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# The Shadow Market of Motherhood: The Surrogacy (Regulation) Act, 2021 and the Unseen Growth of Covert Practices

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## ABSTRACT

*This paper critically examines the Surrogacy (Regulation) Act (2021) and its impact on surrogacy practices in India, particularly the rise of covert surrogacy arrangements following the prohibition of commercial surrogacy. By analyzing the historical context of surrogacy in India and the legal framework of the SRA 2021, this article aims to explore how the Act's restrictive measures have led to unintended detrimental consequences. While current legislation seeks to protect surrogate mothers from exploitation through commercial surrogacy agreements, this has uncalculatedly driven the industry underground, causing more harm than good.*

*Additionally, this paper examines cross-border legal disputes, shedding light on issues of conflicting parentage and citizenship laws, which have rendered children born via surrogacy in a state of legal uncertainty. Indicating that a more equitable and rights-oriented approach to surrogacy regulation is required for better management of this practice. Instead of an outright ban, a regulated system that ensures ethical oversight, safeguards surrogate rights, and enforces contractual protections would be more effective. By offering policy recommendations to address the enforcement gaps and legal ambiguities created by the SRA 2021, this paper advocates for a framework that upholds both reproductive autonomy and ethical protections in surrogacy arrangements.*

**Keywords:** Surrogacy, Surrogacy market, Surrogate rights, covert practices, surrogate mothers

## I. INTRODUCTION

Surrogacy is defined as a process through which a surrogate mother carries and delivers a child on behalf of someone else, most commonly a couple that suffers from infertility and thus is unable to bear children themselves.<sup>3</sup> This process is regarded as being commercial in nature when the surrogate mother is financially compensated past the point of incurred

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<sup>3</sup> Yale Medicine, 'Surrogacy' (Yale Medicine, 15 August 2022) <<https://www.yalemedicine.org/conditions/gestational-surrogacy>> accessed 24 January 2025.

medical expenses and loss of wages, thereby implying a profit made on the surrogate's end.<sup>4</sup> Commercial surrogacy in India has been a booming business since 2002 when the Indian Council of Medical Research (ICMR) proposed draft ethical guidelines on the regulation of assisted reproductive technology (ART) clinics, which included provisions for commercial surrogacy and the arrangements through which this could be carried out.<sup>5</sup>

Since then, the industry grew to be worth over \$400 million USD a year by 2012, with 25,000 babies being born annually through surrogacy agreements, half of which catered to foreign couples from the west end of the globe.<sup>6</sup> Today, an all-out legislative ban has been imposed on this practice as a result of the Surrogacy (Regulation) Act (SRA 2021) enacted in December of 2021.<sup>7</sup> This legislative measure had been regarded as long overdue, a leading cause for this being the rapid rise in the exploitation of surrogate mothers in the industry, who often end up signing these agreements in order to alleviate themselves and their families from poverty, as such succumbing to exploitative circumstances in order to better their lives.<sup>8</sup> The Supreme Court itself prompted the Indian Government to draft a bill regulating surrogacy and ART practices in the landmark case of *Baby Manji Yamada vs Union of India (2008)*.<sup>9</sup> The Court's judgment determined that commercial surrogacy constitutes a legally permissible practice; however, it also made clear that there is a significant regulatory vacuum in existence regarding such practices, which necessitates rectification, which may be achieved through the imposition of stringent laws.<sup>10</sup> The SRA 2021 aimed to address this issue; however, scholars have expressed significant concerns regarding the actual effectiveness of the regulation in relation to its approach towards limiting the practice of surrogacy in its entirety.<sup>11</sup> Consequently, there is increased apprehension regarding the implementation of this ban, as a

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<sup>4</sup> Gaurang Narayan and others, 'The Surrogacy Regulation Act of 2021: A Right Step towards an Egalitarian and Inclusive Society?' [2023] Cureus <<https://pubmed.ncbi.nlm.nih.gov/37213977/>> accessed 20 January 2025, p.1

<sup>5</sup>Olinda Timms, 'Ending Commercial Surrogacy in India: Significance of the Surrogacy (Regulation) Bill, 2016' [2018] 3(2) Indian Journal of Medical Ethics 99, <<https://ijme.in/articles/ending-commercial-surrogacy-in-india-significance-of-the-surrogacy-regulation-bill-2016/?galley=html>> accessed 20 January 2025, p. 100.

