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Surrogacy and Feminist Jurisprudence: Protecting Women's Autonomy or Promoting Exploitation?

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ABSTRACT

This paper examines surrogacy through the lens of feminist jurisprudence, asking whether contemporary legal frameworks protect women's autonomy or facilitate their exploitation. Focusing on India as a primary case study—where commercial surrogacy has been intensely debated and regulated—the paper traces historical and normative arguments, reviews feminist positions for and against contractual surrogacy, analyses legislative responses (notably the Surrogacy (Regulation) Act, 2021), and discusses empirical and theoretical evidence about the lived realities of surrogate mothers. The goal is to move beyond polarized rhetoric by offering a nuanced framework that centers agency, socio-economic context, labour rights, and child welfare. Policy recommendations propose a rights-based regulatory architecture that minimises exploitation while respecting reproductive autonomy.

Introduction

Surrogacy—where one woman gestates and bears a child for another person or couple—raises complex legal, ethical and feminist questions. For proponents, it can be a meaningful exercise of reproductive autonomy and a route to parenthood for infertile couples or LGBTQ+ families. For critics, particularly many radical and Marxist feminists, commercial surrogacy risks commodifying women's bodies and reinforces gendered inequalities by turning reproductive labour into a market transaction. This debate intensifies in contexts such as India, where socio-economic disparities, the presence of medical

intermediaries, and earlier permissive practices created avenues for both agency and exploitation. Understanding whether surrogacy protects women's autonomy or promotes exploitation requires interdisciplinary inquiry—legal doctrine, feminist theory, empirical social science, and human rights thinking.

This paper first maps feminist jurisprudential positions on surrogacy, then outlines the Indian legislative trajectory, surveys empirical criticisms and supportive arguments, analyzes landmark cases and policy choices, and finally offers proposals aimed at balancing autonomy with protection from exploitation.

Feminist jurisprudence: frameworks and fault lines

Feminist jurisprudence is not monolithic; it contains multiple strands—liberal, radical, Marxist, socialist, intersectional, and postcolonial—which yield differing assessments of surrogacy.

Liberal feminism emphasizes autonomy, bodily integrity, and choice. From this viewpoint, banning commercial surrogacy paternalistically restricts women's control over their reproductive capacities. If surrogacy can be safely regulated, it may expand women's options and enable them to make economically beneficial choices about their bodies.

Radical and Marxist feminism see surrogacy as an instance of structural oppression: a capitalist market that exploits primarily poor women's reproductive labour for wealthier commissioning parents. For these theorists, surrogacy commodifies the body and motherhood itself; even "consensual" transactions occur within coercive socio-economic circumstances that vitiate real choice.

Socialist and labour-oriented feminists call attention to whether reproductive labour receives protections, fair remuneration, and labour rights—treating surrogacy as work that ought to be regulated rather than morally condemned outright.

Intersectional and postcolonial feminists highlight how caste, class, race, and global inequalities shape surrogacy arrangements. In global surrogacy markets, wealthier global North clients often contract women in the global South, bringing colonial power imbalances into reproductive arrangements.

These frameworks produce divergent policy prescriptions: prohibition (radical feminist), regulated commercialization with safeguards (liberal/socialist feminists), or robust social provisions that remove the need for commodification (some intersectional critics). Contemporary feminist scholarship increasingly recognizes the inadequacy of single-axis arguments and pushes for nuanced approaches grounded in empirical realities.

The Indian context: law, history, and shifts

Early legal responses and landmark cases

India emerged as a major destination for international commercial surrogacy in the 2000s due to lower costs and permissive clinical environments. Early judicial and administrative responses were reactive and fragmented. Landmark incidents and cases (e.g., Baby Manji Yamada v. Union of India, which exposed issues of citizenship and parentage when a baby born in India through surrogacy had uncertain legal status) forced legal attention to the regulatory vacuum and cross-border complexities.

Legislative response: The Surrogacy (Regulation) Act, 2021

India's legislative trajectory culminated in the Surrogacy (Regulation) Act, 2021. The Act seeks to regulate assisted reproductive technologies and surrogacy through national and state boards, while outlining eligibility criteria for intending parents, surrogate mothers, and surrogacy clinics. Notably, the Act bans commercial surrogacy and permits only "altruistic" surrogacy for certain heteronormative categories of intending parents—effectively prohibiting surrogacy for single parents, same-sex couples, and foreigners. It also lays down criteria for surrogate mothers (e.g., being a close relative, age restrictions, prior childbirth requirement) and prescribes penalties for violations. The statutory text and government commentary reveal a legislative aim to curb perceived commodification of women's reproductive capacities, but critics argue the Act is overly paternalistic and restrictive of reproductive autonomy for various parties.

Critiques of the Indian approach

Scholars and commentators have argued that banning commercial surrogacy without addressing the socio-economic drivers of women's choices could push surrogacy underground, increase harms, and remove livelihoods for women who rely on surrogacy income. Others critique the narrow conception of "altruism" that the Act enshrines—forcing surrogate relationships into familial or relational frames that may not match socio-economic realities and could exclude surrogate autonomy. Empirical studies from India and other developing contexts document clinic control over surrogates, limited decision-making power, and medicalisation that often overlooks surrogate wellbeing.

