Legal (Dis)Orders: A Feminist Assessment of India's Assisted Reproductive Technology and Surrogacy Laws

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Abstract

This article critically examines India's legislative framework on women's reproductive labour, focusing on the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act 2021. It explores how these laws, with their prohibitionist approach, demand altruism on the part of women and undermine their reproductive autonomy. Our analysis combines constitutional arguments on reproductive rights, privacy and bodily autonomy with empirical research to assess the law's ramifications in a privatized labour market. The findings underscore the resilience of women involved in reproductive labour, who resist the unjust laws and assert their rights within a complex regulatory landscape. The research further reveals that the widening demand–supply gap as a result of the restrictive laws potentially fosters an underground economy where reproductive services are rendered with exploitative repercussions for the women, which demands urgent reworking of the law.

Keywords: assisted reproductive technology (ART); reproductive labour; surrogacy; egg donation; reproductive justice.

[A] INTRODUCTION

The law has long been a site of contestation for control over women's bodies. In India today we are at the crossroads of paradoxical moves to rework the law governing intimate relations. The increase in the age of consent has recast instances of consensual adolescent and pre-marital sex as rape while the proposed increase in the age of marriage

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threatens to weaponize criminal law against child marriages. A robust right to privacy jurisprudence has led to the decriminalization of adultery while, at the same time, other forms of consensual sex outside marriage, such as sex work, are effectively criminalized even while non-consensual sex within marriage is not criminalized. The rights of the LGBTQIA+ community to consensual relationships in private are upheld but not their right to marriage. India has some of the most generous laws on abortion and maternity benefits, yet the ability to form a family through the use of assisted reproductive technologies (ARTs) and surrogacy is heavily circumscribed.

These contradictory impulses of the law become particularly problematic when viewed through the lens of women's reproductive labour, often performed in intimate settings across the marriage–market continuum. Increasingly, the criminal law is being mobilized to recast women's decisions regarding their bodily autonomy as gendered violence, thus eliminating women's rights to livelihood. In some instances the prohibitionist impulse of the law is all too evident. Consider the case of sex work. For decades, sex workers have occupied the liminal space of illegality under a legal regime where the right to sell sexual services is not criminal *per se* but all activities required in order to perform sex work are criminalized. The threat of enforcement of the criminal law then rearranges bargaining entitlements within sex work in a way that leads to women's exploitation. Of late the transnational anti-trafficking juggernaut has resulted in a series of carceral anti-trafficking Bills, one more draconian than the other (Kotiswaran & Rajam 2023). In the name of preventing women's sexual exploitation, these laws conflate consensual sex work with trafficking, seeking to prosecute and punish not just traffickers but also sex workers through forced rehabilitation. In other instances, as with various forms of erotic dancing, the carceral move is disguised in the form of a permissive regime which is all but unworkable as became evident with the laws on dance bars in Maharashtra.

Similarly, in the case of domestic work, beneath the legislative indifference in acceding to a labour law for paid domestic workers is the extensive misuse of the criminal law by employers to discipline them. Yet, in no other instance of women's reproductive labour is the turn to carcerality more dramatic than in the case of surrogacy and egg donation. India has the dubious distinction of having experimented with literally every legal regime known to states over a 20-year period before settling on a particularly restrictive ART/surrogacy regime that mandates that surrogates and egg donors perform for free the labour required to sustain a highly lucrative privatized medical sector. Ostensibly passed to

protect women from exploitation, the Assisted Reproductive Technology (Regulation) Act 2021 (ARTA) and the Surrogacy (Regulation) Act 2021 (SRA) push surrogates and egg donors into the realm of precarious labour. This article offers an insight into how these laws came into being, how various stakeholders including surrogates and egg donors have responded to the passage of the new laws and how they can mobilize transformative traditions of Indian constitutional law to push back against hypercarceral laws that impinge on citizens' fundamental rights.

[B] THE LONG ROAD TO REFORM

In 2017, the President of the Federation of Obstetric and Gynaecological Societies of India reported that more than 22-33 million couples of reproductive age are suffering from infertility. While the number is quite worrying, only a small fraction chooses assisted reproductive services, with surrogacy accounting for merely 1% of the total number of *in vitro* fertilization (IVF) cycles in the country (Department-Related Parliamentary Standing Committee on Health and Family Welfare (Standing Committee) 2017).

Nonetheless, over the past two decades, India has experienced substantial growth in the ART and surrogacy sector, establishing itself as a global hub for these services. In response, the development of surrogacy and ART regulations in India has been marked by a persistent tension between the medicalization of the processes and the recognition of the distinct experiences and vulnerabilities faced by women in the sector. Surrogacy has provoked heated feminist debates around the world, with Indian scholars harbouring diverse perspectives that explore the conjunction of gender, capitalism and reproductive rights. Western feminist discussions on surrogacy underwent a normative phase with liberal, Marxist and radical feminists debating on the ethics of commercial surrogacy in the 1980s. In the mid-1990s, the conversations moved on to ethnographic investigations to understand the lived experiences in the face of biomedical breakthroughs (Bailey 2011).

