



# COMMERCIAL SURROGACY:

## A CONTESTED TERRAIN IN THE REALM OF RIGHTS AND JUSTICE

Sarojini Nadimpally,  
Sneha Banerjee, and  
Deepa Venkatachalam

Sama Resource Group for  
Women and Health

championing  
women's sexual and  
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**Asian-Pacific Resource & Research Centre for Women (ARROW)**

1 & 2 Jalan Scott, Brickfield, 50470 Kuala Lumpur, Malaysia

**Telephone** 00 603 2273 9913 to 15  
**Fax** 00 603 2273 9916  
**E-mail** [arrow@arrow.org.my](mailto:arrow@arrow.org.my)  
**Web** [www.arrow.org.my](http://www.arrow.org.my)  
**Facebook** <https://www.facebook.com/ARROW.Women>  
**Twitter** @ARROW\_Women  
**Youtube** ARROWomen  
**Pinterest** arrowomen

**Production Team:**

**Writers:** Sarojini Nadimpally, Sneha Banerjee, and Deepa Venkatachalam  
**Project Supervisor:** Sivananthi Thanenthiran  
**Project Coordinator/Editor:** Maria Melinda (Malyn) Ando  
**Copy Editor:** Cezar Tigno  
**Reviewers:** Amar Jesani, Malyn Ando, Mangala Namasivayam, Rama V. Baru, and Sivananthi Thanenthiran  
**Layout/Graphic Design:** Nicolette Mallari  
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Sarojini Nadimpally, Sneha Banerjee, and Deepa Venkatachalam  
Sama Resource Group for Women and Health

## ABSTRACT

*Commercial surrogacy has emerged in recent years as a volatile site in the encounter among gender, technology, and society; one that is blurring the boundaries not just of the body, but also of feminist praxis. In India, a country that has become a favoured global destination for low-cost, high-tech reproductive tourism, the practice of commercial surrogacy is generating polarised representations: either as a win-win situation or a race-to-the-bottom. Given the extreme vulnerabilities of a vast majority of poor Indian women due to exclusion and marginalisation in labour and job markets, patriarchal social and family structures, and low educational levels, the immediate financial gain through surrogacy assumes significant motivation. Though the fertility market is based on the principles of capitalist economy, its wider ramification both within the country and beyond is yet to unfold. Commercial surrogacy needs to be analysed along the lines of women's reproductive health issues, and within the larger context of rights and justice.*

*between new technologies and old social structures that construct families. It then moves toward an assessment of the role of women vis-à-vis the conception of surrogacy as a form of labour. As conclusion, this paper puts forward reflections on the recent regulatory move to ban commercial surrogacy in India and questions whether such a ban serves as a panacea as far as surrogacy is concerned, whereby women's bodily integrity is at the core, beyond the narrow commercial versus altruistic binary.*

*This paper examines the phenomenon of surrogacy as an industry in India and provides an overview of its operations. An understanding of this industry will be strengthened through an analysis of the regulatory framework in India, and within the broader Asian context. The paper focuses on the way the ideology of family and patriarchal notions of kinship act as drivers for the surrogacy industry, as well as on the interface*



## Surrogacy: A Brief Background



Surrogacy arrangements have been under scrutiny from medical practitioners, researchers, academics, policymakers, and the mass media for the ways such arrangements take into consideration the role of the surrogate, the use of technology, and the future of the child born from the arrangement. In the past two decades, the phenomenon of commercial gestational surrogacy, as it has emerged in India, has had a trajectory distinct from how the practice flourished in the global North.

Up until the 1980s, before the widespread use of in vitro fertilisation (IVF), genetic or traditional surrogacy was a common practice globally. However, in the 1980s, a spate of cases hit the global North in which women who acted as surrogates refused to part with the children after giving birth, and staked a claim to their custody. Most notable among such cases was the 1985 Baby M case in New Jersey. Even though the custody of the child was eventually given to the father in the “best interest of the child,” the case galvanised complex debates around the validity of surrogacy contracts, the ethics of arranging surrogacy commercially, how surrogacy amounts to “baby selling,” and to commodification of women’s reproductive abilities and objectification of their bodies.<sup>1</sup> The potential of conflict between intending parents and women who act as surrogates and the possible exploitation of surrogates were also serious concerns that emerged.<sup>2</sup> Consequently, governments in many countries of the global North enacted laws that prohibited commercial surrogacy. For example, following the 1984 report of the Committee of Inquiry into Human Fertilisation and Embryology or the Warnock Report, the United Kingdom prohibited commercial surrogacy through the Human Fertilisation and Embryology Act of 1990.<sup>3</sup> In France, surrogacy has been illegal since 1991. Other European countries like Germany, the Netherlands, and Spain also prohibit surrogacy.<sup>4</sup>

India offers a conducive environment for the development of surrogacy as an industry, mainly due to a willing and enabling private sector and the lack of regulation. Add to this the comparatively lower costs, less waiting time, availability of women willing to be surrogates, and the extra services such as close monitoring of the surrogates. Infrastructure and medical expertise comparable to international standards and a wide network of intermediaries have together with the above factors

facilitated the further expansion of the industry, not only locally, but also internationally.

*In a globalised market, where women’s reproductive labour is increasingly getting commercialised, surrogacy has assumed the proportion of an industry and forms a substantial part of the larger and expanding fertility industry and “reproductive tourism.”*

### DEFINITIONS

#### SURROGACY

An arrangement in which a woman agrees to undertake a pregnancy with the intention to carry it to term and hand over the child to the parents for whom she is acting as a surrogate.