Empirical evidence: exploitation, agency, and lived experience

Academic and field studies present mixed, context-dependent findings:

Evidence of exploitation and medical control. Several ethnographic and health-studies point to instances where surrogates experience limited autonomy: restrictive clinic policies, confinement during pregnancy, unequal bargaining power, and social stigma. Such studies show that surrogates often have little say in medical decisions and face structural pressures that resemble coerced labour rather than free-market choice.

Evidence of agency and economic benefit. Other studies and interviews with surrogate mothers indicate that many women choose surrogacy for significant economic reasons—paying debts, funding children's education, or improving household welfare. For some, surrogacy provides resources that alternative local labour cannot match. For these women, surrogacy can be a pragmatic exercise of agency within constrained choices.

Mixed outcomes and heterogeneity. Importantly, surrogates are not a homogeneous group. The experiences of surrogate mothers vary with legal context, clinic practices, socio-economic status, and whether arrangements are domestic or international. This heterogeneity undermines simplistic conclusions: some women face exploitative conditions, others exercise meaningful choice, and many experience both empowerment and vulnerability simultaneously.

Feminist critiques revisited: core arguments

Two central feminist critiques recur across literature and activism:

Commodification and objectification. Selling reproductive capacities treats bodies as commodities. This critique argues that monetising gestation undermines the social value of motherhood, reduces children to market outputs, and distorts relationships. Commodification concerns are rooted in worries about dignity and the erosion of non-market social bonds.

Structural coercion and unequal bargaining power. Even if surrogacy contracts are nominally consensual, they often arise where women's economic choices are severely constrained. Payment for surrogacy may therefore reflect coercion by circumstance rather than free choice. Feminists invoking this critique often support strict regulation or prohibition to prevent exploitation.

Opposing feminist arguments emphasize:

Autonomy and reproductive freedom. Banning surrogacy is paternalistic and undermines women's right to make decisions about their bodies. Instead of prohibition, advocates for regulated markets argue for robust protections: informed consent, healthcare access, postnatal care, enforceable contracts, and social security measures.

Labour-rights framing. Treating surrogacy as work allows the design of rights-based frameworks—wages, workplace protections, health insurance—that mitigate exploitation while recognising women's agency.

Thus, feminist debate is a contest between dignity-based and autonomy/labour-based frameworks. Each highlights real risks and real opportunities; reconciling them is the central jurisprudential challenge.

Legal analysis: Does prohibition protect or harm?

The Indian Surrogacy (Regulation) Act, 2021, embodies a legislative response oriented toward preventing commodification by banning commercial surrogacy. Yet legal restrictions that narrowly define who may commission surrogacy and who may act as a surrogate raise several issues:

Paternalism and exclusion. By allowing only "altruistic" surrogacy and restricting commissioning to certain categories, the law excludes single parents, LGBTQ+ individuals or couples, and international clients—limiting their reproductive rights. Additionally, the requirement that surrogates be close relatives constrains surrogate autonomy and may pressure women into familial obligations. These limitations illustrate a form of state paternalism that protects an abstract moral order at the cost of individuals' reproductive choices.

Risk of underground markets. Historical and global evidence suggests that banning or over-restricting commercial markets pushes activity underground, where regulation and protections vanish. Critics of the Act predicted that prohibition might increase clandestine arrangements and black-market intermediation, exacerbating surrogate vulnerability rather than alleviating it. Empirical reportage has raised such concerns.

Insufficient welfare protections. The Act focuses predominantly on prohibitions and eligibility rules, but less on robust welfare guarantees for surrogate mothers (such as long-term health monitoring, mental health support, rehabilitation, or social security). Without comprehensive socio-economic support, prohibition may simply eliminate a source of income for women without providing viable alternatives.

Child-centric and parent-centric protections. The legislation also prioritizes certainties of parentage and the welfare of the child, which are legitimate state interests. But balancing child welfare with surrogate rights demands careful, rights-respecting mechanisms—e.g., ensuring that intended parents have

enforceable obligations and that surrogates retain access to healthcare and aftercare. The Act's design partially addresses these concerns but arguably falls short of a balanced, labour-rights-informed model.

Overall, the legal analysis suggests that simple prohibition of commercial surrogacy is neither a necessary nor sufficient remedy for exploitation; regulatory design matters. A carefully regulated framework that treats surrogacy as reproductive labour—combined with socio-economic policies that expand women's choices—may better protect autonomy and reduce exploitation.

Comparative perspectives and alternative models

Examining other jurisdictions provides useful policy options:

Regulated commercial models (some U.S. states): These treat surrogacy contracts as enforceable and focus on transparent clinic regulation, contract law, and parentage orders. Critics question whether mere contract enforcement suffices to prevent exploitation without socio-economic supports.

