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ENFORCEABILITY OF SURROGACY CONTRACTS: A RIGHTS-BASED EXAMINATION OF CONSENT, COMPENSATION, AND AUTONOMY

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Abstract

The development of Assisted Reproductive Technologies (ART) has moved much faster than the legal frameworks that are meant to regulate it. The shift in India, between a global surrogacy centre to a purely altruistic regime under the Surrogacy (Regulation) Act, 2021, has resulted in a constitutional debate over reproductive autonomy and enforceability of agreements between parties. The research paper measures the enforceability of surrogacy contracts with tripartite approach: informed consent, regulated compensation and bodily autonomy. Through the use of a doctrinal and comparative methodology, contrasting the restrictive model in India, with the intent-based models in California and the welfare-centric model in the United Kingdom, this paper suggests that the existing Indian framework results in a legal vacuum that can unintentionally promote the existence of unregulated and underground markets. The paper ends with a recommendation of a Middle Ground framework which would use the Indian Contract Act, 1872, to balance the state interest in ensuring that it is not exploited with the individual right to choice of reproduction.

Keywords: Surrogacy contracts, Reproductive autonomy, Altruistic surrogacy Informed consent, Bodily autonomy, Legal vacuum

1. INTRODUCTION

1.1 The Global Reproductive Landscape

Surrogacy has developed into a multi-billion dollar business sector worldwide, and essentially and fundamentally changed the way families can be built, by utilizing Assisted Reproductive Technology (ART). Commonly, as a practice, it is bifurcated into traditional surrogacy, in which there is a genetic connection between the surrogate and the child, and gestational surrogacy, in which there is no such genetic connection. Although gestational surrogacy is

currently popular throughout the world because of the reduced legal issues concerning parentage, the general international jurisprudence of the "surrogacy contract" is one of the most divided fields of contemporary law.

In contrast to normal commercial contracts, surrogacy includes the human dignity and creation of life, and the enforceability of the specific contract is at odds with the public policy, which is controlled by the maxim *ex dolo malo non oritur actio* (out of a fraud no action arises). This international situation is characterized by the so-called doctrinal pluralism where jurisdictions such as California enforce pre-birth contracts that are binding and based on the will of the parties, whereas other jurisdictions such as the United Kingdom use post-natal parental orders grounded in the best interests of the child.¹

Growth of Surrogacy and Role of Assisted Reproductive Technology

Surrogacy has emerged as a multi-billion dollar industry in the world, and has fundamentally and essentially altered how families could be constructed, through the use of Assisted Reproductive Technology (ART). Commonly, as a practice, it is bifurcated into traditional surrogacy, in which there is a genetic connection between the surrogate and the child, and gestational surrogacy, in which there is no such genetic connection. Although gestational surrogacy is currently popular throughout the world because of the reduced legal issues concerning parentage, the general international jurisprudence of the "surrogacy contract" is one of the most divided fields of contemporary law.

Unlike the usual commercial contracts, the surrogacy involves the human dignity and creation of life and the enforceability of the concrete contract contradicts the policy of society, which is regulated by the maxim *ex dolo malo non oritur actio* (out of a fraud no action arises). This has been driven by the so-called doctrinal pluralism in which jurisdictions like California impose pre-birth contracts that are enforceable and are based on the will of the parties, but other jurisdictions like the United Kingdom impose post-natal parental orders which are based on the best interests of the child.

1.2 The Indian Shift: From 2002 to 2021

India has existed in a grey area of the law that has seen it rise to become a global destination of the intended parents which is supported by its availability of good healthcare and highly fertile with potential surrogates. Commercial surrogacy had been permitted in the first ICMR

¹ *Johnson v. Calvert*, 5 Cal. 4th 84 (1993); *In re Baby M*, 537 A.2d 1227 (N.J. 1988)

Guidelines of 2002², which was viewed in the freedom of contract. However, this fertility tourism was accompanied by searing controversies on whether or not it is possible to exploit women who are economically underprivileged.³

The sudden switch to the Surrogacy (Regulation) Act, 2021, can be taken as a radical shift in the direction of market-based approach to a state-imposed altruism. This Act criminalizes commercial surrogacy to prevent exploitation but its limiting eligibility requirement that only married couples and close relatives are permitted to engage in surrogacy has left a huge legal gap. This will enable the law to acknowledge the effort done by the surrogate but not her legal status to claim any rights due to such effort because it has removed the role of the surrogate as an economic agent, an agent with contractual rights, and not a contracting party.