#### GENETIC OR TRADITIONAL SURROGACY

Surrogacy through the use of the eggs of the surrogate. This may be done through coitus or artificial insemination of the sperm.

#### GESTATIONAL SURROGACY

Surrogacy done through in vitro fertilisation (IVF), where an embryo is transferred into a woman who will gestate it. In such a case, the ova and sperm could belong to the commissioning parents, or donor gametes may be used. Gestational surrogacy is a more invasive technique than traditional surrogacy, since it requires embryo transfer, and heavy medication for inducing the pregnancy.

#### ALTRUISTIC SURROGACY

The surrogate accepts no monetary compensation for carrying the pregnancy to term.

#### COMMERCIAL GESTATIONAL SURROGACY

Involves monetary compensation to the woman who agrees to act as a surrogate. This is widely practiced in India.

## The Surrogacy Industry and Market



Sunder Rajan cautions that there is a need to retain focus on larger processes and structures driving global body economies that impinge upon women's health and rights.<sup>5</sup> In contextualising commercial surrogacy, this paper scrutinises the larger systems within which it is located and operationalised.

In a globalised market, where women's reproductive labour is increasingly getting commercialised, surrogacy has assumed the proportion of an industry and forms a substantial part of the larger and expanding fertility industry and "reproductive tourism." In recent years, the sharp growth in commercial surrogacy in India has drawn much attention and raised several concerns. Lawyer Apurva Agarwal claimed, in a 2008 article by the Indo-Asian News Service, that commercial surrogacy was a USD445 million industry in India, while Namita Kohli, writing for *The Hindustan Times* in 2011, estimated the commercial surrogacy market at over 2000 crore rupees or about USD298 million. India has been among the most favoured destinations for surrogacy owing to the comparatively low costs, minimum waiting time, absence of a regulatory framework (until 2012, after which certain restrictions and criteria were imposed with regard to commissioning couples accessing surrogacy arrangements), "easy availability" of surrogate women, and a wide network of clinics that offer the use of Assisted Reproductive Technology (ART), primarily in the private healthcare sector, that boast of "world class" infrastructure and facilities.

*It is important to consider commercial surrogacy's location in the contemporary encounter of globalisation, technology, labour, and gender, in understanding the phenomenon in a holistic manner.*

The growth of commercial surrogacy as an industry was not restricted to ART clinics alone. The potentially large overseas market has also motivated the expansion of the industry in smaller cities and towns. The business of reproductive tourism in India thus involves a spectrum of global and local intermediaries or third party agencies. These emerging players

include a wide array of organisations catering to clientele both at the national and international levels. They range from ART consultants, medical tour operators, surrogacy agents, the hospitality industry, law firms, and tourism departments to other organisations specialising in reproductive tourism promotion.<sup>6</sup> Employing aggressive promotional tactics to attract clients, especially from overseas, these players offer competitive incentives, packages, and deals, in providing a quality surrogates and a "seamless" process. A large informal network of agents across the country recruit women to act as surrogates and also ensure supervision, monitoring, and surveillance during the course of their surrogate pregnancies, often in surrogacy hostels.

Commercial surrogacy is often portrayed as a win-win situation, seen to give desperate and infertile parents the child they want and poor surrogate women the money they need. However, it is important to consider commercial surrogacy's location in the contemporary encounter of globalisation, technology, labour, and gender, in understanding the phenomenon in a holistic manner.

The study *Birthing a Market: A Study on Commercial Surrogacy* (2012) by the Sama Resource Group for Women and Health reveals that current operations in the surrogacy industry are unfavourable to surrogates who occupy the lowest rung of the industry. A woman must be married, with biological children ("proven fertility"), and must have her husband's consent to be a surrogate. For surrogacy, the more invasive IVF Embryo Transfer (ET) is preferred over Intrauterine Insemination (IUI), in the interest of severing all biological links between the surrogate and the child (imagined as the potential source of possible conflicting claims over the child in the future). Surrogates have little to no information about multiple IVF ET cycles, and embryo implantation (and possible foetal reduction), or the likelihood and implications of a caesarean section delivery.

Further, the surrogates' lifestyles are monitored by various actors through frequent check-ups, repeated phone calls and visits from the commissioning parents, and surprise visits by agents. Surveillance is heightened in surrogate hostels. The surrogates are asked to refrain from having any sexual relations with their husbands preferably for the period of the pregnancy but particularly in the beginning, to ensure that conception is through the implantation of the embryos. Surrogates are asked to consume only home-cooked food and to increase intake of

fruits, juice, nuts, and others. They are also asked to not exert themselves physically, with demands to minimise household work, avoid working outside their homes, or even going out during the last three months of the pregnancy. These demands regarding surrogates' diet and mobility are often contrary to the surrogates' needs or comforts, and may be adhered to, albeit reluctantly. Surrogacy arrangements currently regulate the lifestyle of the surrogate—her sexual and physical activity, mobility, and diet, for example—but not other important areas like the maximum number of surrogacies and the interval between surrogacies.

The surrogate relies entirely on the agent or the doctor for information regarding the surrogacy arrangement, including the payment process, drugs, and procedures. Her ability to negotiate is severely constrained. She signs a contract that is drawn up by the intended parents invariably in English, which is often not explained to her adequately. She is not provided with any legal counsel, or any counselling for her emotional and psychological needs. The health risks to mother and child from the drugs and ART procedures are both under-researched, and in the case of surrogacy, under-communicated. It is worth asking what the nature of “informed consent” is in such a situation. Post-delivery, the surrogate must relinquish the child but has no control over the terms of relinquishment; for instance, she usually cannot breastfeed the child.

