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## Legal and Ethical Perspectives on Commercial Surrogacy in India

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*The Surrogacy Regulation Act 2021 defines the term surrogacy as a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth. Surrogacy is a relatively new concept in India, and the legal framework in this field is still developing. The Surrogacy (Regulation) Act, 2021, prohibits commercial surrogacy and permits only altruistic surrogacy, which is a form of surrogacy without any monetary incentives for the surrogate mother. The effects of this ban are widespread, having a significant bearing upon the rights of the surrogate mothers, surrogate children, and parental rights in general. The complete prohibition of commercial surrogacy aims to prevent exploitation of surrogate mothers and children, as well as prioritise free and informed consent of all parties involved in the process of surrogacy. Consequently, it also restrains the surrogate mother from profiting from the surrogacy. This doctrinal research attempts to analyse the manifold ethical and legal perspectives on commercial surrogacy in India, with special reference to the Surrogacy (Regulation) Act, 2021.*

**Keywords:** *surrogacy law, commercial surrogacy, women's rights, assisted reproductive technology.*

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### INTRODUCTION

The Surrogacy (Regulation) Act 2021, defines commercial surrogacy in section 2(g) as commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale

or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.<sup>1</sup> This comprehensive and exhaustive definition indicates that commercial surrogacy is a form of surrogacy which is centred around the provision of monetary incentives to the surrogate mother in return for the service performed. S. 38 explicitly prohibits commercial surrogacy and all acts that facilitate or promote it.<sup>2</sup>

The rationale behind this prohibitive action by the legislature is that the legal recognition of commercial surrogacy and the court's views in the Baby Manji Yamada case.<sup>3</sup> Led to a wave of medical tourism in India for commercial surrogacy.<sup>4</sup> This caused the problem of widespread exploitation of women.<sup>5</sup> Surrogate services could be availed in India even at very low costs- about an eighth of the price that would be incurred in the United States<sup>6</sup>, which led to several couples from outside the country approaching Indian women to be their surrogates.<sup>7</sup> Further, the women who became surrogate mothers were often forced to tolerate inhumane living conditions and ill-treatment, by reason of being compelled to perform surrogacy services due to poverty.<sup>8</sup> The concept of womb for rent has been widely criticised by human rights and women's rights activists, having been termed as dehumanising and exploitative.<sup>9</sup>

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<sup>1</sup> The Surrogacy (Regulation) Act 2021, s 2(g)

<sup>2</sup> The Surrogacy (Regulation) Act 2021, s 38

<sup>3</sup> *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84

<sup>4</sup> Ashish Sharma, 'Commercial Surrogacy in India: An Overview' (2023) 32 *Supremo Amicus* 158 <<https://supremoamicus.org/wp-content/uploads/2023/01/Ashish-Sharma..pdf>> accessed 11 July 2025

<sup>5</sup> Raghav Arora and Aryan Bhan, 'EVOLUTION OF SURROGACY LAWS IN INDIA: A CRITICAL ANALYSIS' (2021) 2(3) *Law Essentials Journal* 194 <[https://drive.google.com/file/d/1BkN-6JmkMRgEALUByCoDUZ-D\\_H6XwyBv/view](https://drive.google.com/file/d/1BkN-6JmkMRgEALUByCoDUZ-D_H6XwyBv/view)> accessed 11 July 2025

<sup>6</sup> Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2009) 30(4) *University of Pennsylvania Journal of International Law* 1429 <<https://scholarship.law.upenn.edu/jil/vol30/iss4/1>> accessed 11 July 2025

<sup>7</sup> JSRG Saran and Jagadish Rao Padubidri, 'New laws ban commercial surrogacy in India' (2020) 88(3) *Medico-Legal Journal* 148 <[10.1177/0025817219891881](https://doi.org/10.1177/0025817219891881)> accessed 11 July 2025

<sup>8</sup> Megha Gupta, 'Surrogacy Laws in India' (2023) 6(4) *International Journal of Law Management and Humanities* 472 <<https://doi.org/10.1000/IJLMH.115308>> accessed 11 July 2025

<sup>9</sup> Jaden Blazier and Rien Janssens, 'Regulating the international surrogacy market: the ethics of commercial surrogacy in the Netherlands and India' (2020) 23 *Medicine, Health Care and Philosophy* 621 <<https://doi.org/10.1007/s11019-020-09976-x>> accessed 11 July 2025

