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# Commercial Surrogacy and the Effects of its Inadequate Controlling Mechanism

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HARINI KANNAN<sup>1</sup>

## ABSTRACT

*Surrogacy has been practiced in India since ancient times. Back then, it was called Niyoya Dharma. Looking into Hindu mythology, the seventh child of Devki and Vasudev. Balram's embryo was moved to Rohini's womb. Rohini was Vasudev's first wife. This was done to save the baby from being killed by Kansa. Gandhari in the Mahabharata had a unique case. After two years of pregnancy, she delivered a mass. Rishi Agryasa found this mass had 101 cells. These cells were grown outside the womb in a nutrient medium. From this, 100 male babies known as Kaurans & one female named Dushala were born. Then there's Kartikey, often seen as the god of fertility. He was born through surrogacy too! His parents were Shiva and Ganga (the surrogate mother). Clearly, surrogacy existed long ago. It shows no conflict between assisted reproduction and socio-religious practices.*

*Examining records that span thousands of years, specifically Indian Vedic literature, alongside today's scientific discoveries involving molecules, genes, and DNA, it is evident that motherhood is an instinct-driven physiological phenomenon. The instinct for motherhood stands as the most potent desire within all living creatures, including animals and humans. Ancient Indian philosophy posits that life's biological purpose is to propagate one's own traits (genes). All living beings are in a transitional phase to pass their traits (genes) to the next generation. Propagation emerges as the ultimate aim of any species.*

*In India, infertility is often viewed as a social stigma. The pain and trauma of infertility are intensely felt by infertile couples themselves. Although infertility does not threaten one's life, it imposes a profound impact on individuals unable to fulfil the biological role of parenthood through no fault of their own. Generally speaking, Indian society exhibits a stable family structure and a strong desire for children, especially sons to carry forth the lineage or "Vansh." With the significant advancements in medicine, infertility can now be addressed with new medical technologies collectively referred to as Assisted Reproductive Technology (ART), such as in vitro fertilization (IVF) and intracytoplasmic sperm injection (ICSI). However the commercialized service of assisted reproductive technology have its own set of pros and cons involving moral and legal concerns that require proper regulation to curb and prevent the ill consequences.*

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<sup>1</sup> Author is a LL.M. student at Tamil Nadu Dr. Ambedkar Law University- School of Excellence in Law, India.

**Keywords:** *Commercial Surrogacy, Exploitation of Surrogate Mothers, Child Trafficking Racket.*

## I. INTRODUCTION

The birth of the world's first child, Louise Brown, on July 25, 1978, via in vitro fertilization marked a revolutionary step in combating infertility; it is seen as one of the greatest medical breakthroughs of the past century. In October 1978, Dr. Subhash Mukherjee from Kolkata (India) announced the birth of India's first test tube baby named Kanupriya, alias Durga using cryopreserved embryos. Different types of infertility exist, and in some cases, carrying a baby to term may be physically or medically impossible or undesirable. Thus, surrogacy becomes a pivotal option for fulfilling infertile couples' desire to have a child<sup>2</sup>. In India, two types of surrogacy practices prevail:

(i) Traditional/Natural/Partial Surrogacy; In traditional surrogacy, insemination is artificial. This involves a surrogate mother and either an intended father or an anonymous donor.

(ii) Gestational Surrogacy: Gestational surrogacy involves creating an embryo by fusing an egg and sperm from intended parents. This embryo is then placed into the surrogate mother's womb<sup>3</sup>.

Similar to other countries, India also practices two types of surrogacy arrangements:

- Altruistic Surrogacy: In this arrangement, the surrogate mother receives no financial rewards for her pregnancy or for relinquishing the child to the genetic parents except necessary medical expenses
- Commercial surrogacy is when the surrogate mother gets more than just the necessary medical expenses. It brings together science, society, services, & individuals to make it happen. It creates a win-win for both the infertile and the surrogate mother. The couple can finally achieve their most essential goal, & the surrogate mother gains an appropriate reward.

Renting out a womb means nurturing another couple's fertilized egg and carrying the baby with a specific purpose. This purpose could be money, service, or even altruistic reasons.

As per the proposed draft Assisted Reproductive Technology (Regulation) Bill 2016 the surrogacy and related terms are defined in the following ways:

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<sup>2</sup>R.S.Sharma (2014). *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*. [online] Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/pdf/IJMR-140-13.pdf> [Accessed 12 Sep. 2024].

<sup>3</sup> Sinha, S. *AN UNDERSTANDING OF SURROGACY: A LEGAL ANALYSIS IN INDIAN CONTEXT*.