There is inadequate post-delivery follow up and care. The amount and pattern of payment is variable. The commission of the surrogacy agent may be deducted from the fees of the surrogate and this is not always clarified in advance. Thus, the role of the surrogate, her fees, and her contribution are absent in the scope and discussion of the surrogacy arrangement. Surrogate mothers are recruited and socialised to be part of such arrangements, structured in a manner that allows them little or no control.

Feminists argue that the surrogacy industry promotes exploitation as it is based on a neoliberal market model. Emphasising that cross-border trade is fundamentally based on economic disparity, Deborah Spar talks about the skewed choices that lead women who populate the lower ranks of the labour market to opt for surrogacy, and yet the bulk of the profits go mostly to brokers.<sup>7</sup> Spar argues that concerns regarding global inequality have also been voiced in some cases like the garment industry and environmental arbitrage. However, those cases have led to regulation. According to

Spar, state authority should be wielded to negate the possible ill-effects of surrogacy; prohibition, instead, would result in driving the practice to another region or even underground. As commercial surrogacy has flourished in India, so have the various ethical, social, and legal dilemmas arising out of it.

The current global traffic in body parts, their renting and selling, is unprecedented and has generated new ways of commodifying the human body and commercialising human labour. This has resulted in new and complex ethical, legal, political, and socio-cultural challenges.<sup>8</sup> With surrogacy, reproductive materials and organs have assumed an independent and individualised existence, becoming the property of the person selling them; yet, we also find that the physical and social attributes of the seller affect the price and saleability of these materials. Both objectification and personification are parallel processes at play here. Users may seek surrogates or donor gametes from a particular religious background, just as they may want male or able-bodied embryos to be selected for implantation. Sama's study *Constructing Conceptions: The Mapping of Assisted Reproductive technologies in India* (2010) confirms that India's fertility industry is mediated by class, caste, religion, gender, and other identities, and operates in an environment that leaves much to be desired in terms of access, equity, and justice.

In a new industry that is generating new conflicts, the regulatory framework is engaged in a process of defining and codifying what ethical conduct should look like in this industry. In this broader context, this paper probes into ideas that are gaining prominence and analyses the trajectories they traverse.

## Regulating Surrogacy: Indian, Asian, and Global Contexts

Within the larger milieu of ART, surrogacy was sought to be regulated in India since the early 2000s. The Indian Council of Medical Research under the Ministry of Health and Family Welfare formulated the National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India in 2005. These Guidelines, however, were not legally binding and meant to act literally as a guide for the clinics, which were

expected to voluntarily follow them. ART clinics could not be held accountable for violation or non-adherence to provisions in the Guidelines, thus necessitating legislation to bring the operations of ART Clinics under the ambit of the law. The Council formulated a draft Assisted Reproductive Technology (Regulation) Bill first in 2008, which was subsequently updated in 2010, 2013, and 2014. In the original version, surrogacy remained open to all individuals regardless of their marital status. However, since the 2010 version, the draft laws have located surrogacy within the ambit of heterosexual marriage.

Further, in response to the growing anxiety around the rising transnational surrogacy arrangements in the country and on citizenship issues of children, the Ministry of Home Affairs issued new visa guidelines for foreigners in July 2012. A new “medical” visa category was introduced for seekers of surrogacy who were instructed also to produce an affirmation from a competent authority in their home country or their embassies that surrogacy was recognised and that the child or children born out of surrogacy would be allowed to go back with the commissioning parents from India.

In 2015, however, the government tightened control over transnational surrogacy and stopped the issuance of visas for the purpose of commissioning a surrogacy altogether to foreigners.<sup>9</sup>

A central issue with regard to transnational surrogacy has been the legal and political ambiguities in determining the citizenship of children born out of such arrangements. In India, the two most important cases involving citizenship issues adjudicated by the Supreme Court involved Japanese (Manji Yamada vs. Union of India) and German (Jan Balaz vs. Union of India) commissioning parents. The German case is still pending at the Supreme Court. A brief overview of the Baby Manji case is presented here to outline the complexities that can arise in transnational surrogacy arrangements, including but not limited to issues of citizenship.

Japanese couple Ikufumi and Yuki Yamada travelled to India in late 2007 to hire a surrogate mother to bear a child for them. A surrogacy contract between the Yamadas and Pritiben Mehta, a married Indian woman with children, was agreed upon through a clinic in Gujarat. An embryo from Ikufumi Yamada’s sperm and an egg harvested from an anonymous Indian woman (a Nepalese donor in some reports) was then implanted into Mehta’s womb. In June 2008, the Yamadas divorced, and a

month later Baby Manji was born to the surrogate mother. Although Ikufumi wanted to raise the child, his ex-wife did not. Suddenly, Baby Manji had three mothers—the intended mother who had contracted for the surrogacy, the egg donor, and the gestational surrogate—and a biological father. Yet, legally she had none. Both the parentage and the nationality of Baby Manji could not be worked out under existing definitions of family and citizenship in the Indian and Japanese laws. The circumstances soon evolved into a legal and diplomatic crisis.

