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COMMERCIAL SURROGACY IN INDIA: EMPOWERMENT OR EXPLOITATION OF WOMEN

AUTHORED BY - SHREY SINGH & MS. VANSHIKA PURWAR
B.B.A. LL.B. (Hons) 4th Sem

1. Introduction

Surrogacy has gradually moved from being a purely medical arrangement to a subject of wider social and legal debate. At a basic level, it involves a woman carrying a pregnancy for someone else, but in practice, it raises far more complicated questions about choice, dignity, and fairness. When the element of payment is introduced, these questions become even more pressing, particularly in a country like India where economic differences often shape personal decisions in subtle ways. For many years, India became closely associated with commercial surrogacy. Fertility clinics expanded, and intended parents from different parts of the world began to look towards India as a viable option.¹ For some women, especially those from modest backgrounds, surrogacy appeared to offer a chance to earn in a way that could significantly improve their family's situation. It was not uncommon to hear accounts of women using this income to repay debts, fund their children's education, or secure better housing. From this perspective, commercial surrogacy seemed to provide a form of economic opportunity that was otherwise difficult to access. At the same time, the reality was not always as straightforward. A large number of women who entered into surrogacy arrangements did so in conditions where financial need played a major role. This raised concerns about whether their consent was entirely free or influenced by limited choices. There were also instances where surrogate mothers were not fully aware of the medical risks involved, or where agreements were handled in ways that left them with little protection after childbirth.² These concerns gradually led to a shift in how commercial surrogacy was viewed—not just as an opportunity, but also as a space where exploitation could occur. In response to these developments, the Indian legislature introduced the Surrogacy (Regulation) Act, 2021, bringing an end to commercial surrogacy and allowing only altruistic arrangements under strict conditions. While the intention behind

¹ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 28–30 (Columbia Univ. Press 2014).

² Sama Res. Grp. for Women & Health, *Birthing a Market: A Study on Commercial Surrogacy in India* 52–55 (2012).

this change is to prevent misuse and protect women, it has also led to an ongoing debate about whether such restrictions limit a woman's ability to make decisions about her own body and livelihood. This paper attempts to examine this tension in a balanced manner. Instead of viewing commercial surrogacy in absolute terms, it looks at both the possibilities it creates and the risks it carries. By considering legal developments alongside lived experiences, the paper seeks to understand whether commercial surrogacy in India can truly be seen as a form of empowerment, or whether it remains closely tied to patterns of vulnerability and exploitation.

2. Conceptual Framework of Surrogacy

2.1 Meaning and Types of Surrogacy

Surrogacy, in its simplest sense, refers to an arrangement in which a woman agrees to carry and give birth to a child for another person or couple. While the definition appears clear, the practice itself involves a number of medical, emotional, and legal dimensions. With the advancement of assisted reproductive technologies, surrogacy has become more structured, yet the human element behind it continues to make it a sensitive subject.

Broadly, surrogacy is classified into two types—traditional and gestational. In traditional surrogacy, the surrogate mother uses her own egg, which means she is biologically related to the child. This form has become less common over time due to the legal and emotional complications it can create, particularly concerning parental rights³. On the other hand, gestational surrogacy, which is now more widely practiced, involves the implantation of an embryo created through in vitro fertilisation, where the surrogate has no genetic link to the child. This distinction has played an important role in shaping modern surrogacy arrangements and legal responses.

2.2 Difference between Commercial and Altruistic Surrogacy

A more significant distinction, especially from a legal perspective, is between commercial and altruistic surrogacy. Commercial surrogacy involves payment to the surrogate mother beyond medical and related expenses. In such arrangements, the financial aspect becomes central, and the surrogate's role is often seen as a form of compensated service.⁴ For some, this represents an opportunity for economic gain; for others, it raises ethical concerns about whether the process reduces childbirth to a transaction.

³ Scott B. Rae, *Ethics of Commercial Surrogate Motherhood: Brave New Families?* 36–38 (Praeger 2003).

⁴ Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 2(b), 2(g) (India).