In India, feminist engagement remains ambiguous in relation to the normative-ethnographic distinction and encompasses a spectrum of views. Liberal feminists advocate for regulated commercial surrogacy with robust safeguards and position it as a convenient option for women to exercise reproductive autonomy (Aravamudan 2014). On the other hand, radical feminists oppose commercial surrogacy as a form of exploitation similar to trafficking in reproductive body parts (Gupta 2012; DasGupta

& Das Dasgupta 2014). Marxist feminists hold a similar viewpoint on surrogacy, comparing it with reproductive trafficking (Rao 2012).

Under the paradigm of "biocapital", Kumkum Sangari demonstrates how commercial surrogacy commodifies women's reproductive labour, drawing comparisons from post-Fordist manufacturing, where women bear the weight of uncertainty and repeated failure (Sangari 2015). This perspective places surrogacy within a broader capitalist framework that exploits women's labour for profit, emphasizing the economic and gendered dimensions of the practice. The biocapitalist ordering of life leads to a competitive state that is interested in the deregulation and privatization of (re)production, attracting financial capital and depreciation of its labour force with a view to maintaining competitiveness in the international market (Waldby & Cooper 2006). Yet, time and again, we see it is not the technology that reshuffles the knowledge and practices of reproduction that are contested in society, but rather the asymmetry in power relations (Ginsburg & Rapp 1991). Lastly, ethnographic works by materialist feminist scholars like Pande (2014), Rudrappa (2015) and Vora (2015) give a vivid account of the social realities that Indian surrogates face. The studies show how reproductive labour perpetuates and intersects with underlying socio-economic realities that are evident in the lives of women who engage in it. The experiences of working-class surrogates and egg donors expose the unequal power relations in the sector, where choices are often determined by economic necessities and societal pressures.

Our analysis of the law aligns with the materialist approach, and we critique the shift towards prohibitionist policies that prioritize moralistic assumptions over empirical evidence. We conclude that the law does not address concerns regarding economic justice and agency, nor does it acknowledge women's contribution as a form of technologically mediated reproductive labour within capitalist patriarchy. The shift towards prohibitionism within a conservative framework reflects broader social anxieties over economic exploitation and ethical implications of reproductive technologies.

Surrogacy and ART in India have been the subject of various proposed regulatory frameworks from an initial phase of liberal permissiveness to a current prohibitionist phase, marked by legislative restructuring and evolving governance strategies. Permissive policies in the early stages sought to balance technological breakthroughs with ethical considerations. Until 2005, the ART sector in India witnessed the emergence of a burgeoning private healthcare sector with minimal state or central regulation and a *laissez-faire* approach. The Indian Council for

Medical Research and National Academy of Medical Sciences introduced a set of National Guidelines in 2005 to supervise and regulate the ART sector in India. The guidelines acknowledged the economic implications of reproductive labour and mandated compensation for surrogates and egg donors. The 2008 ART (Regulation) Bill (from the Ministry of Health and Family Welfare (MoHFW)), echoing the same sentiment, detailed standard compensation structures for egg donors and surrogates. The framing of ART and surrogacy as viable avenues for realizing parental ambitions and promoting women's economic agency were key interventions during the phase. The 2009 Law Commission of India report acknowledged the dual objective of supporting infertile couples while mitigating the risk of exploitation. The report advocated for the legalization of altruistic surrogacy, despite acknowledging its potential for exploitation. A subsequent 2010 draft ART Bill followed the path of its predecessors, by introducing structured regulations to balance the interests of all stakeholders, including compensation of surrogates and egg donors. The Bill outlined punitive measures against paid intermediaries. In 2012, the Ministry of Home Affairs introduced medical visas to regulate entry of foreigners seeking surrogacy services in India. A 2014 version of the ART Bill from the MoHFW expanded the compensation framework for surrogates to include coverage of medical expenses, insurance and financial compensation. The Bill also acknowledged long-term health risks associated with egg donation and surrogacy by expanding the insurance coverage. Similarly, the National Commission on Women (NCW) in 2017 advocated for a formulaic approach to calculate compensation for surrogates and gamete donors and the need to recognize surrogates as "skilled employees" (Standing Committee 2017).

Subsequent legislative developments mirrored growing concerns about potential exploitation, and this led to a shift towards more stringent regulations. This is evident in the withdrawal of medical visas for foreigners seeking surrogacy in India and a ban on importing human embryos in 2015. The MoHFW's Surrogacy (Regulation) Bill 2016 was another decisive turn towards prohibitionism by restricting surrogacy to altruistic arrangements involving only close relatives. The Bill only allowed reimbursement for medical expenses and prohibited reimbursing the surrogate monetarily. The requirement that the surrogate be the close relative of the intending/commissioning parties (clause 2(z)) was criticized by the Standing Committee (2017) as potentially coercive rather than genuinely altruistic. The Standing Committee raised concerns that the altruistic surrogacy model envisioned in the Bill was driven by moralistic assumptions rather than empirical evidence. The committee

recommended replacing the altruistic framework with a compensated model that includes reasonable monetary compensation for surrogates.