On the other hand, there are certain arguments in favour of commercialising surrogacy. They are based on the freedom of a woman to make choices about her bodily autonomy,<sup>10</sup> and also regarding the livelihood of women who willingly enter into surrogacy agreements with couples. Many couples- unmarried couples, single men and women, foreigners, same-sex couples, and married couples with existing children who could have earlier children through surrogates can no longer do so, because of the strict regulations imposed by the 2021 legislation.<sup>11</sup> The concept of reproductive labour has even been equated to other kinds of labour, where it is just as possible for a worker to be exploited and underpaid.<sup>12</sup> It is argued that the surrogate mother willingly puts herself in such a situation and undertakes the risks involved with full knowledge of them. The only factor that tips the scales in the case of surrogacy is the relative risk to the health and well-being of the surrogate mother,<sup>13</sup> and the possible lack of free consent and awareness by the woman who is rendering the reproductive service.<sup>14</sup> Surrogacy in general is not inherently problematic. Rather, the societal stigma that persists against the concept of procreating through surrogacy is the primary reason for ethical battles with larger legal consequences.<sup>15</sup>

This paper attempts to weigh the legal and ethical arguments in favour of and against commercial surrogacy, and proposes a set of solutions to ensure an effective balance of human rights and legal restrictions in India's free and developing society.

## STATEMENT OF THE PROBLEM

Commercial surrogacy was recognised and validated by the Supreme Court of India in 2002. The Baby Manji Yamada case also spearheaded the rise of India's popularity as a hub for medical tourism, with many foreign nationals engaging Indian women as surrogate mothers, in exchange for a fee. Further, many other Indian couples also started to resort to commercial

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<sup>10</sup> Vibhi H. Jain, 'Empowering Parenthood: Paving the Way for Legalized Commercial Surrogacy in India through the Surrogacy Bill' (2024) 7(1) International Journal of Law Management and Humanities <<https://doi.org/10.10000/IJLMH.116787>> accessed 11 July 2025

<sup>11</sup> Sharmila Rudrappa, 'Why Is India's Ban on Commercial Surrogacy Bad for Women' (2018) 43 North Carolina Journal of International Law

<sup>12</sup> Blazier (n 9)

<sup>13</sup> Aayushi Selot, 'Commercial Surrogacy: An Analysis' (2021) 4(4) International Journal of Law Management and Humanities <<https://doi.org/10.10000/IJLMH.111596>> accessed 11 July 2025

<sup>14</sup> Vidisha Joshi, 'The Effect of Globalization on Commercial Surrogacy in India: An Analysis of the Proposed Ban on Commercial Surrogacy' (2021) 4(3) International Journal of Law Management and Humanities <<https://doi.org/10.10000/IJLMH.111219>> accessed 11 July 2025

<sup>15</sup> Gupta (n 8)

surrogacy. Many women were forced to engage in commercial surrogacy due to the economic benefit, and the transactional value of surrogacy became based on personal gain and profits, rather than enabling childless couples to experience parenthood. Unethical practices persisted, leading to widespread exploitation of women, while the middlemen running the agencies that facilitated commercial surrogacy profited. In 2021, the Surrogacy (Regulation) Act was passed, prohibiting commercial surrogacy and making it a punishable offence. This prospective legislation brought about several practical issues- including the livelihood of women previously engaged in commercial surrogacy, adoptive rights of many couples, rights of same-sex couples, couples seeking surrogacy for non-medical reasons, spouses who have had children earlier, etc. This study attempts to highlight certain aspects of commercial surrogacy in India by evaluating the ban on commercial surrogacy from the ethical and legal points of view.

## **OBJECTIVES**

This study has the following objectives:

1. To understand the concept and advent of commercial surrogacy in India.
2. To break down the existing legal framework for surrogacy in India.
3. To critically examine the legal implications and judicial perspectives on commercial surrogacy in India.
4. To evaluate the ban on commercial surrogacy from an ethical standpoint.
5. To suggest means of improving the status of surrogacy in India.

## **RESEARCH METHODOLOGY**

This research paper uses a structured doctrinal methodology to analyse the field of surrogacy law in India. The historical development of the concept of surrogacy was looked into to understand the causes for the rise in commercial surrogacy. Further to this, the rationale behind the imposition of regulatory frameworks for surrogacy in India was analysed. Various judicial decisions of Indian courts were considered to examine the perspective of the judiciary with regard to commercial surrogacy. The ethical implications of the ban on commercial surrogacy were explored through an analysis of research articles and papers on the subject. Finally, the legal and ethical approaches were weighed against one another in order to state the findings of this research, and a systematic approach was adopted to provide

suggestions for improvement, especially regarding the regulation of commercial surrogacy and protecting the rights of the vulnerable population.