<sup>6</sup> Priya Shetty, 'India's Unregulated Surrogacy Industry' (2012) 380 The Lancet 1633 <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)61933-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)61933-3/fulltext)> accessed 19 January 2025, p. 1633

<sup>7</sup> The Surrogacy (Regulation) Act 2021 (Act No. 47 of 2021), Gazette of India, Extraordinary, Part II, Section 1.

<sup>8</sup> KS Jayaraman, 'Surrogacy Tourism to Rise' (*Nature India*, 26 March 2012) <<https://www.nature.com/articles/nindia.2012.41>> accessed 24 January 2025

<sup>9</sup> *Baby Manji Yamada v Union of India & Anr* (2008) 13 SCC 518.

<sup>10</sup> Ibid, para 3.

<sup>11</sup> Gaurang Narayan and others, 'The Surrogacy Regulation Act of 2021: A Right Step towards an Egalitarian and Inclusive Society?' [2023] Cureus <<https://pubmed.ncbi.nlm.nih.gov/37213977/>> accessed 20 January 2025 AND Soumya Kashyap and Priyanka Tripathi, 'The Surrogacy (Regulation) Act, 2021: A Critique' (2022) 15 Asian Bioethics Review 5 <<https://link.springer.com/article/10.1007/s41649-022-00222-5>> accessed 21 January 2025.

result of which the country may face a proliferation of illegal surrogacy practices.<sup>12</sup>

This is exactly why the Act has been met with heightened criticism rather than support. While it seeks to safeguard surrogate mothers and tackle ethical issues by banning commercial surrogacy, its stringent measures have unintentionally led to the growth of hidden surrogacy activities, giving rise to a shadow economy that heightens risks for vulnerable women and undermines the Act's goals. As such, this article aims to critically examine the Surrogacy (Regulation) Act 2021, focusing on its restrictive provisions and the unintended rise of covert surrogacy practices in India.

### **A. Methodology**

This paper adopts a mixed-methods approach, combining doctrinal legal research with qualitative socio-legal analysis while placing a stronger emphasis on the former. The reason for this dual approach is that while the research objective of this paper inherently requires a doctrinal analysis of the Surrogacy Act, its implementation, and judicial interpretations, it also necessitates an exploration of socio-legal realities — particularly the emergence of covert surrogacy practices and their implications for surrogate mothers and other relevant parties such as intending couples and involved medical professionals.

The component of this paper that employs doctrinal legal research interests an in-depth examination of the SRA 2021, including the legislation's intent, its key provisions, and its penalties. Meanwhile, the socio-legal component explores the Act's unintended consequences, particularly the rise of illegal and covert surrogacy networks. For this analysis, secondary sources, including empirical studies and academic articles, media reports, and investigative journalism on covert surrogacy practices post-2021, have been studied and employed as relevant in the paper.

Incorporating these diverse sources ensures a holistic analysis that addresses the Act's doctrinal and practical impacts. The aim is to evaluate the effectiveness of the Surrogacy Act critically and to identify gaps in enforcement and policy that have contributed to the emergence of covert surrogacy practices. By combining doctrinal and socio-legal methods, this paper seeks to bridge the gap between the SRA's legal frameworks and the real-world practices it aims to limit and modulate, based on which it offers practical recommendations that work towards addressing the Act's limitations.

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<sup>12</sup> Ibid.

## B. Historical Context

India's first IVF baby and the world's second, Kanupriya alias Durga's birth took place on 3rd October, 1978 in Kolkata.<sup>13</sup> This successful delivery facilitated a division within the medical industry that has subsequently undergone a transformation of considerable magnitude. However, the publication of the 2002 ICMR Guidelines is what truly catapulted India's surrogacy industry to its peak as commercial surrogacy became legally permissible under these guidelines, even though they were not legislatively codified.<sup>14</sup> A couple of factors came into play for this to have happened, for one, India offered widely accessible state-of-the-art services for ART practice at one-third the global price.<sup>15</sup> Moreover, the abundance of willing surrogates, often underprivileged women seeking a fair income by offering their wombs, fueled the commercial surrogacy industry, causing it to flourish.<sup>16</sup>

