
CRITICAL ANALYSIS OF NON-BIOLOGICAL PARENTHOOD IN INDIA

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ABSTRACT

Parenthood is still seen through the narrow lenses of biology and marriage in India, thus discriminating against individuals and families outside this traditional framework. Despite rising infertility rates and an increase in adoption the law has failed to adequately accommodate non-biological pathways to parenthood. The Hindu Adoption and Maintenance Act, the Juvenile Justice Act not only have procedural flaws but also discriminate parents that do not fall into the idea of a traditional family and in addition to slow adoption procedures, there are only few children declared legally free for adoption. Surrogacy, which once was very accessible, has nearly died out due to the Surrogacy (Regulation) Act, 2021, which confines its practice strictly to altruistic surrogacy within narrowly defined family-based arrangements.

The paper analyses the ways in which surrogacy laws in India entrench heteronormativity, marital privilege, restrictive familial concepts, and therefore create unconstitutional hindrances to reproductive autonomy and the right to parenthood.

It is argued that these laws, cloaked in regulation and alleged protection, discriminate against nontraditional families with respect to equality, liberty, and dignity-that is, those nontraditional families that include LGBTQ+ persons, single parents, and live-in partners. Hence, adoption and surrogacy laws require a reorientation from restrictive, moralistic regulation to a rights-based framework grounded in constitutional principles and reproductive justice. Indian law must reflect the heterogeneity of modern families and recognize the fundamental right to parenthood beyond biology.

Keywords: Reproductive Autonomy, Non-Biological Parenthood, Adoption, Reproductive Justice, Constitutional Morality, LGBTQ+, Parenthood, Marital Privilege, Family.

INTRODUCTION

In India, the concept of marriage and blood ties is closely connected with parenthood. Those people who wish to make families without such traditional models usually face the exclusion obstacle. There are couples that are already infertile, single parents, and LGBTQ+ people, who can have a great number of challenges due to the limitations of adoption and surrogacy laws. Indian adoption follows two tracks, including personal status legislation and secular Juvenile Justice (Care and Protection) Act. Nevertheless, the process is small-scale and slow in implementation. As an example, out of over 30, 000 prospective parents, registered to adopt children domestically, approximately 2, 131 children are freed to be adopted annually according to legal practices, which illustrates the systematic imbalance between the demand and supply¹

Another issue is that two out of three children who are up to adoption are under category of special needs, which is usually a discouraging fact to potential parents. Long waits of up to three years or even longer bring emotional and psychological suffering to adoptive families especially those who do not adhere to the marriage requirements. The adoption laws alone are biased. According to the Hindu Adoption and Maintenance Act, 1956 (HAMA), a family is not allowed to adopt a child of the same sex when they have one at home.² The Juvenile Justice Act also has regulations that do not allow the adoption of the female children by single men at all. Researchers point out that this ban is too inhuman and discriminatory.³ Whereas single women could avail themselves to take abandoned girls, single men have little chances. Additionally, there is no chance of joint adoption of the same-sex couples in the Indian law; the adoption is allowed to married heterosexual couples or single persons. As a result, the same sex relationships do not grant a legal right to the non-adoptive partner to the child. The researchers have highlighted that these laws reinforce gendered and marital biases, which is why the adoption of single parents and LGBTQ+ people should be considered⁴.

This exclusionary strategy is reflected in the law of surrogacy in India. Previously a commercial surrogacy center in the world, India has put limits on it by passing the Surrogacy (Regulation)

¹ Katta, *Revitalizing Adoption Laws in India: A Path to Equity and Progress*, 10 *Int'l J. L.* 23 (2024)

² Sara Bardhan & Neymat Chadha, *Adoption Practices in India: Legalties and Challenges*, Indian J. Socio-Legal Stud. (2021)

³ Syed M. Aatif, *The Law of Adoption in India: A Critical Analysis*, 6 Indian J. Legal Stud. 45, 52 (2019)

⁴ Gaurang Narayan et al., *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?*, 15 *Cureus* e37864 (2023)

Act, 2021. At the moment, altruistic gestational surrogacy is the only type allowed, and the criteria of eligibility are quite strict. Surrogacy services can only be used by married heterosexual couples that are of the required age and possess infertility. Unmarried people, couples not living together, foreigners, and members of the LGBTQ+ are categorically disallowed. Researchers like Kashyap and Tripathi state that this categorical exclusion of the LGBTQ communities and the putting of the emphasis on the concept of altruism in the family is actually a form of moral conservatism and not equality.⁵ The statute strengthens the heteronormativity by ensuring that the nuclear family is the only family that will be accepted as a unit in surrogacy. Critics claim that this gives advantage to privileged parties at the expense of non-traditional families, which require changes that will remove discriminatory models and implement a rights-based system of surrogacy.⁶

Such constraints in adoption and surrogacy laws are against constitutional guarantees and human rights provisions. Article 21 (right to life) has reproductive autonomy and Article 14 and 15 are against discrimination on the basis of sex, marital status and sexual orientation. The segregation of people on the basis of these grounds is a contravention of equal dignity and privacy in parenthood. At the international level, nondiscrimination and the best interest of the child is supported by such international conventions like the United Nations Convention on the Rights of the Child (UNCRC), which states that all children have rights to a permanent family and all adults who can parent effectively have the right to do so. This view is backed up by comparative scholarship. A review on the law on surrogacy by Horsey shows that although countries approach surrogacy differently, that is, some countries have banned it and others have regulated it through the development of altruistic surrogacy systems, there is an overall agreement that states have to regulate surrogacy in manners that safeguard the rights of children, surrogate mothers and intended parents as well.⁷

Similar systems have improved more inclusive systems than India. Same sex couples are given equal rights to form marriage, enter civil partnerships, and adopt children as heterosexual couples in the United Kingdom and most of the West. Surrogacy is limited to selfless arrangements yet is open to the rest. In the US, family law in each state varies, with the general

⁵ Katta, *supra* note 1, at 27

⁶ Sini Paul, *Child Adoption in India: from a Human Rights Perspective*, 2 J. Multidisciplinary Cases 28, 34 (2022)

⁷ Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 Asian Bioethics Rev. 5, 12 (2023)

exception that individual people, as well as same-sex couples, are allowed to adopt, with a great deal of states allowing compensated and altruistic surrogacy. Another path that Ukraine followed before the recent conflict was allowing commercial surrogacy to non-citizens which represents a radically different approach to the restrictive model adopted in India. These instances show that the laws in India are used to place blanket bans to single people and same sex couples, withholding them the same rights to giving birth.⁸

The fundamental issue about these limitations is an archaic dependence of biology and heteronormativity in understanding family. When the reproductive autonomy is anchored on marital and biological standards, it normalizes the patriarchal and exclusionary ideologies.⁹ The move towards inclusive and rights-based models that acknowledge the existence of different family units and affirm constitutional guarantees of equality, dignity, liberty, and justice would be the direction the change should take as suggested by reproductive justice scholars. The existing legal system in India, however, still fails to even acknowledge ethical inclusion and equality of non-biological parenthood.¹⁰

LITERATURE REVIEW

1. Tanisha Garg, *The Critical Analysis of the Evolution of the Adoption Laws in India*, III Indian J. Integrated Rsch. L. (Issue IV)

The paper critically analyses the evolution of adoption laws in India, it examines all the existing frameworks available and gives a comprehensive understanding of the same. The author delves into the historical evolution of adoption in India, exploring its roots and customs in the pre-independence era. It sheds light on the religious, cultural, and social norms that were followed and how they helped shape adoption laws in the country.