(i) Surrogacy means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate;

(ii) Surrogate mother means a woman who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to full term and deliver the child to its biological parents; and

## **II. ASSISTED REPRODUCTIVE TECHNIQUE AND SURROGACY**

Assisted reproductive techniques should be considered only for those infertile women for whom it would be physically or medically impossible/ undesirable to carry a baby to the term. Surrogate mother should sign an agreement with the commissioning couple which shall have legal bindings on both the parties. Before signing the agreement, the written consent of her spouse shall be required. A woman seeking or agreeing to act as a surrogate shall be medically tested for diseases such as sexually transmitted diseases or otherwise, as may be necessary, and all other communicable diseases which may endanger the health of the child or children, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months. The commissioning parent(s) shall ensure that the surrogate and the child or children she delivers are appropriately insured until the time the child is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate is free of all health complications arising out of surrogacy. Surrogate mother must register as a patient in her own name in the hospital after signing the appropriate agreement. While registering, the surrogate mother must mention that she is a surrogate mother and should provide all the necessary information about the commissioning parents. Surrogate mother should not use or register in the name of the commissioning couple for whom she is acting as surrogate as this would pose legal issues, particularly in the untoward event of maternal death.

The birth certificate shall be in the name of the commissioning parents. The ART clinic should also provide a certificate to the commissioning parents giving the name and address of the surrogate mother. All the expenses of surrogate mother during the period of pregnancy and postnatal care relating to pregnancy should be borne by the commissioning couple. The surrogate mother would also be entitled a monetary compensation from the commissioning couple for agreeing to act as a surrogate. The exact value of the compensation should be decided by discussion between the commissioning couple. and the prospective surrogate mother or an appropriate formula may be developed by the Government to calculate the minimum

compensation to be paid to the surrogate mother. A surrogate mother should never donate her own oocyte to the commissioning couple. Surrogate mother as well as the donor shall relinquish all parental rights related with the offsprings in writing.

### III. EVOLUTION OF LEGISLATION

Background of proposed draft ART (Regulation) Bill After the birth of the first scientifically well documented test tube baby in 1986 in India, there was mushrooming of IVF clinics in the country. The services offered by some of these IVF clinics were questionable. The reason for this was a lack of ART guidelines as well as legislation on ART in the country, no accreditation, supervisory and regulatory body and no control of Government. Therefore, the Indian Council of Medical Research (ICMR) developed draft National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India<sup>4</sup>.

The Indian Council of Medical Research developed draft Assisted Reproductive Technology (Regulation) Bill in 2008 with the help of a Drafting Committee of ICMR. The draft Assisted Reproductive Technology (Regulation) Bill-2008 was subjected to extensive public debate not only throughout the country but globally by placing the draft Bill on the websites of the Ministry of Health & Family Welfare, Government of India and of the ICMR. Based on the comments received from various stakeholders including the comments from other countries and as per the recommendations of the Drafting Committee, the draft Assisted Reproductive Technology (Regulation) Bill was revised and finalized. The finalized version of draft Assisted Reproductive Technology (Regulation) Bill-2010 was sent to the Ministry of Health & Family Welfare, and has been revised by the Ministry of Law & Justice as Assisted Reproductive Technology (Regulation) Bill - 2013. In 2012, a study by the UN revealed the economic scale of the Indian surrogacy industry. It was found to be worth 400 million dollars a year, with over 3000, fertility clinics across the country<sup>5</sup>. The Assisted Reproductive Technology (Regulation) Bill-2014 has become a part of the Cabinet Note<sup>6</sup>.

The Government of India imposed a complete ban on commercial surrogacy in 2015. They also barred foreign nationals and NRIs from participating. Cost-wise, surrogacy in India is quite affordable when compared to developed countries like the USA. Many foreigners considered India a budget-friendly surrogacy option, with fewer regulations and an easier process for

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<sup>4</sup> R.S.Sharma (2014). *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*. [online] Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/pdf/IJMR-140-13.pdf> [Accessed 12 Sep. 2024].

<sup>5</sup> Sinha, S. (no date a) *AN UNDERSTANDING OF SURROGACY: A LEGAL ANALYSIS IN INDIAN CONTEXT*.

<sup>6</sup> R.S.Sharma (2014). *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*. [online] Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/pdf/IJMR-140-13.pdf> [Accessed 12 Sep. 2024].

obtaining babies. India has long been popular for medical tourism due to its excellent facilities at very low treatment costs. However, this practice was banned by the government in 2015 when it became clear that children were being treated as commodities, and women were exploited both financially and sexually. The Union Cabinet approved the Surrogacy Regulation Bill in 2016. This bill allows only Indian married infertile couples to use surrogacy services. The 2016 Bill differed in many areas from the 2014 version. However, it still did not fully address surrogacy laws and was not introduced in the Rajya Sabha. Later, an identical version of the 2016 Bill was reintroduced in the Lok Sabha as the Surrogacy (Regulation) Bill, 2019. It was passed by the Union Cabinet to protect women who were vulnerable due to their financial situations. Regarding middlemen and clinics, there were numerous cases where agents and doctors exploited mothers by delivering children at very low costs without proper post-delivery care for their health. Agents played a significant role in these cases by guiding couples towards surrogacy and providing women to deliver these services. The mothers were often the worst affected, receiving inadequate nutrition and poor-quality food—essential both during pregnancy and after childbirth.

