



Resolving Surrogacy Disputes through Mediation: A Study of Legal Challenges, Ethical Concerns, and the Protection of Intended Parents and Surrogate Mothers

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ABSTRACT

Purpose: Surrogacy brings together a gestating woman, intending parents, clinics, regulators and, above all, a child whose interests cannot wait for slow litigation. India's shift from a largely unregulated commercial surrogacy market to the altruistic model of the Surrogacy (Regulation) Act, 2021 has changed the kinds of disputes that arise but has not removed them. This article examines whether, and on what terms, mediation under the Mediation Act, 2023 can serve as a legitimate forum for resolving surrogacy disputes while protecting both intended parents and surrogate mothers.

Design/methodology/approach: The study adopts a doctrinal and comparative legal method. It analyses the Surrogacy (Regulation) Act, 2021, the Surrogacy (Regulation) Rules, 2022 and their amendments, the Assisted Reproductive Technology (Regulation) Act, 2021, the Mediation Act, 2023 and leading constitutional and family-law decisions, and compares the Indian position with the United Kingdom, California, Israel and New South Wales. Disputes are classified by subject matter, parties and mediability.

Findings: A large part of the surrogacy dispute field is non-negotiable: commercial payment, abandonment of the child, coerced termination and the legal status of the child are fixed by statute and criminal law and fall outside the reach of private settlement. Yet a substantial band of disputes concerning expenses, insurance, communication, post-birth contact, information-sharing and the practical handover of the child is well suited to facilitative, rights-bounded mediation. The principal risks are structural power imbalance, family pressure on the "willing" surrogate and the absence of the child as a party.

Originality/value: The article proposes a three-tier Surrogacy Mediation Framework (preventive, in-process and post-birth) with explicit statutory "red lines", mandatory safeguards for surrogate mothers and a child-welfare checkpoint, and recommends targeted amendments to the surrogacy rules and mediation standards.

Keywords: surrogacy; mediation; Surrogacy (Regulation) Act 2021; Mediation Act 2023; reproductive autonomy; best interests of the child; alternative dispute resolution; India

1. Introduction

Surrogacy is among the most legally and ethically charged forms of family formation. It separates the experience of pregnancy from the intention to parent and frequently from genetic parenthood itself, and it binds together people whose interests are closely linked but not identical: a woman who carries a pregnancy, a couple or individual who intends to raise the resulting child, medical professionals who make the arrangement technically possible, and regulators who must ensure it is lawful. When these relationships come under strain, the consequences are unusually serious. A dispute over medical expenses may affect the health of a pregnant woman; a disagreement about prenatal testing touches on bodily integrity; a delay in parentage or custody orders can leave a newborn in legal limbo.

India occupies a distinctive place in this field. For roughly a decade from the early 2000s, the country was widely described as a global hub for commercial gestational surrogacy, attracting domestic and international intending parents through lower costs and an absence of binding regulation (Pande, 2014; Rudrappa, 2015). Cases such as *Baby Manji Yamada v. Union of India* (2008) and *Jan Balaz v. Anand Municipality* (2009) exposed the gaps that this model left in citizenship, parentage and the welfare of children born across borders. Empirical studies documented recruitment of economically vulnerable women, limited informed consent and weak protection of surrogates' health (Sama Resource Group for Women and Health, 2012; Saravanan, 2018). Successive policy interventions—the Indian Council of Medical Research guidelines of 2005, the 228th Report of the Law Commission of India (2009), restrictions



on foreign commissioning parents from 2015, and the parliamentary reports on the surrogacy bills—culminated in the Surrogacy (Regulation) Act, 2021 (hereinafter “SRA”) and the companion Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter “ART Act”), both in force from January 2022.

The SRA prohibits commercial surrogacy, confines the practice to altruistic arrangements for eligible Indian intending couples and certain single women, and creates a supervisory architecture of national and state boards, appropriate authorities and district medical boards. It deems the child to be the biological child of the intending couple and makes abandonment of the child an offence. These features close off some of the most notorious disputes of the commercial era, but they also generate new ones: eligibility challenges, contested reimbursement of “expenses”, disputes over insurance and post-delivery care, disagreements within families when the surrogate is a relative or acquaintance, and litigation arising from transition between the old and new regimes. The Supreme Court’s decision in *Vijaya Kumari S. v. Union of India* (2025), holding that the statutory age limits do not apply to couples who had begun the surrogacy process before the Act commenced, illustrates the continuing volume of contested questions.

In parallel, India enacted the Mediation Act, 2023 (hereinafter “MA”), which seeks to institutionalise mediation for civil and commercial disputes, gives mediated settlement agreements the status of enforceable instruments, and identifies through its First Schedule matters that are not fit for mediation. Family courts have long been directed to attempt settlement, and the Supreme Court has repeatedly encouraged mediation in matrimonial and child-related disputes (*K. Srinivas Rao v. D.A. Deepa*, 2013). Surrogacy disputes sit awkwardly between these traditions. They are intensely personal and relational, which favours mediation; but they also implicate criminal prohibitions, public regulatory approvals, the rights of a child who is not a party, and a sharp asymmetry of resources between intending parents and the surrogate mother, which counsel caution.