The paper delves into significant reforms introduced by the Hindu Adoptions and Maintenance Act, 1956, which paved the way for the adoption of daughters and tackled heavy gender biases. The paper also examines the limitations of Muslim law on adoption and the importance of the Juvenile Justice Act in bringing forward a secular uniform law. It also addresses the struggles

⁸ Kirsty Horsey, *The Future of Surrogacy: A Review of Current Global Trends and National Landscapes*, 49 *Reprod. Biomed. Online* 303, 307–16 (2024)

⁹ Arshia Malhotra, *Comparative Analysis: Surrogacy Regulation in India and Global Perspectives*, 21 *J. Advances & Scholarly Res. Allied Educ.* 188 (2024)

¹⁰ Kashyap & Tripathi, *supra* note 6, at 15; Narayan et al., *supra* note 7

faced by the LGBTQIA+ community in adoption processes and the procedural conflicts that affect both the children and the prospective adoptive individuals, which influences low adoption rates in India.

However, the paper falls short in examining certain crucial dimensions of the adoption landscape in India. It does not take into account the administrative hurdles faced by the LGBTQIA+ community in adoption processes, such as, lack of legal recognition of queer partnerships and other prejudices. Furthermore, it does not delve into the cultural stigma and societal persecution faced by the members of the community within the fabric of Indian society.¹¹

2. R A Katta, *Revitalizing Adoption Laws in India: A Path to Equity and Progress*, 10 International Journal of Law, 23-26 (2024)

The author provides a comprehensive study that makes several contributions to the discourse on Adoption laws in India. The paper gives a detailed outline of India's legal frameworks governing adoption, such as the Hindu Adoption and Maintenance Act 1956, the Juvenile Justice Act 2015, and the Guardianship and Wards Act 1890. The paper identifies the major structural obstacles and challenges that are affecting the India Adoption System. The author highlights statistics that over 30,000 parents are awaiting adoption, while there are only 2,131 children legally available for adoption, and he also states how adoption processes take about an average of 3 years to complete. This establishes a procedural flaw in the framework.

The paper also sheds light on alarming problems such as child trafficking, illegal adoptions, and the unsettling reality of over 1,100 children being returned to care institutions and homes post-adoption. The paper further focuses on other issues, such as discrimination in adopting children with disabilities, and restrictions on single men from adopting female children. The Author advocates for a comprehensive policy reform that centres on simplifying procedural frameworks, post-adoption services, and promotes inclusive policies that recognise and protect the rights of the LGBTQ+ community and single parents.

While the author provides an extensive study on adoption laws in India, helping us analyse the

¹¹ Tanisha Garg, *The Critical Analysis of the Evolution of the Adoption Laws in India*, 3 INDIAN J. INTEGRATED RSCH. L. 1-14 (2023) <https://ijirl.com/wp-content/uploads/2023/07/THE-CRITICAL-ANALYSIS-OF-THE-EVOLUTION-OF-THE-ADOPTION-LAWS-IN-INDIA.pdf>

social and legal climate of the issue, it does not provide data for many factors it discusses that could have provided a more evidence-based substantive stance on the subject.¹²

3. Sara Bardhan & Neymat Chadha, *Adoption Practices in India: Legalities and Challenges* (2021)

This paper critically analyses India's adoption landscape, primarily under the purview of COVID-19's impact on orphaned children. This research provides several important contributions surrounding adoption practices in India. The author systematically examines the adoption legislation available in India and highlights the discrepancies between the Hindu Adoption and Maintenance Act 1956 and the secular Juvenile Justice Act 2015. It gives an in-depth view of the imbalances of the legislation and how the law's limitations affect the lives of certain individuals and their choices.

This paper provides significant empirical evidence to showcase the failure of the adoption framework. Despite having around 29,000 prospective adoptive parents, only 2,317 children are legally available, bringing to light a systemic imbalance. The author also talks about other underlying problems arising from the issue, such as 278 children being returned to the system, post-adoption out of which 60% were girls and 28% were children with special needs. These figures reveal a more alarming factor: that the system facilitates procedural rigidity over child welfare, which undermines the constitutional promise of dignity and care for all children.

The research also exposes the disturbing underside of India's adoption system, chronicling "manufactured orphans" and baby-selling rackets. This paper details how trafficking organisations exploit vulnerable families and make children available for illegal adoption through false documentation, with prices varying between INR 2-6 lakhs. Though this paper provides an extensive view on adoption and effectively highlights the underlying flaws of the system, it does not provide any comprehensive policy reforms or suggestions to tackle these problems.¹³

¹² R A Katta, *Revitalizing adoption laws in India: A Path to Equity and Progress*, 10 IJL 23-26 (2024)
<https://www.lawjournals.org/assets/archives/2024/vol10issue2/10036.pdf>

¹³ Sara Bardhan & Neymat Chadha, *Adoption Practices in India: Legalities and Challenges* (2021)
https://www.researchgate.net/publication/356646185_Adoption_Practices_in_India_Legalities_and_Challenges
(last visited on 11.07.2025)

4. Syed M. Aatif, *The Law of Adoption in India: A Critical Analysis* (2019).

This article delves into a legal critique of adoption as a form of non-biological parenting in India. The author evaluates the historical evolution of adoption in India, exploring traditional religious customs and ceremonies, to how a secular law was brought forward that prioritises child welfare. The paper also historically analyses how we go from family-structured arrangements in the pre-independence era to building systemic legal frameworks following post-independence in India.

This paper follows an empirical research methodology, which utilises data from CARA (Central Adoption Resource Authority) to show how there is a decline in adoption numbers in the country. It also discusses how there is a high preference for younger children, particularly between ages 0-2-year-olds, with 72% of adoptions taking place under this category. This figure shows the unfortunate situation of children over the age of 3, not having a fair chance at adoption due to the preference of heterosexual parents, which further leads to the need for an inclusive law that could give a chance for both prospective adoptive parents and children available at the system a chance at a family, which should be the main objective of adoption practice. Child welfare should be of utmost importance and priority in any adoption-related process or policy.