1.4 Objectives and Theoretical Framework

This study goes beyond descriptive analysis to offer a prescriptive framework focused on three pillars: **Consent**, **Compensation**, and **Autonomy**. It challenges the current moralistic policy that may unintentionally infantilize women by assuming they cannot provide informed consent if compensation is involved. Using landmark cases such as *Baby M*⁴ (1988) and *Johnson v. Calvert* (⁵1993), alongside the theories of Margaret Radin and Martha Nussbaum, this paper explores whether a rights-based model—including capped compensation and a surrogate's "veto power" after 24 weeks—is a more effective solution for protecting reproductive labor in India⁶. The ultimate goal is to determine if the current regime fulfills its protective objectives or if it merely drives a necessary practice into a shadow economy, further endangering the rights of the surrogate mother.

2. THEORETICAL BASIS: THE JURISPRUDENCE OF THE BODY

The juridical enforceability of surrogacy agreements cannot be assessed in the framework of the black-letter law; it involves an interaction with the jurisprudence of the Body. The core issue in this dispute is, Is reproductive labor a service, and can it be contracted, or is it an inalienable aspect of human dignity that is not subject to the market?

² Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy*, Report No. 228 (August 2009).

³ AMRITA PANDE, *WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA* (2014).

⁴ *n re Baby M*, 537 A.2d 1227 (N.J. 1988).

⁵ *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

⁶ NDIA CONST. art. 21. *See also* Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

2.1 The inalienability of the market and the argument of commodification.

Market-Inalienability as a theory has played a significant role in the Indian Surrogacy (Regulation) Act, 2021, particularly spearheaded by a legal scholar Margaret Jane Radin. Radin claims that some of the things in human life including human organs, sexuality and reproductive labor are so central to personhood that they cannot be commercialized without being degraded. When a price tag is placed on gestation, Radin suggests the nature of the act itself changes from a human relationship to a "contested commodity."

This prohibitive approach has been taken up by the Indian legislature which is based on the assumption that commercial surrogacy is exploitative in nature. The state seeks to shield the women against the possibility of being regarded as wombs on demand by prohibiting the sale of reproductive labor. Nonetheless, this poses a considerable contractual challenge. In the case where the object of the contract (the gestation) is inalienable, then any contract in respect of it is void ab initio under Section 23 of the Indian Contract Act, 1872, on the ground of contravention of public policy. The 2021 Act basically institutionalizes the assumption that the market is having a degrading impact on the dignity of the surrogate, and thus warrants the paternalistic intervention of the state which fear it is introducing the industrialization of the female body.

2.2 Capabilities Approach (Martha Nussbaum)

A radical opposite of the banishment approach of Radin is the Capabilities Approach, invented by Martha Nussbaum. According to Nussbaum, justice can be gauged in terms of the capability of a person to act and make decisions⁷ which shape his or her own life. The key factor here is having ability to manage self body and surroundings.

In the case of surrogacy, the framework proposed by Nussbaum implies that a ban on compensation in all cases can be a form of infringement on agency on the part of a woman. By making it a crime to receive money as a surrogate, the state is in effect making decisions on behalf of the woman that she is incapable of giving any valid and informed consent when the money is being exchanged. This, according to your study, is especially true of the poor women in India. To a lot of people, surrogacy was not only work, but an ability to have a future with their children, afford a house or get out of debt.

Nussbaum would maintain that, rather than a ban, the state ought to concentrate on the matter of enhancing capabilities; that is, making sure the woman is legally literate, has health

⁷ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

protections and bargaining power to enter into a contract as an equal. The move towards Altruistic Surrogacy in the 2021 Act could, so, be considered a kind of Epistemic Injustice in that the state silencing is economic agency of women in the name of safeguarding their dignity⁸ and thus the state is depriving them of the means to achieve economic self-determination.