We argue that prohibitionist policies, articulated through legislative reforms like the 2016 and 2019 draft Surrogacy (Regulation) Bills, prioritized moralistic imperatives and patriarchal protections. This shift also marginalized feminist concerns over potential economic exploitation of surrogates and egg donors. It also replaced nuanced regulatory frameworks with paternalistic altruism, underscoring the contingent and politically charged nature of Indian reproductive labour laws. Subsequent amendments and policy shifts further entrenched prohibitionist ideals, culminating in the Surrogacy (Regulation) Bill 2021 and the ART (Regulation) Bill 2021, passed by the Indian Parliament on 8 December 2021. Both Acts formalized the prohibition of compensated surrogacy and egg donation and allow for the payment of medical expenses and insurance coverage only.

If observed carefully, one could trace a shift from medical pragmatism to policy-driven control in the way the Indian state has regulated the ART and surrogacy sector. The progressive tightening of the laws gives away the state's inclination towards heavier regulation. This increasing restrictiveness mirrors a policy shift driven by ethical considerations and concerns about exploitation, but also raises queries about the underlying motivations. Below, we present detailed discussions of the two Acts.

The Assisted Reproductive Technology (Regulation) Act 2021

The ARTA seeks to regulate and monitor ART clinics and banks in India. This includes ensuring safe and ethical practices and preventing misuse of the services. The ARTA also regulates the use of ARTs for individuals who need assistance conceiving or need to freeze gametes or embryos for future use. The Act lays out a range of provisions on age registrations for donors and intending parties, frequency of donation and prohibition and sale of reproductive materials. Under the ARTA, a woman aged between 23 and 35 years can donate eggs while a man has to be between 21 and 55 years of age to donate sperm. An oocyte donor can donate only once in her lifetime and no more than seven oocytes can be retrieved from her. On the other hand, only an infertile married couple are allowed to seek ART services, where the man should be between 21 and 55 years old and the woman between 21 and 50 years old. Additionally, any woman above the age of 21 years is also permitted to avail ART services under the ARTA, which includes unmarried women, divorcees or widows.

Section 22 lays out the requirement of informed consent and insurance. Rule 12 of the ART (Regulation) Rules 2022 mandates a 12-month general insurance coverage to cover all expenses for complications arising from oocyte retrieval. The ARTA allows the commissioning couple to withdraw their consent prior to the embryo transfer, however, the egg donors are not granted the same right. Additionally, the ARTA and the Rules are silent on the importance of counselling of the donors.

Section 29 of the ARTA prohibits any sale, transfer, or use of gametes, zygotes and embryos except for one's personal use with the permission of the National Assisted Reproductive Technology and Surrogacy Board, effectively putting a stop to compensated egg donation in the country. Any person who sells human embryos or gametes faces a hefty fine in lakhs of rupees and a jail term of between three and eight years under section 33 of the Act. Section 33(1) outlines similar penalties for registered medical practitioners, gynaecologists, geneticists or any person who engages in unethical practices such as abandoning, disowning or exploiting a child born through ART, selling or importing human embryos and gametes, running illegal agencies, exploiting commissioning parties or donors, or using intermediaries to recruit donors.

Under the ARTA, only a registered ART clinic can carry out the medical procedures, which include ensuring the eligibility of intending parties and donors, and providing professional counselling to intending parties about implications, chances of success, advantages and disadvantages and risks of the procedures. The clinics are also responsible for ensuring safe ovarian stimulation of the oocyte donors to prevent ovarian hyperstimulation. The Act also outlines the functions and obligations of the ART banks, which are responsible for screening and registering the donors.

The Surrogacy (Regulation) Act 2021

Similar to the ARTA, the SRA lays out explicit guidelines on the access to surrogacy procedures in India and the eligibility of surrogates and intending parties. Access to surrogacy remains limited only to Indian married, heterosexual couples with "medical indication necessitating gestational surrogacy". The age of the intending woman must be between 23 and 50 years, and the man should be between 26 and 55 years. The Act mandates that the intending couple must use their own gametes for surrogacy unless a certified medical condition is verified by the District Medical Board. The couple must not have any surviving children, biological or adopted. In addition to that, the Act permits Indian women,

who are divorced or are widows and between the ages of 35 and 55 years to avail surrogacy. However, the intending woman must use her own eggs and donor sperm. Intending parties who are Persons of Indian Origin are also allowed, but with the permission of the National ART and Surrogacy Board. Single men, never-married women, cohabiting heterosexual couples, same-sex couples and persons from LGBTQIA+ communities are not allowed to have children through surrogacy services in India. The laws stipulate highly restrictive criteria for individuals who are and are not allowed to seek ART and surrogacy services based on physiological or social parameters (Banerjee & Kotiswaran 2020). The criteria set forth by the laws effectively exclude a significant population from exercising their reproductive choices based on their age, marital status and sexual orientations.

