

# Surrogacy Laws In India: Balancing Reproductive Rights And Regulation

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## ABSTRACT

The enactment of the Surrogacy (Regulation) Act, 2021 marked a significant shift in India's approach towards assisted reproductive technologies by prohibiting commercial surrogacy and permitting only altruistic surrogacy. While the legislation was introduced with the objective of preventing the exploitation of economically vulnerable women and regulating fertility practices, it has generated considerable constitutional and ethical debate. Critics argue that the Act prioritizes state morality over individual autonomy by imposing restrictive eligibility criteria, criminalising compensated surrogacy, and excluding several categories of intending parents from accessing surrogacy. Consequently, the legislation raises important questions regarding reproductive freedom, bodily autonomy, equality, and privacy under the Constitution of India.

This paper critically examines the legal framework governing surrogacy in India with particular emphasis on the constitutional validity of the Surrogacy (Regulation) Act, 2021. It argues that although the objective of preventing exploitation is legitimate, the means adopted by the legislature are disproportionate and paternalistic. The paper further evaluates the constitutional implications of the Act under Articles 14 and 21, analyses judicial developments concerning reproductive rights, and compares India's regulatory model with selected foreign jurisdictions. It concludes that a rights-based regulatory framework capable of protecting surrogate mothers without unnecessarily restricting reproductive autonomy would better align with constitutional values and international best practices.

## KEYWORDS

Surrogacy (Regulation) Act, 2021, Altruistic vs. Commercial Surrogacy, Reproductive Autonomy, Bodily Autonomy, Articles 14 and 21, Constitutional Validity.

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## INTRODUCTION

Advancements in assisted reproductive technologies have revolutionised the concept of parenthood by providing new opportunities for individuals and couples who are unable to conceive naturally. Among these technologies, surrogacy has emerged as an important means of enabling parenthood while also raising complex legal, ethical, and constitutional issues. For many years, India became a global centre for commercial surrogacy due to affordable medical services and the absence of a comprehensive legal framework.

While this industry created opportunities for many families, it also exposed surrogate mothers to exploitation, inadequate legal protection, and unequal bargaining power. In response to these concerns, Parliament enacted the Surrogacy (Regulation) Act, 2021<sup>2</sup>, which permits only altruistic surrogacy and completely prohibits commercial surrogacy. Although the legislation aims to regulate surrogacy and safeguard the interests of women, its restrictive provisions have generated significant debate regarding reproductive autonomy, equality, privacy, and constitutional rights.

This paper critically examines the legal framework governing surrogacy in India and evaluates whether the existing law successfully balances the protection of surrogate mothers with the reproductive rights guaranteed under the Constitution.

## LEGAL FRAMEWORK GOVERNING SURROGACY IN INDIA

### Evolution of Surrogacy Laws in India

The development of surrogacy law in India reflects the country's transition from an unregulated fertility market to one of the most restrictive legal regimes governing assisted reproduction. During the early 2000s, India emerged as an international destination for commercial surrogacy because of affordable medical facilities, skilled healthcare professionals, and comparatively low costs. Foreign nationals frequently entered into surrogacy arrangements with Indian women, resulting in the rapid commercialisation of reproductive services.

Despite the economic opportunities generated by this industry, the absence of statutory regulation created serious legal uncertainties. Reports of exploitative contracts, inadequate medical care, abandonment of children, and disputes relating to citizenship and parentage highlighted the urgent need for legislative intervention. The Supreme Court's decision in Baby

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<sup>2</sup> The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India).

*Manji Yamada v. Union of India* (2008)<sup>3</sup> exposed these legal gaps and underscored the necessity of a comprehensive statutory framework.

In response, the Indian Council of Medical Research (ICMR)<sup>4</sup> initially issued non-binding guidelines governing assisted reproductive technologies. However, these guidelines lacked enforceability and failed to adequately regulate fertility clinics. Successive legislative proposals eventually culminated in the enactment of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021<sup>5</sup>, which now constitute the primary legal framework governing surrogacy in India.

#### The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021 was enacted with the stated objective of preventing the commercial exploitation of women while ensuring ethical and transparent surrogacy practices. The legislation permits only altruistic surrogacy and completely prohibits commercial surrogacy throughout India. It establishes regulatory authorities at both the national and state levels, mandates the registration of surrogacy clinics, prescribes eligibility conditions for intending parents and surrogate mothers, and imposes criminal penalties for violations.

While the Act undoubtedly seeks to curb exploitative practices, its regulatory approach has been widely criticised for being excessively restrictive. Instead of regulating compensated surrogacy through safeguards such as judicial approval, mandatory counselling, standardised contracts, and fair compensation, the Act criminalises virtually every form of paid surrogacy. Consequently, the legislation shifts from regulation to prohibition, raising serious constitutional concerns regarding individual autonomy and reproductive freedom.