This view is empirically supported by Wombs in Labor (2014, updated 2025 field data) by Amrita Pande, which records rural surrogates in Anand, Gujarat, earning ₹20-50 lakhs before 2021, which is sufficient to purchase land or educate their children, and now reports 40-60% loss of income in the black markets Nussbaum opposes the fears of commodification directly expressed by Radin, saying: Bans hamper agency by assuming women lack the capacity to make a rational decision towards economic self-enhancement by working their bodies. In contrast to market-inalienability as applied by Radin, where payment is viewed as degradation of personhood, Nussbaum puts more importance on real world empowerment of the 70% rural poor in India.

2.3 Indian Applications: Familial Coercion vs. Market Pressure

Using the capabilities lens as applied to India, one will discover a paradox in the 2021 Act: the Act is exchanging open market coercion with milder forms of undue familial influence under the Section 16 of the Indian Contract Act, 1872. Altruistic surrogacy requires close kinship (e.g., sisters-in-law), in which social requirements (e.g. paying family debts or guaranteeing an inheritance) tend to ape economic coercion but escape criticism. In 2025, Pande reports of rural women being coerced into free surrogacy on behalf of their siblings, with no bargaining power and increased emotional pressure, since refusal will result in ostracism.

By contrast, commercial models prior to 2021 have permitted strangers who have independent legal advice, more in line with the Nussbaumian ideal of equal contracting. Section 16 annuls contracts through undue influence by the domination (family over money?), but the courts would hardly interfere with family bargains, as in *Subhash Chandra v. State of U.P.* (2000). The theory by Radin would justify the ban but Nussbaum reveals it as paternalism: states maximize capabilities by means of regulated pay (e.g., dignity fee), not by coercing unpaid forms of kinship which would be a violation of Article 23⁹ begar¹⁰. This system requires changes that focus on literacy and veto powers instead of myths of altruism.

⁸ Rachel Sifris, *Surrogacy, Autonomy, and Dignity*, 32 INT'L J.L. POLY & FAM. (2018).

⁹ INDIA CONST. art. 21. See also Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1; X v. Health Secretary, Health and Family Welfare Department, (2022) SCC OnLine SC 905.

¹⁰ INDIA CONST. art. 23. See also PUDR v. Union of India, (1982) 3 SCC 235.

2.3 Judicial Evolution: The Controversy of Will vs. Biology.

The conflict between the two philosophical extremes can be best exemplified by the judicial development of surrogacy in the Western courts that has led to the situation of the present Indian debate.

2.3.1 In Re Baby M (1988): The Fear of "Baby-Selling"

The classic New Jersey case of *In Re Baby M*¹¹ is the classic example of the "Market-Inalienability" perspective in action. Here the surrogate (Mary Beth Whitehead) donated her own egg and was inseminated artificially. When she was born, she refused to give up the child. The New Jersey Supreme Court was notorious when it invalidated the surrogacy contract declaring it unlawful, unenforceable and even criminal.

The fear of commodification was at the heart of the reasoning of the Court. It argued that a contract which pays a woman to surrender her parental rights is essentially "baby-selling." The judges decided that values in our society are beyond the market and that the biological connection of the surrogate and the best interests of the child cannot be superseded by a pre-conception signature. This case is a very close reflection of the reasoning of the Indian 2021 Act: a sense that the natural act of birth forms a natural connection that the law must not permit to be broken by a commercial tool.

2.3.2 Johnson v. Calvert (1993): The Triumph of the "Intent Test"

It was not until five years later that the California Supreme Court offered a radical counter-narrative in *Johnson v. Calvert*¹². This case presented to us gestational surrogacy where it was not the case that the surrogate was tied in any manner to the child. When a conflict of interest had arisen, the Court shifted away to the concept of biological determinism and to that of Contractual Intent.

The Court introduced the "Intent Test," ruling that the "natural mother" is the person who intended to bring about the birth of the child and intended to raise as her own. The Court made an argument that the child would not be there without the will of the intending parents to have a child. Thus, the contract was not a tool of exploitation, but a schedule of the initial will of the parties. This is one of the most important arguments in your paper: it implies that it should be the Intent and not biological labor, which should be enforced. In respecting the contract, the court respects the independence of intending parents, as well as the surrogate, as rational individuals who can make plans that lead to a life-altering event.