On the other hand, the SRA only allows 25 to 35-year-old ever-married women with at least one child of their own to act as surrogates. The surrogate must be certified as medically and psychologically fit by a registered medical practitioner, and she can be a surrogate only once in her lifetime and cannot provide her own gametes. The surrogate mother must be made aware of all known side effects and risks of surrogacy-related procedures and provide written informed consent, and the SRA allows her to withdraw her consent before the embryo implantation. The surrogate cannot be coerced to undergo an abortion at any stage of pregnancy; it must be done with her consent and the permission of the appropriate authority under the Medical Termination of Pregnancy Act 1971. The surrogates are entitled to a 36-month insurance coverage, which the law presumes is "sufficient enough to cover all expenses for all complications arising out of pregnancy and also covering post-partum delivery complications" (Surrogacy (Regulation) Rules 2022; rule 5(1)).

Once the cycle preparation starts, the surrogate is not allowed to engage in intercourse of any kind, use any drugs intravenously, or undergo blood transfusion except for blood obtained through a certified blood bank on medical advice. She relinquishes all her rights to the child and is responsible for handing over the child to a predetermined third party in case the intending parties are unavailable. Moreover, the SRA presumes that a surrogate mother was coerced into the arrangement in case of any challenge to surrogacy.

Section 2(g) of the SRA defines commercial surrogacy as the commercialization of surrogacy services and related procedures, including buying and selling of human embryos or gametes, and offering any compensation or rewards to surrogate mothers beyond medical expenses

and prescribed insurance coverage. Commercial surrogacy is prohibited under section 3(ii) of the SRA, and sections 4(ii)(b) and 4(ii)(c) permit surrogacy to be conducted only for altruistic purposes. Section 38(a) outlines punishments for any persons undertaking commercial surrogacy or providing commercial surrogacy services. Section 40 punishes the intending couples or women for seeking to avail of commercial surrogacy services with imprisonment and heavy penalties.

In March 2022, the MoHFW issued the Surrogacy (Regulation) Rules, which delineated specific expenses to which a surrogate is entitled. These expenses included medical costs, expenses related to complications arising from the surrogacy process, and coverage for maternal mortality (rule 3). Additionally, the rule included miscellaneous expenses including travel, follow-up charges and, notably, compensation for loss of wages. Interestingly, the MoHFW replaced the March Rules with a new set of notified Rules in June 2022, which excluded the coverage for the aforementioned expenses except for medical insurance.

[C] RESISTING THE LAW WITHIN AND OUTSIDE THE COURTS

Meanwhile, since the enactment of these two Acts, the medical community has been deeply disgruntled; the dissatisfaction was pervasive even before the Acts' implementation due to concerns about the potential criminalization of the medical community. The National ART and Surrogacy Board was set up soon after the laws were enacted, while the formation of State Boards took longer. Some states set up the Boards relatively quickly, others took nearly a year. Many doctors, particularly in smaller clinics, were largely unaware of the status of these Boards and expressed frustration over the lack of communication from the state authorities. We conducted a Knowledge, Attitude and Practice (KAP) survey in October 2022 to delve deeper into their perspectives and to understand how they perceived the new legislative frameworks.

The survey was carried out as part of a broader study with 478 fertility experts, embryologists and gynaecologists (Tank & Ors 2023). The aim was to counteract the prevalent media sensationalism surrounding surrogacy and redirect some attention towards the ARTA. Therefore, the questions addressed both legislative Acts with a primary emphasis on the ARTA, as only a few clinics are engaged in surrogacy practices. The questions were open-ended, multiple choice and ranking, focusing on the Acts' different provisions on the definition of infertility, eligibility of commissioning parties, protection of gamete donors, provisions on gamete transfer and so

on. A majority of the participants agreed upon the prescribed age limit for commissioning parents (74%), and the duration of proven fertility (57%), indicating a broad acceptance of the eligibility criteria of the intending parties in the medical community. However, the study also revealed multiple areas of concern; 24% of the doctors thought the protection for egg donors, as stipulated in the Act, was not sufficient, and 30% felt the screening and recruiting processes of donors were unclear, stipulating the need for more robust and transparent mechanisms to safeguard the well-being of women.

Additionally, 30% thought the prohibition on the sale and transfer of gametes in section 29 of ARTA was unreasonable. The ARTA's provisions on gamete donation were an issue of grave concern in terms of scientific feasibility and ground-level implementation among fertility experts. A substantial 76% of the respondents disagreed with the feasibility of stimulating and retrieving only seven oocytes from the donor, indicating that this provision was impractical and misaligned with the realities of medical practice. Furthermore, 70% of the participants agreed that ovarian hyperstimulation can be avoided in the donor cycles with scientific advancements, something which the law needed to reflect. Similarly, 70% disagreed with the rule limiting egg donation to once in a lifetime; only 15% found it reasonable. There was also a consensus among 56% of participants about the lack of clarity in the current provisions regarding insurance and the unavailability of insurance products in the market (Tank & Ors 2023).

