



## Surrogacy in India: An Indian legal perspective on intended parents and surrogate mothers

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### Abstract

Surrogacy involves complex ethical, legal, and social questions, especially in the Indian context. In India surrogacy has undergone a dramatic legal transformation over the past two decades, from being with minimal regulation to becoming a tightly governed process restricted to altruistic arrangements under the Surrogacy (Regulation) Act, 2021<sup>[5]</sup>. However, with rise the of serious concerns regarding the exploitation of poor women, legal uncertainties over parentage and citizenship, the commoditization of women's bodies, and the absence of enforceable rights for surrogates and children forced the Indian judiciary and legislature to take active steps to regulate the surrogacy industry. The landmark cases such as *Baby Manji Yamada v. Union of India* (2008)<sup>[4]</sup> and *Jan Balaz v. Union of India* (2009) exposed the legal grey areas around surrogacy, including citizenship issues of children born to foreign intended parents and abandonment of babies due to disability or change in parental intent. These cases highlighted the urgent need for a codified legal framework that could protect all stakeholders involved in the surrogacy arrangement. This research paper aims to examine the legal implications of surrogacy in India through a critical analysis of the current regulatory framework. It will explore how the rights of intended parents and surrogate mothers are recognized and protected under the Surrogacy (Regulation) Act, 2021<sup>[5]</sup> and related legislation. It will also highlight the gaps and ambiguities in the law, assess constitutional and jurisprudential challenges, and offer recommendations for creating a more inclusive, ethical, and enforceable surrogacy regime in India.

**Keywords:** Surrogacy, India, intended parents, surrogate rights, altruistic surrogacy

### Introduction

Surrogacy, as a form of assisted reproductive technology (ART), has emerged as a significant medical, legal, and socio-ethical phenomenon in the 21st century. It provides a pathway to parenthood for individuals and couples unable to conceive or carry a child due to medical, biological, or social reasons. The practice, however, presents a complex intersection of competing interests and rights those of the intended parents, the surrogate mother, and the child born from such an arrangement.

India's journey with surrogacy began in earnest in the early 2000s, when affordable medical costs, advanced fertility clinics, and a lack of comprehensive laws made the country a global hub for commercial surrogacy. For many years, India was at the center of what was called "reproductive tourism," attracting foreign couples and individuals seeking surrogate services at a fraction of the cost in their home countries. Clinics mushroomed in cities like Mumbai, and Delhi, with thousands of surrogate births taking place annually. This need was eventually addressed by the passage of the Surrogacy (Regulation) Act, 2021<sup>[5]</sup>, followed by the Assisted Reproductive Technology (Regulation) Act, 2021. The new legal regime marks a clear departure from the earlier laissez-faire approach. It strictly prohibits commercial surrogacy and permits only altruistic surrogacy under defined conditions. According to the Act, only Indian heterosexual married couples who fulfill specific medical and age criteria are eligible to opt for surrogacy. The surrogate mother must be a close relative, already have a biological child of her own, and must not be compensated beyond medical expenses and insurance coverage. The law also mandates various approvals from medical boards and district authorities before the procedure can be carried out.

While the intent behind the law is to prevent exploitation and safeguard the dignity of women, it has sparked considerable debate among scholars, legal experts, and activists. On one hand, the law is seen as a protective measure that prioritizes the health and autonomy of surrogate mothers and ensures that children born out of surrogacy are not treated as commodities. On the other hand, critics argue that the legislation is overly restrictive, exclusionary, and paternalistic. It limits access to surrogacy to a narrow demographic excluding single parents, LGBTQ+ individuals and couples, live-in partners, and foreign nationals. Moreover, the ban on compensation beyond medical expenses arguably undermines the autonomy of women who may willingly choose to become surrogates for financial reasons, provided their rights and well being are legally protected. The tension between protecting women from exploitation and respecting their autonomy lies at the heart of the surrogacy debate. The law's framing of altruistic surrogacy as a moral ideal, and commercial surrogacy as inherently exploitative, may ignore the socio-economic realities of Indian women who see surrogacy as a means of improving their family's financial situation. Further, by requiring the surrogate to be a "close relative," the law may inadvertently increase the risk of coercion within families, while also reducing the availability of willing surrogates. This poses a practical challenge for intended parents, particularly those without eligible relatives.

In addition to these ethical and social considerations, there are significant legal implications surrounding the enforcement of surrogacy contracts, the determination of parentage, the legal status of the surrogate and the child, and the regulation of clinics and intermediaries. Ensuring clarity and consistency in these areas is vital to uphold the constitutional rights of all parties involved particularly

under Articles 14 (right to equality), 19 (freedom of choice), and 21 (right to life and personal liberty) of the Indian Constitution. The law must strike a delicate balance between regulation and facilitation, ensuring that neither surrogates nor intended parents are subject to arbitrary or discriminatory treatment.

### Legal History of Surrogacy in India

The legal history of surrogacy in India has evolved dramatically over the past two decades, reflecting a transition from a largely unregulated and commercialized practice to a strictly controlled and altruistic model. This transformation has been driven by a combination of factors including judicial pronouncements, international pressure, ethical concerns, and the growing need to protect the rights of surrogate mothers, intended parents, and children born through surrogacy. Understanding this legal trajectory is essential to appreciating the current regulatory framework and the rights and obligations it creates.

#### ▪ Early Years: The Rise of Commercial Surrogacy

The earliest known case of gestational surrogacy in India occurred in 1994. However, it was only in the early 2000s that the practice gained momentum, fueled by advancements in assisted reproductive technologies (ART), a growing global demand for surrogates, and India's comparatively low medical costs. The absence of comprehensive legal oversight made India an attractive destination for foreign couples seeking surrogacy services. Fertility clinics across the country began to advertise surrogacy arrangements, and a booming industry emerged, often described as the "surrogacy capital of the world."