#### **IV. THE SURROGACY (REGULATION) ACT, 2020**

The Surrogacy Act has introduced notable changes in the regulation. The Bill has removed the predefined definition of infertility, which was previously defined as the inability to conceive even after five years of unprotected intercourse. The drafting committee observed that a waiting period of five years before a couple can be for surrogacy is excessively long and unreasonable. This stipulation contradicted the main objectives of the Act. Commercial surrogacy has been completely banned. Only a woman who is a close relative of the couple and consents to be the surrogate mother is permitted. The Bill permits altruistic surrogacy and imposes an absolute ban on commercial surrogacy, including the sale and purchase of human embryos or gametes. This ensures women are not engaging in surrogacy due to financial difficulties or other incentives. However, the Act guarantees that proper medical facilities will be available to her, along with comprehensive medical insurance for a period of 36 months. It is now mandatory to register clinics where surrogacy takes place under the Act. This ensures timely regulation.

Offenders under this bill face fines up to Rs 10,00,000/- and imprisonment up to 10 years. A regulatory body is proposed at both national & state levels, named the National Surrogacy Board (NSB) and State Surrogate Board (SSB). Appropriate authorities will be appointed at central and state levels respectively. Their major function will include assisting government policy formulation and supervising surrogacy clinics.

The Surrogacy (Regulation) Bill, 2020, was approved by the Union Cabinet February 26, 2020, after the Select Committee released its report. The Surrogacy (Regulation) Act, 2021 was eventually enacted following the president's assent on December 25, 2021, and came into effect on 25, 2022<sup>7</sup>. Rather than banning commercial surrogacy outright, there is a need for stringent laws with strict regulations & enforcement addressing all stakeholders' concerns in the industry<sup>8</sup>.

**Eligibility criteria for surrogate:** According to the Act, a surrogate must be a woman who is married and has at least one child of her own. She must also be between twenty-five and thirty-five years old on the day of implantation. Further stipulations include that she should only be a close relative of the couple intending to marry. She is not allowed to provide her own gametes or act as a surrogate mother more than once in her lifetime. It also requires surrogates to obtain a certificate of physical and psychological fitness for surrogacy from a registered medical practitioner before proceeding with the procedure.

**Eligibility criteria for intending couple:** The Act states that the intended couple's age should be between twenty-three to fifty years for females and twenty-six to fifty-five years for males on the day of certification. It also requires that the intending partners have been married for at least five years and be nationals of India. Additionally, it specifies that the intending couple should not have previously had any children—whether biologically, through adoption, or through surrogacy—that are still living. Parents of children who are mentally or physically challenged, suffer from a life-threatening disorder, or are afflicted with a terminal illness for which no cure presently exists can seek approval from the relevant authorities. They must obtain a medical certificate from the District Medical Board before proceeding with surrogacy. The Act also permits divorced and widowed women between thirty-five to forty-five years old to serve as single commissioning parents for their children<sup>9</sup>.

## V. THE SURROGACY (REGULATION) ACT, 2021

It was enacted in India to create a legal framework for surrogacy, mainly focusing on altruistic surrogacy while banning commercial surrogacy. The Act came into force on January 25, 2022. It aims to safeguard the rights of surrogate mothers, intended parents, & the children born

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<sup>7</sup> Ranjit Malhotra, highlights and brief analysis of the surrogacy (regulation) bill, 2020 and suggested potential safeguards, INTERNATIONAL BAR ASSOCIATION, available at: <https://www.ibanet.org/article/B5C65969-4901-49A9-82CF-8DC4C8BEB1E2>

<sup>8</sup> Sinha, S. *AN UNDERSTANDING OF SURROGACY: A LEGAL ANALYSIS IN INDIAN CONTEXT*.

<sup>9</sup> Ranjit Malhotra, highlights and brief analysis of the surrogacy (regulation) bill, 2020 and suggested potential safeguards, INTERNATIONAL BAR ASSOCIATION, available at: <https://www.ibanet.org/article/B5C65969-4901-49A9-82CF-8DC4C8BEB1E2>

through surrogacy. The Act permits only altruistic surrogacy. This means surrogate mothers can't get any compensation beyond medical expenses and insurance coverage. This is to stop the exploitation of surrogate mothers & prevent surrogacy from becoming a business<sup>10</sup>.

**Eligibility Criteria:** Intended parents have to meet certain criteria, such as:

- Being legally married for at least five years.
- Providing a certificate of infertility from a District Medical Board.
- Getting a custody order from a Magistrate Court for the child born through surrogacy<sup>11</sup>.

**Ban on Commercial Surrogacy:** Commercial surrogacy is not allowed. This includes any payment to the surrogate mother beyond medical expenses. The Act also bans advertising surrogacy services. Violating this can lead to up to ten years in prison & fines.

**Rights of Surrogate Mothers and Children:** The Act highlights the rights of surrogate mothers, including their right to revoke consent until the embryo is implanted. Children born through surrogacy are considered the biological children of intended parents and have all rights and privileges like any natural child. The Surrogacy Regulation Rules were amended in 2022 and 2023. These amendments clarify certain provisions, such as insurance needs for surrogate mothers & limits on using donor gametes<sup>12</sup>.