On offences and penalties in sections 32 and 33 of ARTA, a majority of 53% viewed the minimum mandatory sentence as unreasonable. While 47% of the respondents disagreed with section 34, which imposes a stringent fine of INR 5 to 10 lakhs for any contraventions of the Act, followed by imprisonment of from three to eight years for repeat offences (Tank & Ors 2023).

To sum up, the KAP survey indicated a decline in the number of available egg donors because of the law's provisions, with donor programmes becoming increasingly expensive for most persons suffering from infertility. Fertility experts indicated that the law is expected to increase the cost of fertility treatment by at least 125%. As a result, the percentage of donor cycles is also expected to go down, coupled with delayed access to donor gametes. The participants believed that the law effectively excludes persons suffering from infertility who cannot cover the high costs of infertility treatment.

In the second phase of the KAP survey, 128 infertility experts were invited to express their views on the Acts. The most significant concern among the respondents was the law's impact on the donor cycles and affordability of IVF. The ARTA's ban on compensated gamete donation and the mandate that a donor's gametes be used exclusively for one couple are anticipated to lead to a shortage of gametes. The shortage is exacerbated by the law's limitation on the number of times a gamete donor can donate, which will potentially reduce the overall availability of donor gametes. The respondents foresaw a significant increase in the costs of IVF cycles due to a diminished supply of donor gametes, and the scarcity would potentially triple the costs of donor cycles. Respondents argued that presuming that oocyte donors, be they third-parties or relatives, would undergo the inconvenience and risks involved with surgical procedures without compensation was unrealistic. In an environment where the law is seen as impractical and economically cumbersome, there is a heightened risk that individuals may circumvent the law to meet the demands of ART and surrogacy services. This concern was met with scepticism that hyper-regulation may lead to increasing bureaucratic hurdles and unwarranted interventions benefiting state officials and lawyers. Interviews reveal that strict regulation, high registration fees for ART banks and fertility clinics and the escalating costs of infertility treatment in India may disproportionately favour large corporate players and lead to the corporatization of the sector. The harsh regulations create a significant financial burden for smaller clinics, particularly those in tier two and three cities, which they will be unable to shoulder. As a consequence, these smaller clinics will likely be forced to discontinue their services, aggravating regional disparities in access to infertility treatments. As the market becomes increasingly dominated by well-heeled corporate entities, the accessibility of affordable reproductive healthcare will diminish, particularly for economically disadvantaged populations.

The SRA and ARTA currently face multiple legal challenges that are pending before the Supreme Court and various High Courts in India. The petitions challenge a broad spectrum of provisions within the two Acts, highlighting the restrictive and unscientific nature of the legal framework. The stakeholders perceive many of the restrictions outlined in the Acts as violations of constitutional rights to reproduction, privacy and bodily autonomy. For instance, the limitation of oocyte donation in ARTA is contended as unscientific and a hindrance to reproductive autonomy. The lack of compensation for donors and surrogates is seen as exploitative and as the law's failure to recognize the physical and emotional labour involved. Similarly, the blanket ban on commercial surrogacy is seen as

neither desirable nor effective, with the potential to drive the practice underground rather than eliminate it.

The public interest litigation suits have challenged the Acts' exclusion of same-sex couples and live-in couples, transgender individuals and single men from accessing ART and surrogacy, marking it to be discriminatory. The medical indications that necessitate gestational surrogacy have been challenged by several commissioning parties. The petitioners have also challenged the incongruent age criteria for widows and divorcees compared to married women. Further, the SRA's denial to allow individuals with existing children to undergo surrogacy is challenged as a violation of one's reproductive autonomy. Lastly, the harsh penalties on medical practitioners are labelled as draconian and likely to deter them from partaking in the sector.

During fieldwork, we found that the legal challenges created an atmosphere of uncertainty, leading the risk-averse stakeholders to halt donor cycles and surrogacy while others circumvented the law's provisions. The situation demands legislation that is clear, scientifically grounded and constitutionally sound and that addresses the rights of the stakeholders, especially the most vulnerable, namely, egg donors and surrogates. A notable absence in the public interest litigation is the voice of egg donors and surrogates, who are likely to bear the biggest brunt of these legislative changes. In an attempt to remedy that, we filed an intervention to the Supreme Court arguing that various provisions of the ARTA and SRA are unconstitutional for various reasons.

Next, we shed light on how the current laws violate reproductive rights, privacy and bodily autonomy guaranteed under the Constitution. We argue that the laws are unduly restrictive, exclusionary and reiterate patriarchal gender norms.