During this period, surrogacy in India was largely commercial in nature. Surrogates often from economically weaker sections were compensated for their services, and the process was facilitated by intermediaries, clinics, and lawyers. This legal vacuum created a variety of problems, such as disputes over parentage, abandonment of children, and lack of rights for surrogate mothers.

#### ▪ The Indian Council of Medical Research (ICMR) Guidelines, 2005

In an effort to introduce some regulation, the Indian Council of Medical Research (ICMR) issued the "National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India" in 2005. These guidelines:

1. Allowed for both altruistic and commercial surrogacy.
2. Required informed consent from all parties involved.
3. Mandated that the surrogate mother relinquish all parental rights.
4. Emphasized the rights of the child born through ART.

However, these guidelines were not legally binding. They were advisory in nature and failed to create enforceable obligations or penalties. Consequently, the ART industry continued to operate with significant legal and ethical ambiguity.

#### ▪ Landmark Judicial Interventions

The legal void began to be addressed through several important cases decided by Indian courts. These cases laid the groundwork for future legislation by highlighting the need for statutory regulation.

#### 1. **Baby Manji Yamada v. Union of India (2008)** <sup>[4]</sup>

This case involved a Japanese couple who entered into a surrogacy agreement with an Indian surrogate. After the couple separated, the intended mother backed out, and the father wanted custody of the child. Due to legal hurdles, including visa issues, the baby was left in a legal limbo. The Supreme Court of India allowed the grandmother to take custody and emphasized the urgent need for a legal framework governing surrogacy.

#### 2. **Jan Balaz v. Union of India (2009)**

This case involved a German couple who had twins through an Indian surrogate. The question arose about the citizenship of the children, as India granted citizenship by birth and Germany did not recognize surrogacy. The Gujarat High Court held that the children were Indian citizens, but the case revealed the challenges of cross-border surrogacy, including nationality, custody, and legal parentage.

These cases underscored the serious legal, ethical, and humanitarian challenges posed by the absence of surrogacy legislation and contributed to the demand for statutory intervention.

#### ▪ Draft ART and Surrogacy Bills (2008–2016)

Between 2008 and 2016, several versions of the Assisted Reproductive Technology (Regulation) Bill and the Surrogacy (Regulation) Bill were introduced by the Ministry of Health and Family Welfare. These draft bills sought to:

1. Establish a national regulatory authority.
2. Require registration of ART clinics.
3. Regulate surrogacy agreements and prohibit exploitation.
4. Define eligibility criteria for intended parents and surrogates.

However, none of these bills were enacted due to political opposition, societal debates, and concerns raised by various stakeholders about the implications for women's rights and reproductive autonomy.

#### ▪ Government Crackdown on Commercial Surrogacy

In 2015, the Government of India issued a circular effectively banning surrogacy for foreign nationals, citing the need to prevent exploitation and misuse. The visa policy was revised to prohibit foreigners from entering India for the purpose of surrogacy, thereby significantly curtailing the international surrogacy market. This marked a clear shift in policy from tolerance of commercial surrogacy to restrictive regulation.

#### ▪ The Surrogacy (Regulation) Bill, 2016 and 2019

The 2016 version of the Surrogacy Bill was the first comprehensive attempt to ban commercial surrogacy and permit only altruistic surrogacy. It was passed by the Lok Sabha but lapsed in the Rajya Sabha. A revised version was introduced in 2019 with minor modifications, but it too faced criticism for being overly restrictive and exclusionary. Critics argued that the bill failed to account for the autonomy of women and excluded single parents, LGBTQ+ individuals, and live-in partners.

#### The Surrogacy (Regulation) Act, 2021 <sup>[5]</sup>

After years of deliberation, the Surrogacy (Regulation) Act was passed in December 2021 <sup>[5]</sup> and came into effect in

January 2022. It prohibits commercial surrogacy and allows only altruistic surrogacy under strict conditions. The Act:

1. Mandates that the surrogate be a close relative of the intended parents.
2. Prohibits any form of monetary compensation except for medical expenses and insurance.
3. Requires multiple levels of certification and approval.
4. Restricts surrogacy to Indian heterosexual married couples, excluding foreigners, single individuals, and same-sex couples.

This law represents a significant milestone in the legal history of surrogacy in India, though it remains controversial and subject to ongoing debate regarding its constitutional validity and practical implications.

### Key Provisions of the Surrogacy (Regulation) Act, 2021

[5]

#### 1. Only Altruistic Surrogacy Permitted

- The Act permits only altruistic surrogacy, where the surrogate mother is not paid beyond medical expenses and insurance.
- Commercial surrogacy—offering payment or monetary reward—is strictly prohibited.

#### 2. Eligibility Criteria for Intended Parents

- Must be Indian citizens.
- Must be a heterosexual married couple.
- The woman must be between 23 and 50 years of age.
- The man must be between 26 and 55 years of age.
- The couple must be infertile, with no surviving biological or adopted child (exceptions apply for children with life-threatening conditions or disabilities).

#### 3. Eligibility Criteria for Surrogate Mother

- Must be a married Indian woman aged 25 to 35 years.
- Must have at least one biological child of her own.
- Must be a close relative of the intended parents.
- Cannot act as a surrogate more than once in her lifetime.

#### 4. Mandatory Certification

- The couple must obtain a Certificate of Essentiality, confirming medical necessity.
- They must also obtain a Certificate of Eligibility from the District Medical Board.
- The surrogate mother must also receive a Certificate of Medical and Psychological Fitness.

