is permitted beyond medical expenses and insurance coverage.

The Eligibility Criteria for Intending Couples for surrogacy of baby : They must be Indian citizens , Must be legally married for at least five years, The wife must be aged 23–50 years, and the husband 26–55 years, Must be infertile or unable to conceive through other means.

The Eligibility Criteria for Surrogate Mothers are as She must be a close relative of the intending couple, Must be a married woman aged 25–35 years with at least one biological child, May act as a surrogate only once in her lifetime, Must undergo medical and psychological fitness tests.

The Act establishes by National and State Surrogacy Boards to oversee implementation, license clinics, and enforce ethical practices .The Act criminalises commercial surrogacy, advertising, intermediaries, and improper registration. If the rule will not followed by the intending couple the has to Penalties range from 5 to 10 years of imprisonment and fines up to ₹10 lakh.

Positive Aspects of the Legislation, Legal Clarity: The Act provides a uniform legal framework where none existed., **Focus on Ethics:** Seeks to curb the commodification of women's bodies

and protect children from trafficking and abandonment., Medical Safeguard: Mandates screening, insurance, and informed consent.

Exclusionary Eligibility Criteria, The Act restricts access to surrogacy to married heterosexual Indian couples, excluding: Single parents, Unmarried couples, Same-sex couples, Foreign nationals, Live-in partners. Such exclusion contravenes the right to equality (Article 14) and reproductive autonomy under the right to life (Article 21) of the Indian Constitution. It was observed In the cases of *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1; *Suchita Srivastava v Chandigarh Administration*, (2009) 9 SCC 1. It also violates India's international obligations under CEDAW, which emphasizes non-discrimination in access to healthcare and reproductive technologies. The requirement that a surrogate must be a close relative may lead to: Emotional coercion in familial settings, Stigmatization within families and communities.

Lack of Compensation Mechanism, Although intended to curb exploitation, the ban on financial compensation devalues the physical, emotional, and social labour of surrogate mothers. The Act treats surrogacy as a service of sacrifice, rather than labour deserving fair remuneration. This is at odds with labour rights and fails to recognize reproductive labour as economic activity, undermining the principle of autonomy and dignity.

The Act provides for surrogate consent but does not detail procedures for: Ensuring informed consent in vernacular languages, Preventing clinic-mediated manipulation, Guaranteeing withdrawal of consent at critical stages. The lack of enforceable guidelines weakens the protection of surrogate agency. **Post-Birth Rights and Support;** There is no mandate for: Post-partum psychological care, Long-term health insurance, Legal remedies for breach of surrogacy agreements, Access to counselling or vocational support .Surrogates are left vulnerable post-delivery, with no framework for rehabilitation or recognition of their reproductive contribution.

Constitutional and International Law Implications, Right to Privacy and Bodily Autonomy: As upheld in *Justice K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1, reproductive choices are an essential component of privacy and autonomy., **Right to Health:** Surrogates' health and well-being must be protected under Article 21 and the ICESCR. And **Gender Justice:** Excluding women from exercising reproductive choice due to marital status violates the gender equality framework of Articles 14 and 15.

In Jurisprudence like United Kingdom: Surrogacy is altruistic, but there is no “close relative” requirement. Surrogates may receive reasonable expenses. Parentage is transferred through Parental Orders under the Human Fertilisation and Embryology Act 2008, Ukraine and Georgia: Allow commercial surrogacy with robust contractual frameworks. California, USA: Recognizes and enforces surrogacy contracts, ensuring parental rights and compensation for surrogates. India’s model stands out for its paternalistic and exclusionary tone, lacking the contractual flexibility of Western jurisdictions or the regulated commercial models of Eastern Europe.

In Conclusion The Surrogacy (Regulation) Act, 2021, though a well-intentioned effort to regulate reproductive practices, suffers from over-correction. In attempting to prevent exploitation, it restricts rights, erases agency, and marginalizes non-traditional families. Most notably, it reduces surrogate mothers to passive participants—failing to accord them the dignity, remuneration, and legal protection due to them as reproductive workers. A reform-oriented, inclusive, and rights-based approach is essential to meet both constitutional mandates and global standards in reproductive justice.