As such, procreative medical tourism in India was at its peak until 2015, when the government imposed a ban on foreign nationals from commissioning surrogacy in India via a notification, restricting surrogacy to Indian couples only.<sup>17</sup> This ban cut the industry's demand by half, which stemmed from foreign couples. The circular delineated specific provisions concerning the issuance of visas. Foreign nationals, including Overseas Citizens of India (OCI) cardholders, were prohibited from obtaining medical visas for the purpose of commissioning surrogacy. Furthermore, they were no longer permitted to acquire exit permissions for their surrogacy-born children.<sup>18</sup> Nevertheless, a legally binding framework regulating ART practices in the country was still absent. The 2015 ban has a limited scope as it did not address the broader issue of domestic commercial surrogacy. As a result, the Surrogacy (Regulation) Bill was introduced in Parliament in 2016, which proposed banning all forms of commercial surrogacy in the country.<sup>19</sup> The bill exclusively permitted altruistic surrogacy for Indian couples who have been legally married for a minimum of five

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<sup>13</sup> History of Surrogacy in India' (*Indian Surrogate Mothers*, 9 February 2023)

<sup>14</sup> Sama Team, 'Assisted Reproductive Technologies: For Whose Benefit?' (2009) 44 *Economic and Political Weekly* 25 <<https://www.jstor.org/stable/40278964>> accessed 25 January 2025.

<sup>15</sup> Diksha Munjal-Shankar, 'Medical Tourism, Surrogacy & the Legal Overtones - the Indian Tale' [2014] 56 *Journal of the Indian Law Institute* 62 <[http://14.139.60.116:8080/jspui/bitstream/123456789/12185/1/006\\_Medical%20Toursim%20Surrogacy%20%26%20the%20Legal%20Overtones%20%2862-77%29.pdf](http://14.139.60.116:8080/jspui/bitstream/123456789/12185/1/006_Medical%20Toursim%20Surrogacy%20%26%20the%20Legal%20Overtones%20%2862-77%29.pdf)> accessed 21 January 2025.

<sup>16</sup> Gaurang Narayan and others, 'The Surrogacy Regulation Act of 2021: A Right Step towards an Egalitarian and Inclusive Society?' [2023] *Cureus* <<https://pubmed.ncbi.nlm.nih.gov/37213977/>> accessed 20 January 2025, p. 2.

<sup>17</sup> Ministry of Home Affairs, Government of India, 'Circular No. 462: Ban on Foreign Nationals Commissioning Surrogacy in India' (3 November 2015) <[https://www.mha.gov.in/PDF\\_Other/surrogacy03112015.pdf](https://www.mha.gov.in/PDF_Other/surrogacy03112015.pdf)> accessed 21 January 2025.

<sup>18</sup> Ibid

<sup>19</sup> 'The Surrogacy (Regulation) Bill, 2016' (*PRS Legislative Research*, 2016) <<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2016>> accessed 21 January 2025.

years and have received certification of infertility from an accredited medical practitioner.<sup>20</sup> With additional eligibility criteria imposed regarding who could undertake the role of the surrogate, this had to be a close relative of the intending couple, aged between 25 to 35 years, who is married and has a child of her own already.<sup>21</sup> Following its passage in December 2018, this bill lapsed due to the dissolution of Parliament in the same month and was subsequently reintroduced in the Lok Sabha in July 2019.<sup>22</sup> This version of the bill encountered further debate, resulting in delays in its passage.

Consequently, the bill was enacted in 2021 and officially notified as law in 2022.<sup>23</sup> In addition to this, the Assisted Reproductive Technology Act was introduced in 2021 which aimed to further oversee and regulate ART clinics. This ART Act was put in place as a response to loopholes, which will be discussed going forward, having been noticed in the Surrogacy Act, which potentially undermines its goals and the effect it intended to have.<sup>24</sup>

## II. LEGAL FRAMEWORK IN INDIA - SURROGACY (REGULATION) ACT 2021

The Surrogacy (Regulation) Act now serves as the only legislative material that mandates the functioning of surrogacy in India. It is made up of eight chapters consisting of 54 provisions, each with its own specific sub-parts. Overall, the essence of the SRA 2021 lies in commercial surrogacy being completely banned and penalised — section VII, titled ‘Offences and Penalties,’ sets out varying punishments for both the medical professional and the other commissioning parties involved, ranging from five to ten years of imprisonment in addition to a ₹10 lakh fine.<sup>25</sup> Consequently, the statute only permits altruistic surrogacy,<sup>26</sup> defined under section 2 (1)(b) as meaning that no monetary compensation can be provided to the surrogate except for medical and insurance expenses being covered.<sup>27</sup> Nevertheless, this practice is subject to a partial ban due to the eligibility criteria imposed on both those who are qualified to utilise surrogacy and those who qualify to serve as surrogates.