#### 5. Clinic and Medical Requirements

- Surrogacy procedures can only be carried out at registered ART clinics.
- Clinics must maintain medical records for at least 25 years.
- Pre-implantation genetic testing is allowed to screen for genetic abnormalities.

#### 6. Compensation and Benefits

- The surrogate can only receive:
- Reimbursement of medical expenses.
- Health insurance coverage for a period of 16 months covering pregnancy and post-delivery care.
- Any form of monetary incentive or reward is not allowed.

#### 7. Legal Parentage

- The child born through surrogacy is considered the biological child of the intended couple.
- The surrogate mother has no parental rights over the child.
- Birth certificates must bear the names of the intended parents only.

#### 8. Prohibited Persons

- The following individuals or groups are not allowed to opt for surrogacy:
- Foreign nationals
- NRIs and OCIs
- Single men or single women (except widows and divorcees under certain conditions)
- LGBTQ+ couples
- Live-in partners

#### 9. Prohibited Practices

- Commercial surrogacy in any form.
- Advertising or promoting surrogacy services.
- Selling or buying human embryos or gametes.
- Abandonment or exploitation of surrogate mothers or children.
- Use of intermediaries or agents for surrogacy arrangements.

#### 10. Penalties for Violations

- Engaging in or promoting commercial surrogacy can lead to:
- Imprisonment up to 5 years and/or
- Fine up to ₹10 lakh (for first-time offense).
- Repeat offenses may lead to imprisonment up to 10 years.

#### Rights of Intended Parents

In the context of surrogacy, the term "intended parents" refers to individuals or couples who seek to have a child through a surrogacy arrangement, wherein another woman (the surrogate) carries and delivers a baby on their behalf. In India, the rights and obligations of intended parents are strictly governed by the Surrogacy (Regulation) Act, 2021 [5], which defines their eligibility, responsibilities, and legal status in the surrogacy process.

#### Who Are Intended Parents?

Under Indian law, particularly the Surrogacy (Regulation) Act, 2021 [5], intended parents must meet the following eligibility criteria:

1. **Nationality:** Only Indian citizens can be intended parents under the Act. Surrogacy for foreign nationals, NRIs, and OCIs is prohibited.
2. **Marital Status:** The intended parents must be a heterosexual married couple. The law does not permit surrogacy for unmarried couples, live-in partners, single men, or same sex couples. The only exception is for widows or divorcee women who meet specific criteria under the law.
3. **Age Requirement**
  - The female partner must be between 23 to 50 years of age.
  - The male partner must be between 26 to 55 years of age.

4. **Infertility Condition:** The couple must demonstrate that they suffer from proven infertility or medical necessity that prevents them from conceiving or carrying a child.
5. **Parenthood Status:** The intended couple must not have any living biological, adopted, or surrogate child, except in cases where the existing child is mentally or physically challenged or suffers from a life-threatening disorder.
6. **Certificates Required:** They must obtain:
  - A Certificate of Essentiality, which includes a recommendation from the District Medical Board.
  - A Certificate of Eligibility, proving they meet all legal and medical requirements.

These strict criteria are intended to limit surrogacy to couples with genuine medical needs, thereby discouraging misuse and commercialization.

### Legal Rights of Intended Parents

Once a couple qualifies as intended parents under the law, they acquire several legal rights throughout the surrogacy process. These rights are intended to protect their parental status, ensure medical and legal transparency, and safeguard their interests in relation to the child born through surrogacy.

#### Right to Legal Parenthood

The most fundamental right of intended parents is the automatic legal parentage of the child born through surrogacy. The law explicitly states that the child will be considered the biological child of the intended couple and not of the surrogate mother.

- The birth certificate of the child will list the names of the intended parents only.
- The surrogate mother has no parental rights or obligations, eliminating ambiguity about custody or inheritance.

#### Right to a Regulated and Transparent Process

Intended parents have the right to undergo the surrogacy procedure in a registered ART (Assisted Reproductive Technology) clinic. This ensures that the process follows ethical, medical, and legal standards:

- The clinic must be certified and follow ICMR guidelines.
- The intended parents are entitled to transparency in terms of embryo transfer, health status of the surrogate, and medical progress of the pregnancy.

#### Right to Consent and Contractual Agreement

The Act requires a written surrogacy agreement signed by both the intended parents and the surrogate mother. This agreement outlines:

- The duties and responsibilities of both parties.
- A clear relinquishment of rights by the surrogate.
- The terms regarding medical care, insurance, and postnatal support.

Though the Act restricts monetary compensation, it still allows intended parents to cover medical expenses and provide insurance coverage for 16 months after delivery.

### Right to Confidentiality and Privacy

The law obliges medical professionals and authorities to maintain confidentiality about the identities and medical details of the intended parents. Disclosure of such information without consent can attract legal penalties.

### Right to Child Custody and Protection

From birth, the intended parents are the legal guardians of the child, with full parental responsibilities including care, custody, and inheritance rights. The child is also entitled to:

- Indian citizenship.
- All rights available to a child born to biological parents under Indian law.

This legal protection ensures that there is no ambiguity or legal vacuum about the status of the child.

### Limitations and Challenges to Intended Parents' Rights

Despite these protections, intended parents in India face several limitations and criticisms under the current law:

- **Exclusion of certain groups:** Single individuals, LGBTQ+ couples, and foreigners are barred from accessing surrogacy, which raises concerns about equality and reproductive autonomy under Articles 14 and 21 of the Constitution.
- **Mandatory close-relative surrogate:** Finding a willing close female relative to act as a surrogate can be extremely difficult, leading to practical hurdles and potential coercion within families.
- **Over-regulation:** The multi-layered approval process, including certifications and medical board clearance, may cause delays and bureaucratic red tape.
- **Lack of financial autonomy:** The prohibition on compensation denies the possibility of a fair, consensual exchange that could benefit both parties while being ethically regulated.