*Baby Manji’s case demonstrates the vulnerability of the child who is rendered a “legal orphan” at birth, irrespective of the presence of people with whom she has genetic/biological ties. It is interesting how law often fails to keep up with technological advances that necessitate “novel” regulatory mechanisms.*

The Japanese Civil Code recognises only the woman who gives birth to a baby as the legal mother and the guardian. In this case, the woman who gave birth to Baby Manji was Indian, so the baby was not entitled to a Japanese passport. Because Indian laws do not address commercial surrogacy, the genetic parents of babies born via surrogacy are required to adopt them. While Yamada should have been able to adopt Baby Manji because he was the genetic father, this did not happen as India’s Guardians and Wards Act of 1890 does not allow single men to adopt baby girls. Yamada could not file for an Indian passport for Manji, because although the clinic document mentioned him as the father, there was uncertainty as to who the mother was. Based on this and after much persuasion, the regional passport office issued Baby Manji an identity certificate as part of a transit document, paving the way for a travel visa to Japan. It was the first such identity certificate issued by the Indian government to a surrogate child born in India. It also gave Baby Manji’s paternal grandmother her custody in the absence of the genetic father. The Japanese Embassy issued the three-month-old a one-year visa on humanitarian grounds, which facilitated the baby’s entry into Japan with her Japanese grandmother. Japanese authorities stated at that time that Baby Manji could become a Japanese citizen “once a parent-child relationship has been established,

either by the man recognising his paternity, or through his adopting her.” However, Baby Manji’s legal status in Japan after the expiry of her humanitarian visa in October 2009 is not known.

Baby Manji’s case demonstrates the vulnerability of the child who is rendered a “legal orphan” at birth, irrespective of the presence of people with whom she has genetic/biological ties. It is interesting how law often fails to keep up with technological advances that necessitate “novel” regulatory mechanisms. Surrogacy thus foregrounds old conventional questions around social citizenship, while raising new debates of economic participation and legal political citizenship. It transforms the very construct of social citizenship itself and expands it further to accommodate larger debates about transnational transactions and the evolving care economy.<sup>10</sup>

In the Asian context, India and Thailand have been the most prominent centres for transnational surrogacy. The most prominent issue of contention has been the fact that women from marginalised socio-economic contexts in the developing world were acting as commercial surrogates for commissioning parents from developed countries, mediated by an “industry.” However, there has been a multiplicity of legal approaches towards the phenomenon of surrogacy in general, and transnational surrogacy in particular. The table below presents the legal scenarios regarding surrogacy in Asian countries for which information is available.

LEGALITY OF SURROGACY IN ASIA	
	Country
Surrogacy Not Legal	Afghanistan, Bahrain, Bangladesh, Cambodia, China, Indonesia, Jordan, Kuwait, Lebanon, Malaysia, Maldives, Nepal, Oman, Qatar, Saudi Arabia, Tajikistan, Thailand, Turkey, Turkmenistan, United Arab Emirates, and Yemen
Only Altruistic Surrogacy Legal	Hong Kong, India, South Korea, and Vietnam
Surrogacy Legal	Armenia, Georgia, Israel, Kazakhstan, Kyrgyzstan, and Ukraine
No Laws/Regulations	Azerbaijan, Japan, Pakistan, Philippines, and Singapore

This establishes that the prevalent positions by countries vis-à-vis commercial surrogacy is “not legal” in the Asian context, with recent moves by countries considered “hubs” towards a prohibition on commercial transnational surrogacy. While India tightened control over visa regulations for foreigners commissioning surrogacy in 2012, the Thai government banned transnational surrogacy in 2015. The controversial case of an Australian couple abandoning one of the twin children born out of surrogacy in Thailand, while taking one of the twins along, led to this.<sup>11</sup> The child who was abandoned with the surrogate mother was born with Down’s Syndrome, while the other twin was healthy.

The stricter visa guidelines for foreigners commissioning a surrogacy in India exclude homosexual, single, and unmarried people. Given this scenario, many Indian clinics opened satellite centres in neighbouring Nepal, where Indian women travelled to act as surrogates for homosexual, single, and unmarried foreigners. This was brought to the fore with the tragic earthquake in Nepal in April 2015. There were reports of Israel organising airlifts for babies born out of surrogacy to its citizens through Indian surrogates, who, however, were left unattended amidst the destruction caused by the earthquake.<sup>12</sup> Subsequently, the Supreme Court of Nepal ruled against commercial surrogacy in the country in August 2015, and it was followed by a Cabinet decision of the Nepali government to formally ban the practice in September 2015.<sup>13</sup>

In the global context, some efforts have been initiated by The Hague Conference on Private International Law.<sup>14</sup> In 2010, the growing problem of international surrogacy arrangements was discussed and “the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements” was acknowledged. The Council suggested that the private international law questions relating to international surrogacy arrangements be reviewed and the connections between international surrogacy cases and the 1993 Convention on Intercountry Adoption be discussed. A Special Commission noted that the number of international surrogacy arrangements was increasing rapidly and expressed concern over the uncertainty surrounding the status of many children born as a result of these arrangements. It was also recommended that The Hague Conference should carry out further study of the legal issues surrounding international surrogacy.

Source: A compilation of the sources of information that forms the basis of this classification is given in the Appendix.