Altruistic surrogacy, in contrast, permits only the reimbursement of medical costs and essential expenses, without any additional financial reward. It is often framed as an act based on compassion or personal relationships, rather than monetary benefit. The Surrogacy (Regulation) Act, 2021 adopts this model by prohibiting commercial surrogacy altogether. While this approach aims to prevent exploitation, it also brings into question whether the absence of compensation fairly recognises the physical and emotional effort involved in pregnancy. The difference between these two forms is not merely financial—it reflects deeper questions about autonomy, fairness, and the extent to which reproductive labour can or should be regulated by law.

2.3 Growth of the Surrogacy Industry in India

The rise of surrogacy in India did not happen in isolation; it was shaped by a combination of medical advancement and socio-economic conditions. By the early 2000s, India had become a preferred destination for surrogacy arrangements, attracting intended parents from across the globe⁵. The availability of skilled medical professionals, relatively lower costs, and a lack of strict regulation contributed to the rapid expansion of what came to be known as the surrogacy industry. During this period, fertility clinics, agencies, and intermediaries played a significant role in facilitating arrangements between surrogate mothers and intended parents. For many women, especially those from economically weaker backgrounds, surrogacy appeared to offer a rare opportunity to earn a substantial sum within a limited period. Some accounts describe how this income was used to improve living conditions, educate children, or achieve a degree of financial stability that would otherwise have been difficult to attain.⁶

However, the growth of this industry also brought serious concerns to light. The involvement of multiple intermediaries, lack of uniform regulation, and unequal bargaining power between parties create conditions where surrogate mothers were often at a disadvantage. These realities eventually led to increased scrutiny and, ultimately, to legal intervention in the form of stricter regulation. Understanding this growth is essential, as it provides the background against which the current legal framework and the ongoing debate between empowerment and exploitation must be examined.

⁵ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 40–45 (Columbia Univ. Press 2014).

⁶ Sama Res. Grp. for Women & Health, *Birthing a Market: A Study on Commercial Surrogacy in India* 60–62 (2012).

3. Legal Framework Governing Surrogacy in India

3.1 Overview of the Surrogacy (Regulation) Act, 2021

For many years, surrogacy in India operated without a detailed statutory framework. Although guidelines were issued by medical bodies, there was no specific law regulating the practice. This lack of regulation contributed to the rapid growth of commercial surrogacy across the country, especially in cities with advanced fertility clinics. India gradually became known as a major destination for surrogacy because the process was comparatively affordable and easily accessible.⁷ However, alongside this growth, concerns regarding exploitation of surrogate mothers, unethical medical practices, and absence of legal protection also began to increase. To address these concerns, the Indian Parliament enacted the Surrogacy (Regulation) Act, 2021. The Act represents a major policy shift, as it completely prohibits commercial surrogacy and permits only altruistic surrogacy under limited conditions. The law was introduced with the objective of preventing the commercialisation of childbirth and protecting women from being treated merely as a means of financial gain. At the same time, it attempts to regulate the process through registration of clinics and supervision by appropriate authorities.

The Act reflects the State's effort to strike a balance between allowing surrogacy in genuine cases and preventing practices considered exploitative. However, its restrictive nature has also generated debate regarding reproductive freedom and personal autonomy.

3.2 Key Provisions and Restrictions

The Act lays down strict eligibility conditions for intending couples as well as surrogate mothers. Under the law, only Indian heterosexual married couples suffering from proven infertility are permitted to opt for surrogacy⁸ The husband and wife must fall within the prescribed age limits, and they are required to obtain certificates of medical necessity and eligibility before proceeding. The law also places several conditions on surrogate mothers. A surrogate must be a married woman with a child of her own, and she can become a surrogate only once in her lifetime⁹. The legislation further requires insurance coverage and medical support for the surrogate mother for a specified period.

One of the central features of the Act is the prohibition of commercial surrogacy. Any payment beyond medical expenses and insurance is prohibited.¹⁰ The intention behind this restriction is

⁷ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 40–44 (Columbia Univ. Press 2014)

⁸ Surrogacy (Regulation) Act, 2021, No. 47 of 2021, § 4(ii) (India).

⁹ Id. § 4(iii)(b).