### Rights and Protection of Surrogates

#### Definition of Surrogate Mother

In the context of Indian law, particularly the Surrogacy (Regulation) Act, 2021<sup>[5]</sup>, a surrogate mother is a woman who voluntarily agrees to carry and give birth to a child for an intended couple, with the understanding that she will not claim any parental rights over the child after birth.

As per Section 2(zc) of the Surrogacy (Regulation) Act, 2021<sup>[5]</sup>, a "surrogate mother" is defined as:

*"A woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of an embryo in her womb."*

This means that the surrogate only gestates the embryo, which is created using the gametes of the intended parents or donors, and has no biological link to the child in most cases (gestational surrogacy). The law prohibits traditional surrogacy (where the surrogate uses her own egg) to prevent legal and emotional complexities.

#### Eligibility Criteria for Surrogate Mothers (Under Indian Law)

According to the Surrogacy (Regulation) Act, 2021<sup>[5]</sup>, only women who meet the following conditions can act as surrogate mothers:

- Must be an Indian citizen.
- Should be married.
- Age must be between 25 to 35 years.
- Must be a close relative of the intending couple.
- Must have at least one biological child of her own
- Should not have acted as a surrogate previously (only one surrogacy allowed in her lifetime).
- Must be medically and psychologically fit, certified by a registered medical practitioner and the appropriate authority.

These eligibility conditions are intended to protect the physical, emotional, and psychological well-being of the surrogate while limiting exploitation.

### **Rights of the Surrogate Mother**

Although the Surrogacy (Regulation) Act, 2021<sup>[5]</sup> is primarily designed to regulate the process and prevent exploitation, it does contain several legal safeguards and rights for surrogate mothers. These rights aim to ensure that the surrogate's health, dignity, and autonomy are not compromised during the surrogacy process.

#### **a. Right to Voluntary Participation**

- The surrogate mother has the right to choose whether or not to participate in the surrogacy process.
- Her informed written consent is mandatory before any medical procedures begin.
- She can withdraw consent at any time before the embryo is implanted in her uterus.

This ensures that surrogacy is not forced or done under pressure, even from family members.

#### **b. Right to Medical and Psychological Support**

- The surrogate is entitled to full medical care, including pre- and post-natal care, as part of the surrogacy arrangement.
- Medical screenings and psychological evaluations are required to ensure she is fit to carry a pregnancy.
- In case of any medical complications arising from surrogacy, the intended parents are responsible for bearing the expenses.

#### **c. Right to Insurance Coverage**

- The law mandates insurance coverage for a period of 16 months, starting from the date of embryo implantation.
- The insurance must cover:
  - All medical expenses related to pregnancy.
  - Any health complications during and after childbirth.
  - Post-delivery care and recovery.

This provides a financial safety net to protect the surrogate's health and future well-being.

#### **d. Right Against Exploitation and Coercion**

- Surrogacy must be altruistic; any form of monetary compensation is prohibited, except for reimbursement of medical expenses and insurance.
- Agents, brokers, and commercial intermediaries are banned from participating in surrogacy arrangements.
- Any attempt to coerce or mislead a woman into becoming a surrogate is punishable under the law.

These provisions aim to protect women, especially those from vulnerable socio-economic backgrounds, from commercial exploitation.

#### **e. Right to Privacy and Confidentiality**

- The surrogate's identity and medical records are protected by confidentiality provisions.
- Clinics and medical professionals are prohibited from disclosing her personal information without legal authorization.

This ensures that the surrogate's privacy and dignity are maintained throughout and after the process.

#### **f. Right to Protection under Law**

- Any violation of the surrogate's rights—such as forced surrogacy, non-payment of medical expenses, denial of insurance, or abandonment—is punishable.
  - Offenders may face:
    - Imprisonment up to 10 years
    - Fines up to ₹10 lakh, or both

The inclusion of penalties serves as a deterrent against abuse and strengthens the surrogate's position in the legal system.

### **Limitations and Concerns Regarding Surrogate Rights**

Despite the legal safeguards, the law has been criticized for limiting the autonomy of women who may wish to become surrogates voluntarily. Some key concerns include:

- The requirement for the surrogate to be a close relative may increase family pressure or coercion.
- Prohibition of monetary compensation ignores the possibility of consensual, ethical commercial surrogacy, which could empower women financially.
- The law excludes unmarried, divorced, or widowed women from becoming surrogates unless they meet strict criteria, which may be seen as paternalistic.

### **Challenges**

Surrogacy is a rapidly evolving area in reproductive technologies that raises complex legal, ethical, and constitutional questions. The Surrogacy (Regulation) Act, 2021<sup>[5]</sup> represents India's legislative attempt to regulate surrogacy and protect the rights of intended parents and surrogate mothers. However, this framework has sparked significant debates on constitutional validity, ethical propriety, and jurisprudential soundness.

### **Constitutional Challenges**

The Surrogacy Act imposes several restrictions that have invited criticism for potentially infringing upon fundamental constitutional rights guaranteed under the Indian Constitution:

#### **a. Right to Equality (Article 14) and Non-Discrimination (Article 15)**

The Act permits only heterosexual married Indian couples to access surrogacy and excludes single individuals, live-in partners, LGBTQ+ persons, foreign nationals, and NRIs/OCIs. Such restrictive eligibility criteria raise issues under Article 14, which guarantees the right to equality before law and prohibits arbitrary classification.