CHAPTER IV: SURROGATE MOTHERS AS RIGHTS-BEARING INDIVIDUALS: LEGAL AND ETHICAL ANALYSIS

Surrogate mothers occupy a paradoxical position within legal frameworks: while they are essential to the surrogacy process, they are often peripheral to the legal discourse. This chapter examines the surrogate not as a passive facilitator but as a rights-bearing individual entitled to bodily autonomy, legal protection, and social recognition. Drawing from constitutional, ethical, feminist, and international perspectives, this chapter explores the legal lacunae in recognising surrogate mothers as autonomous agents.

Feminist scholars such as Adrienne Rich and Silvia Federici have argued that women's reproductive labour, particularly childbirth and caregiving, has been historically undervalued under patriarchal structures. Surrogacy, though framed in altruistic terms in India, is a form of reproductive labour that involves physical, emotional, and psychological work deserving legal recognition and compensation. Indian law, by mandating altruistic surrogacy without adequate support or remuneration, fails to account for the economic and bodily contributions of surrogate mothers, reinforcing the historical marginalisation of women’s reproductive roles.

In India The Legal Status of Surrogate Mothers is under the Surrogacy (Regulation) Act, 2021, the legal status of the surrogate mother is largely functional and conditional. She is treated as a facilitator of parenthood, with little attention paid to her post-surrogacy rights or status. Key issues include: No right to compensation beyond medical costs and insurance, Limited legal standing in contractual disputes, No explicit post-partum support for physical or mental health, No clarity on her right to withdraw consent post-implantation. The absence of enforceable rights places the surrogate in a vulnerable position and raises serious concerns about bodily autonomy under Article 21 of the Indian Constitution.

The right to health, as a facet of Article 21, encompasses physical and mental well-being, especially in contexts involving medical intervention. Yet, the Act does not establish standards for: Pre- and post-natal care; Mandatory counselling services; Regulation of clinics to avoid exploitation or medical negligence. In *Paschim Banga Khet Mazdoor Samity v State of West Bengal (1996) 4 SCC 37*, the Supreme Court recognised health as an essential aspect of the right to life. The failure to protect surrogates' health rights thus breaches constitutional guarantees.

The Act requires consent for surrogacy but lacks depth in enforcing informed consent. Coercion—particularly within families where the surrogate must be a “close relative”—may render consent involuntary. There is also no provision for withdrawing consent during pregnancy, reducing the woman's bodily integrity to a statutory formality. In *Suchita Srivastava*, the Court emphasised that reproductive decisions must be made free of coercion, recognising the individual's agency over their body as a fundamental right.

The work performed by surrogates mirrors labour-intensive care work, yet the law does not extend labour protections. Surrogacy is not recognised under the Maternity Benefit Act, 1961 or other welfare legislation, denying surrogates rights such as: Paid leave; Health benefits; Workplace protections. By contrast, jurisdictions like California treat surrogates as contractual parties entitled to fair compensation, insurance, and counselling.

International Human Rights Obligations, India's obligations under various international instruments require the state to safeguard the rights and dignity of surrogate mothers: CEDAW (Art. 12): Ensures access to healthcare and reproductive autonomy; ICESCR (Art. 12): Protects the right to the highest attainable standard of health; UDHR (Art. 1 & 23): Upholds dignity,

equality, and fair remuneration. The denial of compensation and exclusion from decision-making processes violates these obligations and reflects a paternalistic view of motherhood.

Ethical debates around commercial surrogacy often hinge on whether the practice commodifies women's bodies. Critics argue that paying for surrogacy turns gestation into a transaction, undermining human dignity. However, feminist ethicists like Debra Satz argue that banning compensation can itself be exploitative, as it strips women of agency and forces them into unpaid roles. A regulatory approach—ensuring informed consent, minimum compensation, and legal enforceability—is ethically superior to a ban.