Altruistic-only models (some European countries): These may reduce market incentives but are criticized for restricting reproductive autonomy and excluding many prospective parents. Where altruistic-only regimes exist, informal commercial markets can emerge.

Hybrid models: Some commentators argue for hybrid regimes that allow compensated surrogacy under strict labour-rights frameworks: mandatory health insurance, minimum compensation standards, independent counselling, cooling-off periods, and enforceable postnatal care commitments.

In all contexts, intersectional factors—race, class, migration status—shape outcomes. International surrogacy introduces additional complications: citizenship, cross-border parentage disputes, and possibilities of trafficking—areas where harmonised international norms could help. Comparative experience suggests that neither pure prohibition nor laissez-faire markets are satisfying; hybrid, rights-based regulation that foregrounds surrogate welfare is preferable.

Towards a feminist-informed regulatory framework: principles and recommendations

A feminist jurisprudence that both respects autonomy and guards against exploitation should rest on several core principles: agency, non-exploitation, dignity, transparency, and distributive justice. Operationalising these leads to the following recommendations.

1. Recognise surrogacy as reproductive labour and afford labour protections

Treat surrogacy arrangements as a form of work deserving labour protections: standardized contracts, enforceable compensation, mandated health insurance, maternity and postnatal care, and access to grievance redress. This perspective shifts the focus from moral condemnation to practical safeguards that reduce exploitation.

2. Ensure free, informed, and ongoing consent

Consent must be an ongoing process, not a single signature. Independent legal counsel and counselling (on health risks, psychological impact, and long-term implications) should be mandatory. Counselling must be independent of clinics and include culturally sensitive, illiteracy-friendly processes.

3. Prohibit exploitative intermediaries and strengthen regulatory oversight

Licensing of clinics and strict oversight of intermediaries are essential. Penalties should target trafficking, coercion, and profiteering agents who exploit vulnerabilities. Transparent audit trails and mandatory reporting can deter illicit practices.

4. Provide socio-economic supports and alternatives

To reduce structural coercion, social policies should expand women's real options: access to decent employment, income support schemes, education, and healthcare. Surrogacy should not be the only economically viable route; the state should invest in alternatives for women's economic security.

5. Expand eligibility while protecting child welfare

Excluding single parents, same-sex couples, or foreigners often reflects moral judgements rather than child welfare needs. A better approach is to design parentage and child-welfare safeguards that prioritise the best interests of the child without unduly restricting who can commission surrogacy.

6. Post-surrogacy support and reintegration

Mandate postnatal healthcare, mental health services, and community reintegration support for surrogates. A one-time payment is insufficient; longer-term welfare provisions acknowledge the surrogate's contribution and protect her dignity.

7. Data collection and monitoring

Systematic, anonymised data on surrogacy arrangements, health outcomes, and socio-economic impacts are crucial for evidence-based policymaking. Independent research funding should be allocated to study surrogate outcomes.

These recommendations attempt to reconcile feminist concerns about commodification and structural coercion with a liberal respect for autonomy—by re-framing surrogacy as work worthy of rights rather than solely as a market transaction to be banned.

Addressing counterarguments

"Any marketisation of reproduction is inherently wrong."

This absolutist stance values dignity and non-commodification. But outright bans have demonstrable downsides—underground markets, loss of income for women, and denial of parenthood to some. A rights-based regulatory model protects dignity by enforcing non-exploitative conditions rather than assuming market prohibition will remove structural harms.

"Women cannot meaningfully consent under poverty."

This is an important caution. Consent in poverty contexts is compromised. But the solution lies in removing the underlying poverty and ensuring strong safeguards and alternatives—not in paternalistically excluding women from making choices about their own bodies.

"Regulation is too difficult to enforce in low-resource settings."

While enforcement is challenging, transparent licensing, civil-society monitoring, international cooperation, and targeted resource allocation make effective oversight achievable. Moreover, ethical policymaking requires attempting to regulate rather than abandoning vulnerable groups to illicit markets.

Conclusion

Surrogacy sits at a fraught intersection of autonomy, labour, motherhood, and market dynamics. Feminist jurisprudence offers both cautions and pathways forward: it rightly warns against commodification and exploitation, but it also insists on respecting women's agency and choices. In India and globally, the evidence suggests that neither blanket prohibition nor unregulated commercialisation is adequate.

A feminist-informed legal framework should recognise surrogacy as reproductive labour that requires strong labour protections, robust informed consent procedures, socio-economic alternatives to reduce coercion, and post-surrogacy welfare. Legislation like India's Surrogacy (Regulation) Act, 2021 attempts to address commodification but risks paternalism and exclusionary effects. Policy should evolve toward nuanced regulation that protects surrogate dignity and agency while safeguarding children's welfare.

The future of surrogacy law must therefore move beyond binary judgments. By centring the lived experiences of surrogate women, integrating labour-rights protections, and tackling structural inequality,

law can better ensure that surrogacy is a choice rather than a last resort—a practice that protects women's autonomy without promoting exploitation.

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