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Whose Rights Count: A Comparative Assessment of How Prohibitionist, Altruistic and Commercial Surrogacy Regimes Protect the Surrogate Mother

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Abstract: Comparative writing on surrogacy usually sorts legal systems along a single axis, permission against prohibition, and usually evaluates them from the standpoint of intending parents or the child. This paper asks a different question: how well does each model protect the surrogate mother herself? It develops a framework of five indicators (integrity of consent, bodily autonomy and exit, economic security, health and aftercare, and remedies and voice) and applies it to prohibitionist and abolitionist regimes (France, Germany and Italy), altruistic-regulatory regimes (the United Kingdom and South Africa), commercial-regulatory regimes (California and New York) and India. Its central finding is that the rights position of the surrogate is explained less by whether payment is permitted than by the procedural architecture that surrounds the arrangement: independent counsel, counselling, pre-authorisation, insurance and enforceable decision-making rights. Prohibition removes the arrangement from legal protection without removing the practice, and the 2025 call by the UN Special Rapporteur for global abolition rests on a premise that comparative evidence does not settle. India's Surrogacy (Regulation) Act, 2021 pairs the strictest payment rule in the sample with the thinnest set of surrogate-specific entitlements. The paper concludes with transferable lessons and notes the limits of transplanting foreign solutions into a context of acute inequality and limited legal aid.

Keywords: comparative surrogacy law; surrogate mothers; reproductive rights; altruistic surrogacy; commercial surrogacy; abolition; India

I. Introduction

Surrogacy law is usually compared by asking what a legal system permits. The familiar typology of prohibitionist, altruistic and commercial regimes answers that question, and it has produced a rich literature on parentage, cross-border recognition and the rights of the child. Much less comparative attention has been given to a different question: given what a system permits, what rights does it actually give the woman who carries the pregnancy?

The question has become urgent. In 2024 Italy extended its criminal prohibition of surrogacy to conduct engaged in abroad by Italian citizens.[1] In 2025 the UN Special Rapporteur on violence against women and girls presented a report to the General Assembly that characterised surrogacy as a system of violence and exploitation and recommended that states work towards its eradication, including through a binding international instrument.[2] The report drew immediate criticism from those who argue that blanket prohibition would drive surrogacy underground and harm the women it seeks to protect. Meanwhile the Hague Conference on Private International Law continues its work on parentage and international surrogacy without an instrument in force. The debate is

[1]Law no 169 of 4 November 2024, extending to acts committed abroad the offence in Law no 40 of 2004, art 12(6).

[2]Reem Alsalem, Special Rapporteur on violence against women and girls, *The different manifestations of violence against women and girls in the context of surrogacy* (report to the UN General Assembly, 2025).

conducted largely in the vocabulary of abolition versus regulation, but the evidence needed to resolve it is evidence about surrogates' lived rights under different legal designs.

This paper contributes a rights-centred comparison. It argues that the standard permit/prohibit axis is a poor predictor of how well surrogates are protected. What predicts protection is the procedural architecture of a regime, meaning the mechanisms that give a surrogate independent advice, scrutinise her consent, secure her health and income, and provide a forum in which she can be heard. India, which has moved within two decades from the least regulated to among the most restrictive systems in the world, is used as the focal case. Part II sets out the framework and method. Parts III to V examine prohibitionist, altruistic and commercial models in turn. Part VI places India on the same grid. Part VII presents a comparative matrix, Part VIII states the findings, and Part IX derives lessons and their limits.

II. Framework and Method

The comparison is functional: it asks how each system performs the task of protecting a woman who undertakes gestation for another, whatever doctrinal route it takes. Five indicators are used. They are drawn from the rights that international human rights law and feminist scholarship identify as most at risk for surrogates, including the rights to health and to non-discrimination in CEDAW and the ICESCR, and the relational account of autonomy that treats consent as dependent on its social conditions.[3]

Integrity of consent: whether the surrogate receives independent legal advice and counselling, whether her consent is scrutinised by someone independent of the intending parents, and whether its timing allows reconsideration. *Bodily autonomy and exit*: whether she keeps control over medical decisions in pregnancy, including termination, and what rights she retains at and after birth. *Economic security*: whether she may be paid, or reimbursed for loss of earnings, and whether payment is secured. *Health and aftercare*: whether insurance and postnatal care are guaranteed. *Remedies and voice*: whether she has an accessible forum to enforce these entitlements and whether her interests are represented in law reform and litigation.