The Act lacks a robust framework for surrogacy contracts, leaving surrogate mothers without legal recourse in case of breach or abandonment. Contracts should define obligations and dispute resolution mechanisms. Independent legal advice must be made available to surrogates. Dispute resolution should be fast-tracked through family courts or special tribunals. Enforceable contracts are key to upholding the dignity and autonomy of surrogate mothers.

In Conclusion, Surrogacy laws in India must move beyond viewing surrogate mothers as incidental to the process and instead acknowledge them as autonomous rights-holders. Constitutional protections, international obligations, and feminist ethics converge to support a rights-based framework that guarantees informed consent, health protection, remuneration, and post-natal care. Without such reform, the current legal framework risks replicating the very exploitation it seeks to prevent, under the veil of altruism.

CHAPTER V: COMPARATIVE LEGAL FRAMEWORKS ON SURROGACY

Surrogacy law presents a profound legal, ethical, and social challenge for jurisdictions worldwide. States have responded to surrogacy with varied approaches—ranging from liberal recognition to categorical prohibition. This chapter undertakes a comparative legal analysis of surrogacy regulations across selected jurisdictions to understand best practices, highlight normative divergences, and draw insights for reforming India's surrogacy law.

Typologies of Surrogacy Regulation the Jurisdictions broadly fall into four categories based on their legal treatment of surrogacy: Permissive Commercial Model (e.g., United States - some

states; Ukraine) ; Altruistic Model with Strict Regulations (e.g., United Kingdom, India post-2021) ; Prohibitionist Model (e.g., Germany, France) ; Ambiguous or Unregulated (e.g., several African and Southeast Asian jurisdictions) Each model reflects unique legal philosophies regarding autonomy, family, contract, and bodily commodification.

United Kingdom: Altruism with Judicial Oversight The UK regulates surrogacy under the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. Key features include: Prohibition of commercial surrogacy and agencies charging fees; Permissibility of altruistic arrangements with reasonable expenses reimbursable; Legal parentage is transferred via a parental order issued by a court under the 2008 Act; Courts assess the best interests of the child and ensure informed consent of the surrogate. Despite the altruistic model, UK law incorporates judicial oversight that allows for flexibility and fairness in individual cases.

United States: A Patchwork of State Laws, The U.S. lacks a federal law on surrogacy. Instead, legal regulation is determined by individual states: California: Highly supportive, enforces surrogacy contracts (Gestational Surrogacy Enforceability Act). New York: Legalised compensated gestational surrogacy in 2021 with the Child-Parent Security Act. Michigan: Declares surrogacy contracts void and criminalises commercial surrogacy. In *Johnson v Calvert* , 851 P.2d 776 (Cal. 1993), the California Supreme Court upheld the validity of a surrogacy contract and established that the intended parents, not the surrogate, were the legal parents under the “intent test.” U.S. states that allow commercial surrogacy tend to enforce contracts, ensure agency representation, and require judicial parentage orders.

Ukraine: A Liberal Commercial Framework, Ukraine has emerged as a hub for international surrogacy due to its ****explicit legal recognition of commercial gestational surrogacy**** under the Family Code and related health ministry guidelines. Key features include: Surrogates must be married and have at least one biological child; Contracts are enforceable; Parental rights are automatically vested in the commissioning parents; No genetic link is required for intended parents.

However, the lack of comprehensive welfare protections for surrogates and weak judicial enforcement of health rights has led to human rights concerns, especially during crises like the COVID-19 pandemic and the war with Russia.

Germany and France: Prohibitionist Stance; In Germany, surrogacy is banned under the Embryo Protection Act, 1990, and the Adoption Mediation Act. Similarly, France prohibits surrogacy under the Civil Code, asserting that it violates human dignity and the non-commercial status of the human body. In both jurisdictions: Surrogacy contracts are void; Legal parentage is determined by birth; Surrogates cannot transfer legal rights to intending parents, even post-birth.

Thailand, once a popular destination for international surrogacy, enacted the Protection for Children Born Through Assisted Reproductive Technologies Act (2015), banning commercial surrogacy for foreigners. This followed several high-profile scandals, including the “Baby Gammy” case. The Act now limits surrogacy to Thai couples with medical necessity and mandates: Altruistic surrogacy only; The surrogate must be a relative and have had a child of her own; Criminal penalties for commercial arrangements.