[D] REPRODUCTIVE RESISTANCE

Our written submission for the Intervener Application[1] presents an argument that the surrogate and oocyte donors' economic interests and rights guaranteed to them under the Constitution (Articles 14, 15(1), 19(1)(g), 21 and 23) are violated under the Acts. We make the case that providing reasonable and appropriate compensation to the surrogate or oocyte donor—who is likely to be an unrelated, consenting woman—is an acknowledgment of their reproductive labour. It aligns with constitutional

[1] The written submission was prepared by the Delhi law firm of Chakravorty, Samson and Munoth.

principles such as bodily autonomy and the right to make informed reproductive choice and is fundamentally different from unregulated commercialization. We present brief discussions on each constitutional right to justify why recognizing the physical, emotional and opportunity cost women incur is the pragmatic way to uphold their dignity and agency.

Articles 14 and 15(1)

Viewing women's reproductive labour as "divine" or "noble" and therefore undeserving of compensation reflects a paternalistic and patriarchal morality imposed by the state (Rudrappa 2015; Banerjee & Kotiswaran 2020). It is this patriarchal morality which forms the foundational basis of the ban on commercial surrogacy and egg donation. It diminishes the autonomy of women and disregards the value of their labour. We argue it is violative of Article 14 of the Constitution, considering the fact that the nature of reproductive labour performed by surrogates and egg donors is highly gendered and stigmatized and performed under structurally unequal conditions. Compelling them to provide their reproductive services on an altruistic basis violates women's right to equality and guarantee against non-discrimination. In Indian courts, constitutional morality has superseded social morality on multiple occasions. In *Navtej Singh Johar v Union of India* (2018), for example, the Supreme Court held that the law can be held to violate Article 14 when it is manifestly arbitrary. Similarly, in *Shayara Bano v Union of India* (2017), the court observed that:

> Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under article 14 (paragraph 101; cited in Banerjee & Kotiswaran 2020).

Our aim here is to present a critique of the social morality perspective that views reproduction as something "normal" or "natural" and, more importantly, devoid of labour. While the laws supposedly seek to prevent exploitation of economically vulnerable women engaged as surrogates and egg donors, paradoxically, these provisions end up perpetuating exploitation by putting aside women's interests under the guise of preventing commercialization of surrogacy and egg donation. The assumption that altruism is the only morally acceptable and non-exploitative way out is problematic. It is rooted in the patriarchal belief that women's reproductive roles are inherently noble and, at the same time, invisibilizes the immense physical and emotional labour that goes

into surrogacy and egg donation procedures. Our *pro bono* counsel in the Written Submission have argued that by failing to acknowledge the efforts and sacrifices of women, who endure physical and emotional burdens of oocyte retrieval, pregnancy and their impacts on health and livelihood, and dismissing their work as a "divine" responsibility perpetuates harmful gender stereotypes, which is prohibited under Article 15(1). Indeed, the 102nd report of the Parliamentary Standing Committee stated that: "Permitting women to provide reproductive labour for free to another person but preventing them from being paid for their reproductive labour is grossly unfair and arbitrary" (2017: 13). It further noted that "the altruistic surrogacy model as proposed in the Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner" (2017: 14).

In all likelihood, the state's prohibitionist stand against the compensated model of surrogacy stems from the fact that it challenges traditional gender roles by disconnecting the responsibilities of social motherhood from childbirth. Ironically, altruistic surrogacy perpetuates the same gender stereotypes by assuming that compassion and selflessness are the only ways to circumvent the social duties of motherhood.

Article 19(1)(g)

The second argument presented in the written submission is the violation of Article 19(1)(g), which is the fundamental right to practise and carry on any occupation, which cannot be restricted on the grounds of public or majoritarian morality. We argue that the provisions in the ARTA and SRA intrude on the right of surrogates and egg donors to carry out their profession on the grounds of public morality and the alleged exploitation of women. In the case of *Anuj Garg v Hotel Association of India* (2008), the Delhi High Court held that:

> we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without state protection as by the loss of freedom because of [the] impugned Act. The present law ends up victimizing its subject in the name of protection … State protection must not translate into censorship (paragraph 36).

A complete ban on compensated surrogacy and egg donation curtails women's right to practise their profession. The state has justified the ban from a protectionist lens and a public morality lens. The written submission argues that, in the guise of protecting surrogates and egg donors, the state has managed to propagate the notion that reproductive

labour performed by women is not compensation-worthy. The state must take note of the well-established research by feminist academics that argues that a ban on commercialization is more likely to push the activities underground instead of addressing the exploitation of women.

Article 21

The next constitutional argument challenges the ARTA and SRA on the grounds of Article 21, which protects the right to privacy. While a right to reproduction is not explicitly covered under the Constitution, at times (*BK Parthasarathi v Government of Andhra Pradesh* 2000) the courts have upheld the right to reproductive autonomy as a component of the right to privacy (Banerjee & Kotiswaran 2020).

In *Puttaswamy v Union of India* (2017), the court held that decisional autonomy to have or not to have a child falls under the right to privacy. Prior to the judgment of *Puttaswamy*, in S*uchita Srivastava & Another v Chandigarh Administration* (2009) the Supreme Court noted that:

> There is no doubt that a woman's right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected (paragraph 22).