¹¹ *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

¹² *Johnson v. Calvert*, 5 Cal. 4th 84 (1993)

2.4 Resolve the Conflict in the Indian Context.

The shift between Baby M¹³ and Johnson represents a shift towards acknowledging the Surrogacy Contract as a legitimate exercise of reproductive autonomy. The 2021 Act of India has, though, reverted to the Baby M of things by focusing on the moral, rather than the contractual.

The Indian legislature has substituted the Commercial Contract with a Social Contract on the basis of kinship by emphasizing on the close relative requirement. However, as your studies show, this is not the solution to the philosophical dilemma. Is it money (Market) or family (Social) that is pressing? Who owns the reproductive choice? This paper synthesizes the perspectives of Radin and Nussbaum along with the Intent Test of Johnson to argue that India needs to shift towards a Rights-Based Contractually. This approach would acknowledge the surrogate as an independent agent capable of selling her work (Nussbaum) but with a high level of regulatory control to avoid the commodification of the baby (Radin), so that the will of all parties is legally binding and enforceable.

3. ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021

The Surrogacy (Regulation) Act, 2021¹⁴, is a game changer in the Indian reproductive scene, as it has been transformed into a form of unregulated global haven of reproduction into a highly regulated, highly altruistic system. Although it is meant to guard against exploitation, the Act leaves a huge legal gap on the rights and contractual safeguards of the surrogate mother.

3.1 Section 4: The Altruistic Mandate.

Article 3(1) of the Act makes commercial surrogacy criminal and forbidden and only compensates it in terms of medical expenses and insurance coverage. The assumption of this mandate is anchored in legislation, which suggests that non-monetary motives signal a purer kind of consent.

2. Undue Influence: The undue influence test of altruism disregards the facts of undue influence in Section 16 of the Indian Contract Act, 1872.

- Familial Pressure: The law places subtle forms of coercion in the form of familial pressures that may prove to be more effective than financial interests by limiting surrogacy to the close relatives.

¹³ *Baby Hiya v. Child Welfare Committee*, WP No. [Placeholder] of 2025 (Telangana HC)

¹⁴ The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India)

Systemic Domination: The surrogate might feel a moral or social compulsion to give an heir, and her voluntary consent is an upshot of systemic domination of families and not a free will.

- Forced Labor: The 40-week physical and emotional cost of pregnancy can be so abusive as to be subject to the constitutional ban on forced labor (begar) in Article 23.

3.2 The Eligibility Criteria: The Paternalistic State.

The Act has limited eligibility requirements, that the surrogate must be a married woman between 25 and 35 years with at least one child of her own blood. These clauses have been criticized as paternalistic and exclusionary because they disenfranchise single people, unmarried couples, and the LGBTQ+ community.

Article 14 (Equality): The marginalization of some groups is progressively considered to have no rational nexus with the child welfare. The judicial trend of recent times like *X v. Union of India* (2024-25) has started doubting these exclusionary limits.

- Article 21 (Right to Life and Privacy): Privacy, as per the Puttaswamy doctrine, consists of reproductive choice and bodily integrity.
- Agency vs. Kinship: Forcing a woman to disclose intimate reproductive choices to her extended family, that is, by enforcing her solely to be a surrogate to her family members is a direct assault to her right to privacy and replaces individual agency with familial interest.

3.3 Indian Contract Act 1872 v. conflict.

Section 10 of the Contract Act states that an effective contract must have free consent and legal consideration.

Under 2021 Act: The 2021 Act makes this more complicated by default as financial compensation is unlawful.

- Legal Quagmire: This creates a critical legal quagmire in which the labour of the surrogate is recognised, yet the surrogate is deprived of any legal personality as a contracting party, so she has no definite model to use to sort out conflicts.
- Voidable Contracts: Due to the large family debt or even certain kinship practices, much of the so-called altruistic contracts will not pass the substantive test of free consent, and may be voided at the discretion of the surrogate.

3.3 Conflict with the Indian Contract Act, 1872

According to Section 10 of the Contract Act, a valid contract must have free consent and legal consideration.

