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# Empowering Parenthood: Paving the way for Legalized Commercial Surrogacy in India through the Surrogacy Bill

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VIBHI H. JAIN<sup>1</sup>

## ABSTRACT

*The examination of the Surrogacy Bill 2021 involves a comprehensive exploration of its key provisions. On the commercial front, the study scrutinizes the regulation of surrogacy agencies, the intricacies of compensating surrogate mothers, and the prohibition of commercial surrogacy for profit. Simultaneously, it delves into the reproductive rights dimensions, assessing eligibility criteria for intended parents, consent and autonomy of surrogate mothers, and safeguards against exploitation and coercion.*

*This article examines the laws governing commercial surrogacy, paying particular attention to how the Surrogacy Bill may affect things. Important measures pertaining to the commercial side of surrogacy are introduced in this bill, such as surrogacy agency regulation, surrogate mother compensation plans, and the outlawing of profit-driven commercial surrogacy.*

*Additionally, the study examines the moral implications of commercial surrogacy while taking feminist and societal perspectives into account. It also examines possible objections and challenges to the bill, addressing issues with its overall effectiveness, enforcement, and exploitation. The study's findings provide insights into how commercial surrogacy will develop in the future. As the study progresses, it predicts future developments in surrogacy law and makes suggestions for possible revisions and enhancements.*

**Keywords:** Surrogacy bill, commercial surrogate, legality, reproductive rights.

## I. INTRODUCTION

The role of parenthood has changed significantly in the last several years, particularly with the introduction of assisted reproductive technologies. Leading this change is the Surrogacy Bill of 2021, a landmark piece of legislation aimed at negotiating the complex relationship between commercial interests and reproductive rights. This study begins with a thorough examination of this important piece of legislation in an effort to understand the intricate dynamics and ramifications that come with surrogacy regulation.

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<sup>1</sup> Author is a student at St Joseph's College of Law, India.

By addressing crucial aspects of commercial and reproductive rights, the Surrogacy Bill 2021 plays a crucial role in regulating surrogacy. The bill aims to address the major issue of surrogate mother exploitation by enacting strict regulations that regulate financial transactions and ethical considerations. It places a strong emphasis on defending the legal rights of intended parents and surrogate mothers, outlining their respective roles and duties and guaranteeing just compensation in addition to all-encompassing support the goal of the legislation is to establish a fair legal framework that forbids exploitation or coercion in any way and promotes moral behavior among surrogacy providers. The bill also considers the global aspects of surrogacy, providing measures to control the consequences across borders and guarantee parental rights are recognized. The Surrogacy Bill 2021 seeks to provide a comprehensive legal framework that protects the rights of all parties involved while also fostering transparency, justice, and moral behavior in the rapidly changing field of assisted reproductive technologies. It does this by taking into account a variety of social, cultural, and medical contexts.

### **(A) Understanding the Term Surrogacy**

Surrogacy is a complex and evolving concept that involves a woman, known as the surrogate, carrying and giving birth to a child for another person or couple.<sup>2</sup> This arrangement typically occurs when individuals or couples face challenges in conceiving and carrying a pregnancy to term on their own.

There are two different kinds of surrogacy: "Traditional Surrogacy; Gestational Surrogacy."

Traditional Surrogacy: "The insemination in this scenario is artificial and is done between a surrogate mother and either by intended father or an anonymous donor."

Gestational surrogacy is defined as "It is done by creating an embryo by fusion of an egg and sperm which is produced by intended parents and then is transferred into the womb of the surrogate mother

## **II. HISTORY OF SURROGACY LAWS IN INDIA**

Following India's 2002 legalization of commercial surrogacy, infertile couples unable to conceive naturally began to place more and more requests for surrogates. The demand from both domestic and international couples was driving up the surrogacy market. India has become the global hub for surrogacy due to appropriate policies and regulations. In 2005, the Indian Council for Medical Research, or ICMR, drafted a set of guidelines. However, there was no Act

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<sup>2</sup> Shenfield, F., Pennings, G., Cohen, J., Devroey, P., de Wert, G. and Tarlatzis, B. (2005). ESHRE Task Force on Ethics and Law 10: Surrogacy. *Human Reproduction*, 20(10), pp.2705–2707. doi: <https://doi.org/10.1093/humrep/dei147>

in place to control and govern the same.

In the case titled "Baby Manjhi Yamada vs. Union of India"<sup>3</sup> the issue involved "obtaining travel documents for a baby of Japanese parents who was conceived and born in India by means of commercial surrogacy." According to the Supreme Court, India permits commercial surrogacy. This ruling, in turn, came about at the same time that the "Assisted Reproductive Technology Bill" was drafted in 2008. However, no action had been taken to draft the 2008 Bill before Parliament, so the "Law Commission of India to rise up the issue of surrogacy" was encouraged for additional investigation. The Law Commission of India then filed a report in 2009 on legislation to control surveillance and address related issues. Before beginning the surrogacy procedure, the ICMR updated the guidelines in 2010 and proposed a formal contract between the intended parents, surrogate mother, and ART clinic. The Ministry of Health and Family Welfare also provided recommendations for amending the Act Bill draft.