In *X v The Principal Secretary, Health and Family Welfare Department, Government of the NCT of New Delhi* (2022), the Supreme Court noted that:

> The ambit of reproductive rights is not restricted to the right of women to have or not have children. It also includes the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproductive health. Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence (paragraph 96).

While these judgments were delivered in the context of abortion, we argue that this reproductive rights framework set out in the Indian jurisprudence aptly applies to reproductive labour such as surrogacy and egg donation. The principal tenets of these rulings are focused on

individuals' right to make decisions regarding their own bodies and reproductive health and therefore remain relevant in the situations of surrogacy and egg donation where issues of consent and autonomy are paramount. We do not discount the structural inequalities within which women make their choices, instead, we argue that constrained choices do not negate the ability to make choices altogether.

Article 23

The provisions of the ARTA and SRA banning compensated surrogacy and egg donation also violate Article 23 which prohibits the "traffic in human beings and beggar and other similar forms of forced labour" to ensure that individuals are not coerced into working without compensation. It emphasizes the importance of "protecting individual freedom and dignity, ensuring that no person is subjected to exploitation or degrading conditions of work. It safeguards the right to receive fair and reasonable remuneration for work done."

In the landmark judgment of *PUDR v Union of India* (1982), the interpretation of forced labour was expanded beyond "bonded labour" or "servitude" to include forms of labour performed under other compulsions, including economic compulsion. Building on this jurisprudence, the economic and social structures that often coerce individuals to engage in the labour market are recognized by the courts. This legal recognition, we argue, is crucial in evaluating the regulatory framework on reproductive labour, namely egg donation and surrogacy. The rulings of *PUDR v Union of India* extend the definition of forced labour to rope in economic compulsion and unpaid labour. These are relevant to reproductive labour as well. If labour extracted without minimum wage is deemed forced labour, then laws mandating altruistic surrogacy and egg donation effectively sanction forced labour.

Indian courts have acknowledged that domestic labour, performed predominantly by women, should be considered as labour that deserves compensation. In *National Insurance Co v Minor Deepika* (2009) the Madras High Court emphasized the economic value of women's unpaid domestic work and argued for its recognition in contexts such as compensation in motor vehicle accident cases (Kotiswaran 2021). Similarly, the Supreme Court in *Kirti v Oriental Insurance Co* (2021) reiterated the economic value in household work, which is highly gendered in nature, and challenged the misconception that housework involves no labour. In this context, one could argue that reproductive labour, such as egg donation and surrogacy, which includes donating oocytes and carrying a foetus to

term, should similarly be treated as *labour*, with corresponding rights to compensation and dignity.

Societies have historically devalued women's reproductive labour within the private sphere of the home; brought to attention by feminist movements worldwide, such as the "Wages for Housework" campaign (Federici 2012). While a lot has changed in terms of recognizing women's reproductive work, still much remains to be achieved. Reproductive labour, which is also intimate in nature, is devalued under the capitalist framework because historically it is seen as unskilled and has been unpaid (Jana 2020). The state's refusal to recognize surrogacy and egg donation as labour lays bare a glaring gap in the legal recognition of gendered labour, which, we argue, is imperative in addressing the historical gender disparities. It is only logical that Indian jurisprudence embraces a broader definition of labour, to align with its progressive trajectory, which has surpassed outdated understandings of gendered work and social reproduction.

[E] THE PROBLEM WITH ALTRUISM: SOME UNINTENDED CONSEQUENCES

The mandated altruism and lack of compensation under ARTA and SRA will likely reduce egg donors' and surrogates' willingness to participate in the sector, leading to a shortage in supply and driving up the costs of infertility treatments, as backed by the KAP survey results (Tank & Ors 2023). Individuals seeking those treatments will face heightened financial burdens, restricting the treatment to those who can afford the exorbitant fees. The social and emotional toll on women engaged in the processes will intensify, as they navigate a system that increasingly marginalizes their needs and contributions. Furthermore, the selfless altruistic Indian surrogate cannot extend her benevolence to the same-sex couple, unmarried couples or single men, who are cast outside of the law. The state sees commercial surrogacy and egg donation as a critical nonconformity of the cultural norm, while altruism is considered a more tolerable solution. Sharyn Roach Anleu (1992) argues that commercial surrogacy is not considered inappropriate because it incorporates women into the competitive market economy, but its criticism lies in the fact that it infringes the patriarchal norms that assign women's place within family. If women are to be exploited in the capitalist reproductive market, the traditional institution of family can pose similar challenges to some women. The law needs to take into account the exploitative potential of social controls within families that operate through manipulation and exploitation of emotions (Anleu 1992).