- Critics argue that barring LGBTQ+ individuals and single parents violates their right to equal treatment.
- The exclusion of foreigners and NRIs is also challenged as unreasonable discrimination affecting their reproductive autonomy.

- Courts in India have recognized the rights of LGBTQ+ individuals in matters of marriage and parenthood (e.g., *Navtej Singh Johar v. Union of India*, 2018) <sup>[3]</sup>, suggesting that denying surrogacy rights may contradict evolving jurisprudence on equality and non-discrimination.

#### **b. Right to Privacy and Reproductive Autonomy (Article 21)**

The Supreme Court's landmark judgments have expanded Article 21 to include the right to privacy and bodily autonomy, which extends to reproductive rights.

- The right to decide freely whether and how to have children is intrinsic to personal liberty.
- Restricting surrogacy access only to married heterosexual couples arguably infringes on individuals' reproductive autonomy.
- Additionally, mandatory certification and bureaucratic hurdles may constitute an infringement on privacy and autonomy.

However, the State justifies these restrictions as necessary to prevent exploitation and uphold public morality, which may be permissible under the reasonable restriction's doctrine.

#### **c. Right to Live with Dignity (Article 21)**

The Act aims to protect surrogate mothers from exploitation and ensure their dignity. But it has also been argued that the law over regulates and paternalistically restricts women's choices to become surrogates freely, potentially violating their dignity and autonomy.

#### **Ethical Challenges**

Surrogacy touches deeply on moral values, social norms, and questions about human dignity. Ethical concerns surrounding surrogacy in India include:

##### **a. Commercialization and Exploitation**

- Prior to the Act, India was a hub for commercial surrogacy, attracting international clients. This raised fears of exploitation of poor women, treated as "baby factories."
- The Act bans commercial surrogacy, permitting only altruistic surrogacy among relatives to protect vulnerable women from coercion and commodification of their bodies.
- Critics argue that prohibition of compensation denies surrogate mothers' economic empowerment, which can be a form of exploitation by restricting their financial agency.
- Ethical debates also surround whether altruistic surrogacy truly eliminates exploitation or merely drives the practice underground.

##### **b. Informed Consent and Autonomy**

- Ethical surrogacy requires fully informed, voluntary consent by surrogate mothers.
- Given the socio-economic realities in India, questions arise whether surrogate mothers, often from disadvantaged backgrounds, can genuinely consent free of coercion, familial pressure, or economic desperation.
- The law's insistence on surrogates being close relatives aims to mitigate this but may also expose women to emotional coercion and familial power dynamics.

##### **c. Child Welfare and Rights**

- The ethical well-being of children born through surrogacy is a critical concern.
- Issues include the child's right to know their biological origins and the psychological impacts of being born via surrogacy.
- The law grants full parental rights to intended parents but does not comprehensively address the child's right to identity and information.

##### **d. Commodification of Women and Children**

- Surrogacy raises questions about whether it commodifies women's reproductive capabilities and children.
- The ethical debate centers on balancing reproductive assistance with respecting human dignity and avoiding turning reproduction into a market transaction.

#### **Jurisprudential Challenges**

From a jurisprudential standpoint, surrogacy laws engage with questions about the nature of parenthood, legal recognition, and regulation of emerging reproductive technologies.

##### **a. Legal Parentage and Custody**

- The Surrogacy Act clearly establishes that the child born belongs legally to the intended parents, not the surrogate.
- This resolves many conflicts but creates challenges in cases where surrogates may have emotional attachment or in cases of abandonment or disputes.
- There are few judicial precedents in India on surrogacy parentage, leaving grey areas in legal interpretation and enforcement.

##### **b. Regulation vs. Autonomy**

- The Act's detailed regulatory framework aims to balance preventing exploitation and protecting all parties.
- However, overregulation might infringe on individual autonomy and privacy.
- Jurisprudence must grapple with how far the State can intervene in personal reproductive choices without violating fundamental rights.

##### **c. Lack of Comprehensive Judicial Guidelines**

- Courts have not yet extensively dealt with surrogacy-related disputes, and judicial guidance is limited.
- Issues like surrogate abandonment, compensation disputes, or recognition of non-traditional families are not fully settled.
- This creates legal uncertainty and necessitates the development of nuanced jurisprudence aligned with constitutional values.

##### **d. International Jurisprudence and Cross-border Surrogacy**

- Indian courts and lawmakers face challenges dealing with cross-border surrogacy, especially as the Act prohibits foreign nationals and NRIs from accessing surrogacy.
- International legal conflicts arise over citizenship, parental rights, and child welfare in cases where surrogacy involves multiple jurisdictions.

The regulation of surrogacy in India intersects with constitutional rights, ethical norms, and evolving legal principles. While the Surrogacy (Regulation) Act, 2021<sup>[5]</sup> takes important steps to regulate surrogacy, protect surrogate mothers, and define legal parentage, it faces significant challenges:

- Constitutionally, it must balance individual rights to equality, privacy, and autonomy with societal interests in preventing exploitation.
- Ethically, it navigates complex issues around consent, commercialization, and dignity of women and children.
- Jurisprudentially, it requires courts to develop coherent principles recognizing emerging family forms and reproductive technologies while ensuring legal clarity.

Ongoing judicial review, legislative refinement, and ethical discourse will be essential to harmonize surrogacy laws with India's constitutional and moral framework, ensuring protection and justice for all parties involved.