## Ideology of Family and Kinship as Industry Drivers



To understand the appeal and context in which ART is used and commercial surrogacy is being practised, the social institution of the family, including the perceived need for giving birth and taking care of children, needs careful examination. The traditional family is constructed as a gender-structured, heteronormative, and procreative unit. More important is the universal connotation that accompanies this understanding. Women's identification with their childbearing and childrearing duties is at the heart of hetero-patriarchal culture. The notion of motherhood as natural, and consequently understood as compulsory, has to be located in the pervasive ideology of family which holds that the stereotypical nuclear family is the universal social unit. The family has been accorded material and ideological privilege by society, which is evident from the high expectations of marriage and family, normalised in our cultures. While infertility in women is perceived as an unnatural condition which leaves women's lives unfulfilled, male infertility is symbolic of emasculation. The pathological identification of infertility and the practice of commercial surrogacy are lodged in this ideological context. Yet another need for understanding family as an essentially procreative unit can also be located in the economic arrangement it embodies. Securing family wealth through inheritance is a strong consideration in reproduction across cultures. In social and political philosophy, reproduction within heterosexual and monogamous marriages is understood as the primary mode through which private property is held and social classes created and sustained.<sup>15</sup>

*The idea of “designer babies,” increasingly visible in the demand for specific eggs/gamete on the basis of caste, class, race, and other criteria reflects how kinship and identity are also understood through community and one's position in these social hierarchies.*

In the triad of family, marriage, and property, kinship through genealogy holds primacy. However, the use of gamete donors and the process of gestational surrogacy poses interesting challenges to this idea of kinship defined through genealogy. The idea that kin relations are established through genealogical relations must be located in the fact that the “family is not only an active agent of social control; it is also an active agent of social placement.”<sup>16</sup>

The idea of “designer babies,” increasingly visible in the demand for specific eggs/gamete on the basis of caste, class, race, and other criteria reflects how kinship and identity are also understood through community and one's position in these social hierarchies. IVF treatment makes possible the securing of such bonds of belonging, which is also one of the reasons for boosting the industry and has also led to fewer reservations about surrogacy where the surrogate can be considered irrelevant.

According to Helena Ragone, “It has become increasingly clear that ‘biological’ elements have primarily symbolic significance...[whose] meaning is not biology at all.”<sup>17</sup> To illustrate the contingent nature of defining what constitutes the biological, Nivedita Menon gives the example of two diametrically opposite arguments that are made by doctors in the ART clinics.<sup>18</sup> In the case of gestational surrogacy, the commissioning parents are told that the baby is not related to the surrogate in any way. Here, the understanding of the biological is reduced to DNA and genes. However, in case of a parent who is carrying a foetus she intends to raise, but fertilised by a donor egg, she is reassured that genes are a small component of the child's constitution, because as the foetus grows, every cell is built out of the gestational mother's body, thus making her the biological mother. Here, Menon makes it clear that the all-determining biology is being made up by doctors as they go along.

In the use of ART, Amrita Pande posits that challenges to more hegemonic notions of kinship take shape through the redefinition of the blood tie.<sup>19</sup> The use of blood and human substance from parents, donors, and surrogates complicates the way the intertwined nature of the blood tie as a marker of identity is understood. By breaking down the reproductive process, not only in terms of the distinct components of gametes and gestation but also in taking it beyond the ambit of heterosexual marriage through involvement of donors and surrogates, the mother-child tie is redefined through gestation

where the surrogate is only thought to be providing a service whereas parentage lies with others.

While bringing women's reproductive labour outside the family, gestational surrogacy also pushes a new understanding of masculinities. This aspect is illustrated poignantly by Rita, a surrogate (interviewed as part of Sama's research in 2012), when she joked about the "emasculatation" of husbands. Rita said her own husband had no contribution to the surrogate pregnancy, has no sexual relations with her while she is away, and has to take care of the children and cook. The intended father has no contact or relationship with her or the child throughout the pregnancy, thus demonstrating to her the "minimum contribution by men" in the process. Another surrogate, Parvati argued that "the role of the penis has been taken over by medicine and technology," implicitly reiterating her own contribution to the process.

The discourse around surrogacy is thus not strictly about biology/naturalness, as can be seen through inconsistent arguments that deploy the logic of the "nature-nurture" binary, or in the case of a surrogate and her reproductive labour.

Beyond the child born out of surrogacy, kinship relations are also forged in interesting ways among the people involved in a surrogacy process. In the overall framework of a commercial gestational surrogacy, the surrogate mother is often construed as an indispensable yet a "disposable" actor.<sup>20</sup> Pande observes that surrogates' narratives often reflect their belief that their relation with the commissioning couple/mother would continue even after the birth.<sup>21</sup> Often the idea of their reciprocal involvement in each other's lives or association like any other family member is based variously on fantasy or reality of existing involvement. Throughout her ethnographic work, Pande shows how surrogates were able to construct kinship ties with women cutting across caste, religion, class, and national boundaries. She insightfully argues, "unlike in textbook kinship models, everyday forms of kinship seem to be open to manipulations and transformations. They offer new possibilities for understanding how relatedness may be composed of various components—shared substance, shared company and the continuous labour of women."<sup>22</sup>

## New Technology, Old Structures

■ ■ ■ ■ ■ ■ ■ ■

With their ability to delink reproduction from sex, ART creates new forms of parenthood and family that were not possible before. As such, single people and queer individuals and couples can now use ART to have biologically related children. It can be argued that ART privileges "procreative intent" over the narrow idea of biology (indeed they are interpreting and defining biology); this is how conflicting claims of multiple parents made possible by these technologies can be and are settled, most notably, through the law. This section is an exploration of the following issues: What is the potential in ART for the subversion of the heterosexual family? Does ART serve to pluralise, even democratise, the family and kinship, or do they merely circumscribe it, reinforcing and re-legitimising traditional formats? Or is it a bit of both?