#### The Assisted Reproductive Technology (Regulation) Act, 2021

The Assisted Reproductive Technology (Regulation) Act, 2021 complements the Surrogacy (Regulation) Act by regulating fertility clinics, ART banks, gamete donation, and assisted reproductive procedures. The Act seeks to ensure ethical medical practices through mandatory registration, professional accountability, informed consent, and regulatory oversight.

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<sup>3</sup> Baby Manji Yamada v. Union of India & Anr., (2008) 13 SCC 518.

<sup>4</sup> Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, (2005).

<sup>5</sup> Assisted Reproductive Technology (Regulation) Act, 2021, No. 42, Acts of Parliament, 2021 (India).

Although both statutes collectively aim to improve transparency and accountability within India's fertility sector, their effectiveness ultimately depends upon achieving an appropriate balance between regulatory objectives and constitutional rights. Excessive restrictions imposed in the name of protection risk undermining reproductive autonomy and may encourage the emergence of unregulated underground surrogacy arrangements, thereby defeating the very purpose of the legislation.

## **CONSTITUTIONAL ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021**

The Surrogacy (Regulation) Act, 2021 represents one of the most restrictive legislative interventions in the sphere of reproductive rights in India. While the Act purports to protect women from exploitation, its constitutional validity has been questioned on the grounds that it disproportionately restricts individual liberty, reproductive autonomy, and equality. A constitutional democracy cannot merely justify restrictions by invoking public welfare; it must also demonstrate that such restrictions are reasonable, proportionate, and consistent with fundamental rights. In this regard, the Act raises significant concerns under Articles 14 and 21 of the Constitution.

### Equality and Non-Discrimination under Article 14

Article 14<sup>6</sup> guarantees equality before the law and equal protection of the laws. The Surrogacy (Regulation) Act creates classifications that are difficult to justify on constitutional grounds. By restricting access to surrogacy primarily through narrow eligibility conditions, the legislation excludes several categories of individuals from exercising their reproductive choices.

The exclusion of LGBTQ+ persons, unmarried couples, and many single individuals reflects legislative preferences rather than constitutionally valid distinctions. Such classifications appear arbitrary because they are not based on the welfare of the child or the capability of an individual to become a responsible parent. Instead, they reinforce traditional notions of family structure that have gradually been rejected by constitutional jurisprudence.

The Supreme Court has consistently held that legislation must satisfy the test of reasonable classification and cannot discriminate without a rational nexus to its objective. While

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<sup>6</sup> INDIA CONST. art. 14.

preventing exploitation is undoubtedly a legitimate objective, excluding entire classes of citizens from access to surrogacy bears little connection to preventing exploitation. Consequently, the Act risks violating Article 14 by creating unreasonable and exclusionary classifications.

### Reproductive Autonomy under Article 21

Article 21<sup>7</sup> protects not merely life but also dignity, privacy, bodily integrity, and decisional autonomy. In *Suchita Srivastava v. Chandigarh Administration*<sup>8</sup> (2009), the Supreme Court recognised reproductive choice as an essential component of personal liberty. This principle was significantly expanded in *Justice K.S. Puttaswamy v. Union of India*<sup>9</sup> (2017), where the Court affirmed that decisions concerning family life and reproduction fall within the constitutional right to privacy.

The Surrogacy (Regulation) Act directly interferes with these rights by limiting who may access surrogacy and by prohibiting compensated surrogacy irrespective of informed consent. The legislation effectively substitutes individual choice with legislative morality, thereby reducing reproductive autonomy to a privilege granted by the State rather than a constitutionally protected right.

The constitutional concern becomes even more significant when viewed from the perspective of surrogate mothers. The Act assumes that women cannot voluntarily decide to become compensated surrogates without being exploited. Such an assumption undermines women's agency and treats them as incapable of making informed reproductive decisions. A law intended to empower women should strengthen their bargaining power and legal protection rather than deprive them of autonomy over their own bodies.

### Constitutional Morality and State Paternalism

One of the strongest criticisms of the Act is that it reflects state paternalism rather than constitutional morality. Constitutional morality requires the State to protect individual freedoms unless there exists a compelling justification for restricting them. Paternalism, on the other hand, permits the State to substitute its judgment for that of competent adults under the assumption that it knows what is in their best interests.

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<sup>7</sup> INDIA CONST. art. 21.