This article addresses that tension. It asks which surrogacy disputes can legitimately be mediated in India, what legal and ethical obstacles stand in the way, and how a mediation framework can be designed to protect the interests of both intended parents and surrogate mothers without compromising the welfare of the child or the integrity of the statutory scheme. The contribution is threefold: a typology of surrogacy disputes mapped against mediability; a critical analysis of legal and ethical constraints; and a proposed three-tier Surrogacy Mediation Framework with defined red lines and safeguards.

2. Research Objectives and Questions

The study pursues the following objectives:

1. To examine the legal framework governing surrogacy in India and identify the categories of disputes that arise under the altruistic model.
2. To analyse the scope and limits of mediation under the Mediation Act, 2023 in relation to surrogacy disputes.
3. To evaluate the ethical concerns—autonomy, power imbalance, child welfare and confidentiality—that affect mediation in this context.
4. To compare dispute-handling approaches in selected jurisdictions and draw lessons for India.
5. To propose a rights-protective mediation framework that safeguards intended parents, surrogate mothers and the child.

Corresponding to these objectives, the study addresses four research questions: (RQ1) What types of surrogacy disputes arise under the current Indian regime? (RQ2) Which of these are legally mediable, and which fall within non-negotiable statutory or criminal domains? (RQ3) What ethical risks does mediation pose for the parties, particularly the surrogate mother and the child? (RQ4) What institutional design would allow mediation to resolve surrogacy disputes effectively while protecting the rights of all parties?

3. Research Methodology

The article follows a doctrinal (black-letter) legal method supplemented by comparative and normative analysis. Primary sources comprise the SRA and the Surrogacy (Regulation) Rules, 2022 together with their 2023 and 2024 amendments; the ART Act; the Mediation Act, 2023; the Family Courts Act, 1984; the Guardians and Wards Act, 1890;



the Medical Termination of Pregnancy Act, 1971 (as amended in 2021); and the Consumer Protection Act, 2019. Judicial decisions were selected purposively for their bearing on surrogacy, reproductive autonomy, mediability and child welfare, including *Baby Manji Yamada* (2008), *Jan Balaz* (2009), *Suchita Srivastava v. Chandigarh Administration* (2009), *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.* (2010), *Justice K.S. Puttaswamy v. Union of India* (2017) and *Vijaya Kumari S.* (2025).

Secondary sources include official reports (Law Commission of India, 2009; Parliamentary Standing Committee on Health and Family Welfare, 2017; Rajya Sabha Select Committee, 2020; Law Commission of England and Wales and Scottish Law Commission, 2023), peer-reviewed literature on surrogacy and mediation, and reports of civil-society organisations. The comparative component examines the United Kingdom, California (United States), Israel and New South Wales (Australia). These jurisdictions were chosen because they represent contrasting models—non-enforceable altruism with post-birth parentage orders, enforceable contracts with pre-birth judgments, state pre-approval of agreements, and mandatory counselling and legal advice—each of which offers a different lesson about where and how disputes can be prevented or resolved.

The analysis proceeds in three steps. First, surrogacy disputes are classified by subject matter, parties and the legal norm that governs them. Second, each category is tested against the mediability criteria in the Mediation Act and the Supreme Court's guidance in *Afcons* (2010), and against ethical principles of autonomy, non-exploitation, best interests of the child and procedural fairness. Third, the findings are synthesised into a normative framework. Because the study does not involve human participants, ethics approval was not required; its limitations are discussed in Section 11.

4. The Regulatory Landscape of Surrogacy in India

4.1 From an unregulated market to an altruistic model

Before 2022, surrogacy in India was governed largely by non-binding ICMR guidelines and general contract law. Commissioning parents and surrogates typically signed agreements drafted by clinics or agencies, often in a language the surrogate could not read, and payment was structured in instalments tied to stages of the pregnancy (Pande, 2010; Sama Resource Group for Women and Health, 2012). Disputes were rarely litigated by surrogates; where they surfaced, they tended to concern the status of children born to foreign parents. In *Baby Manji Yamada* (2008), a child born to an Indian surrogate for a Japanese couple who separated during the pregnancy became the subject of a habeas corpus petition, and the Supreme Court directed the parties to the statutory commission for the protection of children. In *Jan Balaz* (2009), the Gujarat High Court held that twins born to an Indian surrogate for a German couple were Indian citizens, a holding that exposed the conflict between Indian and German parentage rules and led to protracted litigation before the children could leave the country.

The Law Commission of India (2009) recommended legislation that would recognise surrogacy agreements while prohibiting commercial exploitation. Subsequent bills moved progressively further toward prohibition. The Parliamentary Standing Committee (2017) and the Rajya Sabha Select Committee (2020) debated whether altruism should be confined to close relatives, how compensation should be defined, and whether single persons and same-sex couples should be eligible. The Act that emerged adopts a strictly altruistic model and excludes the “close relative” requirement in favour of a “willing woman” standard, while leaving many operational details to rules.