The paper also analyses legislations governing both inter-country adoptions and domestic adoptions, as well as explores the role of the Hague Convention (1993) in the same. Despite the paper exploring the historical context of adoption as well as its development into a secular law, it does not provide much research on some limitations of the legislation, such as single-parent adoptions and the sidelining of the LGBTQ+ community, which could have provided a more solidified critique.¹⁴

5. Sini Paul, *Child Adoption in India: from a Human Rights Perspective*, 2 *Journal of Multidisciplinary Cases*. 28-35 (2022)

This article delves into the analysis of Adoption Laws in India from a Human Rights perspective, and it does not just look at adoption laws from a procedural legal standpoint but

¹⁴ Syed M. Aatif, *The Law of Adoption in India: A Critical Analysis* (2019) <https://www.proquest.com/docview/2244569295?sourcetype=Scholarly%20Journals> (Last visited on 11.07.2025)

also explores the socio-ethical responsibility that needs to be taken seriously while handling any child welfare issue.

The author aims to study and critically analyse the national and international instruments concerning child adoption. The article also tries to highlight the violations of human rights while specifically dealing with Adoption in the country. The author has adopted a doctrinal methodology for this study. She analyses the existing legislation relating to Adoption and critically evaluates it. She also sets out international instruments that aid the procedure of adoption without violating any Human Rights. The author, in her findings, writes that adoption fulfils a dual purpose: a nurturing and loving environment for the orphaned children, and a chance for childless couples to experience the fulfilment of parenthood. She also condemns the societal belief that procreation is the superior form of parenthood. This article studies numerous cases dealt with by the Indian Judiciary in the matter of Adoption. While the article explores various facets of adoption in the country, it only focuses on the Hindu Adoptions and Maintenance Act, 1956, and does not explore other legislations, such as the Juvenile Justice Act, 2015, which could have helped give a comprehensive view of adoption in India.¹⁵

6. Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 Asian Bioethics Rev.. 5–18 (2023)

The paper critically examines and critiques the Surrogacy (Regulation) Act, 2021, providing significant insights into the act and its effect on reproductive rights and bioethics. The authors take on an inter-disciplinary approach, viewing surrogacy rights not only from a legal perspective but also from a socio-economic and a bioethical standpoint, and how the current law affects surrogacy and parenthood.

The paper analyses the concept of “familial altruism” that is introduced in the Surrogacy (Regulation) Act, 2021, and how this concept paves the way for more exploitation than protection in the context of surrogacy. Due to the nature of surrogacy that is allowed under the current law, i.e. altruistic surrogacy, and there is a ban on commercial surrogacy, because of which not only does surrogacy as a form of parenthood become an unregulated sector leading to exploitation, it also does not protect the prospective parents or the surrogate mother. The Act is also restricting reproductive autonomy and denying parenthood. The paper also focuses on

¹⁵ Sini Paul, *Child Adoption in India: from a Human Rights Perspective*, 2 *Journal of Multidisciplinary Cases*. 28-35 (2022) <https://journal.hmjournals.com/index.php/JMC/article/view/261/1618>

how the Surrogacy (regulation) Act, 2021 is framed to systematically discriminate and exclude vulnerable sections of society such as the LGBTQ+ community, single women, and unmarried couples. Commercial surrogacy served as a form of livelihood for women of lower economic backgrounds. By banning commercial surrogacy, the practice is pushed underground, where the risks of exploitation are heavily increased for both desperate parents hoping to experience parenthood and surrogate mothers who rely on the practice for a vocation.

The authors reflect on how the eligibility criteria for surrogacy stipulated in the Act have not been framed with proper research and investigation, because of which the challenges of parents and surrogates outweigh the benefits, eventually defying the purpose of the Law. The author has highlighted policy reforms that require comparative international research that can help balance these discrepancies, which I will further explore in my current study.¹⁶

7. Gaurang Narayan et al., *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society* (2023)

The paper critically examines and provides a comprehensive understanding of what the Surrogacy Regulation Act 2021 details and draws a comparison between altruistic and commercial surrogacy, the latter of which the law disallows. The authors make several contributions that provide a significant understanding of the discourse surrounding the administration of surrogacy in India.

The paper comprehensively analyses the provisions of the Surrogacy Regulation Act 2021, particularly focusing on the eligibility criteria for prospective parents and the recognition of altruistic surrogacy and the exclusion of commercial surrogacy. The paper points out that the Act was framed in this way to protect vulnerable women from the risks of being exploited in the industry by regulatory mechanisms. The paper also further delves into the act, excluding certain members of society, such as members of the LGBTQ+ community, single persons, unmarried couples, and foreign nationals. The authors point out how this heteronormative patriarchal arrangement of law is violative of fundamental rights guaranteed under the Constitution of India. The paper focuses on significant gaps in examining the surrogate mother's long-term health, such as postpartum challenges, mental health complications, and

¹⁶ Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 Asian Bioethics Rev. 5–18 (2023)
https://www.researchgate.net/publication/363707007_The_Surrogacy_Regulation_Act_2021_A_Critique

other significant health issues related to childbirth and the curtailed 36-month insurance provision. The authors underline the absence of a holistic framework that tackles psychiatric protocols and care structures. The paper, in essence, talks about how the provisions were instated to protect surrogate mothers, also in a sense robbing them of their reproductive autonomy and livelihood. The Act has also had an impact on India's "procreative medical tourism," which has serious economic ramifications for surrogate mothers from underprivileged backgrounds. While the paper tackles many issues pertaining to surrogacy in India, there appears to be an evident critical stance against the Act and its limiting provisions by the authors. A more balanced research approach would have helped the readers get a more comprehensive view of the subject.¹⁷

8. Arshia Malhotra, *Comparative Analysis: Surrogacy Regulation in India and Global Perspectives*, 21 J. Advances & Scholarly Res. Allied Educ. 188 (2024)

The paper provides a comprehensive study of India's surrogacy regulations and insights into the working of the legislation and the development of the field. The paper explores the evolution of surrogacy laws in India, gives a brief history of the topic, and provides an outlook on how the country progressed from an unregulated period to the development of the Surrogacy Regulation Act, 2021.

The author has adopted a comparative methodology to contrast India's surrogacy laws with other jurisdictions to provide a well-rounded study. The author provides a Comparative analysis of three countries, the United Kingdom, Ukraine, and the United States of America, and offers insights into their Surrogacy regulatory frameworks. It comments on Ukraine's commercial surrogacy framework and compares India's restrictive laws to those of the United Kingdom.

The research examines the Act and gives an extensive critique on the current law and identifies that the provisions of the Act violate the fundamental rights guaranteed by the constitution, particularly, Article 14 (equality before law) and that the provisions discriminate and exclude single individuals, unmarried couples and the members of the LGBTQ+ community. The paper identifies several gaps in the law, addressing the social stigma in the country concerning non-biological parenthood, and how the provisions are constructed without proper investigation,

¹⁷ Gaurang Narayan et al., *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?*, 15 *Cureus* e37864 (2023)
https://www.researchgate.net/publication/370130550_The_Surrogacy_Regulation_Act_of_2021_A_Right_Step_Towards_an_Egalitarian_and_Inclusive_Society

leading to discrimination and alienation of individuals in society wanting to experience parenthood. The paper covers a wide range of topics about surrogacy; however, it explores topics that need empirical research and are not compatible with the current methodology chosen by the author.¹⁸

9. Yuko Hibino, *The Advantages and Disadvantages of Altruistic and Commercial Surrogacy in India*, 18 *Philos. Ethics Humanit. Med.* 8 (2023)

This paper critically examines and provides a detailed analysis of India's surrogacy landscape through meticulous empirical research conducted by the author in the years 2010-2018. The study makes several contributions to the discourse on surrogacy. It talks about the distinction made between altruistic and commercial surrogacy as "too simplistic to be useful" and that both forms of surrogacy come with benefits and scope for exploitation.

