



Motherhood, Reproduction and Surrogacy: A Feminist Perspective

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ABSTRACT:

The term 'motherhood' in Indian law has been used as a universal, self-evident term instead of a term that is subject to contestation. With the arrival of "assisted reproductive technologies", and thus the practice of surrogacy, courts and legislators have been faced with a question feminist scholars have been considering for decades: who owns the reproducible body, and who decides what a family is? This paper looks at the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 through the lens of feminist jurisprudence, and at the same time, asks what liberal, radical and socialist and intersectional feminist critiques of the commercial surrogacy boom that preceded these statutes say about the laws. The paper seeks to use doctrinal interpretation of the constitutional provisions, statutory text and Supreme Court and High Court interpretations to argue that India transitioned from a commercial market without regulation to a narrow altruistic model of commercial market, resolving one problem, the visible exploitation of poor women's bodies but also raising up others a paternalistic gatekeeping regime which excludes single men and unmarried women outside the narrow definition of widow-divorcee, and same sex couples entirely. A comparative analysis of the United Kingdom, the United States, Canada, Israel and Ukraine places India's altruism-only approach as an outlier and not as a universal standard. The paper argues that a rights-based reproductive justice framework is the more constitutional route to take, and suggests some specific reforms which could include consent, compensation and inclusion.

Keywords: surrogacy, reproductive autonomy, feminist jurisprudence, bodily integrity, Article 21, Surrogacy (Regulation) Act 2021, reproductive justice, commodification.

1. INTRODUCTION:

There is something quietly radical about asking who a mother is. For most of legal history the answer seemed to require no theory at all, mater semper certa est, the mother is always certain, said Roman law,

because she is the one who gives birth.¹ Assisted reproductive technology broke that certainty apart. A child can now have a genetic mother, a gestational mother, and a social mother, three women where the law once assumed one, and Indian courts discovered this fracture in the most public way possible when a Japanese couple divorced mid-surrogacy in 2008 and left a newborn with no settled nationality and, for a time, no legally recognized mother at all.² Reproductive autonomy, understood as a woman's right to decide whether, when, and how to reproduce, sits at the center of this paper. It is not a new idea. It runs through the writing of second-wave feminists who insisted that control over one's body was the precondition for every other freedom, and it now sits, somewhat uneasily, inside Article 21 of the Constitution of India, which the Supreme Court has read to include a woman's right to make reproductive choices.³ Surrogacy tests that right in an unusual way. Unlike contraception or abortion, where the woman making the choice and the body affected are the same person, surrogacy involves two women, the intending mother and the surrogate, whose interests do not always align, and a legislature that must decide whose autonomy to protect when they conflict.

India became, for roughly a decade, the world's most visible commercial surrogacy destination. Clinics in Anand, Gujarat, and later across the country, matched foreign and domestic intending parents with Indian women willing to gestate pregnancies for compensation that was, by local standards, substantial, and by international standards, remarkably cheap.⁴ The Law Commission of India flagged the absence of any governing statute as early as 2009, warning that surrogacy arrangements were proceeding entirely on the basis of private contract, with no protection for the surrogate, no clarity on parentage, and no safeguard against the medical risks of repeated implantation.⁵ Parliament did not act on that warning for over a decade. When it finally did, with the Surrogacy (Regulation) Act, 2021 and the twin Assisted Reproductive Technology (Regulation) Act, 2021, it did not choose regulation of the commercial market. It chose to abolish that market altogether and replace it with a narrowly defined altruistic model. This paper asks whether that choice, made in the name of protecting women, actually serves women. Section 2 sets out competing feminist accounts of motherhood and reproductive labour. Section 3 traces the doctrinal evolution of surrogacy law internationally and in India. Section 4 examines the current Indian statutory framework in detail. Section 5 subjects that framework to feminist critique. Section 6 compares India against five other jurisdictions. Section 7 reads the leading judgments through a feminist lens. Section 8 surveys unresolved contemporary problems, and Section 9 proposes reform before a concluding section draws the threads together.

¹ Yuko Nishitani, *Surrogacy under the Shadow of Globalization*, N.Y.U. J. Int'l L. & Pol. (2024).

² Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

³ Constitution of India, 1950, Art. 21; Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

⁴ Law Commission of India, Report No. 228: *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* (August 2009).