### **III. THE PRICE OF PARENTHOOD: COMMERCIAL SURROGACY**

In commercial surrogacy, the surrogate mother receives payment for her services in addition to reimbursement for her medical costs. This type of surrogacy has always been a contentious subject, raising moral and ethical concerns. Commercial surrogacy first started to operate in India in 2002 and has since grown rapidly. Another name for the practice of commercial surrogacy is "rent a womb."

Back in 2002 it was completely legalized. The main goal of the initiative was to improve medical tourism in India, which led to India being known as the "hub of surrogacy."

The low cost of commercial surrogacy in India and the lack of strict laws governing it are the main causes of its widespread use. The CII Report from 2012 states that the surrogacy market brought in up to \$2 billion annually. But the business of commercial surrogacy in India began to raise concerns about unethical practices, which benefited commercial agencies and middlemen the most at the expense of surrogate mothers' exploitation, the abandonment of surrogate children, and rackets like the organ trade and the import of embryos.<sup>4</sup> The surrogacy laws were enacted as a result of these worries. The Surrogacy Regulation Act, 2021, which regulates all forms of surrogacy in India, went into force on January 25, 2022. The Act outright forbids the legalization of commercial surrogacy but legalized altruistic surrogacy.

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<sup>3</sup> Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518 at 521,

<sup>4</sup> Shikha Goyal (2020) Surrogacy in India: History, impact on poor and facts, Jagranjosh.com. Available at: <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1> (Accessed: 16 January 2024).

#### **IV. SURROGACY REDEFINED: THE SURROGACY REGULATION ACT, 2021**

The Surrogacy Regulation Act of 2021<sup>5</sup> was passed in order to safeguard the surrogate mother and child against unethical behavior. It prominently bans commercial surrogacy and promotes altruistic surrogacy. The Act allows only Indian married couples who are infertile to use altruistic surrogacy. The Act emphasizes that in surrogacy, sex identification or selection cannot be offered

Commercial surrogacy is not at all like altruistic surrogacy. Altruistic surrogacy involves the intended parents designating a surrogate mother who is related to them or their friends. Additionally, the surrogate mother in this type of surrogacy receives no payment other than medical expenses.

##### **"Charting the Course for Legal Recognition of Commercial Surrogacy"**

Through commercial surrogacy, couples can develop their relationship their family that would not have been possible without a number of circumstances. These circumstances may include the woman's decision to use surrogacy to highlight her medical circumstances.

In essence, surrogate mothers receive payment and care after giving birth to intended parents. Nonetheless, the contentious issues surrounding commercial surrogacy are deeply patriarchal and aim to violate surrogate moms' autonomy and physical integrity. The Bill disregards the intersectional aspects of how the prohibition on commercial surrogacy would affect women's autonomy over their bodies.<sup>6</sup> The altruistic surrogacy model puts a strong emphasis on the fact that it expects women to endure the physical, psychological, and labor-intensive aspects of childbirth only out of compassion, which is not at all consistent with current reality.<sup>7</sup>

Every human being needs personal autonomy and bodily integrity, and surrogate mothers should never be denied these rights. In India, there are conservative ideologies that claim commercial surrogacy is about selling newborns to make money, but in reality, it helps couples start a family. The intended parents are responsible for covering the costs of the medical care the surrogate mother receives after the child is delivered, and the surrogate mother receives diligent care from the intended parents. In actuality, intended parents or other individuals will

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<sup>5</sup> THE SURROGACY (REGULATION) ACT, 2021

<sup>6</sup> Sanvi Bhatia,(2021) India's New Surrogacy Regulations Bill fall short of protecting bodily autonomy and guaranteeing reproductive liberty, LSE, <https://blogs.lse.ac.uk/humanrights/2021/04/21/indias-new-surrogacy-regulation-bill-falls-short-of-protecting-bodily-autonomy-and-guaranteeing-reproductive-liberty/> ( Accessed: 16 January 2024).