This approach employed by the SRA 2021 in banning commercial surrogacy completely shifts the emphasis from a rights-based approach to a need-oriented model.<sup>28</sup> A rights-based

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Shubanghi Priya, ‘Evaluating Surrogacy Legislation in India’ (*Social & Political Research Foundation*, 2 August 2019) <<https://sprf.in/evaluating-surrogacy-legislation-in-india/>> accessed 21 January 2025.

<sup>23</sup> The Surrogacy (Regulation) Act 2021 (Act No. 47 of 2021), Gazette of India, Extraordinary, Part II, Section 1.

<sup>24</sup> Nayan Varsha, ‘Effectiveness of Surrogacy Legislation: Balancing Regulation and Rights in India’ (2024) SSRN Electronic Journal <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5031903](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5031903)> accessed 21 January 2025, p. 2.

<sup>25</sup> The Surrogacy (Regulation) Act 2021 (Act No. 47 of 2021), Gazette of India, Extraordinary, Part II, Section 1.

<sup>26</sup> Ibid, Chapter III, Section 4(ii)(b).

<sup>27</sup> Ibid, Chapter I, Section 2(I)(b).

<sup>28</sup> Gaurang Narayan and others, ‘The Surrogacy Regulation Act of 2021: A Right Step towards an Egalitarian and

approach would emphasise individual autonomy, particularly in making choices regarding reproductive options like surrogacy. It would support the right of surrogates to enter commercial agreements and the commissioning of parents' right to seek surrogacy to fulfil their wish for a child. Alternatively, coming from a need-based perspective, by prohibiting commercial surrogacy, the SRA 2021 aims to bring attention to and provide a solution for the need to safeguard surrogate mothers from exploitation, particularly in situations where socio-economic vulnerabilities may result in them being coerced into inhumane conditions. This ban represents a moral stance asserting that the commercialisation of reproduction commodifies both women and children and through allowing for altruistic surrogacy, the service is driven by infertility needs rather than a contractual rights arrangement. Employing this approach raises both ideological and practical issues which demand analysis.

### III. GOLDEN TRIANGLE TEST OF FUNDAMENTAL RIGHTS

Established in the *Maneka Gandhi v Union of India* case by the Supreme Court of India, this test was conceived with the notion of ensuring no state action can be taken through arbitrary decision-making, which would inadvertently bring harm to individual freedoms and fundamental rights of Indian citizens.<sup>29</sup> As such, what the SRA 2021 prescribes has been proclaimed as failing to satisfy this test, which mandates that only when Article 14, Article 19 and Article 21 are collectively upheld and sustained can the law being enacted be considered valid.<sup>30</sup> Consequently, evaluating the Surrogacy Act against these articles reveals its alignment with the constitutional provisions of fundamental rights.

Firstly, Article 14, which guarantees the right to equality, is directly implicated due to the Act's exclusionary framework.<sup>31</sup> The definition of "couple" under Section 2(1)(h) of the SRA 2021 restricts eligibility to legally married heterosexual Indian couples, thereby excluding individuals based on marital status and sexual orientation, as well as nationality.<sup>32</sup> Furthermore, Section 4(ii)(a) mandates that the intending couple must demonstrate a medically certified need for gestational surrogacy based on infertility.<sup>33</sup> This excludes fertile couples and single women who are infertile and wish to employ surrogacy in order to build a family. These outright disbarment of groups from being able to access surrogacy cannot be

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Inclusive Society?' [2023] Cureus <<https://pubmed.ncbi.nlm.nih.gov/37213977/>> accessed 20 January 2025, p. 3.

<sup>29</sup> *Maneka Gandhi v Union of India* (1978) 1 SCC 248; AIR 1978 SC 597; 1978 SCR (2) 621.