The potential of ART in subverting the hetero-normative structure of the family by queer couples has been variously contested. By opening up the institution of family to homosexual partners, are we enhancing the scope and meaning of sexual and reproductive rights, and challenging traditional gender roles, or is it simply a need for recognition that dilutes such a challenge precisely for the desire to be in such institutions and reinforce their "natural" and normal status? Cheshire Calhoun argues for an inclusive definitional framework for what is understood and legitimised as "family" and expanding it beyond heterosexual privilege. The inclusion of queer people in legal structures from where they have been historically outlawed for their "deviant nature" has become a possibility through ART. Moreover, creating families in alternative ways also includes the potential to provide alternatives to the conventional family form. And thus, "centred within a liberatory lesbian and gay politics, the bid for access to the family is the bid for the right to exercise definitional authority with respect to the family."<sup>23</sup>

*Does ART serve to pluralise, even democratise, the family and kinship, or do they merely circumscribe it, reinforcing and re-legitimising traditional formats? Or is it a bit of both?*

However, body economies (including the surrogacy industry), despite their subversive potential to reconfigure social structures of patriarchy, gender, caste, class, and race, often get attuned to those traditional structures. Surrogacy through ART lies on the same spectrum as other phenomena that involve the intimate use of the body and its parts. In the context of one such phenomenon, organ donation, Lawrence Cohen highlights how caste and community have come to matter in how families choose organ donors and sellers in ways they hitherto had not.<sup>24</sup> Similarly, some people may seek surrogates or donor gametes from a particular religious background, just as they may want male or able-bodied embryos to be selected for implantation. Sama's 2010 research, as discussed earlier in the paper, confirms this. Similarly, the surrogacy industry serves to re-inscribe ascriptive identities in sometimes predictable and sometimes unpredictable ways.

From Sama's research, as well as other studies that document accounts of surrogates' subjectivities, it is clear how notions of love and sacrifice play a very important role in decision-making. Surrogates often say they are acting "out of love" for their own children and to be able to give them a better future through entering into surrogacy arrangement. In fact, the distinction between "altruistic" and "commercial" surrogacy does not stand up to scrutiny, because commercial surrogates feel altruistically about what they do as well, and altruistic surrogacies could involve transactions, material and otherwise, especially when we consider that altruistic surrogacies occur within family and kinship networks, which are transactional in nature.

Further, the industry employs new and old patriarchal notions of womanhood, motherhood, gender, bodies, and labour. Since ART clinics employ a conscious marketing strategy that glorifies motherhood for women, feminists have criticised the industry for being patriarchal and capitalist, and for cashing in on the pressure on women to be mothers. Socially, the value accorded to biological parenthood within heterosexual marriage is far superior to the value accorded to voluntary childlessness, adoption, or alternative family/kinship structures. At least thus far in India, the practice of assisted reproduction is overwhelmingly geared towards reinforcing the heteropatriarchal family, by restoring the linear progression from heterosexual marriage to biological parenthood. Amrita Pande argues that the surrogate is socialised to be a "mother-worker" in a way that her status as a mother is an insidious disciplining mechanism that undermines her status as a

worker.<sup>25</sup> Saravanan argues that the most important criteria for choosing surrogates is their submissiveness to the demands of doctors and intended parents; clinics prefer women who are on the edge of poverty and not educated beyond the higher secondary level.<sup>26</sup> Additionally, the figure of the sex worker comes up a lot in interviews with agents, doctors, and surrogates; the sex worker is the "other," the real "body-seller," who serves to bolster the altruistic veneer of surrogacy for all involved.

*Surrogacy also flags important questions about reproductive autonomy and justice. If women's right to make reproductive choices with regard to contraception, abortion, and pregnancy is recognised, should we not also understand surrogacy as another choice for women to make?*

Cohen discusses the State and the question of political form in the conversation on bioavailability from two standpoints: "operability" (the degree to which one's belonging to and legitimate demands of the state are mediated through invasive medical commitment) and the medicalisation of politics.<sup>27</sup> Operability is a useful frame to employ in surrogacy. Given that women who act as surrogates are predominantly from marginalised sections of society,<sup>28</sup> there is a need to broaden the debate beyond rights for surrogates in the arrangement (though that is also urgent and needs intervention), to include larger issues of reproductive justice, autonomy, and oppression. Surrogates have very little autonomy over their own pregnancies. They are from a class that has traditionally been targeted for population control, coercive, or incentivised tubectomies; have high maternal mortality and morbidity; and little access to healthcare that should be their entitlement. A longer-term, life-cycle view of the reproductive health of these women and its linkages with interrelated questions of livelihoods, nutrition, education, amongst others, helps to understand surrogacy not only in individual terms but also in the context of communal rights, state responsibility, political economy, and the conditions of women's labour under globalisation. Additionally, only women with "proven fertility" are eligible to be surrogates (can be seen as a prior

operability that has marked its presence in their bodies through their identification as mothers). Often, women who start off doing egg donation later become surrogates, and maybe even surrogacy agents themselves. Clearly, this is a class that already has a medicalised and a highly gendered relationship with the state, and is characterised in public discourse as having “excessive passion and limited reason.”

Surrogacy also flags important questions about reproductive autonomy and justice. If women’s right to make reproductive choices with regard to contraception, abortion, and pregnancy is recognised, should we not also understand surrogacy as another choice for women to make? The idea of choice, however, is questioned by some feminists<sup>30</sup> given that women’s control over their bodies is determined by social relations and power hierarchies. This is evident in the context of surrogacy arrangements, where denial of reproductive rights and autonomy are governed by private contracts, for instance, denial of surrogates’ rights to abort, breastfeed, relinquish the child or children), among others.