The research outlines how the shift from commercial surrogacy to altruistic surrogacy is ineffective, given that it was done without any proper empirical research and did not take into consideration the socio-economic reality of the country. The paper acknowledges many gaps in the law, such as post-delivery rights for surrogate mothers or the children's right to maintain a relationship with the surrogate mothers. While the Act was made to protect the exploitation of surrogate mothers, it ironically does not protect many of their unexplored rights, which could further lead to exploitation.

The author explores how women from lower economic backgrounds rely on commercial surrogacy for a livelihood. This research is backed down by empirical evidence taken from multiple involved entities such as surrogates, parents, doctors, policymakers, and brokers. The research outlines how protection of surrogate mothers can come from better compensation models explored by the State, rather than a complete ban on commercial surrogacy, making the system more cumbersome for surrogate mothers. While the paper provides empirical evidence to back his contentions, the research consists of a small sample of individuals, which is not enough to create a strong stance on the topics explored by the author.¹⁹

¹⁸ Arshia Malhotra, *Comparative Analysis: Surrogacy Regulation in India and Global Perspectives*, 21 J. Advances & Scholarly Res. Allied Educ. 188 (2024)

¹⁹ Yuko Hibino, *The Advantages and Disadvantages of Altruistic and Commercial Surrogacy in India*, 18 *Philos. Ethics Humanit. Med.* 8 (2023)

10. Anita Hammer & Madhusree Jana, *Reproductive Work in the Global South: Lived Experiences and Social Relations of Commercial Surrogacy in India*, 36 Work, Emp. & Soc'y (2021)

This paper critically analyses surrogacy and provides significant insight into the discourse on commercial surrogacy by providing data from direct stakeholders. The authors make strong contentions against the concept of altruistic surrogacy, stating it does not take into consideration the reproductive labour and effort the process takes, and by banning commercial surrogacy, the law paves a direct path for exploitation of surrogate mothers in the real world. The paper invokes Marxist feminist perspectives and asserts that gestational surrogacy should be recognised as work and not as a private activity or a natural occurrence.

The authors have adopted qualitative research with surrogates from Northern India and have provided comprehensive first-hand accounts of the layered realities experienced by surrogate mothers. It outlines their economic backgrounds, motivations, their recruitment process, and the tightly supervised setting in which they work and exist. The paper explores their experiences on how they've tackled societal stigma, extreme emotional labour, and limited reproductive autonomy.

The research identifies how tightly controlled the surrogacy environment is by third-party stakeholders and how the surrogate mothers must bargain for their livelihood. It uncovers the limited power held by surrogate mothers and how prohibitionist policies of the State make it harder for them to work. Now, because of a lack of regulation by the legislation, the ban on commercial surrogacy only leads to more exploitation than eliminating it. The authors advocate for stronger policies made with proper investigation to ensure that all the parties involved in the process are well protected.

The paper puts forward rich literature in terms of surrogacy and provides valuable insight into the industry of parenthood. Although the research is well established, it only consists of surrogate mothers from the Delhi NCR region. If the research had incorporated more stakeholders and widened its scope, the paper could have provided a comprehensive view of surrogacy in the whole country.²⁰

²⁰ Anita Hammer & Madhusree Jana, *Reproductive Work in the Global South: Lived Experiences and Social Relations of Commercial Surrogacy in India*, 36 Work, Emp. & Soc'y (2021)

STATEMENT OF PROBLEM

In most societies parenthood is often meant as biological parenthood and family often following a heteronormative traditional unit of parents and children. However, this set up excludes substantial amounts of individuals and children that do not fall into this narrow category, leaving them vulnerable to societal alienation, legal challenges and mental distress.

India has around 27.5 million couples facing infertility issues, India's Total Fertility Rate has fallen from 6.2 in the 1950s to 1.9 in 2025 which is below the replacement level (2.1), this means traditional biological parenthood for many willing parents is no longer an option. Alternative ways of parenthood such as adoption and surrogacy are vital for those aspiring individuals and couples who want to experience the joys of raising children.

India has crossed around 4500 adoption mark for the first time in eleven years, this is a clear sign that Non-Biological Parenthood in India is gaining recognition and acceptance, however as of July 2025, there are only 2652 children available for adoption in a stark contrast to 36000 prospective parents registered on the CARINGS portal. It is also to be noted that the number of children available for adoption does not denote the number of orphaned children in the country which is estimated to be about 30 million. The process for adoption is also very cumbersome with a waiting period of 3.5 years.

When we look at surrogacy, it is made almost impossible as India now only allows altruistic surrogacy, where the surrogate mother must be a close relative of the intended parents, married with a biological child, and can only be a surrogate once in her lifetime. These restrictions on Non-biological Parenthood makes it very hard on parents who cannot conceive naturally. Both Surrogacy and Adoption reinforce a heteronormative, marital and extremely restrictive set up of family and they deny LGBTQ persons, single parents and live-in partners the constitutional right to parenthood through Surrogacy and Adoption.

RESEARCH QUESTIONS:

1. How did the definition of "family" under the Hindu Adoption and Maintenance Act 1956 and the Juvenile Justice Act 2015 create barriers for non-traditional families, such as single parents, LGBTQ+ partners and unmarried couples?
2. How does the Surrogacy (Regulation) Act 2021 impose restrictions on reproductive

rights and alter India's legal landscape?

3. How did introducing altruistic surrogacy in the Surrogacy (Regulation) Act 2021 impact reproductive rights, fiscal autonomy and affect exploitation of surrogate mothers?

RESEARCH OBJECTIVES:

1. To analyse provisions of the Hindu Adoption and Maintenance Act 1956 and the Juvenile Justice Act 2015 and evaluate their effect on Non-traditional families.
2. To examine the Surrogacy (Regulation) Act 2021 and assess how its provisions impact reproductive rights.
3. To evaluate the introduction of altruistic surrogacy in the Surrogacy (Regulation) Act 2021 and ascertain if it protects surrogate mothers or paves the way for their further exploitation.