<sup>8</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>9</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

The complete prohibition of commercial surrogacy demonstrates this paternalistic approach. Instead of regulating compensation through statutory safeguards, the legislature criminalises the practice altogether. Such prohibition implies that every compensated surrogacy arrangement is inherently exploitative, despite the possibility of informed consent, judicial oversight, and transparent contractual regulation.

The Supreme Court in *Navtej Singh Johar v. Union of India*<sup>10</sup> (2018) emphasised that constitutional morality must prevail over social morality. The restrictive provisions of the Surrogacy (Regulation) Act suggest that legislative policy has been influenced more by moral assumptions regarding motherhood and family than by constitutional principles of liberty, equality, and dignity.

## CRITICAL ISSUES AND CHALLENGES

Although enacted with the objective of eliminating exploitation, the Surrogacy (Regulation) Act, 2021 has generated several legal, constitutional, and practical challenges. Many of these challenges arise not because regulation is undesirable, but because the legislature has chosen prohibition over regulation.

### Prohibition of Commercial Surrogacy

The complete ban on commercial surrogacy represents the most controversial feature of the Act. The legislature assumes that financial compensation necessarily transforms surrogacy into exploitation. However, this assumption ignores the distinction between exploitation and fair remuneration.

Compensation does not automatically amount to coercion. Doctors, nurses, caregivers, and organ donors receive lawful compensation or reimbursement for services involving physical risk. Pregnancy involves significant physical pain, emotional commitment, medical complications, and long-term health consequences. Denying compensation for such labour undervalues reproductive work and reinforces outdated stereotypes that motherhood must always be an act of sacrifice.

A regulated commercial framework with mandatory counselling, judicial approval, health insurance, transparent contracts, and fixed compensation would arguably provide greater

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<sup>10</sup> *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC 1.

protection than an outright prohibition. By criminalising payment rather than exploitation, the Act risks driving surrogacy into informal and illegal markets where surrogate mothers enjoy even fewer legal safeguards.

### Exclusion of LGBTQ+ Persons, Single Individuals and Unmarried Couples

Another major criticism concerns the restrictive eligibility criteria prescribed under the Act. Modern constitutional jurisprudence increasingly recognises diverse family structures and individual reproductive choices. Nevertheless, the legislation adopts a narrow understanding of parenthood by limiting access to surrogacy.

This exclusion appears inconsistent with the principles recognised in *Navtej Singh Johar* and subsequent constitutional developments affirming equality and dignity irrespective of sexual orientation. Parenthood cannot constitutionally be treated as a privilege reserved only for certain social categories. The law therefore creates a contradiction: while constitutional jurisprudence has expanded individual liberty, surrogacy legislation has simultaneously narrowed access to reproductive technologies.

### Rights of Surrogate Mothers and Intending Parents

Ironically, legislation enacted to protect surrogate mothers may ultimately diminish their autonomy. The Act assumes vulnerability instead of empowering women through stronger contractual rights and institutional safeguards. Similarly, intending parents face extensive procedural requirements that increase legal uncertainty and delay access to reproductive treatment. Rather than establishing an efficient regulatory mechanism, the legislation imposes rigid statutory restrictions that frequently discourage legitimate surrogacy arrangements.

A balanced legal framework should recognise that protection and autonomy are not mutually exclusive. Effective regulation should empower surrogate mothers through legal rights, healthcare, insurance, counselling, and enforceable contracts instead of denying them the freedom to participate in compensated surrogacy.

## **COMPARATIVE ANALYSIS**

India's restrictive approach to surrogacy differs considerably from the regulatory models adopted in several foreign jurisdictions, demonstrating that prohibition is not the only mechanism for preventing exploitation. The United Kingdom (UK) permits altruistic surrogacy while maintaining strong judicial supervision and clearly defined parental orders. Although

commercial surrogacy is prohibited, the legal framework focuses on protecting all parties through procedural safeguards rather than criminalisation alone.

In contrast, several states in the United States of America (USA) permits compensated surrogacy under carefully regulated contractual arrangements. Courts recognise enforceable surrogacy agreements, while statutory safeguards ensure informed consent, healthcare protections, and legal certainty for intending parents and surrogate mothers. This model demonstrates that commercial surrogacy can coexist with effective regulation.

Ukraine, prior to recent geopolitical disruptions, became a significant international destination for commercial surrogacy. Its legal framework recognised compensated surrogacy through detailed contractual provisions, medical regulation, and recognition of parental rights. Although concerns regarding cross-border surrogacy persisted, Ukraine illustrated that regulated commercial surrogacy is legally possible without imposing an absolute prohibition.

These comparative approaches indicate that effective regulation does not necessarily require criminalisation. Instead, governments may achieve better outcomes through transparent licensing systems, judicial oversight, mandatory insurance, enforceable contracts, counselling requirements, and strict penalties for coercion and trafficking.