A reproductive justice approach to surrogacy would therefore be one that looks to create structural changes, challenges the inherent power inequalities, and also accounts for reproductive oppression. However, the reproductive justice approach is not without its limitations. Alston Bailey recognises that a surrogate’s life circumstances—housing needs, debt, illness, and disease—may make the health risks associated with contract pregnancy worth taking.<sup>32</sup>

The decision to become surrogates is frequently founded in women’s social conditioning to gendered roles of ensuring families’ well-being.<sup>33</sup> Evidence also points to the industry’s control and construction of information that women need to make an informed decision with regard to surrogacy.<sup>34</sup> Women are not provided clear and comprehensive information about the procedures that they will be undergoing and the implications and risks to their health and lives. For example, surrogate mothers would not be informed and would not know when they would undergo procedures for foetal reduction or would not have a choice about giving birth through caesarean procedure.<sup>35</sup> While commissioning parents have the right to demand abortion (if they wish to discontinue the arrangements, or in view of the detection of congenital abnormalities), the surrogate does not have the right to keep the child if she so wishes. Surrogate women thus have little or no say in decisions, including decisions about their own bodies.

Concerns surrounding surrogacy do not result only from a view of motherhood as sacrosanct and pure. Rather, a feminist engagement with surrogacy, as feminist Chayanika Shah puts it, is conflicted about “the disconcerting use of the language of ‘rights’ and ‘choice’ by the promoters of these businesses on behalf of women going in for these technologies” on the one hand, and “the assertion of rights over the body as a resource” on the other hand.<sup>36</sup>

## Labour in Surrogacy, Surrogacy as Labour

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The debate over the use of the body is at the heart of the development and use of new biotechnologies. Oocytes donation, commercial surrogacy, contributions for stem cell research, and clinical trial participation are some of the ways in which people undergo biological processes, very often stimulated, or make bodily contributions either in exchange for money or in kind or as a promise for future treatment.

When considering the question of surrogacy as labour, it is important to map out and understand key patriarchal constructions, the logic of capital and market, and how they converge at various points. The concept of labour has always been at the centre of feminist debates and theorisation. The classical concept of labour is that of a socially recognised, productive activity that operates on the principle of exchange in the present capitalist society. This understanding of labour, however, has to be located as a historical construction where the separation of home and family and its identification with a private sphere were created in opposition to labour outside the home and seen as the public sphere of all commercial activities and those establishing one as a citizen. This dichotomy was also seen to be the basis of sexual division of labour, accompanied by power organised both materially as well through accompanying ideology of “natural” gender roles and relations.

Feminist scholarship has noted the construction of this distinction with the advent of western capitalism and explained that the creation of this so-called unproductive realm of activity associated traditionally with women itself is a creation of capitalist economy, which has been crucial in sustaining



capitalist relations of production.<sup>37</sup> Feminist critiques and activism have traversed a long path from critiquing its invisibilisation to its informalisation. Childbearing and childrearing have always been seen as part of the naturalised, non-commercial, and most of all, non-productive activity, often coloured by motherly love and nurturance.

*Commercial surrogacy brings women's reproductive labour into the market in an unprecedented manner and poses a challenge to ideological constructs of the family, to the perceived separation of the family from the market, and indeed to the very basis of kinship.*

Surrogacy has effectively destabilised the popular understanding of labour, where the separation of home and family and its identification with the private sphere was created in opposition to work outside home and seen as the public sphere of all commercial activities and those establishing one as a citizen. Surrogacy is not understood as formal wage work. The question that is at the heart of the debate is, What establishes this kind of labour as valuable and how much? Furthermore, does “surrogate” imply a patient, or worker, a participant, or an equal contracting party? Is she the mother/ is she a mother? What is the basis of kinship and claim over the child and is there a hierarchy of bodily contribution itself?

In a bid to mobilise biological resources and participation for the needs of the industry and market, these technologies can also generate encounters that create friction with the existing social relations and hierarchies of gender, class, caste, and religion. Additionally, the possibilities of reproductive choices and decision-making with regard to children, family, and income can itself be a site for struggle over entitlements, recognition, self-perception, and membership in extended family networks and larger communities.

New markets for women's labour under globalisation deploy women's bodies in highly gendered and sexualised roles. While surrogacy pushes the limits of women's labour from the private to the public and from care to work, the accompanying technological interventions in their bodies

pose serious threats to their health due to the use of a large quantity of hormonal drugs and injections needed to sustain the surrogate pregnancy. Sama's 2012 research shows that a surrogate's informed consent is often not sought during the surrogacy process. Commercial surrogacy brings women's reproductive labour into the market in an unprecedented manner and poses a challenge to ideological constructs of the family, to the perceived separation of the family from the market, and indeed to the very basis of kinship. In this scenario, women's reproductive labour is being performed in a particular configuration. The nature of this labour changes when it transgresses these norms and enters the marketplace; to scrutinise the norms as well as the rationale governing this labour once it is commercialised; and at the same time to examine how the prevalent social norms and meanings are alternately negotiated and deployed.

It is important to understand that this subversion is located within an industry that is operating in the context of the increasingly liberalising economic policies of the State, of an established and flourishing privatised health sector, and of the availability of women's cheap labour. On one level, the subversive potential lies in the fact that childbearing is considered as a commercial act, for which women are being remunerated. On the other, the challenges to the understanding of the biological basis of parentage and kinship are severe since such arrangements break the linear links and create multiple parents based on the use of gametes, womb, and procreative intent—each of which could be attributed to a different person.

However, in practice, what can be seen is that the conditions under which the surrogates perform this labour are often a mix of deployment of existing meanings of family and market at the same time to ensure a successful outcome. The dimension of exploitation is indicative in this work as the location of these women. According to Sama's 2012 study, most women who become surrogates and their spouses were employed in seasonal, irregular, low-paying, insecure, and informal jobs. Women were mostly engaged in informal garment work, factory work, domestic work, cooking, garment stitching, or other home-based work, or were not employed formally outside their household. Their spouses were engaged in work such as driving, cooking, and garment factory work.