**(A) Surrogate right to withdraw consent:**

As per the provisions of the Act, one shall seek or conduct surrogacy procedures unless he or she has informed the surrogate mother about all known side effects & after effects of such procedures and has obtained her written informed consent. This consent must be in a language she understands. The Act states that a surrogate mother can withdraw her consent for surrogacy before the embryo is implanted in her womb. It further mentions that no one, including any person, organization, surrogacy clinic, laboratory, or clinical facility, can coerce a surrogate mother to abort at any point in the surrogacy process except as allowed by law<sup>13</sup>.

**(B) Prohibition regarding abandoning of a child born through surrogacy:**

The Act bans the abandonment of a child born through surrogacy for any reason—be it a genetic

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<sup>10</sup> Kashyap, S., & Tripathi, P. (2022). The Surrogacy (Regulation) Act, 2021: A Critique. *Asian bioethics review*, 15(1), 5–18. <https://doi.org/10.1007/s41649-022-00222-5>

<sup>11</sup> Khuranaandkhurana.com. (2023). *The Legality of Commercial Surrogacy in India*. [online] Available at: <https://www.khuranaandkhurana.com/2023/06/16/legality-of-surrogacy-in-india-everything-you-need-to-know/> [Accessed 15 Sep. 2024].

<sup>12</sup> Narayan, G., Mishra, H. P., Suvvari, T. K., Mahajan, I., Patnaik, M., Kumar, S., Amanullah, N. A., & Mishra, S. S. (2023). The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?. *Cureus*, 15(4), e37864. <https://doi.org/10.7759/cureus.37864>

<sup>13</sup>(Section 10, Surrogacy Regulation Act, 2021)



defect, birth defect, any other medical condition, the child's gender, or if more than one child is conceived by intended parents. This stands whether in India or elsewhere. Also, the child will be treated as the biological offspring of the intending spouse. He or she will have all rights and privileges that would be given to a natural child under any existing law<sup>14</sup>.

### **(C) Prohibition of commercial surrogacy, exploitation of surrogate mothers & children born through surrogacy**

The Act forbids any private individual, organization, surrogacy clinic, laboratory, or clinical establishment from engaging in commercial surrogacy. It outlaws running rackets or organized groups to select surrogate mothers or using brokers to arrange such procedures at clinics or laboratories. Advertising for commercial surrogacy is banned too. Moreover, it mandates that no organization should abandon, disown or exploit children born through surrogacy. Exploiting surrogate mothers is also illegal under this law. The Act further prevents authorities from selling human embryos or gametes for surrogacy purposes and from operating any agency for selling or trading in human embryos or gametes.<sup>15</sup>

### **(D) Criticism of surrogacy regulation act, 2021**

Though well-intended, the Surrogacy (Regulation) Act, of 2021 has faced criticism for being too restrictive. Key concerns include: The Act doesn't allow single parents, LGBTQ+ individuals, or unmarried couples to participate in surrogacy. This has led to fears of discrimination & fairness. Enforcing the Act & ensuring that regulatory bodies function effectively remains tough. Reports of ongoing illegal surrogacy practices show a gap between what the law says and what happens. Some critics say that focusing too much on altruism might undermine women's autonomy—especially those who might want to pursue surrogacy for financial reasons, thus restricting their options.

## **VI. BANNING COMMERCIAL SURROGACY**

There's a worry that just stopping commercial surrogacy will push it underground, letting it stay illegal. Agreements, whether legal or not, will pop up if there are parents and women willing to be surrogates. If the law is well-regulated, this business won't do well in hidden markets, and surrogates won't get mistreated as much. Making surrogacy illegal for many people might lead them to find other ways. Now, doing surrogacy just out of kindness has its risks. In India, women usually don't get the final say in this stuff. Sometimes, a family might gently push a woman to be a surrogate when they feel the need for a child through surrogacy. Besides gentle

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<sup>14</sup> (Section 7, Surrogacy Regulation Act, 2021)

<sup>15</sup> (Section 35, Surrogacy Regulation Act, 2021)

nudging, emotional and mental harm could also push a relative to become a surrogate against her will. These chances go up because the Act says surrogacy is only for married or widowed women who can be easily taken advantage of if they're living alone<sup>16</sup>.

The ban on commercial surrogacy drives illegal activities underground where they become far more dangerous & less regulated. This lack of oversight leads to more children being abandoned. Women in desperate need of funds face increased risks due to hazardous medical procedures and the resulting underground market. Instead of outright prohibiting commercial surrogacy, laws should be enacted to protect the economic and health interests of these women. The bill fails to consider its stakeholders' true needs, opting instead for an odd form of moral conservatism that is poorly conceived. The intended beneficiaries—namely, intended parents who use surrogacy to raise a child & women whose rights to bodily autonomy and livelihood should be safeguarded deserve proper consideration. Expecting any woman, whether a close relative or not, to carry a child for nine months (plus recovery time) without compensation or acknowledgment for the physical and emotional toll is unreasonable. For women who are close relatives, altruistic surrogacy remains exploitative in a different way, and without remuneration, it becomes even worse. Compensatory surrogacy offers a more secure alternative for the women involved by ensuring their bodily autonomy and right to livelihood are not compromised; however, more extensive analysis is necessary<sup>17</sup>.