⁵ *Ibid.*

2. Feminist Understanding of Motherhood and Reproductive Rights

Liberal feminism, the tradition most comfortable with surrogacy as contract, treats the surrogate as a rational, consenting agent whose decision to gestate for payment deserves the same respect the law gives any other labour contract. On this view, denying a woman the right to be paid for gestational work while permitting her to be paid for almost any other physically demanding labour is itself a form of discrimination, one that assumes women's reproductive capacity is too sacred, or too dangerous, to be treated as an economic resource she controls. Radical feminism arrives at nearly the opposite conclusion. Writing well before surrogacy became commercially organised in India, Shulamith Firestone argued that women's biological capacity for reproduction was the root of their historic subordination, and that technology which separated reproduction from the female body could be liberating only if it were not captured by existing structures of male control and profit.⁶ Catharine MacKinnon pushed this further, arguing that consent given under conditions of deep economic and social inequality cannot simply be read as free choice, since the state that recognises the contract also created, or at minimum tolerated, the poverty that made the contract attractive in the first place.⁷ For radical feminists, commercial surrogacy is not a woman exercising bodily autonomy so much as a woman's body being rented because she had no better option.

Socialist feminism sits between these positions but insists on foregrounding class. The typical surrogate in the pre-2021 Indian market was not a woman choosing among many attractive options; she was often the wife of a low-wage worker, recruited through informal networks, housed in dormitories for the length of her pregnancy, and paid a sum that, however meaningful to her, represented a fraction of what the arrangement generated for clinics and intermediaries.⁸ Socialist feminist critique reads this less as a story about gender alone and more as a story about how capital extracts value from the bodies of poor women specifically, with gender and class operating together rather than as separate variables. Intersectional feminism, associated with Kimberlé Crenshaw's broader framework though applied here to reproduction rather than to the discrimination law context in which it was first developed, insists that caste, religion, rural or urban location, and economic class shape a woman's actual bargaining power in ways that a generic account of "women's autonomy" obscures. An urban, English-speaking, financially secure woman choosing to be an egg donor experiences a materially different transaction than a rural, illiterate woman recruited as a gestational surrogate by an agent who takes a commission from both sides.

Reproductive justice theory, developed by scholars and activists including Loretta Ross, offers what is arguably the most useful synthesis for Indian conditions.⁹ It refuses to treat "choice" as sufficient and insists instead on three linked rights: the right to have a child, the right not to have a child, and the right

⁶ Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (William Morrow, 1970).

⁷ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989).

⁸ Paula Gerber & Katie O'Byrne, *Surrogacy, Law and Human Rights* (Routledge, 2015).

⁹ Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* (University of California Press, 2017).

to raise the children one has in conditions of safety and dignity. Applied to surrogacy, this framework asks not merely whether a surrogate consented, but whether she had genuine, non-coerced alternatives, whether her own children were adequately cared for during her absence from home, and whether the state's regulatory choices protected her health rather than merely her signature on a form.

3. Evolution of Surrogacy Laws

The United Kingdom permits only altruistic surrogacy, with the Surrogacy Arrangements Act 1985 criminalizing commercial brokering and the Human Fertilization and Embryology Act 2008 requiring intending parents to obtain a parental order after birth, since the surrogate remains the legal mother until that order is made. The United States has no federal surrogacy law; states range from California, which permits compensated gestational surrogacy under detailed pre-birth contracts, to jurisdictions that refuse to enforce surrogacy agreements at all. Canada's Assisted Human Reproduction Act, 2004 bans payment for surrogacy while permitting reimbursement of expenses, a model closer to India's than most. Australia similarly restricts surrogacy to an altruistic basis across its states and territories, with some jurisdictions extending criminal liability to residents who pursue commercial surrogacy abroad. Ukraine, before its recent conflict disrupted the industry, was among the few countries offering commercial gestational surrogacy to married heterosexual foreign couples with full legal parentage vesting at birth. Israel's Embryo Carrying Agreements Law, 1996 initially restricted surrogacy to heterosexual married couples, before later reform widened eligibility to single women and, following further litigation, same-sex couples and single men.

India's own trajectory ran in the opposite direction, from near-total absence of regulation toward increasing restriction. The Indian Council of Medical Research issued non-binding guidelines in 2005, but these carried no statutory force.¹⁰ The Baby Manji case exposed the consequences of this vacuum when the biological parents divorced mid-pregnancy and the Supreme Court, without addressing the underlying legality of commercial surrogacy, had to resolve a custody and travel-document crisis it was never designed to solve.¹¹ The Gujarat High Court, deciding *Jan Balaz* the following year, went further and granted Indian citizenship to surrogate-born twins of a German father on the reasoning that the gestational surrogate mother's Indian nationality, not the foreign intending parents' nationality, determined the children's citizenship, a holding that briefly made India's surrogacy industry even more attractive to international commissioning parents before later executive and legislative action closed that route.¹² The Law Commission's 228th Report, and successive draft ART Bills between 2008 and 2016, eventually culminated in the Surrogacy (Regulation) Bill, which Parliament passed as the Surrogacy (Regulation) Act, 2021,

¹⁰ Law Commission of India, *Report No. 228* (2009), *supra* note 4.