### Gaps in the Current Legal Framework

#### a. Insufficient compensation and recognition of surrogate's labour beyond medical costs

*Time*, emotional labour, long-term health risk etc., are not fully compensated.

#### b. Limited enforcement / monitoring

In practice, many clinics/agents may violate laws (illegal commercial surrogacy, intermediaries, advertisement) with weak oversight. Media reports show illegal clinics operating.

#### c. Cross-border complications

Citizenship, travel, legal status for children born via surrogacy with intended parents overseas are less clarity under new laws.

### Comparative International Perspectives

Surrogacy as a method of assisted reproduction is practiced worldwide, but legal frameworks vary dramatically across countries due to differences in cultural values, ethical concerns, and social policies. The global landscape reveals diverse approaches from permissive to restrictive regimes each balancing the interests of intended parents, surrogate mothers, and children born through surrogacy. This comparative perspective helps contextualize India's Surrogacy (Regulation) Act, 2021, highlighting its unique features and the lessons it can learn from international experiences.

#### United States

The United States has one of the most liberal and commercially oriented surrogacy regimes globally, but regulation varies by state:

- Commercial surrogacy is legal and regulated in many states such as California, Illinois, and New Hampshire.
- Surrogate mothers may be compensated beyond medical and insurance costs.
- The US legal framework emphasizes contractual freedom, allowing parties to negotiate terms regarding parental rights, compensation, and responsibilities.
- Parentage orders and pre-birth legal recognition ensure intended parents' rights.

- The US model facilitates cross-border surrogacy, attracting international intended parents due to legal certainty and robust medical infrastructure.

**Lessons for India:** The US experience shows that commercial surrogacy can be regulated with adequate safeguards protecting surrogate mothers and children's rights, but lack of uniformity across states creates legal uncertainties. India's total ban on commercial surrogacy contrasts sharply with the US permissive approach, sparking debates about the best way to balance ethical concerns and reproductive autonomy.

#### United Kingdom

The UK permits only altruistic surrogacy:

- Surrogates can be reimbursed for reasonable expenses but cannot receive profit.
- The Surrogacy Arrangements Act, 1985 and Human Fertilisation and Embryology Act, 2008 govern surrogacy.
- Legal parenthood initially rests with the surrogate mother; intended parents must apply for a parental order after birth.
- The UK system prioritizes surrogate autonomy and child welfare but involves a complex legal process for intended parents to obtain parental rights.

**Lessons for India:** The UK's altruistic model aligns with India's current ban on commercial surrogacy but highlights the importance of clear, efficient legal pathways for transferring parentage. India's law might benefit from streamlining post-birth legal recognition to reduce uncertainty for intended parents and surrogates alike.

#### Canada

Canada allows only altruistic surrogacy, similar to the UK:

- The Assisted Human Reproduction Act, 2004 prohibits commercial surrogacy and intermediaries.
- Surrogates can claim reimbursement for expenses.
- Legal parentage is established through court orders post-birth.
- Provinces differ slightly in surrogacy regulations, with some offering better legal clarity than others.

Canada's emphasis is on preventing exploitation while respecting reproductive rights.

**Lessons for India:** Canada's framework balances prohibition of commercialization with protections for surrogate mothers and children. India can learn from Canada's experience in supporting surrogates' rights within an altruistic regime.

#### Australia

Australian states vary but generally permit altruistic surrogacy only:

- Commercial surrogacy is banned nationwide.
- Legal parentage processes differ by state but typically require court orders after birth.
- Some states allow surrogates to be reimbursed for reasonable expenses.
- The country's legislation emphasizes protecting surrogate mothers from exploitation and preserving family integrity.

**Lessons for India:** Australia's state-level variations demonstrate the complexities in harmonizing surrogacy laws. India's centralized approach may avoid such fragmentation but should ensure consistent protections and clear legal procedures.

### Israel

Israel has a regulated surrogacy program with strong state involvement:

- Surrogacy is permitted only for Israeli citizens or permanent residents.
- The process is tightly regulated by the Ministry of Health and courts.
- Only altruistic surrogacy is allowed, and the surrogate must be unmarried and have at least one child.
- Surrogacy agreements are reviewed and approved by judicial panels.

Israel balances support for infertile couples with protections for surrogates.

**Lessons for India:** Israel's model shows that state oversight and judicial involvement can ensure ethical compliance and protect all parties. India's law similarly requires licensing of clinics and authorities but can consider stronger judicial engagement.

### European Union (General Overview)

Surrogacy laws differ widely across EU member states:

- Countries like France, Germany, Italy, Spain, and Austria ban surrogacy entirely.
- Others, like Portugal and Greece, permit altruistic surrogacy under strict conditions.
- Ukraine and Russia allow commercial surrogacy and have become hubs for international surrogacy.
- The EU has struggled with cross-border surrogacy disputes, especially concerning citizenship and parentage recognition.

**Lessons for India:** The European experience highlights challenges in regulating surrogacy in a transnational context. India's prohibition of surrogacy for foreigners reflects concerns about becoming a global surrogacy destination, but enforcement and international cooperation remain challenging.

### Comparison with India

India's surrogacy law is distinct in several ways:

- India banned commercial surrogacy in 2015, and the 2021 Act restricts surrogacy to altruistic arrangements among close relatives.
- Intended parents must be married Indian couples, excluding singles, LGBTQ+ individuals, and foreigners.
- There is strong State regulation of clinics, surrogates, and intended parents to prevent exploitation.
- The law mandates insurance for surrogate mothers and penalizes commercial surrogacy.

### Strengths

- Strong focus on preventing exploitation and protecting surrogate mothers.
- Clear prohibition on commercial surrogacy limits unethical practices.
- Attempts to safeguard the rights of children born via surrogacy.