¹⁰ Id. § 2(b), 3(iv).

to ensure that surrogacy does not become a profit-oriented activity. Additionally, the law establishes National and State Surrogacy Boards to regulate clinics and monitor compliance. Strict penalties, including imprisonment and fines, are prescribed for violations such as commercial surrogacy, exploitation of surrogate mothers, or operation of unregistered clinics.¹¹

3.3 Criticism and Practical Challenges

Despite its protective intent, the Act has faced significant criticism from scholars, activists, and legal commentators. One major criticism is that the law completely removes the possibility of compensation for surrogate mothers, even though pregnancy involves considerable physical, emotional, and medical burden. Critics argue that denying compensation may fail to recognise the labour and risks undertaken by women during the surrogacy process.¹² The restrictive eligibility criteria have also been questioned. By limiting access mainly to married heterosexual couples, the law excludes single individuals, live-in partners, and members of the LGBTQ+ community. This has led to debates regarding equality and reproductive rights under the Constitution.

Another practical concern is that a complete ban on commercial surrogacy may not entirely eliminate the practice. Instead, it could push arrangements into informal and unregulated spaces, making surrogate mothers more vulnerable to exploitation. In such situations, the absence of legal monitoring may create even greater risks than a properly regulated framework. Further, the requirement of finding a willing surrogate under strict legal conditions may make altruistic surrogacy difficult in practice. In reality, not every family has someone willing or medically fit to become a surrogate. Because of these challenges, many scholars argue that stronger regulation and safeguards may have been more practical than a complete prohibition. Overall, while the law aims to protect women and preserve ethical standards, its implementation continues to raise important questions regarding autonomy, inclusiveness, and practicality.

4. Commercial Surrogacy as a Means of Empowerment

The debate surrounding commercial surrogacy is often dominated by concerns of exploitation, but there is another side to the discussion that cannot be ignored. For several women, particularly those facing financial hardship, surrogacy has been viewed as an opportunity to

¹¹ Id. §§ 10–12, 38.

¹² Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* 118–21 (N.Y.U. Press 2015)

improve their living conditions and provide better support to their families. This is why the issue is far more complex than simply describing surrogate mothers as victims. In many instances, women who participated in surrogacy arrangements considered it a practical and informed decision taken within the realities of their lives¹³. The idea of empowerment in the context of surrogacy mainly comes from the belief that women should have the freedom to make choices regarding their own bodies and labour. Supporters of commercial surrogacy argue that if a woman voluntarily decides to become a surrogate with full awareness of the process, her decision should be respected rather than automatically treated as exploitation. While economic need may influence such decisions, the same can also be said about many other forms of labour undertaken in society.

4.1 Economic Opportunities and Financial Support

One of the most significant reasons why women entered commercial surrogacy was the financial support it offered. Many surrogate mothers in India came from lower-income backgrounds where stable employment opportunities were limited. In such circumstances, the amount received through surrogacy often represented a life-changing source of income.¹⁴

Studies and personal accounts have shown that women used this money for important family needs such as repaying loans, educating their children, arranging marriages, purchasing homes, or securing healthcare for family members¹⁵. For some women, surrogacy became a way to achieve a level of financial independence that had previously been out of reach.

Unlike regular labour that may provide only limited daily earnings, surrogacy offered compensation capable of creating long-term improvements in living standards. This economic aspect is central to the empowerment argument because it highlights how surrogate mothers were not always passive participants, but individuals attempting to improve their social and financial realities through the choices available to them.

4.2 Reproductive Choice and Agency

Another important aspect of empowerment is the question of reproductive autonomy. Supporters of commercial surrogacy often argue that women should have the right to decide how their reproductive capacity is used, provided the decision is made freely and with informed

¹³ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 70–73 (Columbia Univ. Press 2014).

¹⁴ Sama Res. Grp. for Women & Health, *Birthing a Market: A Study on Commercial Surrogacy in India* 60–64 (2012).

¹⁵ Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* 82–85 (N.Y.U. Press 2015)

consent¹⁶. In this view, preventing women from becoming surrogates may itself limit their agency and reinforce the idea that women are incapable of making decisions about their own bodies.

The concept of reproductive choice has also been recognised within constitutional jurisprudence in India. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court acknowledged that reproductive decisions form an important part of personal liberty under Article 21 of the Constitution.¹⁷ Although the case did not directly concern surrogacy, the principle of bodily autonomy remains relevant to the broader debate. At the same time, the idea of “choice” in commercial surrogacy is not entirely free from criticism. Economic conditions may strongly influence decisions, especially when women have limited alternatives. Even so, recognising these pressures does not necessarily mean denying women the ability to exercise agency within those circumstances.