4.2 Key provisions of the Surrogacy (Regulation) Act, 2021

Table 1 summarises the provisions of the SRA that most directly shape the type and resolution of disputes.

Table 1. Provisions of the Surrogacy (Regulation) Act, 2021 relevant to dispute resolution

Subject	Statutory position (summary)	Implication for disputes
Permitted form	Only altruistic surrogacy; commercial surrogacy, including sale of gametes or embryos, is prohibited and punishable (s. 2, s. 4, s. 38).	Any claim for payment beyond medical expenses and insurance is unlawful and cannot be settled by agreement.



Subject	Statutory position (summary)	Implication for disputes
Intending couple	Married Indian couple with medical indication; wife 23–50 and husband 26–55 years; no surviving child (with exceptions); widow or divorcee aged 35–45 also eligible.	Eligibility disputes are public-law matters against authorities, not private disputes between parties.
Surrogate mother	Ever-married woman with a child of her own, aged 25–35, may act as surrogate only once, with medical and psychological fitness certification.	Disputes over her health, care and consent are central and require special protection.
Certificates and orders	Essentiality certificate, certificate of medical indication, and an order of parentage and custody from a Magistrate's court; insurance cover for the surrogate for 36 months.	Court involvement is built in before the procedure, creating a natural point for facilitated agreement.
Consent and withdrawal	Written informed consent of the surrogate; she may withdraw before implantation of the embryo (s. 6).	Consent cannot be bargained away; withdrawal before implantation is a protected right.
Termination of pregnancy	No one may force the surrogate to abort; termination only with her written consent and authorisation under the MTP Act (s. 3, s. 10).	Decisions over the surrogate's body are outside the scope of negotiation.
Abandonment	Intending couple may not abandon the child for any reason, including disability or sex (s. 7).	Abandonment is an offence; mediation cannot validate refusal to accept the child.
Status of child	Child deemed the biological child of the intending couple with all rights and privileges (s. 8).	Parentage is fixed by law; disputes concern implementation, not status.
Regulatory bodies	National and State Surrogacy Boards; Appropriate Authorities; registration of clinics.	Regulators can host or mandate dispute-resolution mechanisms.

Note. Summary prepared by the author from the Surrogacy (Regulation) Act, 2021 and the Surrogacy (Regulation) Rules, 2022, as amended. Section references are indicative; readers should consult the current consolidated text.

4.3 Judicial and regulatory developments since 2022

The Act has been the subject of sustained litigation. A batch of writ petitions led by *Arun Muthuvel v. Union of India* challenges the exclusion of single men, unmarried and same-sex couples, the prohibition of commercial surrogacy, and the age and “no surviving child” criteria. One focal issue concerned donor gametes. A 2023 amendment to the Rules required that both gametes come from the intending couple; after the Supreme Court permitted individual petitioners with specific medical conditions to proceed with donor eggs, the Surrogacy (Regulation) Amendment Rules, 2024 allowed the use of one donor gamete where a District Medical Board certifies a medical condition, provided the other gamete comes from the intending couple, while single women must use their own eggs.

In *Vijaya Kumari S. v. Union of India* (2025), the Supreme Court held that the upper age limits in section 4(iii)(c)(I) do not apply to couples who had commenced the surrogacy process—for instance by creating and freezing embryos—



before the Act came into force on 25 January 2022. The Court described reproductive choice, including access to surrogacy, as an aspect of personal liberty under Article 21, building on *Suchita Srivastava* (2009) and *Puttaswamy* (2017), and allowed similarly placed couples to approach the jurisdictional High Courts. The judgment is significant for this study in two ways. It confirms that many surrogacy disputes are disputes with the State rather than between private parties, and it shows that the legal position is still evolving, which increases uncertainty for those negotiating arrangements.

4.4 The Mediation Act, 2023

The Mediation Act was notified on 15 September 2023, with initial provisions brought into force on 9 October 2023 and further operationalisation proceeding in phases. It defines mediation broadly, provides for pre-litigation mediation, court-referred mediation, online mediation and community mediation, sets a 120-day time limit extendable by 60 days, requires confidentiality, and makes a signed mediated settlement agreement final, binding and enforceable in the same manner as a court decree. Challenge is confined to narrow grounds: fraud, corruption, impersonation and the dispute not being fit for mediation.

Section 6 and the First Schedule list matters not fit for mediation. Relevant here are disputes involving prosecution for criminal offences, disputes that affect the rights of third parties who are not parties to the mediation (with an exception for matrimonial disputes involving the interests of a child), claims against minors and persons with intellectual disabilities, and matters barred by other statutes. These exclusions are decisive for surrogacy: they place commercial-surrogacy offences and abandonment outside the process, and they require careful handling of any dispute that touches the child, who cannot be a party in the ordinary sense. At the same time, the Act preserves the power of courts to refer compoundable matters and recognises the long-standing practice of mediation in family matters, which the Family Courts Act, 1984 already encourages.