¹¹ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

¹² *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.

alongside the Assisted Reproductive Technology (Regulation) Act, 2021, both bringing India's decade of uncertainty to a formal, if contested, close.

4. Legal Framework Governing Surrogacy in India

Article 14 guarantees equality before the law, a guarantee surrogacy law tests directly given its exclusion of unmarried women outside the narrow widow-divorcee category, its exclusion of single men, and its exclusion of same-sex couples from access to surrogacy altogether. Article 15 prohibits discrimination on grounds including sex, a provision relevant wherever the law imposes burdens on women, as surrogates, that it does not impose on men in any comparable reproductive role. Article 19 protects freedom of profession, a right the commercial surrogacy ban arguably curtails for women who might otherwise have chosen gestational labour as an income source. Article 21, read expansively since *Maneka Gandhi*, has been held to include the right to make reproductive choices, dignity, and privacy, the last confirmed as a distinct fundamental right by the nine-judge bench in *Puttaswamy*.¹³

The Surrogacy (Regulation) Act, 2021 defines and permits only altruistic surrogacy, expressly prohibiting commercial surrogacy in all its forms.¹⁴ Section 4 sets out the conditions under which surrogacy may be undertaken at all: the intending couple must be Indian citizens, married for a defined period, medically certified as requiring surrogacy, and without a surviving biological, adopted, or previously surrogated child, subject to narrow exceptions for children with serious disabilities or life-threatening conditions.¹⁵ The Act separately defines an "intending woman" as an Indian widow or divorcee between the ages of thirty-five and forty-five, the sole route by which an unmarried woman may access surrogacy under the statute.¹⁶ Section 6 mandates written informed consent from the surrogate mother, explained in a language she understands, and preserves her right to withdraw that consent at any point before embryo implantation.¹⁷ The surrogate herself must be an ever-married woman aged between twenty-five and thirty-five, must possess a child of her own, may act as a surrogate only once in her lifetime, and is barred from providing her own gametes for the pregnancy she carries. The Act creates National and State Assisted Reproductive Technology and Surrogacy Boards and appropriate authorities responsible for registering clinics, granting certificates of essentiality and eligibility, and enforcing the Act's prohibitions, with contravention attracting substantial custodial and financial penalties under the statute's penal provisions.¹⁸ The companion Assisted Reproductive Technology (Regulation) Act, 2021 separately regulates IVF clinics, gamete banks, and donor sourcing, extending comparable registration and consent requirements to the wider ART sector.¹⁹

¹³ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹⁴ The Surrogacy (Regulation) Act, 2021 (ACT NO. 47 Of 2021), s. 3.

¹⁵ The Surrogacy (Regulation) Act, 2021 (ACT NO. 47 Of 2021), s. 4.

¹⁶ The Surrogacy (Regulation) Act, 2021 (ACT NO. 47 Of 2021), s. 2.

¹⁷ The Surrogacy (Regulation) Act, 2021 (ACT NO. 47 Of 2021), s. 6.

¹⁸ The Surrogacy (Regulation) Act, 2021 (ACT NO. 47 Of 2021), Chapter VIII (Offences and Penalties).

¹⁹ The Assisted Reproductive Technology (Regulation) Act, 2021 (ACT NO. 42 Of 2021).

5. Feminist Critique of Indian Surrogacy Law

The 2021 framework was drafted to answer a real and documented problem, the exploitation of poor Indian women in an unregulated commercial market. It does not follow that abolishing payment solves that problem, and a feminist reading of the statute suggests it may simply relocate the harm. Consider the surrogate's bodily autonomy first. The Act permits her to withdraw consent, a genuine protection, but conditions her participation on being "known" to the intending couple, following the 2023 amendment's relaxation of the earlier close-relative requirement.²⁰ In practice this still concentrates recruitment within family and community networks where refusal is socially costly in a way that a stranger's refusal to a clinic-brokered request is not. A woman asked by her sister-in-law to carry a pregnancy faces pressures a market transaction, whatever its other faults, does not generate.