The jurisdictions were chosen to cover the principal models and to include systems that India itself has looked to or been compared with. The paper relies on statutes, reported decisions, law reform reports and secondary literature; it does not claim original empirical data on surrogates, and its conclusions about practice are accordingly more tentative than its conclusions about the law. Legislative reform is proceeding in several of these systems, and the position stated here is that of the date of writing.

III. Prohibitionist and Abolitionist Regimes

France is the paradigm of principled prohibition. Articles 16-7 and 16-9 of the Civil Code declare any agreement for procreation or gestation on behalf of another void and treat the prohibition as a matter of public order, resting on the inalienability of the human body and of civil status.[4] Germany reaches a similar result through criminal law directed at medical practitioners: the Embryo Protection Act penalises the transfer of an embryo to a woman who is prepared to give the child up, while the surrogate and intending parents are not themselves the targets, and the woman who gives birth is the legal mother.[5] Italy now combines a domestic offence with extraterritorial reach.

For the surrogate, prohibition has a double effect. In the domestic setting it gives her the protection of non-participation: no one can enforce an arrangement against her. But it provides no rights framework for the woman

[3]Convention on the Elimination of All Forms of Discrimination against Women (1979), arts 12 and 16; International Covenant on Economic, Social and Cultural Rights (1966), art 12; Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy* (OUP 2000).

[4]Code civil, arts 16-7 and 16-9; Cour de cassation, Assemblée plénière, 31 May 1991.

[5]Embryonenschutzgesetz 1990, s 1(1) no 7; Bürgerliches Gesetzbuch, s 1591.

who participates anyway, in the shadow of the law or abroad. The European Court of Human Rights' case law shows where the law's attention falls. In *Mennesson v France* and *Labassee v France* the Court held that France's refusal to recognise the legal relationship between children born through surrogacy abroad and their genetic father violated the children's right to respect for private life under Article 8, while the state's margin of appreciation permitted the prohibition itself.[6] The Court's 2019 advisory opinion and its later decision in *D and Others v France* accepted that adoption could satisfy the requirement of recognition for the intended mother.[7] In Germany the Federal Court of Justice has recognised a Californian judgment of parentage in favour of a male couple, one of whom was the genetic father.[8] In none of these decisions is the surrogate the claimant or the focus. The prohibitionist model protects the institution of motherhood and the child's status; it is largely silent on the surrogate as a rights-holder.

The abolitionist argument of the 2025 report goes further and treats surrogates as victims of structural violence, on the basis that consent is unreliable where there is inequality, where clinics and agencies profit, and where health risks are borne by the woman. Its evidentiary base draws on submissions that were largely from organisations opposed to surrogacy, and critics have said that surrogates' own accounts are under-represented.[9] The comparative question is therefore whether the harms the report identifies are inherent in surrogacy or contingent on the way it is regulated. The remaining sections suggest that they are at least substantially contingent, while accepting that some harms, such as medical risk, are inherent.

IV. Altruistic-Regulatory Regimes

A. The United Kingdom

The Surrogacy Arrangements Act 1985 makes it an offence to negotiate or advertise surrogacy on a commercial basis, but not to enter into a private altruistic arrangement, and it provides that surrogacy arrangements are not enforceable.[10] The woman who gives birth is the child's legal mother at birth. Intending parents obtain legal parenthood through a parental order under section 54 or 54A of the Human Fertilisation and Embryology Act 2008, which requires, among other things, that the surrogate has freely and with full understanding consented, and that the consent is not given until six weeks after the birth. Payments are limited to reasonable expenses, but the court may authorise payments beyond that, and courts have done so retrospectively where the arrangement was not a purchase of a child and the order served the child's welfare.[11]

The UK model gives the surrogate a strong right at the point of exit: she remains the legal mother until a court order is made, and her free consent after the birth is a statutory condition. Her position is weaker on the indicators concerning consent integrity and economic security. The statute does not require independent legal advice for her at the intending parents' expense, and the boundary between reimbursement and payment is policed by judicial discretion rather than by clear entitlements. The Law Commissions' 2023 report proposed a regulated pathway

[6] *Mennesson v France* App no 65192/11 and *Labassee v France* App no 65941/11 (ECtHR, 26 June 2014).