The Hague Conference on Private International Law is working on a multilateral instrument to address conflicts arising from international surrogacy, focusing on parentage recognition and child welfare. The European Court of Human Rights has called for balancing the child's right to identity with state interests in ethics and public policy. UN Special Rapporteurs have urged states to ensure that surrogacy regulation upholds women’s reproductive rights and avoids exploitation.

India’s restrictive altruistic-only model under the Surrogacy (Regulation) Act, 2021 contrasts sharply with the diversity of global practice. Key insights from comparative law include: Parentage clarity and judicial enforcement improve legal certainty; Compensation, when regulated, protects surrogates from exploitation more effectively than bans; Contractual enforceability, independent counselling, and health safeguards are crucial ;Rights of surrogate mothers must be placed at the centre of the regulatory framework.

In Conclusion Global approaches to surrogacy reveal an evolving jurisprudence shaped by cultural, ethical, and constitutional values. There is no one-size-fits-all model, but India’s current law would benefit from integrating international best practices, especially in recognising the rights of surrogate mothers and ensuring the well-being of all parties. A hybrid model—combining judicial oversight, enforceable contracts, and regulated compensation—offers a path forward that balances autonomy, ethics, and justice.

CHAPTER VI: CONSTITUTIONAL AND HUMAN RIGHTS

DIMENSIONS OF SURROGACY IN INDIA

Surrogacy, as a mode of assisted reproduction, engages several core constitutional and human rights in India. While the Surrogacy (Regulation) Act, 2021 seeks to balance ethical concerns with reproductive autonomy, it simultaneously introduces restrictions that raise important constitutional questions. This chapter examines surrogacy regulation through the lens of the Indian Constitution—focusing particularly on Articles 14, 19, and 21—while also analysing India's international obligations under human rights treaties.

Article 21 of the Indian Constitution guarantees the right to life and personal liberty. The Supreme Court has interpreted this article expansively to include the right to health, dignity, bodily integrity, and reproductive autonomy. In *Suchita Srivastava v. Chandigarh Administration*, [(2009) 9 SCC 1], the Court affirmed that reproductive rights are an aspect of personal liberty under Article 21, recognising a woman's right to make reproductive choices as part of her autonomy, dignity, and privacy. "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21." By limiting surrogacy to altruistic arrangements and barring single persons, LGBTQIA+ individuals, and live-in partners from commissioning surrogacy, the 2021 Act potentially violates reproductive autonomy.

The right to health is an implicit facet of Article 21, as held in *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, [(1996) 4 SCC 37]. Surrogate mothers are entitled to comprehensive maternal care and post-partum protection under this right. However, the current legal regime offers only limited insurance coverage and lacks structural support for physical and mental health rehabilitation.

Article 14 guarantees equality before the law and equal protection of the laws. Any classification made under a statute must pass the twin tests of intelligible differentia and rational nexus to the objective sought to be achieved. The Surrogacy Act excludes: Unmarried individuals, Same-sex couples, Transgender persons, Foreign nationals, Individuals without Indian citizenship. This selective inclusion, though justified on moralistic and cultural grounds, arguably fails the test of reasonable classification, especially when reproductive autonomy is a fundamental right. As held in *Navtej Singh Johar v. Union of India*, [(2018) 10 SCC 1], equality

must accommodate the rights of sexual and gender minorities. “The guarantee of equality is not merely a formal declaration; it must be substantively meaningful.

Similarly, in Justice K.S. Puttaswamy v. Union of India, [(2017) 10 SCC 1], the Supreme Court acknowledged the constitutional status of privacy, decisional autonomy, and the liberty to form family relationships.