## LIMITATIONS OF THE STUDY

This study is based on a topic that has emerged recently in the Indian legal field. Therefore, the availability of judicial opinions and binding decisions on surrogacy is relatively limited. Further, this study has the limitations of being restricted by secondary data availability. The topic chosen for this study has many ethical and moral perspectives associated with it, especially with regard to social beliefs and opinions. It is, as a result, highly subjective and dynamic in nature, making it difficult to pinpoint concrete, implementable solutions in the short run.

## REVIEW OF LITERATURE

**Jennifer Rimm (2009)**<sup>16</sup> conducted a detailed, theoretical study on the regulation of commercial surrogacy in India, at a time when there was a severe dearth of a legislative framework in place for surrogacy. The research identifies the proposed legislative actions and evaluates them, as well as presents the dangers and benefits of commercial surrogacy coherently and neutrally. It was concluded that commercial surrogacy is not inherently wrong, but has many negative and dangerous implications for society. Therefore, removal of exploitative elements and facilitation of ethical and lawful practices through proper legislative means will lead to safe and affordable services, which protect the surrogates from an unregulated and unethical market.

The ban on commercial surrogacy itself was comprehensively analysed by **Vidisha Joshi (2021)**.<sup>17</sup> Global perspectives on commercial surrogacy were the main focus of the study. Procedural elements and issues related to commercial surrogacy were highlighted with reference to the legal framework for surrogacy in India. Certain critical points were raised about the 2021 legislation, and it was concluded that commercial surrogacy must not be totally banned, but instead must be highly regulated by state authorities.

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<sup>16</sup> Rimm (n 6)

<sup>17</sup> Joshi (n 14)

**Ananya Dixit (2023):**<sup>18</sup> Analysed the ethical aspects of surrogacy laws in India. The study aimed to evaluate the existing regulatory framework for surrogacy in India and assess the legal and ethical conflicts that surround commercial surrogacy in India. The various legal issues, ambiguities, and ethical arguments regarding commercial surrogacy were looked into by the researcher. It was concluded that commercial surrogacy is unlawful, and commercial surrogacy should be readily available to those looking to have a family, even as an illegal measure. Further, a lot of medical attention is to be paid to the surrogates, and their rights must be protected effectively.

**Ashish Sharma (2023):**<sup>19</sup> Conducted a thorough analysis of commercial surrogacy in India, with specific reference to the legislative framework for surrogacy. The emergence and development of surrogacy laws in India were analysed, followed by an overview of the legislation and reports that enable the regulation of surrogacy. It was concluded based on judicial decisions as well as ethical considerations that the blanket ban on commercial surrogacy is not in the best interest of women and married couples, and instead, it would be advisable to adopt a more liberal approach to surrogacy, to facilitate the freedom of choice, protect bodily autonomy and uphold personal liberty.

The possibility of legalised commercial surrogacy was analysed by **Vibhi Jain (2024)**.<sup>20</sup> This study mainly covered the ethical and legal aspects of surrogacy with reference to the Surrogacy (Regulation) Act, 2021. The existing legal model for commercial surrogacy was criticised on certain grounds, and it was distinguished from altruistic surrogacy. The study suggested a harmonisation approach to be adopted with reference to surrogacy laws, to honour ethics, inclusivity, and innovation. Non-commercial surrogacy is advocated for, and the importance of public review of legislation was highlighted.

## ANALYSIS AND DISCUSSION

**Historical Development of Commercial Surrogacy in India:** Indian history shows evidence of surrogacy that dates back all the way to the Mahabharata period.<sup>21</sup> Other historical

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<sup>18</sup> Ananya Dixit, 'Ethical Aspect of Surrogacy Laws in India' (2023) 6(2) International Journal of Law Management and Humanities <<https://doi.org/10.1000/IJLMH.114775>> accessed 11 July 2025

<sup>19</sup> Sharma (n 5)

<sup>20</sup> Jain (n 10)

<sup>21</sup> Arora (n 5)

references include Rachel and Jacob in the Bible,<sup>22</sup> as well as the stories of Rohini, Kunti and Yajnakunda.<sup>23</sup>

The modern concept of surrogacy arose first in the form of IVF (in vitro fertilisation) technology, and the first IVF baby was born in 1978 in Manchester, England.<sup>24</sup> India was the second country to incorporate this technology into practice, and in 1978, Kanupriya, the first test-tube baby in India, was born in Kolkata.<sup>25</sup> Medical practices involving surrogacy persisted in India for a long time before the need for comprehensive legislation was recognised.<sup>26</sup>