5. A Typology of Surrogacy Disputes

Surrogacy disputes do not form a single category. They differ in their parties, in the legal norms that govern them and, crucially, in whether the parties have anything that they may lawfully negotiate. Table 2 classifies the main categories observed in Indian litigation, regulatory practice and the comparative literature, and assesses their mediability under the MA and the *Afcons* (2010) criteria.

Table 2. *Typology of surrogacy disputes and their mediability*

Dispute category	Typical parties	Governing norm	Mediability
1. Eligibility and certification (age, medical indication, donor gametes)	Intending couple v. Appropriate Authority / DMB	SRA s. 4; Rules; Article 21	Not mediable between private parties; administrative review or writ. Facilitated dialogue with authorities possible.
2. Commercial payment, “compensation” or inducements	Surrogate / agent v. intending parents	SRA prohibitions; criminal offences	Not mediable; offence. Mediator must terminate and refer.
3. Medical and incidental expenses; insurance claims	Surrogate v. intending parents / insurer / clinic	SRA; Rules; insurance contract	Mediable within statutory limits.
4. Antenatal care, lifestyle, communication and visits	Surrogate v. intending parents	Consent; dignity; clinic protocols	Mediable, with surrogate’s bodily autonomy protected.



Dispute category	Typical parties	Governing norm	Mediability
5. Prenatal testing, foetal anomalies and termination	Surrogate v. intending parents / clinic	SRA s. 3, s. 10; MTP Act	Partly mediable (information, support); final decision rests with surrogate and law.
6. Clinic negligence or deficiency in service	Parties v. clinic / ART bank	Consumer Protection Act 2019; tort; ART Act	Mediable (consumer mediation), subject to regulatory reporting.
7. Handover, post-birth care and breastfeeding arrangements	Surrogate v. intending parents	SRA s. 7, s. 8; parentage order	Mediable as to practicalities; status of child non-negotiable.
8. Refusal to accept the child; abandonment	Intending parents v. child / State	SRA s. 7; criminal law; JJ Act	Not mediable; child-protection and criminal process.
9. Separation or death of intending parents during pregnancy	Intending parents inter se; families	SRA s. 8; family law; guardianship	Mediable between adults (custody, support), with court approval on child welfare.
10. Post-birth contact, information and origins	Surrogate / child / intending parents	Privacy; child's best interests	Mediable; agreements require child-welfare review.
11. Transitional and cross-border legacy cases	Parties, foreign authorities, embassies	Citizenship, private international law	Partly mediable; status issues for courts.

Note. DMB = District Medical Board; JJ Act = Juvenile Justice (Care and Protection of Children) Act, 2015; MTP Act = Medical Termination of Pregnancy Act, 1971. Assessment by the author.

The typology reveals three zones. The **non-negotiable zone** (categories 1, 2 and 8) is governed by public law or criminal law and cannot be the subject of private settlement. The **bounded zone** (categories 5, 7, 9, 10 and 11) contains matters on which parties can reach agreement about practical arrangements, but within limits set by the surrogate's bodily autonomy and the child's legal status and welfare. The **open zone** (categories 3, 4 and 6) concerns ordinary relational and financial questions that are well suited to mediation. The analysis that follows shows that the legitimacy of mediation depends on keeping these zones distinct.

6. Legal Challenges to Mediating Surrogacy Disputes

6.1 The non-negotiable core: criminal and public-law dimensions

The first and most fundamental challenge is that the SRA converts many former contractual questions into questions of criminal and regulatory law. Commercial surrogacy, exploitation of the surrogate, sale of embryos and abandonment of the child are offences. The First Schedule of the MA excludes prosecution for criminal offences, and the general principle articulated in *Afcons* (2010)—those matters involving serious criminal allegations, rights in rem and public-law questions are unsuitable for ADR—applies with equal force. A mediated agreement in which intending parents pay a surrogate a sum disguised as “expenses” in exchange for her silence about a breach would be void and potentially incriminating for all involved, including the mediator if he or she knowingly facilitated it.

This has practical consequences for mediators. They must be able to recognise when a dispute has crossed from the **bounded** or **open** zones into the **non-negotiable zone**, terminate the mediation, and—where the law requires—report



or refer. The tension between this duty and the confidentiality obligation in the MA is real. The Act's confidentiality provisions do not extend protection to communications that disclose ongoing offences or threats to a person's safety in every case, and specialised guidance is needed so that mediators understand where confidentiality ends.

6.2 Unenforceability, status and the limits of party autonomy

Mediation draws its legitimacy from party autonomy: the parties decide what is fair for them. In surrogacy, however, the law has removed much of that autonomy deliberately. The child's status is fixed by section 8; the surrogate's right to withdraw before implantation and to refuse termination is protected; the intending parents' duty not to abandon the child is absolute. Comparative experience shows the same pattern. In England and Wales, surrogacy arrangements are unenforceable by or against any party, and parenthood is transferred by a court through a parental order under section 54 of the Human Fertilisation and Embryology Act 2008, with the welfare of the child as the paramount consideration. In the American case of *In re Baby M* (1988), the New Jersey Supreme Court refused to enforce a traditional surrogacy contract as contrary to public policy, whereas in *Johnson v. Calvert* (1993) the California Supreme Court relied on the parties' intentions to determine maternity in a gestational arrangement.