4.3 Social and Personal Impact

For some women, the experience of surrogacy extended beyond financial benefit. A number of surrogate mothers expressed emotional satisfaction in helping childless couples experience parenthood.¹⁸ In certain situations, the income earned through surrogacy also improved their position within the family by allowing them to contribute financially in meaningful ways. Surrogacy, in some cases, changed how women viewed themselves. Earning a substantial amount independently gave some surrogate mothers a sense of confidence and recognition that they had not previously experienced. While social stigma around surrogacy still exists in many communities, there were also instances where women saw the process as an act of sacrifice and responsibility rather than shame.

However, these experiences are not universal. The impact of surrogacy differs depending on social background, family support, and economic conditions. Still, the existence of such experiences demonstrates that commercial surrogacy cannot be understood only through the framework of exploitation. For many women, it has represented a difficult yet meaningful choice shaped by the realities of their lives. Overall, the empowerment perspective does not deny the risks associated with commercial surrogacy. Instead, it emphasises that women’s experiences are diverse and that the issue should be understood with greater sensitivity and balance rather than through a purely one-sided approach.

¹⁶ Debra Satz, *Markets in Women’s Reproductive Labor*, 21 *Philos. & Pub. Aff.* 107, 112–16 (1992).

¹⁷ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 S.C.C. 1 (India).

¹⁸ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 88–90 (Columbia Univ. Press 2014).

5. Commercial Surrogacy as a Form of Exploitation

5.1 Economic Vulnerability and Compulsion

While commercial surrogacy is often presented as a choice, in many cases that choice is shaped by financial pressure. A large number of women who enter such arrangements come from economically weaker backgrounds, where limited opportunities leave them with few alternatives.¹⁹ In such situations, the decision to become a surrogate may not be entirely voluntary, but influenced by the need to support their families.

5.2 Health Risks and Lack of Safeguards

Pregnancy itself carries physical and emotional risks, and in the context of surrogacy, these risks can be even more significant due to medical procedures involved. There have been concerns about inadequate healthcare, lack of proper counselling, and absence of long-term medical support for surrogate mothers²⁰. In many cases, once the child is delivered, the responsibility towards the surrogate mother becomes unclear, leaving her without continued care.

5.3 Role of Clinics and Intermediaries

The involvement of clinics and middlemen has also been a point of concern. These intermediaries often manage the entire process, from identifying surrogate mothers to handling agreements with intended parents. However, the imbalance of power can result in surrogate mothers having little say in the terms of the arrangement²¹. This raises questions about transparency and fairness in such transactions.

5.4 Ethical Concerns

At a broader level, commercial surrogacy raises ethical issues about whether reproduction should be treated as a market activity. Critics argue that paying for surrogacy risks reducing a woman's body to a means of earning, rather than recognising the full dignity of the individual²². This concern becomes more serious when combined with existing social and economic inequalities. Taken together, these factors suggest that commercial surrogacy can, in certain

¹⁹ Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* 52–55 (N.Y.U. Press 2015).

²⁰ Sama Res. Grp. for Women & Health, *Birthing a Market: A Study on Commercial Surrogacy in India* 70–73 (2012).

²¹ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* 98–101 (Columbia Univ. Press 2014).

²² Debra Satz, *Markets in Women's Reproductive Labor*, 21 *Philos. & Pub. Aff.* 107, 120–22 (1992).

situations, operate in ways that disadvantage the very women it is supposed to benefit, making the line between empowerment and exploitation difficult to draw.

6. Judicial Approach and Key Case Laws

6.1 Important Judicial Decisions

The legal understanding of surrogacy in India has largely developed through judicial decisions, especially at a time when there was no clear statutory framework. Courts were often required to deal with complex situations involving parentage, citizenship, and the rights of children born through surrogacy.

One of the earliest and most discussed cases is *Baby Manji Yamada v. Union of India*, where the Supreme Court indirectly recognised the practice of surrogacy in India.²³ The case involved a child born through surrogacy to a Japanese couple, and the dispute primarily revolved around issues of guardianship and travel documents. Although the Court did not lay down detailed principles, it acknowledged surrogacy as a legitimate arrangement within the existing legal system.