The official recognition of surrogacy and validation of commercial surrogacy occurred in 2002 in India.<sup>27</sup> Following this, there was a huge influx of foreign clients who sought to have children through Indian surrogates at very low costs, compared to the cost of surrogacy in any other nation at that time.<sup>28</sup> Many women were employed by agencies, who would pocket the majority of the fees paid by the foreign clients, and pay the surrogate women a very meagre amount.<sup>29</sup> This type of exploitation of women, who were forced into being surrogates and surviving in very poor conditions due to socio-economic pressures, ran rampant for many years. Another indicator of exploitative practices is the fact that complex surrogacy agreements were entered into by women who were unable to comprehend them due to illiteracy, language barriers, etc. This poses a threat to free consent, which is one of the essentials of a valid contract.<sup>30</sup>

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<sup>22</sup> Urvi Gupta, 'Surrogacy: History and Contemporary Laws with Focus on Commercial Surrogacy' (2021) 2(1) Jus Corpus Law Journal <<https://www.juscorpus.com/wp-content/uploads/2021/10/87.-Urvi-Gupta.pdf>> accessed 11 July 2025

<sup>23</sup> Gabriella Judith Martin, 'ETHICAL PERSPECTIVES ON COMMERCIAL SURROGACY' (2021) 2(2) Indian Journal of Law and Legal Research <[https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5\\_f06918ca03574f15baffc6b26fbf603f.pdf](https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5_f06918ca03574f15baffc6b26fbf603f.pdf)> accessed 11 July 2025

<sup>24</sup> Gupta (n 22)

<sup>25</sup> Pritha Sen, 'SURROGACY LAWS IN INDIA THROUGH THE YEARS' (2022) 2(6) Indian Journal of Integrated Research in Law <<https://ijirl.com/wp-content/uploads/2022/11/SURROGACY-LAWS-IN-INDIA-THROUGH-THE-YEARS.pdf>> accessed 11 July 2025

<sup>26</sup> Arora (n 5)

<sup>27</sup> Dixit (n 18)

<sup>28</sup> Tarushi Kapoor, 'The Evolution of Surrogacy and Its Shortcomings in India' (2023) 6(4) International Journal of Law Management and Humanities <<https://doi.org/10.1000/IJLMH.115673>> accessed 11 July 2025

<sup>29</sup> Saran (n 7)

<sup>30</sup> Indian Contract Act 1872, s 10

India, therefore, became a global hotspot for surrogacy services. However, there were no fixed legal regulations in place to control the various unethical and immoral activities which occurred in this period. The 2005 ICMR guidelines sought to prescribe procedures and practices for the use of Assisted Reproductive Technology (ART), but these were merely advisory and not penal in nature, therefore leading to a situation where the exploitation of surrogate women was apparent and uncontrolled.

The Baby Manji Yamada judgment<sup>31</sup> of 2008 was a landmark legal development in surrogacy law in India, which shall be discussed subsequently. Concurrently, the 2008 ART Bill<sup>32</sup> was drafted, but no further action was taken at that time. The 228<sup>th</sup> Law Commission Report<sup>33</sup>, published in 2009, dealt with the need for surrogacy legislation. The recommendations of the Law Commission were considered and reflected in the consequent 2010 ART Bill,<sup>34</sup> which was brought forth. This bill greatly restricted the categories of persons who could avail surrogacy in India, and also attempted to give strict regulations regarding the rights and status of the surrogate mother. It was in the 2014 ART Bill<sup>35</sup> that the option for unmarried persons and foreigners to reproduce through surrogacy in India was completely taken away. In 2016, the Surrogacy (Regulation) Bill<sup>36</sup> was introduced, and the 102<sup>nd</sup> report of the Parliamentary Standing Committee<sup>37</sup> provided certain recommendations regarding the 2016 bill.

Finally, in 2019, following the lapse of the previously proposed legislation, the Surrogacy (Regulation) Bill<sup>38</sup> was brought before the Lok Sabha and was passed by the Rajya Sabha in 2021. This Bill was finally promulgated as the Surrogacy (Regulation) Act 2021<sup>39</sup>, which has binding force, and made many changes to the existing law.

**Regulatory Framework for Commercial Surrogacy in India:** In the initial stages, between 2002 and 2021, there was no binding legislation that prohibited commercial surrogacy.