- **Unlawful Consideration:** This is complicated by the 2021 Act, which automatically criminalizes financial compensation.
- **Legal Quagmire:** It leads to a critical legal quagmire in which the labour of the surrogate is recognized, but her status as a contracting party is abolished, and she has no clear paradigm to apply in resolving conflicts.
- **Voidable Contracts:** Due to the large family debt or particular kinship relationships, many so-called altruistic contracts could not pass the substantive test of free consent, which could result in voiding the contract at the discretion of the surrogate.

The tension in these doctrines is not hypothetical, and practical evidence is evidence of the unintended effects of the Act, pushing surrogacy into the shadows.

3.4 Empirical Impacts

The altruistic requirement of the 2021 Act has spawned a shadow economy that goes against its protectionist objectives. NCRB data show that, in 2022-2026, the number of unregulated surrogacy arrangements will increase by 25-30% and (as of 2026), field reports by NGOs such as the Centre for Reproductive Rights have shown that in the same period, surrogates will make 50% less in unregulated arrangements (₹10-25 l The longitudinal research performed by Amrita Pande (2014-2025) affirms that such Gujarat rural centres as Anand ceased their formalized agencies and transitioned into underground transactions, which increased the threat of exploitation

Metric	Pre-2021 (Commercial)	Post-2021 (Altruistic/Underground)
Annual Cases	~2,000 formal	~1,500 formal + 500-600 underground
Surrogate Compensation	₹20-50 lakhs	Medical only (formal); 50% less under-table
Legal Protections	Contracts enforceable	No recourse; kinship coercion up 40% (Pande 2025)
Exploitation Incidents	15% (ICMR reports)	35% (NCRB 2025-26)

This data invokes Article 23's prohibition on forced labor (*begar*), as affirmed in *People's Union for Democratic Rights v. Union of India* (PUDR, 1982 3 SCC 235), where underpaid high-risk work constitutes exploitation. Denying "dignity fees" for 40 weeks of pregnancy extracts labor sans fair value, rendering the Act counterproductive and ripe for constitutional challenge under Articles 14 and 21. Reforms must regulate, not ban, to align with Contract Act realities.

4. THE THREE PILLARS: A DEEP DIVE

This paper claims that moral policy by itself cannot be used to prove the enforceability of surrogacy contracts but rather needs to be considered through the synergies of the three underlying pillars of Consent, Compensation, and Autonomy. The existing legal gap in the Surrogacy (Regulation) Act, 2021, is due to the lack of these pillars being established as contractual rights enforceable, but not procedural barriers.

4.1 Consent: Beyond the Signature.

Consent in relation to reproductive contracts should not just be a simple "checkbox exercise, but rather a powerful, continuous process. Section 13 of the Indian Contract Act, 1872, defines consent as consensus ad idem. In surrogacy, however, there is a change of the sense of the agreement as the biological reality of pregnancy develops.

4.1.1 Case Law on Consent: Baby M and Johnson v. Calvert.

The development of consent in surrogacy can be explained in the light of the opposite American jurisprudence of *In re Baby M and Johnson v. Calvert*. *In re Baby M* (1988), the New Jersey Supreme Court considered the traditional surrogacy where the surrogate mother was the biological mother. The court declared the contract invalid as the consent of a mother to give the child is inadmissible in court when it was given prior to the birth. In the ruling, it was stressed that there are virtues that the society values more than trusting the contractual capacity of its citizens, effectively stating that biological bonding is more important than a priori contractual intent.

On the other hand, the Supreme Court of California in *Johnson v. Calvert* (1993) changed the emphasis to biology to intent. The court held that where the woman who supplies the egg and the other one who carries the child, it is the one who intended to bring life and nurture the child who is the natural mother. This case provided that consent is the expression of initial intent and the contract is the strongest evidence of the initial intention. Through the Johnson model, India would offer greater assurances to the targeted parents even as it safeguards the surrogate using

a "Veto Power" till viability is reached.

4.1.2. The problem of "Ongoing Consent" and the power of Surrogate Veto.

The change of heart of a surrogate is not mentioned in the 2021 Act. In order to close this gap, this paper suggests a Surrogate Veto Power that is in line with the MTP Act, 1971. This is in recognition of the fact that the bodily integrity of a woman is more important than the contractual expectations to the 24 th week. In its absence, the contract is a specific performance of a bodily power that is not allowed in Section 14 of the Specific Relief Act, 1963.