The Indian model is closer to the former than the latter: what the parties agree cannot alter the statutory allocation of parenthood or the surrogate's protected rights. Mediation in this setting therefore operates, in the phrase of Mnookin and Kornhauser (1979), "in the shadow of the law" to an unusual degree. The mediator's task is not to help parties create rights but to help them implement statutory rights humanely and to settle the many practical matters that the statute leaves open.

6.3 Third-party rights, the absent child and the First Schedule

The child is the person most affected by many surrogacy disputes and the one least able to participate. The First Schedule of the MA excludes disputes that affect the rights of third parties who are not parties to the mediation, while making an exception for matrimonial disputes in which the interests of a child are involved. Surrogacy disputes are not matrimonial disputes in the conventional sense, although some—such as the separation of intending parents during the pregnancy—have a matrimonial character. The safer reading is that mediation can proceed on matters between the adults, but any term that affects the child's custody, care, maintenance or contact must be reviewed by a court applying the welfare principle that underlies section 17 of the Guardians and Wards Act, 1890 and the Supreme Court's child-custody jurisprudence. This is consistent with the practice of family courts, which scrutinise mediated settlements on child-related matters rather than simply recording them.

6.4 Institutional fragmentation

Surrogacy disputes may currently reach a Magistrate's court (parentage and custody orders), a District Medical Board (medical indication and donor gametes), the Appropriate Authority (registration and complaints), a consumer commission (deficiency in clinical services), a family court (custody and maintenance), a criminal court (offences), a Child Welfare Committee (abandonment) and a High Court or the Supreme Court (constitutional challenges). There is no single forum with a mandate to address the human relationships at the centre of the arrangement. Mediation could serve an integrative function, but only if it is linked to these institutions through clear referral pathways and if settlements are capable of being recognised by the relevant authority.

6.5 Legacy, transitional and cross-border cases

Finally, disputes from the commercial era and from cross-border arrangements continue to surface, as *Vijaya Kumari S.* (2025) illustrates. These involve frozen embryos, foreign intending parents who began procedures before restrictions, or children whose citizenship and parentage are recognised differently in different states. The European Court of Human Rights has required states to provide a route to recognise the parent-child relationship with a genetic intended parent (*Mennesson v. France*, 2014) while allowing wide discretion in other respects (*Paradiso and Campanelli v. Italy*, 2017). Mediation can help parties and authorities coordinate practical steps, but status questions remain for courts and, increasingly, for international cooperation of the kind studied by the Hague Conference on Private International Law (2023).



7. Ethical Concerns

7.1 *Power asymmetry and the “willing” surrogate*

The central ethical risk is inequality of bargaining power. Studies of Indian surrogacy in the commercial era documented women entering arrangements under economic pressure, with limited education and limited access to independent advice (Pande, 2014; Rudrappa, 2015; Saravanan, 2018). The altruistic model removes payment, but it does not remove inequality. A surrogate who is a relative, employee or acquaintance of the intending couple may face emotional obligation, family expectations or fear of social consequences. Feminist critiques of mediation warn that informal, confidential processes can magnify such imbalances, because the more powerful party can shape the agenda and the weaker party may concede in order to preserve relationships (Grillo, 1991; Field, 2006). These concerns apply with special force when the weaker party is pregnant, physically dependent on medical care arranged by the other side, and socially embedded in the same family network.

Mediation is not inherently disempowering. Transformative approaches emphasise empowerment and recognition (Bush & Folger, 1994), and well-designed processes can give a surrogate a voice that litigation would not. The ethical question is therefore one of design: whether the process screens for coercion, ensures access to independent advice, uses separate sessions where needed, and refuses to proceed where consent is not genuine.

7.2 *Autonomy and bodily integrity*

Disputes over diet, travel, medical procedures, prenatal testing, multiple pregnancy and termination engage the surrogate's bodily integrity directly. The SRA and the MTP Act reserve decisions on termination to the surrogate and the medical framework; intending parents cannot compel or forbid them. A mediator must therefore distinguish between legitimate discussion—sharing information, expressing concerns, agreeing on communication about test results—and illegitimate pressure. Any settlement term that purports to bind the surrogate to undergo or refuse a medical procedure should be treated as unenforceable and excluded from the agreement. Recognising reproductive autonomy as part of Article 21 (Suchita Srivastava, 2009; Puttaswamy, 2017) strengthens this limit.

7.3 *The best interests of the child*

The child's welfare is not a bargaining chip. Mediation can serve the child by reducing conflict, speeding up handover and creating cooperative arrangements for information-sharing. But mediated agreements can also reflect adult interests—for example, an agreement to delay a parentage application because the intending parents are separating, or to exclude the surrogate entirely from a child's life despite an established bond. Research on families formed through surrogacy suggests that children generally fare well and that openness about origins is associated with positive outcomes (Golombok, 2015; Jadvia et al., 2003). A child-welfare checkpoint, independent of the parties, is therefore essential for any term that affects the child.