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<sup>31</sup> *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84

<sup>32</sup> The Assisted Reproductive Technologies (Regulation) Bill 2008

<sup>33</sup> Law Commission, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* (Law Comm No 228, 2009)

<sup>34</sup> The Assisted Reproductive Technologies (Regulation) Bill 2010

<sup>35</sup> The Assisted Reproductive Technologies (Regulation) Bill 2014

<sup>36</sup> The Surrogacy (Regulation) Bill 2016

<sup>37</sup> Department-related Parliamentary Standing Committee on Health and Family Welfare, *One Hundred-Second Report on The Surrogacy (Regulation) Bill, 2016*

<sup>38</sup> The Surrogacy (Regulation) Bill 2019

<sup>39</sup> The Surrogacy (Regulation) Act 2021



Commercial surrogacy was recognised and permitted in India, without any prohibitive action by the state, with some regulations being imposed from time to time, which prevented foreigners, same-sex couples, single persons, etc., from partaking in surrogacy. Other kinds of restrictions and prescriptive guidelines were also promulgated, but the practice of commercial surrogacy itself was not condemned by the state until the Surrogacy (Regulation) Act 2021 was enforced.

The Surrogacy (Regulation) Act, 2021- hereinafter, the Act- is the first binding legislation that regulates surrogacy in the country. Being a much-needed legislation to scrutinise, prevent and control unlawful activities, there are certain significant changes made by this Act which alter previously followed practices and procedures to a great extent. The prohibition of commercial surrogacy and categorising it as a punishable offence under the Act is the biggest change brought about by the Act.

Section 2(g)<sup>40</sup>, the Act defines 'Commercial Surrogacy'. Section 4<sup>41</sup> of the Act provides the types of surrogacy procedures that are permitted to be carried out by registered surrogacy clinics. This provision allows only for altruistic surrogacy procedures that have medical justification and have been duly certified by the Board. The eligibility criteria of a surrogate mother and of the intending couple are also given in this section. Various legal and procedural requirements have to be fulfilled by the intending couple for them to be duly certified as an eligible couple for altruistic surrogacy.

Chapter VII of the Act deals with Offences and Penalties relating to surrogacy.<sup>42</sup> This is the most important provision, as it criminalises commercial surrogacy, exploitation of surrogate mothers, and exploitation of children born through surrogacy. The purpose of the Surrogacy Act is reflected in this provision, as it seeks to protect the rights of those persons who are commonly victimised by reason of unlawful and immoral practices. Undertaking or engaging in commercial surrogacy, sex selection, exploitation of surrogate mothers and children, human trade/trafficking by means of surrogacy are some of the offences that are punishable with imprisonment for up to ten years, and a fine of up to ten lakh rupees. Section 40<sup>43</sup> imposes specific punishment - imprisonment of up to five years, and a fine of up to five

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<sup>40</sup> The Surrogacy (Regulation) Act 2021, s 2(g)

<sup>41</sup> The Surrogacy (Regulation) Act 2021, s 4

<sup>42</sup> The Surrogacy (Regulation) Act 2021, s 38

<sup>43</sup> The Surrogacy (Regulation) Act 2021, s 40

lakh rupees for the first offence, the quantum of which is doubled for any subsequent offences- on any intending couple, woman or person who seeks the aid of a surrogacy clinic for commercial surrogacy. Therefore, the existing regulatory framework for commercial surrogacy in India strictly construes it as a punishable offence.

**Judicial Decisions and Legal Stances on Commercial Surrogacy in India:** The landmark case relating to surrogacy in India is that of *Baby Manji Yamada v Union of India*.<sup>44</sup> In this case, a Japanese couple, Ikufumi Yamada and Yuki Yamada, chose to avail the services of a surrogate in Anand, Gujarat, by means of a surrogate agreement. The grandmother of the child, Emiko Yamada, filed a petition, challenging the directions of the Rajasthan High Court regarding custody of the child. The couple were divorced, and the father sought custody of the child. The Bench followed the rule as per Indian law to state that the father could not be given custody of the child, and instead gave custody to the grandmother, thereby giving validity to the commercial agreement of surrogacy that was in place between the Japanese couple and the surrogate mother from Gujarat. The court identified the pressing need for proper regulation of surrogacy in India, and observed that the intending couple may be of any composition and any kind. Further, the fact that commercial surrogacy is in high demand in India was highlighted by the court, and the terms womb for rent, baby farms, etc., were criticised. The importance of child rights in surrogacy agreements is apparent from this judgment, and the child was finally permitted to be taken to Japan with the grandmother.

The case of *Jan Balaz v Anand Municipality*<sup>45</sup> dealt with a question regarding the citizenship of the two baby boys born of an Indian surrogate mother, where the father was a German national. The father sought to take the babies to Germany and obtain German citizenship for them, but they were given Indian citizenship and Indian passports. Further, surrogacy was not recognised in Germany. The petition was filed by the father, who sought to obtain the passports for the babies, as it is a fundamental right under Article 21. In this case, certain questions that specifically concern the rights of a child born out of surrogacy were addressed, and the court also stated that there is a need for legislative intervention in the field of surrogacy.