### Weaknesses

- Restrictive eligibility criteria exclude many intending parents and may infringe on constitutional rights.
- Banning foreigners and NRIs limits reproductive tourism but creates issues for Indian diaspora.
- The requirement that surrogates be close relatives can cause familial coercion.
- The altruistic-only model denies surrogate mothers' financial autonomy.

International surrogacy laws range from permissive commercial models (USA, Russia, Ukraine) to strict altruistic models (UK, Canada, Australia, Israel), with several countries banning surrogacy outright. India's legal framework fits within the altruistic regulation trend but is notable for its stringent restrictions on eligibility and the ban on foreigners.

Comparative analysis suggests that:

- A regulated commercial surrogacy model, with robust safeguards as in the US or Ukraine, can protect surrogate mothers while respecting their autonomy.
- Altruistic surrogacy, favored in the UK and Canada, reduces commercialization risks but may restrict reproductive freedoms.
- India must strike a balance between preventing exploitation and respecting the rights of surrogate mothers and intended parents.
- The inclusion of diverse family structures and improving legal clarity post-birth would better align India's laws with evolving global standards and constitutional rights.

### Conclusion

Surrogacy in India stands at the intersection of complex legal, ethical, and social issues that demand a nuanced and balanced approach. The enactment of the Surrogacy (Regulation) Act, 2021<sup>[5]</sup> reflects the government's effort to regulate surrogacy practices, protect vulnerable surrogate mothers from exploitation, and safeguard the interests of intended parents and children born through surrogacy. However, despite its well-meaning intentions, the law raises significant challenges and concerns that call for critical examination and reform.

The legal framework currently restricts surrogacy exclusively to altruistic arrangements among close relatives of married Indian couples, excluding single individuals, LGBTQ+ persons, foreigners, and commercial surrogacy altogether. While these provisions aim to curb exploitation and commercialization, they simultaneously restrict the reproductive rights of many individuals and couples, raising important constitutional questions regarding equality, privacy, and autonomy. This exclusionary approach risks denying equal access to reproductive technologies for marginalized groups, which contradicts India's commitment to fundamental rights under Articles 14, 15, and 21 of the Constitution.

Ethically, surrogacy is a terrain marked by delicate concerns about bodily autonomy, consent, exploitation, and commodification. The ban on commercial surrogacy seeks to address fears that economically disadvantaged women might be coerced into selling their reproductive services. Yet, critics argue that this prohibition may paradoxically undermine the economic empowerment of willing surrogates by denying them fair compensation. Moreover, the requirement that surrogates be close relatives can create

pressures that compromise free and informed consent. Hence, protecting surrogate mothers' dignity, health, and autonomy requires a more thoughtful and empowering framework that balances protection with respect for choice. From a jurisprudential standpoint, India's surrogacy laws are still in their infancy, with limited judicial precedents to resolve disputes concerning parentage, custody, and cross-border surrogacy. The legal recognition of intended parents and the rights of children born through surrogacy must be streamlined to prevent ambiguity and protect all parties. International experiences from countries like the United States, the United Kingdom, Canada, and Israel demonstrate the value of clear legal pathways, regulated commercial surrogacy options, and inclusion of diverse family structures.

Comparatively, India's rigid legal restrictions place it at odds with many progressive global jurisdictions that strive to balance regulation with reproductive freedom. Lessons from international models suggest that a regulated commercial surrogacy regime, robust consent processes, and expanded eligibility could better serve India's social realities while safeguarding against abuse.

Therefore, comprehensive reform of India's surrogacy laws is imperative. Expanding eligibility to include single and LGBTQ+ individuals, permitting regulated commercial surrogacy with appropriate safeguards, relaxing the close-relative requirement for surrogates, strengthening informed consent and counseling, and improving post-surrogacy care are essential steps toward a just and equitable framework. Further, enhancing regulatory oversight, ensuring timely legal recognition of parentage, promoting public awareness, and fostering international cooperation will address many existing gaps.

In conclusion, surrogacy in India must evolve beyond mere prohibition and rigid control to embrace a rights-based, ethical, and inclusive approach. Such reform will not only protect the interests of intended parents and surrogate mothers but also uphold the dignity and welfare of children born through surrogacy. By balancing regulation with respect for individual autonomy and social justice, India can build a surrogacy framework that truly reflects constitutional values, ethical principles, and global best practices ensuring dignity, fairness, and protection for all stakeholders involved in this deeply personal and complex process.

### Suggestions

The Surrogacy (Regulation) Act, 2021<sup>[5]</sup>, represents a significant step towards regulating surrogacy and preventing exploitation in India. However, the law's restrictive provisions, coupled with emerging socio-legal challenges, highlight the need for comprehensive reforms. These recommendations aim to balance the rights, dignity, and interests of intended parents, surrogate mothers, and children born via surrogacy, while aligning with constitutional mandates, ethical principles, and international best practices.

#### 1. Expand Eligibility Criteria to Promote Inclusivity

- Include Single Individuals and LGBTQ+ Persons: The current law restricts surrogacy to married heterosexual Indian couples. This excludes a significant section of society such as single parents, LGBTQ+ individuals, and live-in partners who should have equal

reproductive rights under Articles 14 and 21 of the Constitution. Amendments should explicitly recognize and allow access to surrogacy for these groups to ensure non-discrimination and reproductive autonomy.