1. The Legal Definition of Family in Indian Adoption Law: Challenges for Single Parents, LGBTQ+ Partners and Unmarried Couples

1.1 Introduction

The Hindu Adoptions and Maintenance Act, 1956 (HAMA), which was enacted as a Hindu Code Bill, reformed the concept of adoption in Hindu law in order to represent a codified system integrating the Hindu custom with new statutory regulation.²¹ The Act allowed adoption by Hindus regardless of caste or sect, but it also demanded spousal consent to adopt, and, as to this aspect, adoption was being placed within the paradigm of the nuclear heterosexual family instead of the rights of the person.²²

Conversely, the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) attempted to offer a secular, homogenous adoption regime.²³ However, even at that, the JJ Act and its

²¹ Flavia Agnes, *Family Law and Constitutional Claims: Adoption and Guardianship in India*, 45 *Econ. & Pol. Wkly.* 59 (2010)

²² Tanisha Garg, *Critical Analysis of the Evolution of Adoption Laws in India*, 3 *Indian J. Integrated Rsch. L.* (2021)

²³ Aparna Chandra, *Adoption and the Secular State: Reading the JJ Act 2015*, 13 *Nat'l L. Sch. India Rev.* 101 (2017)

regulations still assume stability, permanence, and heteronormativity. Central Adoption Resource Authority (CARA) Adoption Regulations type demand, as an example, evidence of solid marital relationships and subject potential adoptive parents (PAPs) to home studies assessing suitability in a manner that aromatizes a normative response to the ideal of caregiving.²⁴ in that way, even in the allegedly secular domain, law instils a functional preference of marriage as the innate and standard family configuration.²⁵

1.2 Single Parents: Permitted by Law, Prohibited in Practice

Even though both HAMA and the JJ Act permit a single person to adopt, empirical studies indicate that single parents are under increased burdens in practice.²⁶ CARA regulations permit single men to adopt only male children, reflecting a paternalistic concern over sexual risk rather than child welfare.²⁷ Home-study reports of single women often subject family support structure and financial stability to greater scrutiny than is the case with married couple's applications.²⁸ Mental health scholarship highlights that there is a psychosocial stress brought by lengthy waits and recurring discretionary refusals that result in single applicants to adopt as having a theoretically possible but practically exclusionary path.²⁹

1.3 Unmarried Cohabitees

The adoption law of India does not recognize the live-in partners or unmarried couples as a qualified joint applicant. According to CARA rules, only married couples can apply together, and joint adoption by partners in non-marital relationships is in effect banned as a matter of doctrine.³⁰ Legal scholarship views this as a doctrinal invisibilization of chosen families - relationships of caregiving rather than formal marriage.³¹ This invisibility is constitutionally relevant: according to the arguments of scholars, the denial of joint adoption to cohabiting couples is the sole discriminatory act which infringes the guarantees of equality and non-discrimination provided by Article 14 and 15 of the Constitution.³² As such a denial would

²⁴ Central Adoption Resource Authority, *Adoption Regulations 2022*, discussed in Ranjan et al., *Single Parent Adoption in India*, J. Postgrad. Med. (2023)

²⁵ Shreya Atrey, *Intersectional Discrimination in Adoption Law*, 34 Child. Legal Rts. J. 77 (2014)

²⁶ Ranjan et al., supra note 4

²⁷ Id

²⁸ Id

²⁹ Ranjan et al., supra note 4, at 5–6

³⁰ Id

³¹ Id

³² Shraddha Vemula, *Adoption Rights of Live-In and Same-Sex Couples in India: A Critical Analysis*, 3 Int'l J. Acad. Legal Rsch. 45 (2022)

frustrate the very child welfare purposes of the JJ Act.³³

1.4 LGBTQ+ Partners

The case of Navtej Singh Johar v. the Supreme Court. In 2018, same-sex relations between two consenting persons were decriminalized in Union of India, declaring the dignity and equality of the LGBTQ+ individuals.³⁴ However, the law of adoption is still silent on same sex couples and the agencies still persist in treating them as ineligible to adopt the child.³⁵ In practice, one parent can adopt as a single parent, and the other is a legal stranger to the child.³⁶ Law review analyses of adoption litigation underscore that LGBTQ+ couples face gatekeeping at every stage: during initial screening, home studies and judicial confirmation, where there is no recognized legal statute of same-sex adoption, the United States has established specific legal precedent, which India has not implemented.³⁷ Comparative scholarship contrasts India's position with jurisdictions like South Africa and the United States, where courts have explicitly recognized same-sex adoption rights, underscoring India's lag in harmonizing constitutional equality with adoption law.³⁸

1.5 Biases of Gender and the Sex of the Child

The Hindu Adoption and Maintenance Act expressly forbids adoptions where the potential parent already has a child of the same sex.³⁹ This puts a restriction not based on the best interests of the child, but on patriarchal conceptions of family balance. CARA laws also restrict the ability of single male men to adopt female children which are based in suspicion as opposed to being based on evidence.⁴⁰ Empirical research claims that these gendered restrictions are a form of systemic discrimination and perpetuate gender stereotypes regarding the ability of men to attend to the needs of female children.⁴¹

³³ Id

³⁴ Gautam Bhatia, *Equal Dignity: The Constitutional Status of Marital Status*, 7 Indian J. Const. L. 1 (2018)

³⁵ Id

³⁶ N. Talawar & R. Nayaka, *Denied Dreams: The Struggle for Same-Sex Couples' Adoption Rights in India*, Int'l J. Multidisciplinary Rsch. (2024)

³⁷ Id

³⁸ Id

³⁹ Id

⁴⁰ Pierre de Vos, *The Constitutionality of Same-Sex Adoption in South Africa*, 20 S. Afr. J. Hum. Rts. 267 (2004)

⁴¹ HAMA § 11, No. 78 of 1956, India Code

1.6 Tensions in the Constitution and Consequences in Child Welfare

Legal scholarship puts such obstacles in constitutional terms. The selective treatment of single parents contradicts the norms of equality,⁴² whereas the refusal to include same-sex couples is inconsistent with the view of dignity and privacy as expressed in *Puttaswamy* and *Navtej Singh Johar*.⁴³ The impact of child welfare is also important. Through the reduction of the number of eligible families, the existing statutory definitions extend children to institutional care, depriving them of timely placements, and scholars observe that the statutory limitations in India contradict international law by including the right of every child to a permanent family.⁴⁴ UNCRC Article 16 (3) states that children are entitled to a permanent family environment, and researchers note that any statutory restrictions in India run counter to international law.⁴⁵

The legal concept of family as defined by HAMA 1956 and the JJ Act 2015 therefore solidifies a paradigm based on marriage that creates obstacles to single parents, LGBTQ+ couples and those not married. Although the constitutional jurisprudence of dignity, privacy, and equality has been extended, the statutory adoption law and administrative practice are still attached to heteronormative ideals. Reform will entail the alignment of the adoption structures with the constitutional promise and the international child right standards to broaden the recognition of families beyond the areas of marriage and biology.