Article 19: Freedom to Occupation and Expression: Article 19(1)(g) guarantees the right to practise any profession or to carry on any occupation, trade, or business. Surrogate mothers, fertility specialists, and surrogacy agencies are stakeholders affected by the ban on commercial surrogacy. The Supreme Court, in *Indian Express Newspapers v. Union of India*, [(1985) 1 SCC 641], held that professional freedom under Article 19(1)(g) could only be curtailed by “reasonable restrictions in the interest of the general public.” The blanket prohibition of commercial surrogacy lacks proportionate justification, especially when the same could be regulated through safeguards. **Constitutional Morality vs. Social Morality;** The law often seeks to enforce social morality—evident in the preference for traditional heterosexual marriages under the Act. However, the doctrine of constitutional morality, as laid down in *Navtej Singh Johar*, mandates the protection of individual dignity, identity, and liberty, even against prevailing societal norms. “Constitutional morality requires that all individuals be treated as equals, without discrimination on the basis of sex, sexual orientation or gender identity.” The Act’s exclusionary provisions risk perpetuating patriarchal and heteronormative norms inconsistent with constitutional morality.

Judicial Interpretations of Surrogacy in India, Although Indian courts have not directly struck down statutory provisions of surrogacy law, they have engaged with the legal complexities of parentage and rights of children born through surrogacy. In *Baby Manji Yamada v. Union of India*, [(2008) 13 SCC 518], the Supreme Court intervened to facilitate the child’s departure to Japan despite the absence of a legal framework, recognising the best interests of the child. In *Jan Balaz v. Union of India* (2010 AIR SCW 1023), the Gujarat High Court granted Indian citizenship to children born through surrogacy to a German couple, citing **jus soli** and the need for legal protection. These cases underscore the judiciary’s willingness to adopt a rights-based approach even in the absence of clear legislative provisions..

The Need for Proportionality and Rights-Based Reform ,The doctrine of proportionality, as

reiterated in *Modern Dental College v. State of Madhya Pradesh*, [(2016) 7 SCC 353], demands that restrictions on fundamental rights must be necessary, the least restrictive means available, and proportionate to the goal sought. Applying this doctrine to the Surrogacy Act, the complete ban on commercial surrogacy and categorical exclusions are not proportionate. The goal of preventing exploitation can be better achieved through informed consent, minimum compensation standards, and regulatory oversight.

In Conclusion, Surrogacy, when regulated with sensitivity to constitutional values, can balance the interests of all stakeholders—intended parents, surrogate mothers, and children. The current legal regime, however, prioritises a paternalistic and moralistic vision over autonomy, equality, and dignity. A constitutionally compliant surrogacy law must expand eligibility, ensure consent and welfare of surrogates, and adopt a rights-based framework that aligns with both domestic constitutional values and international human rights obligations.

CHAPTER VII: ETHICAL AND FEMINIST PERSPECTIVES ON SURROGACY

Surrogacy, as a method of assisted reproduction, presents complex ethical questions and elicits strong responses from a wide spectrum of feminist and moral theorists. It intersects with questions of reproductive autonomy, commodification of the body, agency, and the influence of class, caste, and gender structures. While the legality and mechanics of surrogacy are the subject of statutory and judicial development, its moral and ethical contours demand deeper introspection. This chapter critically analyses ethical and feminist responses to surrogacy with particular attention to the Indian context, while situating the discourse in broader global and philosophical paradigms.

Ethical Considerations in Surrogacy, The ethical discourse surrounding surrogacy often pivots on competing values: individual autonomy versus protection from exploitation; contractual freedom versus commodification; and personal liberty versus moral conservatism.

Reproductive Autonomy and Choice A core ethical argument in favour of surrogacy, especially from liberal traditions, is the primacy of reproductive autonomy. A woman's decision to become a surrogate, if informed and voluntary, ought to be respected as an expression of bodily autonomy and agency. *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1, the

Supreme Court of India recognised reproductive rights as part of Article 21 (Right to Life), reinforcing the constitutional value of autonomy in reproductive decision-making.

However, ethical concerns arise regarding coerced consent, particularly when surrogates come from socio-economically disadvantaged backgrounds.

Commercial surrogacy is often criticised as commodifying women's bodies and reducing children to products. The Kantian ethical imperative—treating humans as ends and not as means—appears to be violated. Elizabeth Anderson argues that commercial surrogacy “alienates women from their reproductive labor and the children they bear,” making both surrogates and infants into market commodities (Ethics, 1990). However, critics of this view note that commodification per se is not necessarily degrading, particularly when consensual and regulated—such as in other forms of labour like acting, sports, or hazardous work.