7.4 *Confidentiality, privacy and the right to know one's origins*

Confidentiality encourages candour and protects sensitive information about infertility, family relationships and the surrogate's identity. However, confidentiality can conceal exploitation, and absolute secrecy may conflict with the child's later interest in knowing the circumstances of his or her birth. The SRA and ART Act require clinics to maintain records; mediation agreements should not purport to destroy or suppress information that the law requires to be kept, and parties should be encouraged to address future information-sharing explicitly.

7.5 *Mediator competence and neutrality*

Surrogacy mediation demands knowledge of reproductive medicine, family law, criminal prohibitions, gender-sensitive practice and trauma-informed communication. A mediator who adopts a narrow, evaluative or settlement-driven style (Riskin, 1996) may pressure the surrogate toward concessions; one who lacks legal knowledge may facilitate an unlawful agreement. Neutrality in this setting does not mean indifference to statutory protections. The mediator's impartiality between the parties must coexist with a firm commitment to the legal floor that protects the surrogate and the child.

8. Comparative Perspectives

Table 3 compares how four jurisdictions structure surrogacy and where they place dispute prevention and resolution. None has a fully developed surrogacy-specific mediation regime, but each offers a design element relevant



to India.

Table 3. *Comparative approaches to surrogacy regulation and dispute handling*

Jurisdiction	Model	Dispute prevention / resolution features	Lesson for India
United Kingdom (England and Wales)	Altruistic; arrangements unenforceable; parental order after birth (HFEA 2008, s. 54).	Court decides parenthood on child-welfare basis; Law Commission (2023) proposed a pre-conception pathway with counselling, independent legal advice and safeguards.	Front-load counselling and independent advice; keep child status with courts.
California (United States)	Compensated gestational surrogacy; enforceable agreements; pre-birth parentage judgments (Family Code ss. 7960–7962).	Mandatory independent counsel for each side; detailed agreements reduce later disputes; <i>Johnson v. Calvert</i> (1993) intent test.	Independent legal advice for the surrogate is a key safeguard regardless of model.
Israel	State-regulated surrogacy; agreements approved in advance by a statutory committee (1996 Law).	Pre-approval screens for coercion and fairness; parentage order after birth.	Ex ante review by a neutral body can prevent disputes; Surrogacy Boards could play this role.
New South Wales (Australia)	Altruistic only (Surrogacy Act 2010); agreements largely unenforceable.	Pre-conception counselling and independent legal advice are conditions of a parentage order; welfare-based court review.	Make counselling and advice preconditions, linking them to the parentage process.

Note. Compiled by the author from statutes, case law and the Law Commission of England and Wales and Scottish Law Commission (2023) report. Positions summarised in general terms.

Three lessons emerge. First, every model that works reasonably well invests heavily in prevention: counselling, independent legal advice and clear written understanding before conception. Second, child status is everywhere reserved to courts or statute, never to private agreement. Third, the jurisdictions that allow enforceable agreements (California) rely on independent counsel to legitimise them, while those that make agreements unenforceable (UK, NSW) rely on post-birth judicial review. India, with an altruistic and non-commercial model but with a pre-procedure parentage order, is positioned between these approaches and can borrow from both.

9. Toward a Rights-Protective Surrogacy Mediation Framework

9.1 Guiding principles

Drawing on the foregoing analysis, the following principles should govern mediation of surrogacy disputes in India:

- **Legality first:** mediation operates within the SRA, ART Act and criminal law; no settlement may derogate from statutory rights or prohibitions.



- **Primacy of the surrogate's bodily autonomy:** decisions over her body and medical care are hers within the law and are not negotiable.
- **Best interests of the child:** any term affecting the child requires independent welfare review.
- **Substantive equality:** the process must actively correct power imbalances through advice, support and procedural safeguards.
- **Informed and voluntary participation:** parties may decline or withdraw without penalty; coercion screening is mandatory.
- **Bounded confidentiality:** confidentiality yields where disclosure is required to prevent harm or comply with law.
- **Accountability:** mediators are trained, accredited and subject to oversight; outcomes are monitored in anonymised form.

9.2 A three-tier structure

The framework proposes three tiers aligned with the stages of a surrogacy arrangement (Table 4).

Table 4. *Proposed three-tier Surrogacy Mediation Framework*

Tier	Stage and trigger	Scope	Institutional link and safeguards
Tier I — Preventive	Before embryo transfer; when applying for essentiality certificate and parentage order.	Facilitated discussion of expectations: expenses, insurance, communication, visits, birth plan, post-birth contact, contingency plans (separation, death, anomalies).	Linked to Appropriate Authority / Magistrate's court; independent legal advice and counselling for surrogate; written memorandum of understanding attached to records.
Tier II — In-process	During pregnancy; on request of any party or clinic.	Disputes over expenses, insurance claims, care arrangements, communication breakdown, information about tests.	Clinic-linked or board-empanelled mediators; separate sessions available; immediate termination and referral if offence or coercion appears; medical decisions remain with surrogate.
Tier III — Post-birth	After delivery; handover, separation, or contact issues.	Practical handover, post-delivery care, records, contact and information-sharing, arrangements between separating intending parents.	Court-annexed or family-court mediation; child-welfare review of any child-related term before recording; abandonment or status issues excluded and referred.