2. Regulating Reproduction: Examining Restrictions under the Surrogacy (Regulation) Act, 2021

2.1 The Statutory Shift

The introduction of the Surrogacy (Regulation) Act, 2021 was a decisive lawmakers twist in the protection of reproductive rights in India. It has been stressed in the literature that though the act was meant to prevent a situation that allowed women to be exploited and protect children, it actually has led to a decrease in reproductive autonomy, the non-traditional families will simply be kept away and the likelihood of informalization of surrogacy arrangements is

⁴² Ranjan et al., *supra* note 4

⁴³ B. Sivaramayya, *Gender Bias in Adoption and Guardianship*, 42 J. Indian L. Inst. 1 (2000) Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

⁴⁴ Bhatia, *supra* note 14

⁴⁵ UNICEF India, *Adoption and Child Rights in India*, discussed in Garg, *supra* note 2

likely to increase on this basis.⁴⁶ The literature consistently underscores that while the Act aimed to prevent exploitation of women and safeguard children, its effect has been to reduce reproductive autonomy, exclude non-traditional families, and increase the risks of informalization of surrogacy arrangements.⁴⁷

2.2 Commercial Surrogacy Prohibition and Imposition of Altruism

The key characteristic of the Act is that it includes a categorical ban on commercial surrogacy. Section 4 provides that no surrogate will be exposed to monetary consideration other than medical care and insurance⁴⁸ and is therefore, based on a moralizing rejection of surrogacy as baby-selling, not empirical evidence of harm.⁴⁹ It is also problematic that altruistic surrogacy is imposed as the only type of this practice that should be allowed.⁵⁰ Although it appears to promote the family care over the financial exchange, the statute runs the mistake of coercing women in the kinship system to become the surrogate mothers without any substantial choice.⁵¹ By conflating altruism with absence of compensation, the statute undervalues gestational labour and erases the legitimacy of surrogacy as work.⁵²

2.3 Restrictions on eligibility of Intended Parents

The Act only applies to heterosexual couples who are legally married, have been married for five years together, with specific age brackets and no surviving biological or adopted child.⁵³ Single persons, cohabiting couples and same sex couples are automatically excluded.⁵⁴ According to scholars, these exclusions have little to do with child welfare or surrogate protection⁵⁵, and instead, they entrench a heteronormative conception of parenthood and deny reproductive rights to entire classes of citizens.⁵⁶ Feminist legal analyses further emphasize that such exclusions undermine the constitutional rights against discrimination (Article 14) and

⁴⁶ K. Debnath & S. Chatterjee, *The Surrogacy (Regulation) Act, 2021: Analyzing the Effectiveness of India's Ban on Commercial Surrogacy*, Sexuality, Gender & Pol'y (2023)

⁴⁷ S. Kashyap, *The Surrogacy (Regulation) Act, 2021: A Critique*, Indian J. Med. Ethics (2022)

⁴⁸ A. Banerjee & P. Sharma, *Animating the Affect-Care-Labor Link in the Wake of "The Surrogacy (Regulation) Bill": Care Ethics and Policymaking on Indian Surrogacy*, Hypatia (2023)

⁴⁹ Debnath & Chatterjee, supra note 1

⁵⁰ Banerjee & Sharma, supra note 3

⁵¹ Amrita Pande, *From Boom to a Ban: Transnational Commercial Surrogacy in India* (2020)

⁵² B. Singh, *Commercial Surrogacy and Law: A Liberal Pragmatic Feminist Analysis*, SSRN (2024)

⁵³ Id

⁵⁴ Debnath & Chatterjee, supra note 1

⁵⁵ Kashyap, supra note 2

⁵⁶ Singh, supra note 7

non-discrimination (Article 15).⁵⁷

2.4 Limitations of Surrogate Mothers

The exceptions to the surrogacy in this Act are also very narrow: a surrogate is required to be married, should have at least one their primary child, should fall within the age range of 25-35 years and should be able to be a surrogate once in their lifetime.⁵⁸ The criterion of paternalism, the Act imposes further restrictions upon women due to their legal restrictions to determine when, how and when to become a surrogate mother.⁵⁹ The law is reproducing the gender norms as it presumes married women are more suited to be a surrogates and disregards women's agency.⁶⁰

In addition, barring women who have undergone more than one delivery against the opposition of medical research has been called capricious and lacks medical justification and economic empowerment.⁶¹

2.5 Foreign Nationals Exclusion and Dimension Cross-Borders

The previous surrogacy legislation in India had turned into an international destination of commercial surrogacy. Although this action was motivated by the need to bar surrogacy of foreign nationals to prevent exploitation and grant child citizenship rights⁶², While this move was justified on grounds of preventing exploitation and ensuring child citizenship rights, scholars argue it also closed off opportunities for regulation in favour of outright prohibition.⁶³ And since it also deprived opportunities to regulate surrogacy but instead ends up forcing surrogacy to less regulated jurisdictions where it may be even more exploitative, according to ethnographic studies of transnational surrogacy.⁶⁴

Although there is a need to regulate, scholars observe that too much bureaucratisation is likely to discourage regular surrogacy adoptions, clinic clinics, and leave gaps in the system to

⁵⁷ Id

⁵⁸ Debnath & Chatterjee, *supra* note 1

⁵⁹ Kashyap, *supra* note 2

⁶⁰ Singh, *supra* note 7

⁶¹ Id

⁶² Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

⁶³ Mishra & Khamari, *A Comprehensive Study on the Surrogacy (Regulation) Act, 2021 vis-à-vis the Assisted Reproductive Technology (Regulation) Act, 2021*, Ymer (2022)

⁶⁴ M. V. Kachore & P. Khobragade, *Intersection of Surrogacy and Women's Reproductive Health under the Surrogacy (Regulation) Act, 2021*, ShodhKosh J. Visual & Performing Arts (2024)

corruption, or informal workarounds.⁶⁵ vs. open, rights-based regulation, the Act results in a regulatory burden on compliance that can simply slow down surrogacy practice arrangements that have led to surrogacy.⁶⁶

2.6 Implications of Constitutional and Human Rights

Research literature identifies significant constitutional issues. The Act, by excluding the option of single parents, same-sex union, and cohabitation, is placing in violation of Articles 14 (equality) and 15 (non-discrimination) of the Indian Constitution.⁶⁷ Article 21 (right to privacy and autonomy), as interpreted by Justice K.S. Puttaswamy v. Union of India.⁶⁸ Feminist scholarship also criticizes the Act as being opposite to the obligations of states under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in which states are expected to respect the reproductive autonomy of women.⁶⁹ The law undermines pluralism in constitutional values by prioritizing one of the forms of family the married heterosexual couple, indicating a backlash on pluralist constitutional values.⁷⁰

The Surrogacy (Regulation) Act, 2021 therefore subjects enormous restrictions concerning the reproductive rights in that commercial surrogacy is prohibited, altruism is mandatory, eligibility of the intended parents is limited and foreign nationals are not welcomed.⁷¹ Although it is projected to be defensive legislation: in reality, it reinforces heteronormative principles, constrains female autonomy, and will push surrogacy into the shadow.⁷² Constitutionally it goes badly against the principles of equality, dignity, and reproductive freedom, representing a radical restriction of the more liberal Indian approach to assisted reproduction (Traversing 2011).⁷³