<sup>7</sup> Karan Babbar(2022), The Surrogacy Act 2021: Another Attempt to Reproduce A Heteronormative Patriarchal Society? FEMINISIMINDIA <https://feminisimindia.com/2022/02/02/the-surrogacy-regulation-act-2021-another-attempt-to-reproduce-a-heteronormative-patriarchal-society/> ( Accessed date 17 2024)

be paying for the services, reproductive labor, discomfort, and other pregnancy-related items that are sold in commercial surrogacy instead of the baby.<sup>8</sup>

The use of commercial surrogacy is a great way for intended parents to expand their families. Additionally, commercial surrogacy honors surrogate moms' autonomy and physical integrity. The right to maintain their physical integrity and their freedom to choose whether or not to become a mother is guaranteed to surrogate mothers. The surrogate mother decides to give birth to a child for intended parents in order to earn money by exercising her right to bodily integrity and autonomy. Using commercial surrogacy is a great way for intended parents to expand their households. Additionally, commercial surrogacy honors surrogate moms' autonomy and physical integrity. The right to personal autonomy and bodily integrity is granted to surrogate mothers. To determine whether they wish to become parents or not. The surrogate mother decides to give birth to a child for intended parents in order to make money by exercising her right to bodily integrity and personal autonomy. The surrogate mother has the option to consent to the procedures being performed on her body and to profit financially from them. Furthermore, no law can ever limit or eliminate this right that is, the right to one's own body and autonomy as these. Surrogate mothers' bodily integrity and personal autonomy are flagrantly violated when commercial surrogacy is prohibited and charitable surrogacy is permitted. The foundation of a woman's fundamental right to equality and privacy, with regard to private matters of physical and psychological integrity, is her ability to make autonomous decisions about her own body and reproductive functions.<sup>9</sup>

Therefore, the Act's prohibition on commercial surrogacy is unconstitutional due to the violation of individual autonomy and bodily integrity. Legalization of commercial surrogacy is primarily motivated by surrogate mothers' desire to improve their financial situation. An agreement reached between the intended parents and the surrogate mother in order to accomplish a goal is known as commercial surrogacy. In exchange for fulfilling her Act-mandated obligations, the surrogate mother receives financial compensation. A ban on commercial surrogacy would force surrogate mothers out of their jobs and worsen their already precarious financial situations. The Act has a possibility to worsen the situation for surrogates by creating a black market where commercial surrogacy may operate clandestinely. Since their socioeconomic circumstances make them more likely to choose commercial surrogacy. Since commercial surrogacy is now legal, women can now use it to help them out of financial hardship

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<sup>8</sup> Sanjana Dwivedi, Requisites for Legalization of Commercial Surrogacy in India: Small Reference to Surrogacy in the United States, IPLEADERS , <https://blog.ipleaders.in/requisites-for-legalization-of-commercial-surrogacy-in-india-small-reference-to-surrogacy-laws-in-united-states/> ( Accessed date 17 2024)

<sup>9</sup> Articles 3 and 17 of the ICCPR.

by undergoing the process with their full consent.

The right to reproductive health of the surrogate mother will also be safeguarded by legalizing commercial surrogacy. For instance, after pregnancy any health issue occurs then by virtue of contract intended parents will be in obligation to provide treatment of the highest attainable standard to the surrogate mother thereby scouring the right to health of the highest attainable standard of surrogate mother. An outright ban on commercial surrogacy would deny the surrogate her right to health, and in the case of altruistic surrogacy, the intended parents would not be required to protect the surrogate mother's right to health. Children born into legal commercial surrogacy will also have the same rights to know their identity and parentage, as well as legal protection. This will be achieved through transparent and easily accessible information. Additionally, it will defend the legal rights of surrogate moms and intended parents.

The Act was created with the idea that selfless surrogacy would lessen the exploitation of surrogate mothers. It is highly likely that surrogate mothers will be forced to participate in the surrogacy process by family members, even in cases of selfless surrogacy. On the other hand, a carefully drafted contract will lessen surrogate mothers' exploitation.

The right to personal autonomy, bodily integrity, free consent, and health of surrogate mothers is thus being jeopardized by the prohibition on commercial surrogacy. While commercial surrogacy is not immoral, its main goal is to assist intended parents in expanding their families and surrogate mothers in earning a living.

### **"Harmonizing Surrogacy Laws: Towards an Ethical, Inclusive, and Globally Informed Future"**

A number of suggestions come to light when navigating the complexities of surrogacy laws, especially in the Indian context, in order to create a more solid and morally sound framework. First and foremost, it is essential to establish a specific regulatory body. This body would act as a tactical supervisor, guaranteeing ethical standards and uniform enforcement of surrogacy laws. Concurrently, extensive educational initiatives ought to be put in place, giving intended parents and surrogate mothers a deep comprehension of the medical, emotional, and legal aspects of surrogacy agreements.

Surrogacy laws should be subject to periodic reviews in order to ensure their continued relevance and efficacy and to make necessary adjustments to reflect changing social, medical, and legal contexts. It becomes imperative to require psychological counseling for all parties involved, providing essential emotional support during the surrogacy process and anticipating

and resolving potential issues before they arise.

Examining and advocating for non-commercial options, like selfless surrogacy, is in line with moral principles and cultural norms. In order to stay up to date with surrogacy practices around the world, it is imperative to promote international collaboration and information exchange. This will enable lawmakers to craft legislation that is both informed and nuanced, taking into account the rapidly changing and diverse landscape of assisted reproductive technologies.

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