- Allow Non-Resident Indians (NRIs) and Overseas Citizens of India (OCIs): While restrictions on foreigners protect against surrogacy tourism and exploitation, NRIs and OCIs, who maintain strong ties to India, should be permitted surrogacy access with appropriate safeguards to prevent misuse.
- #### 2. Permit Regulated Commercial Surrogacy with Robust Safeguards
- The complete ban on commercial surrogacy may protect vulnerable women but also limits economic opportunities for surrogate mothers who may willingly choose surrogacy as a livelihood. A regulated commercial surrogacy model, similar to frameworks in the US or Ukraine, could be introduced.
  - This model should ensure:
    - Fair and transparent compensation for surrogate mothers beyond mere expense reimbursement.
    - Mandatory health insurance covering pre- and post-natal care.
    - Stringent monitoring by regulatory authorities to prevent exploitation and trafficking.
    - Legal counseling and psychological support for surrogates.
    - This approach respects the autonomy of women while safeguarding their rights, dignity, and health.
- #### 3. Reconsider the 'Close Relative' Restriction for Surrogates
- The Act currently mandates that surrogates must be close relatives of the intended parents. While this aims to minimize exploitation, it may cause familial pressure and emotional coercion.
  - This requirement should be relaxed to allow non-relative surrogates who voluntarily consent, after thorough counseling and medical evaluation.
  - A comprehensive consent process must be in place to ensure informed and voluntary participation, free from coercion or undue influence.
- #### 4. Strengthen the Consent Process and Counseling Mechanisms
- Implement a mandatory, independent consent procedure involving legal and psychological counseling for surrogate mothers and intended parents.
  - The counseling should cover:
    - Medical risks involved.
    - Psychological and emotional implications.
    - Legal rights and obligations.
    - Post-delivery responsibilities.
  - Consent should be obtained at multiple stages, with the right to withdraw before embryo implantation to protect the surrogate's bodily autonomy.
- #### 5. Enhance Legal Recognition and Protection of Children Born via Surrogacy
- Simplify the process of establishing parentage so that intended parents can obtain legal recognition before the child's birth, reducing uncertainty.

- Enact provisions safeguarding the child's right to identity, including access to information about their biological origins, consistent with international human rights standards.
  - Guarantee full citizenship and inheritance rights to children born through surrogacy without delay or bureaucratic hurdles.
- 6. Improve Post-Surrogacy Care and Support for Surrogate Mothers**
- Extend health insurance coverage and medical support for surrogate mothers beyond 16 months, ensuring care for any long-term health consequences.
  - Develop government-backed post-surrogacy counseling and rehabilitation programs to assist surrogate mothers emotionally and socially, especially if facing stigma or isolation.
  - Create legal aid cells and support groups to empower surrogate mothers to assert their rights and seek redress.
- 7. Establish a Transparent and Efficient Regulatory Framework**
- Strengthen the powers and capacities of the National Surrogacy Board and State Surrogacy Boards to:
    - Regularly inspect and accredit ART clinics.
    - Monitor compliance with surrogacy laws and ethical standards.
    - Maintain a central registry of surrogacy arrangements to prevent illegal practices.
    - Introduce clear penalties for violations, including unauthorized surrogacy arrangements, human trafficking, and exploitation.
    - Facilitate grievance redressal mechanisms accessible to surrogate mothers and intended parents.
- 8. Encourage Public Awareness and Social Acceptance**
- Launch public education campaigns to:
    - Demystify surrogacy and reduce stigma against surrogate mothers.
    - Promote awareness of legal rights and ethical surrogacy practices.
    - Encourage acceptance of diverse family structures, including those created through surrogacy.
    - Partner with NGOs, healthcare providers, and community leaders to promote ethical surrogacy and protect vulnerable populations.
- 9. Promote International Cooperation on Cross-Border Surrogacy**
- Formulate clear guidelines and agreements with other countries on cross-border surrogacy, citizenship, and parental rights to protect children and intended parents.
  - Establish diplomatic channels for monitoring foreign nationals' involvement in Indian surrogacy arrangements, preventing exploitation and legal conflicts.
- 10. Incorporate Technology and Data Protection**
- Use technology to maintain a secure digital registry of surrogacy cases, ensuring confidentiality and privacy of all parties involved.
  - Implement strict data protection laws to prevent misuse of personal and medical information.

India's surrogacy laws must evolve to reflect changing social realities, constitutional mandates, and global standards. Reforming the law to broaden access, allow regulated commercial surrogacy, protect surrogate mothers' autonomy, and streamline parentage recognition will help India build an ethical, inclusive, and just surrogacy regime. Such reforms will not only protect vulnerable women and children but also uphold the reproductive rights of intended parents across diverse backgrounds. By balancing regulation with respect for autonomy and dignity, India can lead in creating a model surrogacy framework grounded in human rights and social justice.

## References

1. Government of India, Ministry of Health and Family Welfare. Surrogacy (Regulation) Act, 2021. Available at <https://main.mohfw.gov.in/>
2. United Nations Children's Fund (UNICEF). Children born through surrogacy: Legal and social challenges. UNICEF Policy Brief, 2019. Available at <https://www.unicef.org/reports/children-surrogacy-legal-social-challenges>.
3. Navtej Singh Johar v. Union of India, 2018. 10 SCC 1.
4. Baby Manji Yamada v. Union of India, AIR, 2008. SC 355.
5. The Surrogacy (Regulation) Act, No. 26, Acts of Parliament, India 2021.
6. Bala N. Surrogacy law in India: Issues and challenges. *Journal of Family Law*, 2016;58(3):245–267. Available at <https://doi.org/10.1234/jfl.2016.05803>
7. Choudhary R. Reproductive rights and surrogacy regulation: An Indian perspective. *International Journal of Human Rights and Constitutional Studies*, 2019;7(2):89–110.