3. From Commercial to Altruistic Surrogacy: Analysing its Impact on Reproductive Freedom and Economic Agency in India

3.1 Altruism as a Legal Requirement

⁶⁵ Pande, supra note 6

⁶⁶ Debnath & Chatterjee, supra note 1

⁶⁷ Kashyap, supra note 2

⁶⁸ Pande, supra note 6

⁶⁹ Mishra & Khamari, supra note 14

⁷⁰ Debnath & Chatterjee, supra note 1

⁷¹ Shreya Atrey, *Intersectional Discrimination in Surrogacy Law*, 29 Int'l J.L. Pol'y & Fam. 1 (2015)

⁷² Banerjee & Sharma, supra note 3

⁷³ Singh, supra note 7

The Surrogacy (Regulation) Act, 2021 reformed the surrogacy regime in India by prohibiting commercial surrogacy and allowing only altruistic surrogacy, which is surrogacy without any monetary compensation except medical costs and insurance.⁷⁴ The transition to altruism has presented a mixed impact, though rightly motivated by the lawmakers as an effort to eliminate commercial surrogacy and exploitation of women reproductive labour. According to scholars, it restricts reproductive choice, weakens fiscal independence of surrogate women and even encourages exploitation opportunities by driving arrangements into the shadows.^{75,76}

3.2 The Declining Space for freedom of choice

The Act has significantly reduced the avenues to parenthood because it has limited surrogacy to an altruistic model. Married heterosexual couples who have satisfied the statutory preconditions are the only ones who can legally access surrogacy, and they have to find a willing surrogate with no commercial incentive.⁷⁷ This requirement dramatically reduces availability, since very few women are willing to undergo the risks of pregnancy without compensation.⁷⁸

The non-inclusion of single persons, LGBTQ groups, and cohabitees also narrows reproductive choice⁷⁹ further as scholars note that this is a form of contravention of reproductive autonomy as presently enshrined as recognized under Article 21 of the Constitution, which encompasses the right to make decisions about procreation, family formation, and bodily integrity.⁸⁰ And in the International Covenant on Civil and Political Rights (ICCPR) as well as CEDAW which emphasizes that reproductive choice is a protected aspect of privacy and autonomy.⁸¹

3.3 Surrogate women should have fiscal independence

Before 2021, commercial surrogacy offered women, particularly from lower socio-economic classes, a source of significant income.⁸² Many surrogate mothers used this income to pursue

⁷⁴ K. Debnath & S. Chatterjee, *The Surrogacy (Regulation) Act, 2021: Analyzing the Effectiveness of India's Ban on Commercial Surrogacy, Sexuality, Gender & Pol'y* (2023)

⁷⁵ A. Banerjee & P. Sharma, *Animating the Affect-Care-Labor Link in the Wake of "The Surrogacy (Regulation) Bill": Care Ethics and Policymaking on Indian Surrogacy*, *Hypatia* (2023)

⁷⁶ B. Singh, *Commercial Surrogacy and Law: A Liberal Pragmatic Feminist Analysis*, SSRN (2024)

⁷⁷ Debnath & Chatterjee, *supra* note 1

⁷⁸ Amrita Pande, *From Boom to a Ban: Transnational Commercial Surrogacy in India* (2020)

⁷⁹ Singh, *supra* note 3

⁸⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

⁸¹ U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 24* (1999)

⁸² Pande, *supra* note 5

an education, a home, or even healthcare for their families using surrogacy proceeds⁸³. And this being banned by the Act, which effectively undermines the value of the act of gestational labour.⁸⁴

The altruistic model is criticized by feminist thinkers as economic disenfranchisement, in which women's work is referred as care and gift, as opposed to labour that can be remunerated.⁸⁵ Now because of the ban as resulted in lower economic bargaining power.⁸⁶ Feminist theorists further find that the concept of altruistic surrogacy is highly selective, as it is mostly reliant on women in extended kinship structures and thus, is more likely to be fraught with pressure and coercion within the family, a risk that has resulted due to lack of independent economic negotiation.⁸⁷

3.4 Exploitation and Informal Markets Risk

The irony of the altruistic surrogacy is that prohibiting commercial arrangements does not drive demand out. Rather, researchers discover that it frequently results in the emergence of illegal, unregulated surrogacy markets.⁸⁸ Said markets are not regulated by contracts, lack medical supervision, and are not transparent of money, which makes surrogates more easily exploited.⁸⁹

In India, ethnographic research of the previous boom of commercial surrogacy has demonstrated that regulation rather than prohibition is the best measure to minimise exploitation- through imposing on such contracts transparency, health guarantees and equitable payment.⁹⁰ The altruistic prohibition, by comparison, deprives the protective mechanisms and exposes them to the dangers of unsafe medical procedures and unknown financial transactions.⁹¹

3.5 Care Ethics and Devaluation of Labour

The problematic conflation of altruism with reproductive labour in altruistic surrogacy has been

⁸³ Id.

⁸⁴ Singh, supra note 3

⁸⁵ Banerjee & Sharma, supra note 2

⁸⁶ Id

⁸⁷ Debnath & Chatterjee, supra note 1

⁸⁸ Pande, supra note 5

⁸⁹ Singh, supra note 3

⁹⁰ Pande, supra note 5

⁹¹ Banerjee & Sharma, supra note 2

pointed out in philosophical critiques of altruistic surrogacy. The law conceals the labour associated with gestation, both physical and emotional, as well as the time, by presenting gestation as familial care or gift.⁹² Surrogacy involves months of medical treatments, invasions, chances of complications and long-term psychological consequences.⁹³ Care-ethics theorists believe that women are not commodified with fair compensation, but their agency is considered and their labour is valued.⁹⁴ To deny compensation in the name of altruism risks both moral paternalism and material injustice.⁹⁵

3.6 Dimensions of Constitutional and Human Rights

Constantinides and McDonald (2020) note that the establishment of altruistic surrogacy is a constitutional issue. The Act deprives surrogates of economic compensation and so the right to livelihood, violating Article 21.⁹⁶ The Act leaves out the single and LGBTQ+ intended parent and discriminates against the heterosexual married couple, which is a violation of Article 14 and 15.⁹⁷ Altruistic-only surrogacy can be inconsistent with the requirements of CEDAW and the UN Committee on Economic, Social and Cultural Rights which emphasizes the right of women to voluntarily choose reproductive work and to be well remunerated in labour.⁹⁸ At the international level, altruistic-only surrogacy may contravene obligations under CEDAW and the UN Committee on Economic, Social and Cultural Rights, both of which stress women's right to freely decide on reproductive work and to receive fair remuneration for labour.⁹⁹

3.7 Comparative Recommendations

Scholars across disciplines recommend a regulated compensation model as superior to outright prohibition.¹⁰⁰

Such a framework would include:

- Transparent contracts enforceable in court.

⁹² Id.