<sup>30</sup> <sup>28</sup> Ujjwal Singh, 'Golden Triangle of the Indian Constitution: Interdependence of Fundamental Rights' (2023) 2(3) ILS Weekly Law Journal 33 <<https://wr.iledu.in/wp-content/uploads/2023/08/V1I134.pdf>> accessed 22 January 2025.

<sup>31</sup> The Constitution of India, 1950, art. 14.

<sup>32</sup> The Surrogacy (Regulation) Act (2021), Chapter I, Section 2(1)(h).

<sup>33</sup> Ibid, Chapter III, Section 4(ii)(a).

argued to be proportional in relation to the aim the Act had when being drafted. The objectives of the Act, as expressed by its advocates, are to safeguard women against exploitation, avert the commodification of childbirth, and eliminate trafficking within the realm of the surrogacy market.<sup>32</sup> These limitations epitomise a patriarchal and majoritarian viewpoint embedded within the fabric of Indian society, portraying a perspective that traditionally stigmatises live-in relationships, motherhood outside of marriage, and homosexuality; legislation such as this Act will further marginalise such groups by preventing them from exercising and realising their fundamental rights to the fullest extent and thereby violating their fundamental right to equality protection under the law.

Secondly, under Article 19(1)(g), which protects the freedom of trade, occupation, and profession, the SRA 2021 imposes undue limitations on surrogate mothers and surrogacy clinics.<sup>34</sup> The Act bans commercial surrogacy and limits arrangements to altruistic cases, reducing economic opportunities for women considering entering the industry, especially the agency of women from marginalised backgrounds who may choose this path as a way of ameliorating their livelihood end up having their economic autonomy taken away from them.

Lastly, the SRA 2021 also raises concerns under Article 21,<sup>35</sup> which guarantees the right to life and personal liberty, including the right to livelihood and reproductive autonomy. Reproductive autonomy is a critical aspect of individual dignity, and the Act infringes upon this right by both denying fertile couples access to surrogacy services and stopping surrogate women from making autonomous decisions about the use of their bodies.<sup>36</sup> While the Act ostensibly seeks to protect women from exploitation, it paradoxically removes their ability to choose surrogacy as a legitimate source of earning. Moreover, the Act's stipulation that only 'close relatives' of the intending couple qualify as surrogates further narrows this avenue, leaving no scope for other women to offer help, as well as making it increasingly tougher for surrogacy to take place at all.<sup>37</sup> This has an adverse effect on 'intending couples' as well, highlighted in Section 2(1)(r) of the Act as the target group that can legally secure a surrogacy agreement.

Overall, the SRA 2021 falls short of passing the Golden Triangle test due to the

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<sup>34</sup> 'An Overview of Surrogacy (Regulation) Act, 2021' (*Das Legal Advocates*, 4 April 2024) <<https://www.daslegal.co.in/an-overview-of-surrogacy-regulation-act-2021/>> accessed 22 January 2025.

<sup>35</sup> The Constitution of India, 1950, art. 21.

<sup>36</sup> 'Fundamental Rights and the Surrogacy (Regulation) Act, 2021: A Constitutional Scrutiny' (*The Law Reporter*, 12 February 2023) <<https://thelawreporter.in/2023/02/12/fundamental-rights-and-the-surrogacy-regulation-act-2021-a-constitutional-scrutiny/>> accessed 24 January 2025.

<sup>37</sup> Soumya Kashyap and Priyanka Tripathi, 'The Surrogacy (Regulation) Act, 2021: A Critique' (2022) 15 *Asian Bioethics Review* 5 <<https://link.springer.com/article/10.1007/s41649-022-00222-5>> accessed 21 January 2025.



disproportionate impact its prohibitory clauses have on the functioning and accessibility of surrogacy by all the parties mentioned.<sup>38</sup> If we take this assessment as fact, it becomes clear how the objectives of the Act do not sufficiently justify the measures it delineates. Although it seeks to tackle ethical issues, its method undermines constitutional rights, necessitating a more balanced and nuanced regulatory framework.

