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SURROGACY LAWS IN INDIA

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ABSTRACT

Surrogacy in India has moved from an unregulated commercial sector to being tightly regulated by the Surrogacy (Regulation) Act, 2021. Although the Act prohibits commercial surrogacy and allows only altruistic surrogacy to safeguard women from exploitation, it has been criticized as being too restrictive. Excluding single men, LGBTQ+ persons, and live-in couples, the law generates constitutional issues under Articles 14 and 21 of equality and reproductive freedom. Judicial precedents and international human rights paradigms emphasize the demand for more inclusive law that is sensitive to autonomy, provides safeguards, and is cognizant of various family forms. Comparative models from the UK and Canada indicate that ethical regulation can go along with inclusiveness. The way ahead for India is to balance protection with empowerment, from restriction towards recognition of surrogacy laws.

INTRODUCTION

India being the most populated country in the world has now a rapid increase in the demand of Surrogacy amongst intended parents in industrialized nations because of the relatively low costs, easy access offered by Indian surrogacy agencies also remained unregulated for years. While it has fulfilled the dreams of many couples who could not conceive a child both domestically and internationally, it also raised serious concerns about the exploitation of financially vulnerable women, lack of legal safeguards and disputes parentage and citizenship.

Surrogacy is legal in India but strictly regulated under the Surrogacy (Regulation) Act, 2021 where the law permits only altruistic surrogacy i.e. the surrogate mothers receive no monetary compensation beyond the medical expenses and insurance. Now on the other hand, the

Commercial Surrogacy is the one where the surrogate mother is paid which is prohibited in India.

While the legislation aims to protect the surrogate mothers and ensure ethical practices, it also has got criticism for being overly restrictive which violates the fundamental rights, particularly the right to equality and reproductive autonomy.

This article explores and examines the development of surrogacy laws in India and its key provisions of the 2021 Act, judicial perspective, constitutional implications and the need for a more inclusive and balanced regulatory framework.

Background of the Evolution of Surrogacy Laws in India

In the year of 2002, India had legalized commercial surrogacy through guidelines issued by the Indian Council of Medical Research (ICMR), where the basic directions under the guidance was for assisted reproductive technologies (ART), including the surrogacy arrangements despite the absence of any binding legislation. India's commercial surrogacy industry was estimated to be worth over \$400 million annually by 2012 with hundreds of private fertility clinics operating across the country and surrogate mothers from financially weaker section enter into contractual arrangements with both Indian and Foreign couples.¹

Rapidly and largely unregulated expansion of the industry raised a serious ethical and legal concerns. Economically weaker section women were subjected to poor working conditions, inadequate health care and pressure to give their reproductive autonomy.

Moreover, fertility clinics prioritized monetary gain over medical ethics, while the legal gaps creates complex disputes over the citizenship, nationality, and legal parent of the child born through such arrangements.

Landmark Cases and Judicial Intervention

Indian judiciary played an important role in shaping the discourse. In *Baby Manji Yamada v. Union of India*², Supreme Court permitted the commissioning Japanese parents to take the child back to Japan, despite divorce during the pregnancy. This case showed the legal gap between the lack of clarity regarding parentage and rights.

¹ Anindita Majumdar, The Surrogacy (Regulation) Bill, 2019 and the Politics of Motherhood, 54(2) ECON. & POL. WKLY. 35 (2019); Ipsita Chakravarty, Why India Banned Commercial Surrogacy, SCROLL.IN
² *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India)

In *Jan Balaz v. Anand Municipality*³, the Gujarat High Court held that child born to a surrogate Indian mother was an Indian citizen, thereby recognizing the child's nationality and parentage.

Overview of the Surrogacy (Regulation) Act, 2021

The said Act was enacted with the objective to ban commercial surrogacy and to regulate the altruistic surrogacy to ensure ethical practices and prevent exploitation of surrogate mothers. The Statement of Objects and Reasons attached to the Act shows that the legislature has concern about the rampant commercialization of surrogacy in India, which lacked ethical safeguards and was just turned into a multi-million dollar industry.⁴

Primary Objectives of the Surrogacy (Regulation)

- i. To prohibit commercial surrogacy and any profit-driven arrangement involving surrogate mothers. This Act defined the commercial surrogacy as the surrogate mother receiving monetary gains other than the medical and insurance expenses.⁵
- ii. To allow altruistic surrogacy under strict conditions, where no monetary consideration is involved, except for the expenses incurred from the medical and provision of insurance coverage.
- iii. To establish a structured regulatory mechanism through the creation of National and State Surrogacy Boards, which are tasked with advising, monitoring, and enforcing compliance.
- iv. To safeguard the interests of the surrogate mother and the child, by mandating with the written informed consent, medically fit certificates and a ban on sex-selective surrogacy and embryo implantation beyond the prescribed number of attempts.⁶ The infringement made to comply with the rules of the Act results in penalty including imprisonment and fines for engaging in or promoting commercial surrogacy.