### **(A) War on Women**

The UN has received a stark warning about the increasing global incidence of sex-selected abortions and prenatal sex selection. Speaking on the issue of growing 'son preference,' demographics expert Dr. Eberstadt from the American Enterprise Institute termed this trend a 'Global War Against Baby Girls.' China's demographics have been permanently skewed by the practice, and India is following the same path. Additionally, most African countries are becoming more vulnerable to this preference as well. In certain areas, there is a three to two ratio of boy to girl births. As these boys grow up into men, the practice of trafficking women will likely worsen. Furthermore, this phenomenon is not limited to developing countries; it is increasingly seen in Latin America and Eastern Europe too. Paradoxically, rising levels of education have exacerbated the problem in some nations. Making sex selection abortions illegal worldwide may not solve the issue, as seen in South Korea, where it made the practice even

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<sup>16</sup> Paramjit S. Jaswal & Jasdeep Kaur, *Surrogate Motherhood in India: An Analysis of Surrogacy (Regulation) Act, 2021*, 4 *Shimla L. Rev.* 1 (2021).

<sup>17</sup> Kashyap, S. and Tripathi, P. (2022). The Surrogacy (Regulation) Act, 2021: A Critique. *Asian Bioethics Review*, [online] 15(1), pp.5–18. doi:<https://doi.org/10.1007/s41649-022-00222-5>.

more popular. Dr. Eberstadt cautioned that the world is 'moving to the realm of science fiction,' with the ratio of boys to girls already at levels 'beyond nature'<sup>18</sup>.

Until 2021, finding women to act as surrogate mothers in India was quite easy. Excellent medical facilities were available at a much lower cost compared to developed countries. Factors that attracted potential parents included flexible rules, control over women's bodies to suit their wishes, and loopholes in the law. Inadequate governance over surrogacy and widespread unethical medical practices made India a top global destination for surrogate parenting. Reports emerged of deaths among surrogate mothers and egg donors, custody battles over children, abandoned or stranded (disabled) children, and trafficking and exploitation of women and girls. As a result, India prohibited commercial surrogacy with the Surrogacy (Regulation) Act, 2021. The law now only permits altruistic surrogacy and allows non-resident Indians (NRIs) to use surrogacy in India.

Surrogate mothers from a high caste, specific religion, with attributes such as fair skin and higher body weight were preferred by intended parents and hence came at an additional “price.” Field work conducted by Sheela Suryanarayanan, interviewing surrogate mothers and medical practitioners revealed that Muslims were not preferred as surrogate mothers in Gujarat. Madeeha and Rabina (surrogate mothers) were transferred from there to Aluva in Kerala due to demand from intended parents visiting Kerala from Arabian Gulf countries for vitro fertilization (IVF) clinics. Madeeha was carrying twins but the intended parents wanted only one baby boy. Her agent told her she should abort the other child. She refused & gave birth to twins, but her friend Rabina was not so lucky—one of the foetuses in her womb was aborted.

Another story of Ujwala: after her first surrogacy, Ujwala needed Rs. 50,000 more to buy a house. The clinic asked her to become a surrogate mother again. This time, she carried three foetuses (two females and one male), but the intended parents didn't want the second female. An in-utero selective abortion was done, much to Ujwala's disappointment. This procedure is risky & can cause miscarriage of all babies. Ujwala bled profusely & was admitted to an intensive care unit (ICU). She remembered her sobbing son standing outside the ICU, watching her through a glass door, thinking she was going to die. She lost all the babies & received Rs. 50,000. Due to post-surrogacy medical treatment costs, she could not buy her house. She felt exploited & betrayed and said the clinic had played around with her life. The surrogate pregnancies made it impossible for her to work like before.

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<sup>18</sup> for today's Christian doctor triple helix. (2007). Available at: [https://admin.cmf.org.uk/pdf/helix/win07/helix\\_38.pdf#page=17](https://admin.cmf.org.uk/pdf/helix/win07/helix_38.pdf#page=17) [Accessed 13 Sep. 2024].

Trafficking of women was rampant when there was no law on surrogacy. A 13-year-old from Jharkhand was trafficked to Delhi and raped & enslaved by the traffickers. She delivered six times (Hindustan Times 2015). She breastfed the children for six months before they were given away. Rights activists rescued her & she filed a complaint with the child welfare committee in her home district when she was a 31-year-old in 2015. The same network lured girls into work as housemaids or forced them into prostitution for trafficking them for surrogacy purposes. All this brings us to societal pressure on having children. Couples choosing to live without children are often labelled abnormal. Women carry a double burden as targets of abuse and subjected their bodies to treatments regardless of infertility status. Women feel pressured to try technological reproduction just because it exists. They walk into a dark tunnel hoping for light at its end without realizing it keeps getting longer due to doctors not fully informing them about depression from hormones or low IVF success rates<sup>19</sup>.