[7] ECtHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (P16-2018-001, 10 April 2019); *D and Others v France* App no 11288/18 (ECtHR, 16 July 2020).

[8] BGH, 10 December 2014, XII ZB 463/13.

[9] For the criticism, see the discussion in IPS, 'New report investigates violence against women and girls through surrogacy sparks global dialogue' (19 September 2025). The critique relates to the evidence base and to the policy recommendation, not to the report's documentation of exploitative practices.

[10] Surrogacy Arrangements Act 1985, ss 1A and 2.

[11] Human Fertilisation and Embryology Act 2008, s 54; *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam); *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).

under which intending parents could become legal parents from birth, with a short post-birth period in which the surrogate could withdraw her consent; the proposals also contemplated regulated surrogacy organisations and a register.[12] At the date of writing no implementing legislation has been enacted.

B. South Africa

Chapter 19 of the Children's Act 38 of 2005 requires that a surrogate motherhood agreement be confirmed by the High Court before conception. The court must be satisfied that statutory conditions are met, including that the commissioning parents are domiciled in South Africa and unable to give birth, that at least one of them contributes a gamete, that the surrogate is of full age, has a documented history of pregnancy and delivery and a living child, and that the agreement serves the child's interests; payment other than compensation for expenses and loss of earnings is prohibited.[13] The Constitutional Court upheld the requirement of a genetic link to a commissioning parent in *AB v Minister of Social Development*, treating it as a justified limitation grounded in the child's interests.[14] The surrogate keeps her right to terminate the pregnancy under the Choice on Termination of Pregnancy Act.

The South African model performs better than the British on consent integrity because a judge scrutinises the agreement before any medical step is taken; and on economic security because compensation for loss of earnings is expressly permitted, which narrows the gap between reimbursement and fair treatment without introducing a fee for gestation. Its limitations are those of any court-centred scheme: cost, delay, the need for legal representation, and uneven access. The model also illustrates a trade-off. Pre-conception confirmation provides early legal certainty and an independent check, but it also commits the surrogate to an agreement shaped by the court's view of the child's interests.

C. Canada and Australia

Canada prohibits payment to a surrogate and acting as an intermediary under the Assisted Human Reproduction Act, while permitting reimbursement of prescribed expenses, and it leaves parentage to the provinces.[15] Several Australian states criminalise commercial surrogacy and, in New South Wales, Queensland and the Australian Capital Territory, extend the offence to arrangements made abroad.[16] These systems share the altruistic orientation of the UK and South Africa, and their experience suggests that the line between reimbursement and compensation is an enduring source of dispute that is best addressed by clear rules on expense categories rather than by case-by-case discretion.

V. Commercial-Regulatory Regimes

California's statute authorises gestational surrogacy agreements subject to procedural conditions. The agreement must be in writing and executed before medical procedures begin, the surrogate and the intending parents must each have independent counsel, with the intending parents bearing the surrogate's legal costs, and parentage is established by a judgment that can be obtained before birth.[17] Compensation is negotiated privately. New York,

[12]Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Com No 411, Scot Law Com No 262, 2023).

[13]Children's Act 38 of 2005, ch 19 (ss 292 ff). The compensation provision permits payment for expenses relating to the agreement, pregnancy and birth, and for loss of earnings suffered as a direct result of the agreement.

[14]*AB v Minister of Social Development* 2017 (3) SA 570 (CC).

[15]Assisted Human Reproduction Act, SC 2004, c 2, ss 6–7; *Reference re Assisted Human Reproduction Act* 2010 SCC 61.

[16]Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Parentage Act 2004 (ACT).

[17]Cal Fam Code, ss 7960–7962.

which for decades voided compensated surrogacy contracts, enacted the Child-Parent Security Act, in force from 2021, which legalised compensated gestational surrogacy and added a statutory Surrogate's Bill of Rights.[18] The Bill of Rights guarantees the surrogate's right to make her own health and welfare decisions in pregnancy, including whether to terminate or reduce the pregnancy, independent counsel at the intending parents' cost, and health insurance for the surrogate through the pregnancy and for a period after birth.