In the Indian context, the bulk of surrogacy arrangements have historically involved poor, illiterate women acting as surrogates for wealthy Indian or foreign couples. This asymmetry of power and access raises concerns of structural coercion, even when legal consent is obtained. Feminist critiques of surrogacy are diverse and often conflicting. They range from strong opposition to commercial arrangements to liberal endorsements of reproductive freedom. Radical feminists such as Catharine MacKinnon and Andrea Dworkin argue that surrogacy is an extension of patriarchal oppression. In their view, it reflects the objectification and instrumentalisation of women's reproductive capacities. *MacKinnon* views surrogacy as undermining women's dignity and re-inscribing gendered subordination: “No woman would be a surrogate unless she had no other choice.” Liberal Feminism: In contrast, liberal feminists like Martha Nussbaum argue for recognising women's agency, supporting their ability to contract and benefit economically from their reproductive labour. Nussbaum, in *Sex and Social Justice* (1999), challenges the idea that using the body for economic gain is inherently degrading, drawing analogies to other forms of bodily labour such as sports or dance.

Postcolonial and intersectional feminist perspectives examine how race, caste, class, and geography compound exploitation in surrogacy. Indian surrogates, particularly from Dalit or marginalized backgrounds, may face triple layers of discrimination—gendered, economic, and caste-based. Sharmila Rege's concept of Dalit feminism is instructive in analysing how mainstream feminist narratives often exclude subaltern experiences in surrogacy debates.

India's Surrogacy (Regulation) Act, 2021 prohibits commercial surrogacy and allows only altruistic surrogacy. The assumption is that monetary compensation corrupts the morality of the act, whereas altruism preserves dignity. Reinforces patriarchal and familial control over women's reproductive labour; Assumes surrogacy should only be done out of love or familial obligation; Dismisses the time, labour, and health risks involved; Can perpetuate exploitation in non-monetised, informal arrangements. Amrita Pande's ethnographic work in *Wombs in Labor* (2014) illustrates that Indian surrogates saw their labour not as exploitation, but as aspirational and dignified work—deserving of fair pay.

Ethical Concerns Around the Child From an ethical perspective, the child born through surrogacy must be treated as a rights-bearing individual. Does the child have a right to know the identity of the surrogate?, Who is morally responsible for the child's well-being if the intended parents abandon the arrangement?, How should emotional and genetic parenthood be reconciled?, The UN Convention on the Rights of the Child (CRC) emphasises that the best interests of the child must be paramount in all decisions affecting them (Article 3).

International Perspectives and Ethical Models like United Kingdom The Surrogacy Arrangements Act 1985** permits only altruistic surrogacy, but ethical criticisms arise due to informal arrangements, lack of enforceable contracts, and legal parentage uncertainty.

Israel: A unique ethical framework operates in Israel where a state committee approves every surrogacy case, ensuring psychological counselling and legal support. This balances reproductive freedom with state oversight.

United States (California): California permits commercial surrogacy with enforceable contracts and pre-birth orders declaring the intending parents as legal parents. Ethical oversight is done via contractual transparency, legal representation, and court validation.

The concept reproductive justice, pioneered by Black feminists in the U.S., offers a transformative framework that moves beyond the binary of choice versus coercion. Applying this lens to surrogacy shifts the focus from mere legality or autonomy to social conditions, access to healthcare and economic equity.

In Conclusion, Ethical and feminist analyses of surrogacy resist simple conclusions. They

compel us to examine deeper questions: Is the surrogate's consent autonomous or structured by socio-economic coercion? Does prohibition empower or silence women? Can reproductive labour be ethical if fairly compensated and regulated?, A nuanced ethical framework must avoid paternalism while acknowledging inequality. It must centre the lived experiences of surrogate mothers, uphold their dignity, and challenge assumptions about motherhood, labour and kinship. Ultimately, a just surrogacy regime must strive not only for legal compliance but for ethical integrity and feminist inclusion.?

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