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<sup>44</sup> *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84

<sup>45</sup> *Jan Balaz v Anand Municipality* (2009) SCC OnLine Guj 10446

While the above two judgments deal directly with surrogacy, several other landmark cases discuss reproductive autonomy as a right, deal with the rights of women and children, as well as parental rights and duties. Therefore, these judgments also have several implications for surrogacy in general and raise certain queries regarding the ban on commercial surrogacy.

For instance, the case of *Justice K.S. Puttaswamy v Union of India*<sup>46</sup> recognises that reproductive and bodily autonomy are aspects of dignity and personal liberty under Art 21 of the Constitution.<sup>47</sup> This may be used to contradict the ban on commercial surrogacy and the strict restrictions imposed on those who are eligible as a surrogate mother or intending couple.

Another legal question is regarding the limited viability of couples to seek surrogacy due to the exclusion of homosexual or same-sex couples, single persons, or married couples where one or both of them already have existing biological children, as potential candidates for being an intending couple. In *Navtej Singh Johar*,<sup>48</sup> the court recognised the rights of same-sex couples, decriminalizing Section 377.<sup>49</sup> However, in the *Supriyo* case,<sup>50</sup> the court stated that the recognition of same-sex marriage would have to be done only with a series of legislative and not judicial actions. At the same time, there is a paradox which exists in the form of judgments such as *Bharatha Matha v Vijaya Renganathan*.<sup>51</sup> It was held that a presumption of marriage arises automatically when there is a cohabitation for a long period, like marriage. Therefore, would a live-in relationship like marriage warrant eligibility to reproduce through altruistic surrogacy? This is a question that remains unanswered to this day.

Surrogate women are treated as mothers in the sense that they provide reproductive labour by going through pregnancy and actually giving birth. However, the rights of the surrogate mother about maternity leave and benefits for the women who actually give birth are not stated in substantive law. The extent of protection given to surrogate mothers, therefore, is

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<sup>46</sup> *Justice K.S. Puttaswamy (Retd) v Union of India* AIR 2018 SC (Supp) 1841

<sup>47</sup> Constitution of India 1950, art 21

<sup>48</sup> *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

<sup>49</sup> Indian Penal Code 1860, s 377

<sup>50</sup> *Supriyo @ Supriya Chakraborty v Union of India* MANU/SC/1155/2023

<sup>51</sup> *Bharatha Matha v Vijaya Renganathan* AIR 2010 SC 2685

still unclear.<sup>52</sup> Further, if surrogacy agreements are treated exactly like contracts,<sup>53</sup> the remedies in case of breach or dispute cannot be construed in the same sense, because of the nature of the contract and the potential detrimental effects on the rights of the child. The foreign case of *Mr. and Mrs. W*<sup>54</sup> is an example wherein the court observed that surrogacy agreements are not legally binding in the same sense as a contract. The prohibition of commercial surrogacy has been argued to be a contravention of personal autonomy, freedom of choice, and reproductive rights- all of which have been recognised by Indian courts. However, when a balance is sought to be established between the right to reproductive autonomy and the rampant exploitation of the vulnerable women who are forced into surrogacy as a trade, it is undeniable and apparent that the ban on commercial surrogacy is mainly aimed at protecting and not at restricting.

**Social and Ethical Approaches to Commercial Surrogacy:** The emergence of surrogacy in India occurred amidst widespread social stigma against the idea of surrogacy.<sup>55</sup> The legal landscape of commercial surrogacy has been, as discussed above, quite volatile due to legislative discrepancies. The disputes regarding commercial surrogacy that have reached the courts in India are few and far between, but various interpretations can be drawn regarding the legal status of commercial surrogacy by looking into related judgments by the courts, about reproductive rights, child rights, etc. At the same time, surrogacy is a topic that is to be viewed from a social and ethical lens, due to its various socio-economic implications. Commercial surrogacy has many dangers and risks associated with it, which make the ban on commercial surrogacy an appreciable legal decision.

The major reason for the ban on commercial surrogacy was the heavy exploitation of women who act as surrogate mothers. They are essentially the reproductive service-providers for the intending couple, who are the clients, and although they are sometimes equated to regular workers or labourers, it is impossible to place them on the same footing as regular workers who provide manual or other forms of labour. The health risks, relative consequences, and forced separation of the birth-giver from her child cannot be equated to any other kind of labour.