Tier I is the most important. Comparative experience consistently shows that the majority of surrogacy disputes stem from unspoken expectations. Because the SRA already requires a parentage and custody order from a Magistrate before the procedure, India has a ready-made institutional point at which a facilitated discussion can occur. A short, structured session—supported by counselling and independent advice for the surrogate—can produce a non-binding memorandum of understanding that anticipates contingencies. Tier II provides rapid, accessible help during pregnancy, when delay is most costly. Tier III integrates mediation with the courts that must in any event deal with



child-related questions, ensuring that adult agreements are reviewed for the child's welfare.

9.3 Red lines

Table 5 distinguishes issues that are excluded from mediation from those that may be discussed or settled. Making these lines explicit protects all parties, including mediators.

Table 5. *Red lines and negotiable matters in surrogacy mediation*

Excluded (red line) — refer to court or authority	Open to discussion, not binding	Open to settlement
Payment beyond lawful expenses and insurance; any form of commercial consideration	Prenatal testing and how results will be communicated	Reimbursement of documented medical and incidental expenses
Abandonment or refusal to accept the child	Surrogate's preferences on lifestyle and care (she decides)	Insurance claims and coverage gaps
Compelling or forbidding termination or any medical procedure	Birth plan and presence at delivery	Communication schedule and visits
Legal parentage and status of the child	Breastfeeding and immediate post-birth care preferences	Post-birth contact and information-sharing (subject to welfare review)
Eligibility and certification decisions of authorities	Future disclosure to the child about birth	Arrangements between separating intending parents (subject to court approval)
Suppression of records the law requires to be kept	—	Claims against clinics for deficiency in service

9.4 Procedural safeguards

To make the framework operational, the following safeguards should be adopted:

1. **Independent legal advice and counselling** for the surrogate, funded by the intending couple as part of lawful expenses, before Tier I and at any later stage on request.
2. **Coercion and domestic-violence screening** before every mediation, with separate (caucus or shuttle) sessions available as of right.
3. **Language access and support persons**, including interpreters and, at the surrogate's choice, a trusted person who is not a member of the intending couple's family.
4. **Specialised accreditation** of surrogacy mediators by the Mediation Council of India, covering reproductive law, gender sensitivity and child welfare.
5. **Child-welfare checkpoint** requiring court or Child Welfare Committee review of any term affecting the child before it is recorded as enforceable.
6. **Statutory exceptions to confidentiality** for disclosure of offences, risk to life or health, and child-protection concerns.
7. **Anonymised data collection** by Surrogacy Boards on the number, type and outcomes of mediations, to support evidence-based regulation.

10. Discussion and Policy Recommendations

The analysis answers the four research questions. On RQ1, surrogacy disputes under the altruistic regime cluster around eligibility, expenses and insurance, care and communication, medical decisions, clinic conduct, handover, separation of intending parents, post-birth contact and legacy cases. On RQ2, a significant share—those involving



commercial payment, abandonment, coerced termination, status and eligibility—is not mediable, while practical, relational and financial matters within statutory limits are suitable for mediation. On RQ3, the ethical risks are concentrated in power asymmetry, threats to bodily autonomy, the absence of the child and the misuse of confidentiality. On RQ4, a three-tier framework with explicit red lines and safeguards offers a way to capture the benefits of mediation while managing its dangers.

These findings have implications for both intended parents and surrogate mothers. For intended parents, mediation offers speed, privacy and the chance to maintain a cooperative relationship with the woman carrying their child, which matters for the pregnancy and often for the child's later understanding of his or her origins. For surrogate mothers, it offers a forum in which concerns about care, expenses and dignity can be raised without the cost and exposure of litigation. The framework protects both by insisting that their statutory rights form the floor of any agreement. The following recommendations are made:

1. **Amend the Surrogacy (Regulation) Rules** to provide expressly for preventive facilitation at the stage of the parentage and custody order, and for referral of disputes during and after pregnancy to accredited mediators.
2. **Empower National and State Surrogacy Boards** to empanel mediators, issue practice directions and receive anonymised reports.
3. **Issue specialised standards under the Mediation Act**, through the Mediation Council of India, for surrogacy and reproductive-health mediation, including red lines and mandatory termination triggers.
4. **Clarify the treatment of child-related terms** by providing that settlements affecting a surrogate-born child are enforceable only after judicial or CWC review.
5. **Provide legal aid** through Legal Services Authorities for surrogate mothers in disputes, recognising the possibility of economic and social vulnerability even in altruistic arrangements.
6. **Integrate clinic-level grievance mechanisms** with the mediation pathway so that complaints against clinics and ART banks are handled promptly and reported to regulators.