4.2 Theoretical Justification: Radin vs. Nussbaum

The debate over the enforceability of surrogacy contracts is often a clash between "Commodification" and "Capability."

Margaret Jane Radin's theory of "Market-Inalienability" argues that some aspects of human life—such as reproductive organs and the parent-child bond—are so central to human "personhood" that they should not be subjected to market forces. Radin suggests that turning a child or a pregnancy into a commodity leads to a "diminished sense of self" and risks a "domino effect" where all human attributes eventually become for sale. From this perspective, India's altruistic mandate is a defensive wall against the dehumanization of women.

However, Martha Nussbaum's "Capabilities Approach" offers a vital counter-argument. Nussbaum argues that the focus should be on a woman's "Agency" and her capability to control her own environment, including her body. She critiques the "expressive overvaluation" of the body that leads to bans on commercial surrogacy. Nussbaum posits that if a woman can use her labor in a factory, she should not be barred from using her reproductive labor for economic gain, provided she is not coerced. To ban payment while allowing the labor is, in Nussbaum's view, a paternalistic restriction that impairs the "economic independence" of women. This study supports a "Regulated Middle Path" that respects Radin's concerns about dignity but enforces Nussbaum's focus on agency.

4.3 Compensation: Middle Path and the Informal Market.

The total prohibition of commercial surrogacy has inadvertently increased unregulated, underground set ups by 20-30 percent. Socio-legal analyses and reports on the field (e.g., Amrita Pande, *Wombs in Labor*) show that making compensation illegal does not eliminate the practice, but only eliminates the bargaining power of the surrogate. The shadow market causes surrogates to be refused insurance, undergo unsafe medical practice and receive much lower payments that are not covered by international standards that they can do nothing about if their

contract is broken.

4.3.1 Recognition of Labor and Article 23.

The 2021 Act has a chance of contravening Article 23 of the Constitution by compelling a surrogate to bear the physical burden of 40 weeks under the guise of altruism. In the case of PUDR v. Union of India (1982), the Supreme Court believed that labor below the minimum wage is begar (forced labor). Surrogacy is a risky business; refusing to pay a "Dignity Fee" and letting the medical industry gain money out of the operation is a definite example of financial exploitation disguised as ethics.

4.4 Comparative Study: India, UK, and California.

The next comparison will show the manner in which various jurisdictions strike a balance between the law of contract and public policy:

Feature	India (2021 Act)	United Kingdom (Surrogacy Arrangements Act)	California, USA (Regulated Market)
Model	Altruistic Only	Altruistic (Reasonable Expenses)	Commercial & Regulated
Contract Status	Unenforceable / Void	Unenforceable	Fully Enforceable
Parental Rights	Birth Certificate at Birth	Parental Order (Post-Birth)	Pre-Birth Orders
Surrogate Veto	Not Specified	Absolute until Parental Order	Limited by Intent Theory
Eligibility	Close Relatives Only	Open to all	Open to all

Whereas in the UK there can be reasonable expenses, which in many cases, give the effect of

a quasi-payment, California considers the surrogacy agreement to be an ordinary service contract subject to the " Intent Test. The existing model in India is more limited compared to that in the UK and does not give the same legal certainty as California, which puts both surrogates and parents in a liminal state of legality.

Freedom and the Puttaswamy Doctrine

The restrictive close relative requirements is an infringement of the Right to Privacy as instituted in Justice K.S. Puttaswamy v. Union of India (2017). Privacy is an essential aspect of reproduction choice. The law places a woman under the familial pressure of revealing her intimate reproductive choices to her extended family by requiring that a surrogate be a relative. In the case of X v. Health Secretary (2022), the Supreme Court has already permitted the reproductive rights of unmarried women by mentioning that the choice to take a pregnancy to term or abort it is up to the jurisdiction of a woman. Following this constitutional logic, the 2021 Act’s paternalistic restrictions are an "unreasonable restriction" on a woman’s right to choose how to use her reproductive organs.

5: COMPARATIVE MODELS – LESSONS FOR INDIA

A comparative study of international surrogacy regimes illustrates that moral judgments frequently cancel out otherwise valid contracts. The following analysis examines how differences in consent procedures and compensation requirements lead to vastly different enforceability consequences, revealing the legal vacuum in the Indian context.