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<sup>52</sup> *K. Kalaiselvi v Chennai Port Trust* (2013) 2 CTC 400

<sup>53</sup> *Mr. Ebert Trujillo Duthil v Marjina Khatun* CS No 306/2013

<sup>54</sup> *Mr. and Mrs. W* [2011] EWHC 33 (Fam)

<sup>55</sup> Gupta (n 8)

Although these services are often availed only with the consent of the surrogates, it is impossible to state that such consent is always free and fully informed.<sup>56</sup> The possibility of exploitation is high in terms of illegal organ trade, human and child trafficking, and economic exploitation. The concerns that the agencies that are paid by the intending couples pocket the majority of the money, and underpay the women who provide the services, are valid and apparent.<sup>57</sup> The fact that India was viewed as a hub for commercial surrogacy, until its ban, is itself proof that choosing Indian women as surrogates is far cheaper for foreign couples than availing surrogacy services in their own countries.

Indian women may be forced into surrogacy due to socioeconomic strife, ultimately steering them towards entering into agreements, whether consensual or not, which are greatly disadvantageous to their health and well-being. There are innumerable risks to the surrogate mother's mental, physical and reproductive health, which are insufficiently covered by legal mechanisms in India.<sup>58</sup> Further, the lack of economic profitability for the women who are forced into commercial surrogacy by circumstance is a serious problem. Exploitation is accompanied by a severe violation of fundamental rights, and the boundaries of equity and equality are stretched and challenged by the commercialisation of surrogacy.<sup>59</sup> The term 'commodification' is often used by those who argue against commercial surrogacy; it is the treatment of women and/or children born out of surrogacy as commodities, rather than human beings. This inhumane treatment leads to various problems like trafficking and the flesh trade.<sup>60</sup>

While the issues that accompany commercial surrogacy are many in number, the complete ban on commercial surrogacy has also been criticised by thinkers on certain grounds. For instance, it is argued that one's reproductive autonomy is threatened by the ban on commercial surrogacy. The choice not to procreate naturally and to instead engage a surrogate should ultimately lie with the parents of the unborn child, and this choice is limited and restricted by the ban. Aside from this, the freedom to choose one's own means of livelihood is inherent to India's constitutional principles, and taking away the choice of

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<sup>56</sup> Rimm (n 6)

<sup>57</sup> Saran (n 7)

<sup>58</sup> Manasi Kumar, 'Birthing a Contract: A critical evaluation of commercial surrogacy in India through a contractual framework' (2017) 1(3) Indian Law Review 206 <<https://doi.org/10.1080/24730580.2018.1446659>> accessed 11 July 2025

<sup>59</sup> Rimm (n 6)

<sup>60</sup> Blazier (n 9)

women who have chosen to receive compensation for their reproductive services can be argued as a restriction on this freedom.<sup>61</sup>

A woman's right to exercise bodily autonomy includes the choice to act as a surrogate for a couple, whether related to them by blood or not. This choice is highly restricted by the ban on commercial surrogacy.<sup>62</sup> The Surrogacy (Regulation) Act 2021, permits only altruistic surrogacy, but this action alone does not guarantee that all surrogacy practices will remain free from ethical and legal disputes. The rights of surrogate mothers are still not thoroughly protected, at least not as much as they are in other countries like the USA, which offers both legal and psychological support to surrogate mothers, even in the case of subsequent termination of pregnancy.<sup>63</sup>

The aftermath of the total ban on commercial surrogacy was that many women who had no other means of livelihood were left without alternative earning opportunities. Further, the ban rendered the money that was exploited from these women virtually irrecoverable. The rights of the children who were ill-treated, trafficked, and sold- as a result of commercial surrogacy activities that occurred before the ban- were left as unaddressed issues. Thus, the ban has many downsides as well.

## FINDINGS

The legal landscape for surrogacy in India is scarce, and there is a lack of judicial clarity regarding commercial surrogacy, especially at the apex court level. Surrogacy is a concept which can give rise to many medico-legal disputes, and therefore, it is necessary to establish a concrete legal position regarding the commercialisation of surrogacy, beyond the complete and total ban on commercial surrogacy by the legislature.

The prohibition of commercial surrogacy and its allied activities by the legislature is an ethical conundrum, as it has been criticised as well as praised by many researchers in the field. Despite being steeped in socio-economic, legal and ethical uncertainty, it may be conclusively stated that the classification of commercial surrogacy as a punishable offence is a direct attack on the commodification of women and children in society. It is a move that

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<sup>61</sup> Martin (n 23)

<sup>62</sup> Kumar (n 58)

<sup>63</sup> Sheela Saravanan, 'Global Justice, capabilities approach and commercial surrogacy in India' (2015) 18 *Medicine, Health Care and Philosophy* <<https://doi.org/10.1007/s11019-015-9640-y>> accessed 11 July 2025

seeks to uphold the sanctity of reproduction and prevent the ‘womb-for-rent’ culture amongst intending couples. The ban is imposed merely on commercial surrogacy, and altruistic surrogacy is still permitted under the 2021 legislation. Altruistic surrogacy, that is not based on economic or personal gain, and instead motivated by the desire for parenthood or familial connections, is rarely known to be exploitative in nature. The extensive procedural and legal requirements imposed by the 2021 legislation aim to ensure transparency and ethical soundness of altruistic surrogacy procedures.