#### **(B) Commodification of children**

Surrogacy arguments often link the practice to the commodification of children, which many view as morally unacceptable and unlawful. This concern specifically arises in commercial surrogacy. According to international law, the sale of children is prohibited. Article 35 of the Convention on the Rights of the Child (CRC) states that ‘States Parties shall take all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.’ Additionally, Article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography specifies that: ‘Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.’ So, according to these rules, if commercial surrogacy involves selling children, then it should not be allowed<sup>20</sup>.

Satz explains that surrogacy agreements do not result in intended parents becoming owners of the resulting children. Children born from surrogacy are not expendable objects. Parents cannot do whatever they want with their children. They cannot sell or destroy them as they may do with other objects. Children do not become slaves to their intended parents. Intended parents must adhere to the same laws and human rights responsibilities as those binding biological or adoptive parents. Poor women may be forced to work as surrogates due to their financial

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<sup>19</sup> Sheela Suryanarayanan (2022). *Surrogacy Biomarkets in India: Troubling Stories from before the 2021 Act*. [online] The India Forum. Available at: <https://www.theindiaforum.in/article/surrogacy-biomarkets-india-troubling-stories-2021-act> [Accessed 15 Sep. 2024].

<sup>20</sup> Martín Hevia, *Surrogacy, Privacy, and the American Convention on Human Rights*, 5 **J.L. & Biosciences** 375 (2018).

situation, although this work need not always be exploitative. The main reason for exploitation is the current lack of legislative protections and regulatory monitoring for commercial surrogates<sup>21</sup>.

### (C) Reported Cases

The Central Bureau of Investigation (CBI) has uncovered a **child trafficking ring** linked to fertility clinics in New Delhi, revealing a network that acquired babies from surrogate mothers. This highlights the persistent dangers associated with illegal practices in services, despite existing legal restrictions<sup>22</sup>.

In Thane, eight individuals, including six women, have been apprehended by the police for operating a child trafficking and surrogacy racket. Rakhi Babre, aged 38, identified as the mastermind of this operation, formed a network of agents who recruited impoverished women from slum areas to become surrogate mothers for a fee. The group has sold 18 unwanted babies over two years, all under six months old, for Rs 5 lakh each.

Babre, residing in Suryanagar, Vikhroli, would employ these poverty-stricken women and connect them with childless couples. Additionally, these women were compelled to frequently donate their eggs, essential for the surrogacy process. Babre herself had experience as a surrogate mother and decided to turn it into a full-time business by assembling a team. This team of around 20 individuals spread across the state and established contacts with doctors in various hospitals and clinics. They also enlisted clerks at orphanages who would refer childless couples to Rakhi. Given that the legal adoption process in the country is lengthy and complex, many couples opted for this quicker alternative. Rakhi guaranteed to provide infants within a week, whereas the legal adoption process through orphanages could take a year or more.

Aside from the surrogacy scam, the gang also dealt with unwanted or illegitimate babies. Women or families unable to keep their babies due to financial constraints or circumstances such as rape would approach Rakhi to hand over their babies for a fee. She sold each infant for Rs 5 lakh and charged around Rs 2 lakh for supplying surrogate mothers. Some of these children were even sold to begging syndicates. In one instance, a 35-year-old woman came to Mumbai intending to sell her six-month-old baby conceived after being raped by her stepson. She contacted Rakhi who arranged a buyer for the child. This woman was also arrested in connection

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<sup>21</sup> : Parry B, Ghoshal R. Regulation of surrogacy in India: whenceforth now? *BMJ Glob Health* 2018;3:e000986. doi:10.1136/bmjgh-2018-000986

<sup>22</sup> TNN (2024). *IVF centres turn fertile grounds for illegal acts*. [online] The Times of India. Available at: <https://timesofindia.indiatimes.com/city/delhi/ivf-centres-turn-fertile-grounds-for-illegal-acts/articleshow/109295918.cms> [Accessed 15 Sep. 2024].

with the case," stated an officer from Thane crime branch. DCP Abhishek Trimukhe of Thane Crime Branch confirmed the arrests and noted that additional arrests were anticipated"<sup>23</sup>

#### **(D) Problems faced in opting surrogacy transnationally**

Baby Manji Yamada was born through surrogacy agreement on July 25, 2008 in Anand Gujarat through a surrogacy arrangement. This involved Dr. Yuki Yamada and Dr. Ikufumi Yamada, who are a Japanese couple. The surrogate mom was from India, and the sperm was from Dr. Ikufumi. The egg came from an anonymous donor. After her birth, there were issues between Baby Manji's biological parents. Dr. Yuki Yamada went back to Japan before Baby Manji was born. This made a big mess about who would take care of the child and what nationality she would have since India and Japan didn't have clear rules about surrogacy then. Once Baby Manji was born, she stayed with her grandma in India. Her grandma went to the Supreme Court of India to ask for custody of Baby Manji. At the same time, her biological dad wanted to take her back to Japan. The Supreme Court saw that India didn't have specific laws about surrogacy, which caused problems. In the end, they let Baby Manji leave India with her grandma and dad. The Baby Manji case showed that India lacked detailed laws on surrogacy. It pointed out the need for clear rules about parentage, custody, and the rights of kids born via surrogacy. This case also showed how tough it can be for foreign couples doing surrogacy in India, especially regarding getting citizenship and legal status for the baby. The Japanese government didn't recognize surrogacy, which made it hard to get travel papers for Baby Manji. This led to the Surrogacy (Regulation) Act, 2021 which aims to manage how surrogacy is practiced and protect everyone involved<sup>24</sup>.