#### **IV. UNINTENDED MERGING OF COVERT SURROGACY PRACTICES DUE TO THE 2021 BILL**

As noted, while altruistic surrogacy is allowed, it involves such specific requirements that it effectively becomes partially prohibited. The layers of requirements that start building up for the eligibility of the surrogate mother make it so much tougher for intending couples to be able to find someone suitable to help them out. Firstly, privacy from society and from one's own family in situations regarding stigmatised topics is highly valued in Indian society. Due to this, it is highly likely that childless couples end up hesitant to involve their relatives in the surrogacy process due to the stigma surrounding infertility. Instead, they would be much more inclined towards seeking assistance from an unknown individual, with whom they can have as minimal contact as possible, in exchange for monetary compensation.<sup>39</sup> Secondly, the altruistic surrogacy model framed in the SRA 2021 relies heavily on India's traditional social structure of joint families, where multiple generations cohabit under the same roof, creating the expectation of reciprocal relationships within the family. This, however, will no longer be practical as societal norms shift and families grow to become more nuclear in nature, leaving couples to turn to seek out commercial surrogacy wherever available.<sup>40</sup> Moreover, the concept of altruistic surrogacy may turn out to be illusory in nature, as it may prove challenging for prospective couples to locate a willing surrogate who intends to carry a child without financial compensation.<sup>41</sup>

As such, even if the government prohibits commercial surrogacy, couples and individuals with the conviction and monetary resources to be able to afford surrogates accessible through clandestine will inadvertently lead to a growth in covert surrogacy practices. Willing

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<sup>38</sup> Bhumitra Dubey and Yash Tiwari, 'Analysis of the Surrogacy (Regulation) Bill, 2020.' (*India Law Journal*, 2020)<<https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php> accessed 22 January 2025.

<sup>39</sup> Yuri Hibino, 'The Advantages and Disadvantages of Altruistic and Commercial Surrogacy in India' (2023) 18(8) *Philosophy, Ethics, and Humanities in Medicine*<<https://link.springer.com/article/10.1186/s13010-023-00130-y>> accessed 23 January 2025.

<sup>40</sup> *Ibid*, p. 7.

<sup>41</sup> Kunal Debnath and Sreetama Chatterjee, 'The Surrogacy (Regulation) Act, 2021: Analyzing the Effectiveness of India's Ban on Commercial Surrogacy' (2023) 6 *Sexuality Gender & Policy* 81<[https://onlinelibrary.wiley.com/doi/full/10.1002/sgp2.12061?casa\\_token=3DN1zFq6rxsAAAAA%3AJUJLw2yG7loetD9nOIC8DrgvGel1i62Q9yH1mTyHWjvRXAkdwOdsLieqOFEt67iWHvQV3BS2mvcVTrUA](https://onlinelibrary.wiley.com/doi/full/10.1002/sgp2.12061?casa_token=3DN1zFq6rxsAAAAA%3AJUJLw2yG7loetD9nOIC8DrgvGel1i62Q9yH1mTyHWjvRXAkdwOdsLieqOFEt67iWHvQV3BS2mvcVTrUA)> accessed 21 January 2025.

surrogate women may face a significant reduction in their income as the surrogacy industry transitions to becoming fully underground, as this situation will effectively diminish whatever bargaining power they previously may have had and expose them to even more heightened levels of exploitation.<sup>42</sup>

## V. LEGAL AND ETHICAL IMPLICATION OF COVERT SURROGACY PRACTICES

The rise of covert surrogacy practices begs a dissection of the legal and ethical outcomes and their implications that are bound to follow. Partaking in such practices itself is a direct contravention of the SRA 2021, as the offenders would be operating outside the scope of formal legal stipulations the Act provides, leading to a lack of accountability of the parties involved that existed previously in a system with regulated commercial surrogacy rather than banned. Naturally, surrogate mothers involved in covert arrangements are deprived of the safeguards currently mandated by the SRA 2021 for surrogates, such as the contractually mandated provision of adequate medical care. This leaves such women vulnerable to ill-treatment, non-payment, and even abandonment after childbirth. Moreover, if a woman who has been wronged seeks to pursue justice based on an agreement made, she encounters a lack of legal support since contracts formed under such illegal arrangements are devoid of legal enforceability. This absence of enforceability could result in disputes regarding matters such as payment obligations, medical expenses, and child custody.<sup>43</sup>

## VI. CROSS-COUNTRY BORDER DISPUTES

Children born through covert surrogacy face legal ambiguities regarding their citizenship and parentage, particularly in cross-border cases, which can lead to them being denied access to fundamental rights like identity registration due to their parentage not being recognised as legitimate as a result of loopholes and inconsistencies in the national laws of the nation they were born in, to a surrogate mother, and the one their biological parents are from. This has been a prominent issue in India since surrogacy started booming, and an increase in covert practices will simply exacerbate these complications. Two landmark cases, *Baby Manji Yamada vs Union of India (2008)*<sup>44</sup> and *Jan Balaz vs Anand Municipality and ors. (2008)*,<sup>45</sup> are exemplary of this.