These measures are modest in cost and build on institutions that already exist. They are also consistent with the direction of judicial thinking, which increasingly treats reproductive choice as a constitutional value while accepting that the State may regulate its exercise. A well-designed mediation pathway would respect both elements: it would facilitate the private exercise of reproductive choice while keeping that exercise within the protective boundaries that Parliament has drawn.

11. Limitations and Directions for Future Research

This study is doctrinal and comparative; it does not draw on primary empirical data from surrogate mothers, intending parents, mediators or regulators. Reported case law captures only a small share of disputes, and the experiences of surrogates under the altruistic model are not yet well documented. The legal position is also in flux, with constitutional challenges to the SRA and ART Act still being adjudicated and further amendments to the Rules possible; readers should verify the current position before relying on any specific provision. Future research should include qualitative interviews with surrogates and intending parents, studies of how Magistrates and Surrogacy Boards handle disputes in practice, pilot evaluations of the Tier I preventive model, and comparative work on cross-border cooperation in parentage recognition.

12. Conclusion

Surrogacy disputes are among the most delicate that a legal system must handle, involving pregnancy, parenthood and the identity of a child. India's altruistic model has removed the market from surrogacy but not the potential for conflict. Mediation, now placed on a statutory footing by the Mediation Act, 2023, is attractive because it can address the relational and practical dimensions of these disputes quickly and privately. But it cannot be applied indiscriminately. Much of the surrogacy field is governed by non-negotiable statutory and criminal norms, the child is an absent but central stakeholder, and the surrogate mother may be vulnerable to pressure even without payment. The article has argued that mediation can legitimately resolve a defined band of surrogacy disputes if it is structured around explicit red lines, the primacy of the surrogate's bodily autonomy, independent welfare review for the child, and robust safeguards against coercion. The proposed three-tier framework—preventive, in-process and



post-birth—offers a practical blueprint that builds on existing Indian institutions. Implemented carefully, it would better protect intended parents and surrogate mothers alike, reduce the burden on courts, and, most importantly, serve the interests of the children whom surrogacy brings into the world.

References

Books, articles and reports

1. Bush, R. A. B., & Folger, J. P. (1994). *The promise of mediation: Responding to conflict through empowerment and recognition*. Jossey-Bass.
2. Deomampo, D. (2016). *Transnational reproduction: Race, kinship, and commercial surrogacy in India*. New York University Press.
3. Field, R. (2006). Using the feminist critique of mediation to explore “the good, the bad and the ugly” implications for women of the introduction of mandatory family dispute resolution in Australia. *Australian Journal of Family Law*, 20(1), 45–78.
4. Fisher, R., & Ury, W. (1981). *Getting to yes: Negotiating agreement without giving in*. Houghton Mifflin.
5. Golombok, S. (2015). *Modern families: Parents and children in new family forms*. Cambridge University Press.
6. Grillo, T. (1991). The mediation alternative: Process dangers for women. *Yale Law Journal*, 100(6), 1545–1610.
7. Hague Conference on Private International Law. (2023). *Final report of the Working Group on the private international law issues surrounding legal parentage, including legal parentage resulting from international surrogacy agreements*. HCCH.
8. Jackson, E., Millbank, J., Karpin, I., & Whittaker, A. (2017). Learning from cross-border reproduction. *Medical Law Review*, 25(1), 23–46.
9. Jadv, V., Murray, C., Lycett, E., MacCallum, F., & Golombok, S. (2003). Surrogacy: The experiences of surrogate mothers. *Human Reproduction*, 18(10), 2196–2204.
10. Menkel-Meadow, C. (1984). Toward another view of legal negotiation: The structure of problem solving. *UCLA Law Review*, 31, 754–842.
11. Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal*, 88(5), 950–997.
12. Pande, A. (2010). Commercial surrogacy in India: Manufacturing a perfect mother-worker. *Signs: Journal of Women in Culture and Society*, 35(4), 969–992.
13. Pande, A. (2014). *Wombs in labor: Transnational commercial surrogacy in India*. Columbia University Press.
14. Riskin, L. L. (1996). Understanding mediators’ orientations, strategies, and techniques: A grid for the perplexed. *Harvard Negotiation Law Review*, 1, 7–51.
15. Rudrappa, S. (2015). *Discounted life: The price of global surrogacy in India*. New York University Press.
16. Sama Resource Group for Women and Health. (2012). *Birthing a market: A study on commercial surrogacy*. Sama.
17. Saravanan, S. (2018). *A transnational feminist view of surrogacy biomarkets in India*. Springer.
18. Scherpe, J. M., Fenton-Glynn, C., & Kaan, T. (Eds.). (2019). *Eastern and Western perspectives on surrogacy*. Intersentia.
19. Trimmings, K., & Beaumont, P. (Eds.). (2013). *International surrogacy arrangements: Legal regulation at the international level*. Hart Publishing.