Another important case is *Jan Balaz v. Anand Municipality*, decided by the Gujarat High Court.²⁴ This case dealt with the question of citizenship of children born through surrogacy to foreign parents. The Court recognised the rights of the children and treated them as legitimate, highlighting the need for clarity in law when dealing with cross-border surrogacy arrangements.

These decisions reflect how courts initially approached surrogacy in a practical manner, focusing on resolving immediate disputes rather than laying down a comprehensive legal framework.

6.2 Changing Judicial Perspective

Over time, the judicial approach towards surrogacy has become more cautious, especially in light of concerns regarding exploitation and lack of regulation. Courts have increasingly emphasised the need for proper legal safeguards to protect the interests of surrogate mothers as well as children born through such arrangements. The shift can also be understood in the broader context of constitutional values, particularly those related to dignity and personal liberty. Judicial thinking in India has gradually moved towards recognising reproductive

²³ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518 (India).

²⁴ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21 (India).

choices as part of individual autonomy, while also acknowledging that such choices must be protected from misuse.²⁵ This evolving perspective has influenced legislative action, eventually leading to the enactment of a comprehensive law on surrogacy. While earlier decisions reflected a relatively open approach, the current trend indicates a preference for regulation and control to ensure that the practice does not lead to exploitation. Overall, the judicial approach in India shows a gradual transition—from initial acceptance in the absence of law to a more balanced stance that supports regulation in the interest of fairness and protection.

7. Suggestions and Recommendations

7.1 Need for Balanced Regulation

The present legal approach in India reflects a strong intention to prevent exploitation, but a complete ban on commercial surrogacy may not fully address the realities on the ground. A more balanced regulatory framework could be more effective—one that allows surrogacy under strict supervision rather than pushing it out of the legal space altogether. Clear guidelines, transparency in agreements, and proper monitoring of clinics can help ensure that the process remains fair for all parties involved. Regulation, in this sense, should aim not only to restrict but also to create safer conditions.

7.2 Protection of Surrogate Mothers

At the centre of any surrogacy arrangement is the surrogate mother, and her well-being must remain the primary concern. There is a need to ensure proper medical care before, during, and after pregnancy, along with compulsory health insurance and counselling support. Informed consent should not be treated as a mere formality; it must involve a clear understanding of medical risks and legal rights. Financial transparency is also important, so that surrogate mothers are not left dependent on intermediaries. Strengthening these safeguards can reduce the chances of exploitation while recognising the effort and risks involved.

7.3 Scope for Legal Reform

The current framework also leaves room for reconsideration in certain areas. Expanding eligibility criteria could make surrogacy more inclusive, while still maintaining necessary safeguards. At the same time, there is a need to revisit whether a complete prohibition on compensation is the most practical approach. A regulated system that allows limited and fair

²⁵ Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1 (India)

compensation, with strict oversight, may better reflect ground realities. Ultimately, legal reform in this area should focus on finding a balance—protecting women from coercion and misuse without entirely removing their ability to make decisions about their own bodies and circumstances. A thoughtful and flexible approach is more likely to address the concerns of both empowerment and exploitation in a meaningful way.

Conclusion

The discussion on commercial surrogacy in India cannot be reduced to a simple question of whether it is right or wrong. As this paper has shown, it exists in a space where both empowerment and exploitation can be present at the same time. For some women, surrogacy has provided a real opportunity to improve their financial situation and support their families. For others, the same arrangement has raised concerns about pressure, unequal bargaining power, and lack of adequate protection. The shift brought by the Surrogacy (Regulation) Act, 2021 reflects an effort by the State to respond to these concerns and prevent misuse. However, the complete prohibition of commercial surrogacy also highlights an ongoing tension—between protecting women and respecting their ability to make independent choices. The law, while well-intentioned, may not fully capture the complex realities in which these decisions are made. What emerges from this analysis is that commercial surrogacy in India cannot be viewed in absolute terms. It is neither entirely empowering nor entirely exploitative. Instead, it is shaped by social and economic conditions that influence how and why women enter such arrangements. This makes it important for the legal framework to move beyond a purely restrictive approach and towards one that is more balanced and responsive. In the end, the challenge lies in creating a system that protects dignity without taking away agency. A thoughtful and practical approach—one that listens to the lived experiences of women—offers a more meaningful way forward in addressing the concerns surrounding surrogacy in India.

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