India's decision to prohibit commercial surrogacy reflects a preference for legislative paternalism over regulatory innovation. Comparative experience suggests that protecting women and respecting reproductive autonomy are not mutually exclusive objectives. A rights-based regulatory model capable of balancing both interests would arguably provide stronger constitutional protection while effectively addressing genuine concerns relating to exploitation.

## **FINDINGS AND RECOMMENDATIONS**

The analysis of the Surrogacy (Regulation) Act, 2021 demonstrates that although the legislation pursues the legitimate objective of preventing the exploitation of surrogate mothers, its regulatory approach is excessively restrictive and constitutionally contentious. Rather than addressing exploitative practices through robust regulation, the Act imposes a near-complete prohibition on compensated surrogacy and significantly narrows access to reproductive technologies.

The legislation adopts a paternalistic approach towards women's reproductive choices by presuming that all compensated surrogacy is inherently exploitative, thereby disregarding

informed consent and voluntary participation and undermining reproductive autonomy. It also raises serious constitutional concerns regarding equality, as the exclusion of LGBTQ+ persons, unmarried couples, and certain single individuals appears inconsistent with Articles 14 and 21 and lacks sufficient constitutional justification, reflecting traditional notions of family rather than constitutional principles of dignity, privacy, and non-discrimination.

Furthermore, the blanket prohibition on commercial surrogacy is unlikely to eliminate exploitation and may instead push surrogacy practices into unregulated markets where surrogate mothers face greater risks without legal safeguards. Comparative experiences show that regulated surrogacy frameworks, which include judicial oversight, licensing, counselling, and enforceable agreements, are more effective in balancing autonomy with protection. Overall, the Act reflects a disproportionate restriction on reproductive freedom, failing the test of proportionality under Article 21 and creating an imbalance between state interests and individual rights. A constitutionally sound framework must therefore replace prohibition with structured regulation that ensures informed consent, fair compensation, and robust institutional safeguards while respecting autonomy, dignity, equality, and privacy.

The existing legal framework requires significant reform to ensure that constitutional rights are protected without compromising the welfare of surrogate mothers, and the blanket prohibition on commercial surrogacy should be replaced with a regulated compensation model where compensation is fixed within statutory limits under state supervision to prevent exploitation while recognising reproductive labour. eligibility criteria must be revised in line with Articles 14 and 21 so that access is not restricted on the basis of marital status, gender identity, or sexual orientation but is instead based on the intending parent's ability to provide a safe and stable environment for the child.

Mandatory judicial approval prior to embryo transfer should be introduced to ensure informed consent, fairness of contracts, and protection against coercion; the rights of surrogate mothers must be strengthened through comprehensive healthcare coverage, mental health support, maternity benefits, post-delivery care, and independent legal representation.

An independent regulatory authority should be established to supervise fertility clinics and surrogacy agencies through licensing, audits, and strict penalties for misconduct; and finally, future reforms must be guided by constitutional morality rather than social morality, ensuring that dignity, autonomy, equality, and privacy are fully respected in all reproductive choices.

## CONCLUSION

The enactment of the Surrogacy (Regulation) Act, 2021 undoubtedly represents an important attempt by the Indian legislature to regulate assisted reproduction and eliminate exploitative practices associated with commercial surrogacy. However, the constitutional legitimacy of any legislation depends not only upon the objective it seeks to achieve but also upon the proportionality of the means adopted to achieve that objective. In this respect, the present legal framework remains deeply contested.

The legislation also reflects an outdated understanding of family and parenthood by imposing restrictive eligibility conditions that exclude several categories of intending parents. These exclusions appear inconsistent with the Supreme Court's evolving constitutional jurisprudence recognising privacy, dignity, decisional autonomy, and equality as indispensable components of fundamental rights. A constitutional democracy committed to pluralism cannot permit access to reproductive technologies to depend upon traditional social expectations alone.

A more balanced legal framework would therefore regulate compensated surrogacy through transparent licensing mechanisms, judicial oversight, informed consent procedures, enforceable contractual safeguards, fair compensation, and comprehensive healthcare protections. Such an approach would preserve reproductive autonomy while effectively preventing exploitation.

Ultimately, the debate surrounding surrogacy is not merely about reproductive technology; it concerns the broader constitutional relationship between individual liberty and state power. The Surrogacy (Regulation) Act, 2021, in its present form, prioritises control over choice and morality over autonomy. Unless future reforms adopt a rights-based approach grounded in constitutional values rather than paternalistic assumptions, the legislation will continue to invite constitutional scrutiny and remain at the centre of India's evolving discourse on reproductive justice.