<sup>42</sup> Nandan Gowda, 'A Case for Commercial Surrogacy' (*Rostrum Legal*, 15 April 2023) <<https://www.rostrumlegal.com/a-case-for-commercial-surrogacy/>> accessed 24 January 2025

<sup>43</sup> Prithivi Raj, 'Regulating Surrogacy in India: Legal Frameworks, Ethical Considerations and Lessons from Global Practices' [2024] SSRN Electronic Journal <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5017308](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5017308)> accessed 23 January 2025.

<sup>44</sup> *Baby Manji Yamada v Union of India & Anr* (2008) 13 SCC 518

<sup>45</sup> *Jan Balaz v Anand Municipality and Ors* (2008) 1 SCC 670

In both cases, the children born through surrogacy agreements in India were left stateless due to conflicting national laws on parentage recognition. The *Baby Manji case* brought to light the complexities of transnational surrogacy agreements when rules governing the legal recognition of mothers in the state are in conflict. And the *Balaz Twins' case* brings to light the entanglements one faces when one of the involved jurisdictions prohibits surrogacy altogether, thereby stopping children through the practice from being recognised as legal wards of the commissioning couple. While both these cases are critical in nature due to the unique issues they brought forward, they have highlighted how important it is for nations to develop a cohesive system of rules that govern such parentage cross-border issues, falling within the realm of private international law.

Despite the prohibition against foreign individuals commissioning surrogacy arrangements in India, cross-border parentage remains a problem that Indian surrogacy law needs to tackle. Firstly, legacy cases from arrangements made before the 2015 ban or disputes regarding children born via surrogacy prior necessitate clear legal pathways to address conflicts related to parentage and citizenship effectively. Particularly since, as indicated above, the existing legal framework is inadequately equipped to manage such cross-border issues and disputes.<sup>46</sup> Especially considering that these cases arising from such situations often involve India and competing legal systems, causing an extended litigation process which increases uncertainty for both the biological parents of the child born and the the child itself.

Additionally, illegal surrogacy may persist in cases where foreign couples are willing to circumvent the law, which is why addressing cross-border parentage issues proactively within Indian surrogacy law would lead to the formulation of a legal framework that is appropriate for managing such disputes effectively and can help prevent, not just provide posterior mechanisms for dealing with, the harm caused to the children born from such arrangements. Lastly, there is currently no treaty that oversees the use of surrogacy at an international level, which is why India's participation in international legal frameworks on surrogacy and parentage, such as attending and taking part in The Hague Conference on Private International Law (HCCH), will make it possible to establish a uniform approach that will ultimately work to the nation's advantage as it would augment global governance of transnational surrogacy.

Covert surrogacy disproportionately targets economically vulnerable women, who may be

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<sup>46</sup> Stellina Jolly, 'Cross-Border Surrogacy: Indian State Practice' [2017] Private International Law South Asian States' Practice 175 <[https://link.springer.com/chapter/10.1007/978-981-10-3458-9\\_9](https://link.springer.com/chapter/10.1007/978-981-10-3458-9_9)> accessed 29 January 2025.

coerced or misled into surrogacy arrangements catalysed to make this decision due to their pressing personal circumstances. In such cases, the absence of oversight puts the child's well-being at risk since they are delivered in this world with pre-existing uncertainties attached to their legal identity, status, and true parentage. In worst-case scenarios, the unregulated nature of these practices increases the risk of surrogate mothers being trafficked to ensure their identities stay hidden.<sup>47</sup> This potential risk also extends to the children born under such circumstances.<sup>48</sup>

## VII. POLICY AND ENFORCEMENT GAPS & RECOMMENDATIONS

The SRA 2021, in its effort to safeguard women and children, has unintentionally pushed surrogacy into secrecy, shedding light on the significant policy and enforcement deficiencies it bears. Insufficient monitoring and corruption in enforcement systems have enabled covert practices to thrive, and with no evidence and structured networks in place, the prosecution of offenders is seriously hindered, undermining the effectiveness of the law.