Secondly, the Acts' emphasis on altruism fails to acknowledge the inherent power asymmetries and socio-economic pressure that push working-class women into surrogacy and egg donation. We argue that the mandate of altruism not only obfuscates the tangible economic and emotional cost borne by women but, more importantly, denies them the right to make autonomous decisions about their bodies and reproductive capabilities. That is why it is important to draw out the shortcomings of an altruistic framework to unveil the exploitative potential of the current regulations and their disproportionate impact on the most vulnerable stakeholders in the sector, namely, the egg donors and surrogates. The insistence on altruism disregards women's realities, such as lack of employment opportunities, lack of state support and the necessity to provide for their families. By reframing reproductive labour as selfless "generosity" or "acts of charity", the laws effectively run the risk of erasing the lived experience of surrogates and egg donors, for whom this work may be the last resort to secure financial stability.

In addition, in situations where gender-based inequalities are prevalent, the expectation that women render their reproductive services without compensation places an unrealistic expectation and undue burden on women. This argument is further substantiated by an overall lack of economically well-off women in egg donation and surrogacy. In reproductive work, women have not only navigated the financial aspects, but also the nature of involvement, anonymity and ethical consideration (Pande 2014; Rudrappa 2015). The law's stigmatization of compensation in exchange for women's reproductive services reinforces existing biases while perpetuating stereotypes about the morality of women engaged in reproductive labour (Pande 2014).

[F] CONCLUSION

As the laws on ARTs and surrogacy have become increasingly prohibitionist, the memories, practices and indeed social actors that populated the permissive phase of the ART sector in India have persisted to date. While commercial surrogacy in its transnational and domestic forms seems to be less visible and more likely to be reconfigured (including through displacement of various components of the process to other foreign jurisdictions), the same cannot be said of ARTs. The ARTA, through its mandates of gamete exclusivity between the commissioning couple and gamete donors and altruistic donations, has at once respectively necessitated a greater demand for gametes and a smaller supply pool of gamete donors. At the other end of the spectrum, high levels of inequality exacerbated by the Covid pandemic

are likely to produce a regular supply of women reliant on egg donation as a means of sustenance. Informal networks of intermediaries and agents will likely persist. Against this backdrop, certain clinics which are highly risk averse are obeying the laws strictly while waiting to see how the new laws will be implemented. Other less risk-averse actors have, despite the prohibition of the sale of gametes backed up by stringent penalties, been driven by the demand for and high supply of gametes to engage in practices that are only partially compliant with the ARTA.

Records are likely being maintained of egg donors, but these have not yet been cross-verified by the National ART and Surrogacy Registry which should be able to identify egg donors who have donated oocytes more than once in their lifetime. Insurance policies are being taken out as well. The failure of formal law to adapt to the dynamics of biotechnical advancements, as evident in the organ procurement market, serves as a cautionary tale here. Studies highlight a critical disjunction between law and the evolving biomedical landscape (Cohen 2005; Goodwin 2013; Fenton-Glynn & Scherpe 2019). Relying solely on altruistic transfers results in an evident shortfall, where demand significantly surpasses the available altruistic supply. The scarcity gives rise to clandestine transactions, with individuals resorting to black markets. Similar to organ transactions, the lack of robust legal enforcement mechanisms could yield analogous consequences. Additionally, banning commercial surrogacy and egg donation without addressing the underlying issues could potentially drive these practices into unregulated spaces. This not only risks the exploitation of vulnerable individuals but also hinders the overall safety and ethical standards of such procedures. This means that egg donors and surrogates will never be able to enforce obligations against the clinics, the banks or commissioning couples. The sharp edge of the ARTA's and SRA's prohibitionist provisions will therefore be borne by the reproductive foot soldiers of the ART sector.

A critical reform necessary to address the inequalities in the law lies in broadening access to ART and surrogacy beyond the affluent, heterosexual, married demographic that the current framework privileges. We argue that a more inclusive legal regime that recognizes diverse family structures and eliminates prohibitive barriers would better realize the egalitarian ideals of the Constitution. Indeed, arbitrary distinctions that the laws rely on to restrict access to ARTs and surrogacy are constitutionally suspect. To alleviate the disproportionate financial burden resulting from the restrictive laws that deprives individuals of their right to reproductive health and autonomy, greater state intervention in regulating costs and subsidizing ART services through public healthcare is imperative.

Current laws, with their prohibitionist and altruistic frameworks, fail to acknowledge the labour, risks and sacrifices involved in the process, thereby undermining the women's autonomy and economic rights. This article advocates for a legal framework that balances ethical concerns with the economic realities of reproductive labour. Specific legislative changes could include (a) defining surrogacy and egg donation as legitimate forms of labour, (b) permitting fair and transparent compensation that accounts for medical risks, lost income and associated costs, and (c) establishing clear regulatory mechanisms to ensure informed consent to prevent exploitation. What remains to be seen is whether advocates for the interests of reproductive labourers like egg donors can successfully challenge the constitutionality of the ARTA and SRA on the basis of the constitutional guarantees of the right to privacy, bodily autonomy, right to livelihood and prohibition against forced labour. There is precedence for such recognition of the right to livelihood of bar dancers in the absence of the provision by the state of economic alternatives after the imposition of the ban on bar dancing. It is this hope for transformative constitutionalism that we aspire to.

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