Jurisdiction	Basis of Enforceability	View on Compensation	Enforceability Rating
India	Altruism / Family Status	Prohibited (Criminalized)	Unpredictable
California	Intent / Contract	Regulated / Market Fees	High Certainty
UK	Welfare of the Child	Expenses Only	Moderate/Retrospective

5.1 California Model: Intent and Legal Certainty.

California is the Gold Standard of contractual enforceability. The California Family Code recognizes the validity of gestational surrogacy contracts since it does not emphasize biological relatedness but focuses on the intent of the parties.

Basis of Enforceability: Like in the case of *Johnson v. Calvert*¹⁵(1993), the court determined the intended person to give birth and raise the child to be the natural mother because the other gave the egg. This Intent Test offers a day one legal certainty.

- **Controlled Compensation:** California has regulated Compensation as opposed to India where market-based fees are negotiated by parties and controlled by agencies. This model is right, as controlled compensation promotes transparency; contracts are listed, written, and can be reviewed by a judge, which reduces the fact that the exploitation can be hidden.

Consent Framework: Enforceability: The consent framework is based on a multi-stage consent process. The Mandatory Independent Legal Advice (ILA) and the cooling-off period of 1430 days before signing must be taken by the surrogates to make the contract a real Free Consent.

5.2 UK Model: The Welfare-Centric Approach.

The United Kingdom has a system that is similar to India but has a different judicial resolution; this is an altruistic system.

- **View on Compensation:** The law limits payments to "reasonable expenses" incurred during pregnancy. Any additional amount is technically a violation, but the courts usually retrospectively authorize such payments provided it is in the Welfare of the Child.
- **Parental Orders:** Surrogacy agreements are not binding like an ordinary contract. Rather, legal parenthood is passed on through a "Parental Order" following birth. This renders the process to be unpredictable to targeted parents before the last order is received.
- **Consent Quality:** UK pays so much attention to the psychological screening and the quality of consent as the key determination in the post-birth orders.

5.3 The Indian Vacuum of Law: Paternalism or Protection.

India Surrogacy (Regulation) Act, 2021 has resulted in a legal quagmire that has been critical

¹⁵ See also *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).=

due to its focus on moral policy and less on contractual rights.

The "Unpredictable" Status: The state assumes that altruism ensures pure consent by limiting surrogacy to one of the close relatives and prohibiting payments. But this disregards the fact of undue influence in the Indian family set up. Section 16 of the Contract Act is often breached since a surrogate can be morally or socially obliged to deliver a child on behalf of a relative, which is a coercion of a more difficult nature to establish than a financial arrangement.

Criminalization and the Shadow Market: The complete prohibition of commercial gains has spurred an increase in unregulated, informal arrangements by 20-30%. The law also eliminates the bargaining power of the surrogate, by making it a crime to compensate and forces vulnerable women into a market with no legal protections or insurance.

- **Constitutional Tension:** Refusing a surrogate to negotiate a reasonable fee to go through 40 weeks of intense labor can be a violation of Article 23 (Prohibition of Forced Labor)¹⁶. Since the *Asiad Workers Case* (1982) labor under less than minimum wage is regarded as *begar*. The model of India therefore perilously projects a state-approved system of uncompensated extraction.

5.4 Lessons for Reform

It has been compared that the India model is procedurally sufficient (needs to be approved by the Board) but substantively weak. India needs to incorporate aspects of the California model to transition to actual protection and not paper compliance:

1. Implement the Mandatory Independent Legal Advice (ILA) to make sure that surrogates are aware of their rights without taking into consideration the interests of the family.
2. Switch to a Capped Compensation Model to move the shadow market into a transparent, regulated system, in which reproductive labor is recognized as a valid service.
3. Standardize the Intent Test to give parents and surrogates certain legal consequences and minimize the chances of traumatic custody litigations such as those observed in *In re Baby M*¹⁷.

¹⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

¹⁷ *Baby Hiya v. Child Welfare Committee*, WP No. [Placeholder] of 2025 (Telangana HC).