The issue lies not in the commercialization of surrogacy itself but in its previous commercialization in the absence of effective regulation, which allowed exploitative practices to flourish. As such, the prohibitionist approach taken to banning the practice outright only risks pushing the previously multi-million-dollar industry underground, further exposing sensitive parties such as women from vulnerable backgrounds in need of financial help to exploitation.

Having legislation that focuses on two key areas would be more fitting, the first area of focus should be establishing robust governance over the administration of rights and obligations of all parties involved, which will help ensure transparency and fairness in surrogacy arrangements. For instance, the focal point for the exploitation of surrogates is contract signing, as it is assumed that the contracting parties are in equal bargaining positions when that is not the case.<sup>49</sup> Women from marginalised backgrounds cannot be expected to be adequately proficient and educated in English, the language that surrogacy contracts may end

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<sup>47</sup> Mridulika Jha, 'Ground Report: The Dark Side of Surrogacy Industry, Packages from Rs 20 Lakh' (*India Today*, 27 July 2024) <<https://www.indiatoday.in/india/story/surrogacy-delhi-ncr-fertility-clinics-illegal-human-trafficking-hospitals-2572480-2024-07-27>> accessed 24 January 2025.

<sup>48</sup> Chetan B C, 'Baby Business Busted: CCB Cracks down on Illegal Surrogacy' (*Deccan Herald*, 28 November 2023) <<https://www.deccanherald.com/india/karnataka/bengaluru/baby-business-busted-ccb-cracks-down-on-illegal-surrogacy-2788576>> accessed 24 January 2025.

<sup>49</sup> Cyra Akila Choudhury, 'Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation' [2016] SSRN Electronic Journal <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2753783&cf\\_chl\\_tk=ITWE.gkGk9nuTkdg.ElsdZh83H\\_1\\_t5yWRHypfVOqQRA-1737690530-1.0.1.1-dSFv3cAtE8Ojc\\_EigfAspECwbYdxLfdb4skqkI3tPwk](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753783&cf_chl_tk=ITWE.gkGk9nuTkdg.ElsdZh83H_1_t5yWRHypfVOqQRA-1737690530-1.0.1.1-dSFv3cAtE8Ojc_EigfAspECwbYdxLfdb4skqkI3tPwk)> accessed 24 January 2025, p. 8.

up being drafted in, in India.<sup>50</sup> Therefore, the nature of surrogacy contracts needs to be carefully regulated, making sure that they are drafted in a language comprehensible to the surrogate. Or, alternative means of facilitating the surrogate's understanding of the contract should be instilled, such as through the provision of competent and fair legal aid.

The second point of focus should be the enforcement of these regulations in order to ensure compliance across the surrogacy market. This matter, however, represents a persistent theme that has necessitated resolution within the nation for decades. Consequently, it cannot be effectively addressed until more foundational country-level impediments are resolved first. Even still, as the demand for surrogacy persists due to social and medical needs, and as economically marginalised women continue to view it as a viable livelihood option, a well-regulated system is preferable to a complete ban.

## VIII. CONCLUSION

In conclusion, this paper demonstrates that a more nuanced approach to surrogacy regulation is necessary—one that acknowledges both the autonomy of surrogate mothers and the legitimate needs of intended parents while also implementing safeguards to prevent exploitation. Rather than an outright ban on commercial surrogacy, a regulated framework with ethical oversight and enforceable protections may provide a more effective and balanced solution.

Having examined the historical context of surrogacy in India, the legal framework established by the Surrogacy (Regulation) Act (2021), and its implications through the Golden Triangle Test of Fundamental Rights, this analysis further explores the unintended consequences of the Act, particularly the emergence of covert surrogacy practices, along with the legal and ethical challenges that arise in cross-border disputes. Through this breakdown, it becomes evident that while the SRA 2021 aims to regulate surrogacy and prevent exploitation, the prohibitions and limitations it imposes on surrogacy as a procedure have inadvertently created legal and policy gaps that demand considering alternative lines of action to regulate this practice.

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<sup>50</sup> Ibid.