The case under discussion is **Paradiso and Campanelli v Italy** (Paradiso I). This matter involved an arrangement between an Italian couple and a Russian company, Rosjur Consulting. Based on the agreement, neither the prospective parents nor the surrogate mother contributed genetic material. A surrogate mother in Russia delivered the child, and the birth certificate was issued listing the intended parents. The Italian consulate in Russia provided the necessary documents, enabling the child to be taken to Italy. Upon arrival, Paradiso and Campanelli attempted to have the birth certificate recognized. However, recognition was denied due to falsified documentation. The couple faced accusations of misrepresenting their marital status

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<sup>23</sup> Sayed, N. (2017). *8 held for selling babies, running surrogacy racket*. [online] Mumbai Mirror. Available at: <https://mumbaimirror.indiatimes.com/mumbai/crime/8-held-for-selling-babies-running-surrogacy-racket/articleshowprint/60847862.cms?prtpage=1> [Accessed 15 Sep. 2024].

<sup>24</sup> S. Kiruti Ratchaya (2021). *Surrogacy in India: Baby Manji Yamada Case and Surrogacy Regulation Bill, 2020 - Libertatem Magazine*. [online] Libertatem Magazine. Available at: <https://libertatem.in/blog/surrogacy-in-india-baby-manji-yamada-case-and-surrogacy-regulation-bill-2020/> [Accessed 15 Sep. 2024].

and violating adoption regulations by bringing in the child without proper authorization. A juvenile court ruled that the child was abandoned and eligible for adoption since his biological parents were unidentified. The Court of Appeals confirmed this ruling, handing over custody of the child to social services and prohibiting any further contact with the couple. It was determined that Paradiso and Campanelli did not have standing to represent the child. Nonetheless, there was an argument that this situation violated Article 8 of the European Convention on Human Rights due to interference with the couple's family life. The Court emphasized that "the State should prioritize the best interest of the child over other considerations such as genetic connections." Although Ms. Paradiso and Mr. Campanelli had interacted with the baby for only six months, it sufficed for them to establish family ties. The State was urged to make every effort to restore these ties<sup>25</sup>.

The European Court of Human Rights addressed the case of *K.K. and Others v. Denmark* (application no. 25212/21), which focused on Denmark's refusal to allow K.K. to adopt twins C1 and C2 as a "stepmother." The children were born to a Ukrainian surrogate mother who received payment under a contract with K.K. and her partner, the biological father. Danish law prohibits adoption in cases where the consenting party has received payment<sup>26</sup>.

#### **(E) Abusive practices in the context of surrogacy**

For instance, convicted sex offenders from Australia & Israel surrogate mothers from India and Thailand. Additionally, a wealthy Japanese man employed 11 surrogate mothers, resulting in the births of 16 infants in Thailand & India. There's also an instance where a surrogacy-born infant with disabilities was abandoned in Thailand, and cases where "excess" surrogate-born infants from twin births in India were either abandoned or sold.

Commercial surrogacy networks sometimes transfer surrogate mothers even while they are pregnant across national borders to evade domestic laws. One case involved 15 Vietnamese women being found and freed by Thai authorities, which led to human trafficking charges within a baby-farming scheme. Many of these abuses happen in unregulated settings. Often, intending parents from Western countries use for-profit intermediaries to contract vulnerable surrogate mothers in developing nations<sup>27</sup>.

Having strict rules for surrogacy is super important. It helps keep surrogate mothers safe. If we

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<sup>25</sup> Martín Hevia, *Surrogacy, Privacy, and the American Convention on Human Rights*, 5 **J.L. & Biosciences** 375 (2018).

<sup>26</sup> *K.K. and Others v. Denmark*, App. No. 25212/21, **ECHR 377** (2022), 06 Dec. 2022.

<sup>27</sup> U.N. Human Rights Council, Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, U.N. Doc. A/HRC/37/60 (Jan. 15, 2018).

don't have these rules, people who run surrogacy agencies just for money & the difficult demands of clients will cause big problems for surrogate mothers. When you look at it from a worldwide angle, protecting these mothers' rights is tied to even deeper social unfairness. Surrogate mothers are women too, and their rights can't be pushed aside or forgotten. The arguing and judgment about morals and the lack of action from the government make it hard to protect these mothers' rights. So, we need laws, how we put them into practice, rules from officials, and what society believes in, all working together to sort things out<sup>28</sup>.

## VII. RECOMMENDATION

**Regulatory Framework and International Cooperation:** Setting up legal framework for commercial surrogacy. This should cover the rights and duties of everyone involved, like surrogates, intended parents, and medical experts. In places like India, there's been a boom in surrogacy because of legal gaps, which can lead to exploitation and legal headaches. Intending parents go abroad for surrogacy services. So, having international agreements on surrogacy laws can help dodge legal battles and protect surrogates and kids born this way. Different countries have different rules about surrogacy, which can mess things up for intended parents & surrogates. Trying to draft uniform law to deal surrogacy matters around the globe will prevent conflict and confusion<sup>29</sup>.