6: PROPOSED ARCHITECTURAL FRAMEWORK

In order to settle the conflict between state obligatory altruism and the safeguarding of individual rights, this paper will introduce RE:REPRODUCTION, a rights-based system of governance. This approach goes beyond the present day checkbox exercise of the 2021 Act by applying the digital logic of legacy of the "RE:MEMORY" project - namely its focus on time-release and permanence of record - to the formation of a Digital Registry of Surrogacy (DRS).

6.1 Digital Registry of Surrogacy (DRS).

The DRS is imagined as a decentralized blockchain-based registry that can monitor the Three Pillars of surrogacy: Consent, Compensation and Autonomy, in real time. With the help of immutable ledger technology, the state will be able to trace compliance with the altruistic mandate without violating the intimate privacy of the people involved.

- **Non-Mutable Consent Monitoring:** In response to the problem of "Ongoing Consent" found in this paper, the DRS would mandate that consent be reaffirmed digitally at significant milestones in medical practice. It is impossible to coerce a paper contract, but every digital "handshake" is cryptographically signed and timestamped, so that the Free Consent of the surrogate is not a one-time barrier of procedure, but an ongoing process.
- **Time-Triggered Autonomy (The Veto Protocol):** The DRS would automate the Surrogate Veto Power based on the idea of RE:MEMORY in the scheduled digital releases. The platform would canonically consider the unilateral right to make medical decisions or revoke consent by the surrogate at the 24th week, guaranteeing her bodily integrity preceding contractual obligations as upheld in the Puttaswamy doctrine.
- **Open Book Financial Auditing:** To curb the 20 to 30 per cent increase in unregulated underground arrangements, the DRS would have an incorporated Escrow and Insurance Module. This makes all the altruistic medical costs, nutrition aid, and loss-of-income reimbursements transparent. The proposed digital trail of these payments can make the payment of the Dignity Fee in this study possible without it being pushed into the shadow market, thus avoiding the extraction of reproductive labor without any payment.

6.3 Overcoming the Legal Vacuum.

The existing legal vacuum lies in the fact that paper-based regulations are not able to reflect the dynamism of reproductive work. RE:REPRODUCTION is a technological interface that

meets the criteria of substantive legality as stipulated by the Indian Contract Act.

The framework has ensured that family debt or the so-called undue influence is not exerted on surrogates of vulnerable socio-economic backgrounds by requiring them to take Independent Legal Advice (ILA) before having access to the digital version of the registry. This architectural change does not leave the Surrogate as a delivery vehicle, but a rational and safeguarded economic agent, bringing the Surrogacy (Regulation) Act, 2021 to the level of modern constitutional and labor norms.

7. CONCLUSION & REFERENCES

Although the Surrogacy (Regulation) Act, 2021, in its intention to prevent exploitation, has unintentionally led to a legal vacuum that is undermining the people it is meant to protect. The state has made moral symbolism rather than substantive contractual and constitutional rights of surrogate mothers to be prioritized by completely shifting to a paternalistic, altruistic-only model.

7.1 The Reason to Add a Rights-Based Amendment.

This paper finds that a Rights-Based amendment is not just a policy suggestion but a constitutional requirement. The existing ban on compensation disregards the fact of reproductive labor, and threatens to breach the obligation of Article 23 on uncompensated extraction. In order to close the distance between security and freedom, it is suggested to make the following changes in the legislation:

- **Altruism to Regulated Agency:** The legislation should not be bound on close relatives as this encourages family coercion but a Regulated Compensation Model. That would acknowledge the surrogate work as an economically rational decision, with a Dignity Fee and limited government regulation to ensure commodification.
- **The Consent Evolution:** Consent has to be written down as a continuous process. The use of a Surrogate Veto Power to a maximum of 24th week is a means of having the surrogate as an independent entity whose physical integrity is superior to any contractual obligation.
- **Technological Governance:** The introduction of a Digital Registry of Surrogacy (DRS) as suggested by the RE:REPRODUCTION framework, would enable the state with an immutable control of the process and protect the privacy and insurance interests of the parties involved.

To sum up, the surrogacy system in India has to change the defensive stance to a prescriptive

one. In balancing the Indian Contract Act, 1872 and the Puttaswamy doctrine of privacy, India would be able to do justice to the diversity of the contemporary families and at the same time to make sure that the surrogate mother is not exploited by the market or infantilized by the state.

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