Consider compensation next. The Act permits reimbursement of medical expenses and insurance but no payment for the labour of gestation itself.²¹ Feminist labour scholarship has long argued that unpaid reproductive and caregiving work is systematically undervalued precisely because it is coded as natural rather than as work; the surrogacy statute reproduces this logic by name, insisting that a woman's nine months of physical risk, medical intervention, and bodily change must be gifted rather than compensated if it is to remain legally permissible. This is state paternalism dressed as protection: it assumes that if a poor woman is paid for gestational labour she is necessarily being exploited, while an altruistic arrangement between relatives, which can carry its own coercive pressures, escapes scrutiny entirely. Consider exclusion. The Act's eligibility criteria commodify not the surrogate's body but the category of family entitled to reproduce through her. A same-sex couple, an unmarried woman under thirty-five, a single man of any age, all are shut out regardless of their capacity to parent, on grounds that track a specific heteronormative, marriage-centered model of family that the Constitution's equality guarantees arguably do not permit the state to enforce so rigidly. Martha Fineman's critique of the "sexual family", the assumption that legal protection and reproductive access should track marital and heterosexual status rather than actual caregiving capacity, applies to the Indian statute almost without modification.²²

Finally, consider the child. The Act's prohibition on payment for gestational labour sits alongside strict prohibitions on abandoning a surrogate-born child, a welcome protection, but the underlying framework still treats the child's welfare and the surrogate's economic interests as though they must be traded off against each other, rather than recognizing that a well-compensated, well-regulated, medically supervised surrogate is more likely, not less, to produce a healthy outcome for the child she carries.

²⁰ The Surrogacy (Regulation) Amendment Rules, 2023.

²¹ The Surrogacy (Regulation) Act, 2021 (ACT NO. 47 Of 2021), s. 4.

²² Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995).

6. Comparative Legal Analysis

Table 1: Comparative Legal Framework of Surrogacy Across Selected Countries

Country	Commercial Surrogacy	Altruistic Surrogacy	Parentage Rules	Rights of Surrogate Mother	Key Legal Features
India	Prohibited	Permitted, restricted eligibility	Intending couple deemed legal parents at birth	Consent, one attempt only, no payment beyond expenses	Surrogacy (Regulation) Act, 2021; ART Act, 2021
United Kingdom	Prohibited	Permitted	Surrogate is legal mother until parental order granted	Right to retain the child before order	Human Fertilisation and Embryology Act 2008
United States	Permitted in several states (e.g. California)	Permitted nationwide	Varies by state; pre-birth orders common in permissive states	Contractually defined, state-dependent	No federal statute; fragmented state regimes
Canada	Prohibited	Permitted	Provincial parentage statutes generally favor intending parents	Reimbursement of expenses only	Assisted Human Reproduction Act, 2004
Israel	Prohibited	Permitted, expanding eligibility	Parentage order via Family Court	Statutory welfare committee oversight	Embryo Carrying Agreements Law, 1996, amended
Ukraine	Historically permitted (pre-conflict)	Not the dominant model	Intending parents deemed parents from conception, per contract	Limited independent protections historically noted	Family Code provisions; industry disrupted since 2022

7. Judicial Approach

Baby Manji established, almost by accident, that the Supreme Court would resolve individual surrogacy crises without settling the underlying legality of commercial arrangements, leaving the child's welfare to executive improvisation rather than legislative design.²³ Feminist readings of the case note that the surrogate mother herself, the woman whose body produced the child at the center of an international custody dispute, appears in the judgment almost as a footnote, her interests and identity subordinated to the biological father's travel documentation problem. Jan Balaz, by contrast, placed the gestational connection at the center of its reasoning, holding that a child born to an Indian surrogate carried an Indian nationality regardless of the foreign intending parent's citizenship, a rare judicial moment that took the surrogate's body, rather than the commissioning parents' intent, as legally determinative.²⁴ The decision's

²³ Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

²⁴ Jan Balaz v. Anand Municipality, AIR 2010 Guj 21.

practical effect, ironically, was to accelerate legislative closure of the citizenship route that had made India attractive to foreign intending parents in the first place. Suchita Srivastava addressed a different but related question, whether a woman with an intellectual disability retained the right to decide whether to continue or terminate a pregnancy resulting from rape while institutionalized in state care. The Court held that reproductive choice is a facet of personal liberty under Article 21, and that disability does not extinguish that right, a holding with clear resonance for the question of whether the state may similarly override a surrogate's own reproductive decision-making in the name of protecting her.²⁵