While the above findings are in favour of the ban on commercial surrogacy in India, it is also true that the highly restrictive nature of the Surrogacy (Regulation) Act, 2021, might actually deter couples from opting even for altruistic surrogacy. Couples that do not have medical justification, or those who are unmarried, or homosexual, or non-citizens, and even couples where one/both spouses have existing biological children, are ineligible for surrogacy in India, which raises many questions regarding inclusivity and freedom of choice.

## SUGGESTIONS

**Protection of Surrogate Mothers’ Rights:** Surrogate mothers in many developed countries, like the USA, are given ample protection, both psychological and legal. However, the protective mechanism in place for surrogate mothers in India for health issues, exploitation, termination, disputes with the intending couple, etc. is insufficient and almost null. Therefore, significant policy reform is needed in this area, accompanied by exhaustive legislation and thorough enforcement mechanisms.

**Recognition of Couples Seeking Surrogacy for Non-Medical Reasons:** A significant issue raised about the severe restrictions imposed by the 2021 legislation is that couples may only opt for altruistic surrogacy if there is a genuine medical condition which prevents them from conceiving naturally. There is no provision for couples to opt for surrogacy if they have other reasons, like work restrictions, personal reservations, or beliefs, that draw them towards surrogacy. In such cases, it may be advisable for the state to provide for a highly regulated environment in which surrogacy may take place with monetary compensation. In such a sense, it need not be commercial or advertised as an open service to the public, but will remain a viable option for those couples who can afford such surrogacy, while state regulations protect the rights of the women who willingly enter into such contracts.

**Recognition of Same-Sex Couples/Live-in Relationships:** The issues of same-sex marriages and recognition of cohabiting couples as married couples for legal purposes are both intertwined when it comes to having children. Children born out of wedlock are already seen as taboo in many parts of India, which is one reason for the lack of leeway for such couples even to adopt children together, let alone opt for surrogacy. Therefore, recognition of these couples will enable better reproductive autonomy and social development in terms of erasing the stigma which hinders a conducive environment for raising children.

**Rehabilitation and Compensation for Victims:** The exploitation of women who were forced into commercial surrogacy services before the ban, and those who are being illegally involved in the surrogacy trade even after the promulgation of the prohibitive law, cannot be reversed or eradicated overnight. Therefore, it is necessary to provide due care to those women and children who were treated as commodities, as a side-effect of commercial surrogacy, and ensure that such women are given alternate means of livelihood. These actions are to be taken at the grassroots level, by local bodies and societies that focus their attention on the rights of women and children.

**Widening the Limits of Altruistic Surrogacy:** Altruistic surrogacy is permitted by law, but is subject to various restrictions and strict requirements, many of which are excessive and unreasonable. Reducing the severity of the restrictions on the legal and procedural aspects of altruistic surrogacy will open the doors for transparent, regulated, and consensual surrogacy practices. This will thereby reduce the number of persons who are being involuntarily forced into the illegal surrogacy trade, and also enable the reduction of the social stigma against surrogacy in India.

## **CONCLUSION**

Commercial surrogacy, since 2021, has been classified as a punishable offence in India. Before this ban, India acquired the status as a hub for commercial surrogacy, attracting clients from around the world, due to the cheap cost of service and liberal legal system, which allowed commercial surrogacy to be carried out on a large scale. Repeated instances of exploitation, forced labour, child commodification and other problems, such as poor wages for the surrogate mothers, led to a series of restrictions imposed by the state on surrogacy,



culminating in the total ban on commercial surrogacy in 2021. This ban, however, does not eradicate this practice from the nation. Rather, it renders it illegal.

Alongside this ban, several other restrictions on surrogacy have been placed by the legislature, making it a very time-consuming and restrictive option in terms of procedure and eligibility. Due to the excessive restrictions, illegal surrogacy trade activities continue to persist in the country, and the social stigma which vilifies surrogacy remains unaddressed. There are various arguments both in favour of and against commercial surrogacy, both carrying merit. Upon a thorough analysis of various arguments, it is recommended that the restrictions be loosened, and a highly regulated environment for surrogacy as a service be created in India, to annihilate the non-consensual and exploitative practices of surrogacy, which are black marks on India's basic constitutional principles of freedom, equity, and justice.