**Informed Consent and Empowerment of Surrogates:** Make sure surrogates know all about the medical stuff, risks, and what surrogacy means. They need to know their rights and the potential for exploitation. Many might not get how risky and stressful it can be, leading to bad outcomes, measures shall be taken to empower surrogates so they have a say in the process. Give them legal help & support throughout their journey. Fixing power imbalances is key to stopping exploitation and making sure surrogates are treated well<sup>30</sup>.

**Monitoring & Oversight:** Create independent groups to keep an eye on surrogacy practices and make sure they follow ethical standards. Regular checks on clinics and agencies can stop shady practices and make sure surrogates get fair pay and care<sup>31</sup>.

**Support Services:** Offer psychological and medical support services for surrogates before,

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<sup>28</sup> Yue Zhao, *Protection of Rights and Legal Remedies for Surrogate Mothers in China*, 12 Int'l J. Hum. Rts. 45 (2023).

<sup>29</sup> Brandão, P. and Garrido, N. (2022). Commercial Surrogacy: An Overview. *Revista Brasileira Ginecologia e Obstetrícia*, [online] 44(12), pp.1141–1158. doi:<https://doi.org/10.1055/s-0042-1759774>.

<sup>30</sup>Jutharat Attawet, Ethar Alsharaydeh and Brady, M. (2024). Commercial surrogacy: Landscapes of empowerment or oppression explored through integrative review. *Health Care For Women International*, [online] pp.1–19. doi:<https://doi.org/10.1080/07399332.2024.2303520>.

<sup>31</sup> Hibino, Y. (2023). The advantages and disadvantages of altruistic and commercial surrogacy in India. *Philosophy, Ethics, and Humanities in Medicine*, 18(1). doi:<https://doi.org/10.1186/s13010-023-00130-y>.



during, and after the process. This includes counselling and health care to deal with the emotional & physical toll that comes with being a surrogate.

**Social Awareness & Education, Public Awareness Campaigns:** Spread the word about what commercial surrogacy really involves, including the risks & ethical issues. Educating people can reduce stigma and foster a better understanding of surrogacy as an option for building families while pointing out the need for ethical practices<sup>32</sup>.

**Research & Data Collection:** Push for ongoing research into how surrogacy affects women and children, especially in developing countries. Insights from data can guide policy decisions and help establish fairer practices within the industry.

**Establishment of child care facility for abandoned child:** An institution shall be set up to take care of a child being abandoned by the intending parents by reasons of a child born with a disability, gender reasons, or any other reasons.

## VIII. CONCLUSION

Since the dawn of time, surrogacy has been a way to have a child. But now, with advances in science & technology, it's used not just by infertile couples but also by anyone wanting a child. Technology has made contraception simpler and cheaper; this has created a market to meet that demand. The growing use of surrogacy has sparked legal, ethical, moral & religious debates worldwide. Surrogacy involves more than two people, each whom can claim to be the child's parent. This can lead to conflicts over who should hold parental rights and responsibilities. It's an issue inherent in surrogacy, and such problems are hard to avoid.

On one side, surrogacy is a blessing for infertile couples. But on the flip side, its commercialization brings various problems. While commercial surrogacy supports the reproductive rights of infertile women, making it illegal violates human rights. Developing countries permitting commercial surrogacy may better protect women's reproductive freedoms. Regulating surrogacy practices for mutual benefits is essential. Without proper regulations, a global black market for surrogacy services will persist, exposing women to considerable risks like trafficking & exploitation. Legal contracts must evolve to safeguard surrogate mothers' interests, considering that personal circumstances can change over time. These contracts should

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<sup>32</sup> Agarwal, A. (2022). *SURROGACY IN INDIA The last two decades have witnessed a dramatic surge in cases of commercial surrogacy in India, whereby women – predominantly from impoverished households or marginalised communities – have resorted to renting their wombs in exchange for monetary compensation. India has fast emerg.* [online] LinkedIn.com. Available at: <https://www.linkedin.com/pulse/surrogacy-issues-india-apurva-agarwal> [Accessed 15 Sep. 2024].

include clauses about medical insurance and emergency needs for the surrogate mother<sup>33</sup>. While India's surrogacy industry is well-established, banning it now could create implementation challenges & drive the business underground, escaping government oversight. India faces rising cases of male infertility where banning commercial surrogacy takes away a couple's right to have a child. Prohibitionary measure of commercial surrogacy ends up paving way for underground illegal surrogacy businesses and the exploitation of surrogates, rather commercial surrogacy shall be made permissible with established laws to regulate the same in such a way that people don't resort to illegal rackets and prevent exploitation.

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<sup>33</sup> **Virginie Rozée, Sayeed Unisa & Elise de La Rochebrochard**, *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, **20** BMC Women's Health 234 (2020), <https://doi.org/10.1186/s12905-020-01087-2>