Puttaswamy's recognition of privacy as an intrinsic constitutional right, encompassing decisional autonomy over intimate matters including procreation, supplies much of the doctrinal foundation on which a stronger surrogate's-rights argument could be built, even though the case itself did not concern surrogacy directly.²⁶ Navtej Singh Johar, striking down the criminalization of consensual same-sex conduct, similarly rests on dignity and equal citizenship regardless of sexual orientation, reasoning that sits uneasily beside a surrogacy statute that denies same-sex couples any access to surrogacy at all.²⁷ *X v. Principal Secretary* extended reproductive autonomy under the Medical Termination of Pregnancy Act to unmarried women, holding that marital status cannot determine access to a reproductive right grounded in bodily autonomy and equality, a principle the surrogacy framework, which conditions unmarried women's access to surrogacy on widowhood or divorce specifically, does not yet honour.²⁸

8. Contemporary Challenges

Despite the limitations imposed on cross-border surrogacy by the citizenship provisions of this Act, the practice is still creating stateless or contested-nationality children in countries where intending parents facilitate pregnancy in other countries with more relaxed surrogacy laws and then try to travel home with the resulting child with a legal system that is not ready to cleanly allow for parentage to be recognized. From the equality and dignity reasoning of Navtej Singh Johar and Puttaswamy, the most constitutionally exposed aspect of the existing statute is that of exclusion of the LGBTQ+ community. The same applies to single parents: a widow or divorcee can gain access at age thirty-five, but an unmarried woman of the same age, who has never been married, does not gain access, for no medically or child welfare apparent reason. Economic exploitation continues in an altruistic form, as the economic pressure in the family can just as effectively as in the market prove to be effective, except that it is not formally compensated, which makes the surrogates contribution visible in principle negotiable. Protections for informed consent are limited to the paper and are not guaranteed by registration requirements. Although some health and insurance coverage will be mandated for a defined period after birth, there are still areas of concern related to complications from repeated cycles of hormonal treatment and embryo transfer. The protection rules for

²⁵ Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

²⁶ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

²⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

²⁸ *X v. Principal Secretary, Health and Family Welfare Department*, 2022 SCC OnLine SC 1321.

genetic and medical information collected during ART treatments also remain subject to general health data rules, not some specific rules on surrogacy privacy; this is becoming more relevant in an era where genetic testing is increasingly a regular practice.

Table 2: Major Feminist Concerns and Corresponding Legal Challenges in Indian Surrogacy Regulation

Feminist Issue	Existing Legal Position	Critical Concerns	Suggested Reform
Bodily autonomy of surrogate	Consent required, withdrawable pre-implantation	Family pressure substitutes for market pressure	Independent, clinic-external counselling and consent verification
Reproductive labour and compensation	Only expense reimbursement permitted	Unpaid labour framing undervalues gestational risk	Regulated, capped compensation distinct from commercial exploitation
Exclusion of unmarried women, single men, same-sex couples	Access limited to married couples and widow/divorcee women	Conflicts with Puttaswamy and Navtej Singh Johar equality reasoning	Eligibility based on capacity to parent, not marital or sexual status
Class and recruitment	Surrogate must be "known" to intending couple	Concentrates recruitment in family networks with coercive potential	Independent surrogate registry with safeguarded, monitored matching
Long-term health monitoring	Insurance for a defined post-birth period	Limited coverage for chronic or delayed complications	Extended, mandatory long-term health monitoring and coverage

9. Conclusion

The 2021 statutory framework is a response to a question which Indian courts have been grappling with since the Baby Manji case: who would be held accountable if a surrogacy arrangement fails? The statutory framework that answers that question, however, does so by creating a smaller pool of people who can enter a surrogacy arrangement. This is not a neutral technical decision. It embodies a particular and contestable decision regarding which families are worthy of legal recognition and which types of women's work are legitimate and acceptable to the state for compensation. Feminist jurisprudence does not have a single consensus opinion on surrogacy, with liberal, radical, socialist and intersectional perspectives at odds over whether it is possible for surrogacy to ever be liberated from exploitation, but reproductive justice theory provides a feasible synthesis: the test of a just surrogacy law is not that it leaves no room for commerce, but that it accords the woman who carries the pregnancy a genuine, informed, unpressured control over her own body, adequate compensation and protection for her labour, and a state that treats her as a rights-bearing human being rather than a vessel to be managed. The constitutional obligations that India has towards equality (under Article 14 and 15), liberty and privacy (under Article 21), and dignity (under *Puttaswamy*, *Navtej Singh Johar* and *X v. Principal Secretary*), provide the doctrinal tools for that synthesis. What remains is the tougher, more politically difficult task of extending them, without a doubt, to the women whose bodies enable new families to come into being, and to the families that current law still does not concede that they are families.

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