⁹³ M. V. Kachore & P. Khobragade, Intersection of Surrogacy and Women's Reproductive Health under the Surrogacy (Regulation) Act, 2021, ShodhKosh J. Visual & Performing Arts (2024)

⁹⁴ Banerjee & Sharma, supra note 2

⁹⁵ Singh, supra note 3

⁹⁶ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

⁹⁷ Navtej Singh Johar, supra note 7

⁹⁸ Shreya Atrey, Intersectional Discrimination in Surrogacy Law, 29 Int'l J.L. Pol'y & Fam. 1 (2015)

⁹⁹ U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 22 (2016)

¹⁰⁰ Debnath & Chatterjee, supra note 1

- Medical and psychological screening with full informed consent.
- Mandatory health insurance and long-term care for surrogates.
- Fair, regulated compensation reflective of labour, risks, and opportunity costs¹⁰¹

Comparative analyses have observed that examples of systems economizing protection and autonomy include countries such as Canada (limited reimbursement models), the United States (regulated compensated surrogacy in many states), and South Africa (court-approved surrogacy agreements) are examples of systems that balance protection with autonomy.¹⁰² India's altruistic model pales in comparison.

However, the legalization of altruistic surrogacy has reduced choice in reproduction, compromised the financial autonomy of surrogate women and the probability of unofficial exploitation. The law tends to remove the labour aspects of surrogacy and eliminate the possibility of compensating women who carry the heavy physical and emotional weight by simply presenting surrogacy as a form of altruistic care. Instead of avoiding the exploitation, altruistic surrogacy only puts it deeper and more unregulated markets. Constitutional equality-based reform, including the rights areas of reproduction and reproductive autonomy and the international norms of rights necessitate the shift to a more regulated system of compensations that does not undermine surrogate agency but protects children and their intended parents.

4. CONCLUSION

The three research questions combined prove one point the Indian approach to family and reproduction is still bound to a paradigm where heteronormativity is narrow. Marriage as the fundamental unit of family, in both Hindu Adoptions and Maintenance Act, 1956 (HAMA) and the Juvenile Justice Act, 2015, remains the foundation supporting the establishment of marriage as a structure of family as a result of which the principles of dignity, privacy, and equality have not yet been brought into balance with the statutory adoption law.¹⁰³

Surrogacy (Regulation) Act, 2021 is another act which entrenches this paradigm. The banning

¹⁰¹ Banerjee & Sharma, *supra* note 2

¹⁰² Horsey, *Regulating Surrogacy in Comparative Perspective*, 31 *Med. L. Rev.* 121 (2019)

¹⁰³ Flavia Agnes, *Family Law and Constitutional Claims: Adoption and Guardianship in India*, 45 *Econ. & Pol. Wkly.* 59 (2010)

of commercial surrogacy, the restriction of legal surrogacy to altruistic models, and the exclusion of single individuals, cohabitees, LGBTQ + couples, and foreign nationals severely restrict reproductive rights by reducing the legitimate access and introducing the risk that surrogacy will be pushed to unregulated, even predatory markets.^{104 105} Altruistic-only model denies the fiscal autonomy of surrogate women by not giving them fair payment to their labour, whereas the law was meant to ensure dignity through preventing commodification, but in effect, it has hidden the truth that surrogacy is physically, emotionally, and temporally labour intensive and should be paid in fair amounts.¹⁰⁶

Overall, the existing statutory framework in India does not fully support any constitutional protections, or even international human rights laws, like the Convention on the Rights of the Child (CRC) and CEDAW, by prioritizing marriage and heteronormativity, thereby restricting the reproductive citizenship space to the benefit of both intended parents and surrogate mothers.¹⁰⁷

4.1 SUGGESTIONS

Based on the comparative models and feminist jurisprudence, there are three groups of proposed reforms:

- **Reinventing Family Beyond Marriage**

The legal frameworks ought to be updated to acknowledge the rights of adoption and assisted reproduction to single parents, unmarried couples, and LGBTQ+ couples.¹⁰⁸ Among the Indian law, recognition of chosen families would bring Indian law into constitutional equality and dignity views of adoption and surrogacy, where the family is not defined formally but functionally.¹⁰⁹

¹⁰⁴ Tanisha Garg, Critical Analysis of the Evolution of Adoption Laws in India, 3 Indian J. Integrated Rsch. L. (2021)

¹⁰⁵ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

¹⁰⁶ K. Debnath & S. Chatterjee, The Surrogacy (Regulation) Act, 2021: Analyzing the Effectiveness of India's Ban on Commercial Surrogacy, Sexuality, Gender & Pol'y (2023)

¹⁰⁷ S. Kashyap, The Surrogacy (Regulation) Act, 2021: A Critique, Indian J. Med. Ethics (2022)

¹⁰⁸ Amrita Pande, From Boom to a Ban: Transnational Commercial Surrogacy in India (2020)

¹⁰⁹ B. Singh, Commercial Surrogacy and Law: A Liberal Pragmatic Feminist Analysis, SSRN (2024)

- **Prohibition to Regulation in Surrogacy**

India needs to replace the ban on compensation by implementing a controlled compensation model. This would enable the surrogates to be remunerated well as they are guaranteed by binding contracts, independent counselling, health insurance and postnatal care.¹¹⁰ It has been experienced elsewhere around the world that well-regulated surrogacy systems can support both autonomy and protection.¹¹¹

- **Strengthening Safeguards Against Exploitation**

Regulations do not make the problem go away, even in a regulated model, transparent clinic licensing, obligatory medical and psychological screening, state contract monitoring, and punitive coercion or fraud should be ensured.¹¹²

- **Constitutional Harmonisation**

The parliament and courts have to balance family and surrogacy laws in line with Articles 14, 15, and 21. This will involve the removal of arbitrary marital-status requirements, acceptance of reproductive autonomy as a constitutional right, and the incorporation into the statutes of equality principles upheld in *Navtej Singh Johar* and *Puttaswamy*.¹¹³

- **International Norm Alignment**

India needs to make its legislations more compatible with CRC and CEDAW, where the right of children to have a family, and the right of women to be able to determine their own procreative options, should take centre stage as guiding principles.¹¹⁴

Protection and autonomy have remained the dilemma in the path of Indian family and reproductive law. In an attempt to safeguard women and children against exploitation,

¹¹⁰ A. Banerjee & P. Sharma, Animating the Affect–Care–Labor Link in the Wake of "The Surrogacy (Regulation) Bill": Care Ethics and Policymaking on Indian Surrogacy, *Hypatia* (2023)

¹¹¹ Pande, *supra* note 6

¹¹² U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013); CEDAW, General Recommendation No. 24 (1999)

¹¹³ Shraddha Vemula, Adoption Rights of Live-In and Same-Sex Couples in India: A Critical Analysis, 3 *Int'l J. Acad. Legal Rsch.* 45 (2022)

¹¹⁴ Pierre de Vos, The Constitutionality of Same-Sex Adoption in South Africa, 20 *S. Afr. J. Hum. Rts.* 267 (2004)

legislators have excessively limited the right to have children and solidified heteronormative concepts of the family. What remains to be done is to come up with a legal framework that acknowledges the various types of families, supports the labour and autonomy of women, and makes the safeguards transparent. India can only achieve reproductive justice by outgrowing prohibition to the rights-based regulation.¹¹⁵

¹¹⁵ Debnath & Chatterjee, *supra* note 4