On the framework's indicators these regimes perform best on consent integrity and economic security, since counsel is mandatory and payment is contractual and, in New York, secured. They also give the surrogate the most explicit protection of bodily autonomy. Their weaknesses are different. They depend heavily on a private market of agencies and attorneys; compensation is a negotiated outcome and may reproduce inequality between intending parents, who are often wealthy, and surrogates, who are typically of modest means; and the high cost of surrogacy in these jurisdictions limits access and invites cross-border use. The liberal-feminist argument for regulated payment, that denying women the right to be paid for demanding work is itself a form of disrespect, has real force in this context. The radical-feminist argument that payment makes the surrogate's consent structurally unreliable has equal force in the transnational context, where affluent clients commission pregnancies from women in poorer jurisdictions.[19]

VI. India on the Same Grid

India's Surrogacy (Regulation) Act, 2021 is an altruistic-regulatory statute with an unusually strict payment rule. Altruistic surrogacy excludes any payment other than medical and prescribed expenses and insurance for the surrogate. Commercial surrogacy is prohibited and, with advertising for surrogates, criminalised. Any willing woman who is ever married, has a child, is aged 25 to 35, has not previously been a surrogate and holds medical and psychological fitness and eligibility certificates may act, but the intending couple or woman must themselves present her to the appropriate authority.[20]

On consent integrity India requires written consent in a language the surrogate understands, but not independent counsel or independent verification of voluntariness. The matching rule, combined with the prohibition of advertising, means that surrogates are drawn from the intending couple's existing relationships, which raises the dependence concern developed in the companion analysis of the constitutional position. On bodily autonomy, the surrogate may withdraw before implantation, but termination of a surrogate pregnancy requires both her consent and the authorisation of the appropriate authority, a requirement that does not apply to other pregnant women and that has no counterpart in the New York, California or South African schemes. On economic security, India is strictest in the sample: even South Africa, which also prohibits remuneration, permits compensation for loss of earnings. On health and aftercare, insurance is required for a prescribed period, but no more. On remedies and voice, enforcement runs through the Boards, authorities and criminal law, and the principal constitutional litigation, concerning donor gametes and age limits, has been brought by intending parents.[21]

[18]Child-Parent Security Act, 2020 NY Laws (effective 15 February 2021).

[19]For contrasting accounts, compare Carole Pateman, *The Sexual Contract* (Polity 1988) and Kalindi Vora, *Life Support: Biocapital and the New History of Outsourced Labor* (University of Minnesota Press 2015) with Debora Spar, *The Baby Business* (Harvard Business School Press 2006).

[20]Surrogacy (Regulation) Act 2021, ss 2(1)(b) and 4(iii)(b). An earlier Bill had required a close relative; the Act as passed does not. See PRS Legislative Research, *Comparison of the Surrogacy (Regulation) Bills 2019 and 2021*.

[21]Surrogacy (Regulation) Amendment Rules, G.S.R. 119(E) (21 February 2024); *Arun Muthuvel v Union of India* 2025 INSC 1209 (decided 9 October 2025).

The overall picture is of a regime that has adopted the anti-commodification premise of the strictest altruistic systems without the procedural safeguards that make such systems protective in South Africa, or the entitlements that make the commercial systems protective in New York.

VII. Comparative Matrix

Table 1: Protection of the surrogate mother across selected regimes (summary of the position at the date of writing)

Regime	Consent and counsel	Bodily autonomy and exit	Economic and health security	Remedies and voice
France / Germany / Italy (prohibition)	No framework; agreements void or criminalised	Birth mother is legal mother; no rights framework for participants	No lawful payment; no statutory cover for participants	Litigation concerns the child's status, not the surrogate
United Kingdom	Free consent to parental order, not before six weeks after birth; independent advice not a statutory right	Legal mother until order; agreements unenforceable	Reasonable expenses only; court may authorise more	Court process; reform proposed (2023), not enacted
South Africa	Pre-conception High Court confirmation of agreement	Retains right to terminate pregnancy under termination law	Expenses and loss of earnings; no fee for gestation	Court-based; access depends on legal representation
California / New York	Independent counsel mandatory, paid by intending parents	NY: statutory right to all health decisions incl. termination; CA: contractual allocation	Compensation negotiated; NY: insurance and secured payment	Counsel and courts; market-dependent; high cost
India	Written consent; fitness and eligibility certificates; no independent counsel	Withdrawal before implantation; termination needs her consent and authority's authorisation	Medical expenses and insurance only; no loss-of-earnings recognition	Authorities and criminal law; litigation led by intending parents

VIII. Findings

First, procedure matters more than permission. The regimes that give surrogates the most substantive protection are not those that permit or forbid payment but those that supply independent counsel, scrutiny of consent, insurance and defined decision-making rights. This explains why South Africa, an altruistic system, and New

York, a commercial one, resemble each other on several indicators and differ sharply from the UK and India. A prohibition on payment cannot do the work of these safeguards, and the absence of such a prohibition does not make them unnecessary.