In the context of the spectrum of body economies, the driving logic of capitalist production, according to Sunder Rajan,

is that of creating “surplus health.”<sup>38</sup> Furthermore, “health itself gets redefined into becoming something alienable and appropriable, a source of surplus value in a manner analogous to that by which labour became surplus labour under logics of industrial capital. Patients, in this calculus, have no meaning except as potential future consumers of therapy, leading to the imagination of patients as, always already, patients-in-waiting who are consumers-in-waiting.”<sup>39</sup>

In the case of surrogacy, such logic overlooks health as a shared necessity of both the surrogates and the commissioning parents. On the other hand, this logic also sustains the continuous production and pathologisation of infertility. To account for the present situation requires understanding the uniqueness of these forms as well as situating it in its shared characteristics of contractual, insecure, casual labour increasingly prevailing as the general form of labour globally. Thus, we need to better understand the linkages between technological development, innovation, and policy shifts in post-industrial economies on the one end, and multiple articulations of labour, risk, and fragmentation experienced in developing economies by those already part of global value chains through their participation in the workforce in other industries simultaneously.

## CONCLUSION

### Unpacking Bodily Integrity

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Most recently in August 2016, the Government of India carved out a new proposed law with the sole focus on surrogacy. Surrogacy (Regulation) Bill 2016 emerged separately from the Draft ART Bill 2014 whose fate remains uncertain. The new Surrogacy Bill prohibits commercial surrogacy and allows only altruistic arrangements within “close relatives,” where the surrogate will not receive any remuneration. Moreover, it limits access to surrogacy only for childless Indian heterosexual couples who have been married for five years. Such eligibility criteria are discriminatory towards all the other people who may want to access surrogacy but are now rendered ineligible—unmarried couples, individuals who are single,

and the queer community. Even for married couples who are infertile, a window of five years may seem arbitrary since a clinical diagnosis of infertility rests on the “inability of a sexually active, non-contracepting couple to achieve pregnancy in one year.”<sup>40</sup>

As a policy response, a ban runs the risk of creating black markets and further exacerbating the vulnerabilities of women who act as surrogates. In patriarchal societies, families can also be exploitative towards women who may be coerced to become surrogates for close relatives. Thus, the argument that commercial surrogacy is an exploitative arrangement, while altruistic surrogacy is not, does not stand on firm ground.

*Bodily integrity understood as opportunity, power, and rights must be problematised to factor in hierarchies of gender, race, caste, class, and ethnicity and those that arise from global politico-economic asymmetries.*

A pro-ban vs. anti-ban debate on commercial surrogacy tends to miss the larger picture of how gestational surrogacy using IVF is induced and how the surrogacy industry functions. Until the Bill is passed, it is difficult to assess how it can safeguard the rights of women who act as surrogates in India, an issue that is much broader than just remuneration for surrogacy. It includes women’s ability to make informed decisions regarding intrusive technological interventions in their bodies, their reproductive autonomy, their right to health, and control over their reproductive labour. Commodification and choice are enmeshed in a very complex way. For surrogates, earning a living by giving birth is closely linked to their own contexts where at a given time, surrogacy appears to be the best available option.<sup>41</sup> The more pressing question is that of the right against exploitation, upholding their rights as workers in the surrogacy industry, ensuring informed consent, payment of wages, and legal guarantees for the same. Will banning commercial surrogacy address all these pressing issues?

In the regulation of ART, including surrogacy, “technology” is seen in isolation from women’s voices. Sama’s research has focused on the voices of women from both sides—women who

access infertility treatments as patients<sup>42</sup> and also women who act as surrogates.<sup>43</sup> Both experience vulnerability and lack of bargaining power in a hyper-medicalised scenario. However, the latter is even more vulnerable since her experience is not just mediated by technology and medical practitioners but also by her economic deprivation and her location at the lowest tier of the surrogacy industry.

The phenomenon of surrogacy, regardless of whether it is commercial or altruistic, necessitates a broader unpacking of various concepts that have become a part of the feminist lexicon. One such conceptual trope is that of “bodily integrity.” It must be unpacked to include scenarios where somebody’s bodily rights are sought to be projected on others’ bodies, especially when those others are more vulnerable and marginalised; even more so when such projections find transnational expression. Infertility treatment which piggybacks on a “right to procreation” presents a case in point when that right is sought to be realised through the bodies of egg and sperm donors, as well as commercial surrogates. Bodily integrity understood as opportunity, power, and rights must be problematised to factor in hierarchies of gender, race, caste, class, and ethnicity and those that arise from global politico-economic asymmetries.

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ARROW is a regional non-profit women's NGO based in Kuala Lumpur, Malaysia, and has consultative status with the Economic and Social Council of the United Nations. Established in 1993, it envisions an equal, just, and equitable world, where every woman enjoys her full sexual and reproductive rights. ARROW promotes and defends women's rights and needs, particularly in the areas of health and sexuality, and to reaffirm their agency to claim these rights.

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**Asian-Pacific Resource and Research Centre for Women (ARROW)**

1 & 2 Jalan Scott, Brickfields 50470, Kuala Lumpur, Malaysia

**Telephone** (603) 2273 9913/9914/9915  
**Fax** (603) 2273 9916  
**E-mail** [arrow@arrow.org.my](mailto:arrow@arrow.org.my)  
**Web** [www.arrow.org.my](http://www.arrow.org.my)  
**Facebook** The Asian-Pacific Resource & Research Centre  
for Women (ARROW)  
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