Second, altruism is not self-protecting. The altruistic label suggests safety, but altruistic surrogacy places the surrogate in a relationship of obligation, and it removes the monetary exchange that, in commercial systems, at least makes the terms explicit. A strict altruistic rule, as in India, can increase the surrogate's dependence on the intending couple's goodwill. The South African recognition of loss of earnings shows that a regime can remain non-commercial without requiring the surrogate to bear the economic costs of the arrangement.

Third, exit rights and certainty pull in opposite directions. The UK gives the surrogate the strongest post-birth position, at the price of uncertainty for intending parents and children; California and South Africa provide early certainty, at the price of reducing the surrogate's post-birth discretion. There is no costless solution, but it is a trade-off that should be made explicitly. India's deeming of the child as that of the intending couple provides certainty without the compensating procedural safeguards.

Fourth, there is a standing gap. In none of the systems examined do surrogates figure prominently as litigants or law-reform participants. Prohibitionist case law is about children, UK case law about parental orders, and Indian case law about intending parents' autonomy. The abolitionist report and its critics both rely substantially on the accounts of intermediaries. Reform that is not informed by surrogates' own testimony risks reproducing the pattern in which the woman at the centre of the arrangement is spoken about rather than heard.

Fifth, the abolition debate turns on capacity, not only on principle. The evidence that unregulated commercial markets have produced serious exploitation supports the concern behind the 2025 report. The evidence that well-designed procedural protection improves surrogates' position, though limited, supports regulation. Which is preferable depends in part on whether a state has the institutional capacity, in courts, legal aid, medical supervision and enforcement, to make regulation real. That is an empirical question about each system, not one that principle alone can answer.

IX. Lessons for India and the Limits of Transplantation

Several lessons follow for India. The New York Bill of Rights is a template for a statutory charter that makes independent counsel, medical decision-making and aftercare non-waivable entitlements and that could be adopted without altering the Act's anti-commercial premise. The South African treatment of loss of earnings offers a model for reimbursement that preserves altruism while recognising real costs. The UK and South African experience of independent scrutiny of consent suggests that India should require an assessment of voluntariness by someone independent of the clinic and the intending couple, with particular attention to employment, debt and kinship relationships between the parties. The comparative position on termination suggests aligning the Indian rule with the general law on abortion and confining the authority's role to verification of compliance. And the standing gap suggests institutional channels, such as surrogate representation on State Surrogacy Boards and a registry of outcomes, through which surrogates' interests can be articulated.

The limits of transplantation must be acknowledged. Procedures that work in a high-income system with widespread legal representation and strong courts may fail in a system where legal aid is scarce and litigation slow. The New York model assumes that the intending parents can fund counsel, insurance and escrow, which presupposes a market that the Indian Act has forbidden. The South African model assumes an accessible High Court. Importing the form of these safeguards without their conditions would be a mistake. For India the appropriate response is to design protections suited to the capacity of its institutions: tribunal-style or Board-based pre-authorisation with trained examiners, state-funded or intending-parent-funded counsel drawn from panels, and standardised aftercare entitlements administered through public health systems. Each of these needs piloting,

evaluation and data, and the absence of data on surrogates' experience under the 2021 Act is itself a significant finding.

X. Conclusion

The comparative literature has taught us how legal systems classify surrogacy; it has taught us less about how they treat the surrogate. Measured by the rights she can actually invoke, the permit/prohibit axis is a weak guide. What distinguishes the more protective regimes is a set of procedural and substantive entitlements, and these can be built within an altruistic or a commercial framework. India's 2021 Act has adopted a restrictive payment rule and a deliberate anti-commodification policy, and in doing so it has made the surrogate's protection depend on provisions that it has not yet enacted. The calls for global abolition and the calls for regulation are both attempts to protect the same woman. A comparative, rights-centred approach suggests that the better test of any regime is whether she has counsel, whether her consent is independently tested, whether she controls her own body, whether she is secure in her health and income, and whether she can be heard.