This Act has been heavily criticized for being too stringent and failing to accommodate with notions of family, particularly not including the single men, LGBTQ+ individuals, and live in couples. Such exclusion raise the concerns for the violation of the right to equality (Article14)

³ *Jan Balaz v. Anand Municipality*, A.I.R. 2009Guj. 21 (India).

⁴ Statement of Objects and Reasons, Surrogacy (Regulation) Bill, 2019, Bill No. 156 of 2019, Rajya Sabha (India).

⁵ Surrogacy (Regulation) Act, No.47 of 2021, Section 2(f), INDIA CODE (defining "commercial surrogacy").

⁶ Surrogacy (Regulation) Act, No.47 of 2021, Section 6,8,10 INDIA CODE

and reproductive autonomy under Article 21 of the Indian Constitution.⁷ The Eligibility of Intended Parents as per Section 4(ii)(a), only a heterosexual Indian married couple are eligible for surrogacy if the wife is aged between 23-50 years. The husband is aged between 26-55 years. The couple has no biological or adopted child.

The 2023 amendment also permits single women who are divorcees and widows having the age between 35 to 45 years to avail surrogacy, subject to certain medical conditions.

Constitutional and Legal Challenges

Article 14 of the Indian Constitution guarantees equality before the law and equal protection of the laws. The said Act violates this principle by excluding a wide category of people including unmarried couples, single men, LGBTQ+ individuals, and live in partners from accessing the surrogacy. The eligibility as per the section 2(r) is restricted to Indian heterosexual married couples, and section 4(ii) (a) requires at least five years of marriage, unless the intending parent is a widow or divorcee woman, recently included through amendment.⁸ In *Navtej Singh Johar v. Union of India*, the Supreme Court held that the LGBTQ+ communities are fully entitled of constitutional rights i.e. dignity, privacy and autonomy.⁹ Still the Act refuses same sex couples and individuals their right to become parents through surrogacy, which results in a very discriminatory classification that is neither reasonable nor justifiable under the Article 14.

Furthermore, in *Shafin Jahan v. Asokan K.M.*, the court held that the individual autonomy in family and marriage matters is a fundamental right protected by the Constitution.¹⁰ But, the Act mandates only close relatives as surrogates, which indirectly infringes on the autonomy of couples who may wish to opt for voluntary third party altruistic surrogacy, even when medically safe and consensual.

Article 21 guarantees the Right to Life and Personal Liberty, which includes the freedom to make reproductive choices. In *Suchita Srivastava v. Chandigarh Administrative*, the Supreme Court categorically recognized a women's reproductive autonomy as a component of personal liberty under Article 21, affirming her right to make decisions about whether to bear a child.¹¹

⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India); *Suchita Srivastav v. Chandigarh Admin.*, (2009) 9 S.C.C.1 (India).

⁸ Surrogacy (Regulation) Act, No.47 of 2021, Section 2(r),4(ii)(a), INDIA CODE.

⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C.1 (India).

¹⁰ *Shafin Jahan v. Asokan K.M.*, (2018) 16 S.C.C. 368 (India).

¹¹ *Suchita Srivastav v. Chandigarh Admin.*, (2009) 9 S.C.C. 1 (India).

Section 4 (iii)(b)(1) of the Act requires that the surrogate mother must be a “close relative” of the intending couple. However the term “close relative has not been defined anywhere in the Act or its accompanying rules. This vagueness introduces legal uncertainty and practical obstacles, especially for nuclear families or individuals without a suitable female relative willing or medically eligible to become a surrogate. This can create confusion where the couples can move toward informal and black market surrogacy arrangements, defeating the very purpose of the legislation, which was to curb unethical practices.

International Human Rights Concerns

In an era where reproductive technologies are globally acknowledged as an integral to the right to family life, India’s stringent approach under the Surrogacy (Regulation Act), 2021 has invited scrutiny in the view of international human rights law.

As per Article 16(1) of the Universal Declaration of Human Rights, every adult has the right “to marry and found a family”, without discrimination based on sex, religion or nationality.¹²

Similarly, the International Covenant on Civil and Political Rights (ICCPR), to which India is a signatory, enshrined in Article 17 the right to privacy and family life, and in Article 23, the right of men and women to marry and form a family.¹³

The Indian provisions failed to acknowledge the evolving global understanding of family, which is no longer confined to heterosexual marriage. Moreover, India’s commitment to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obliges it to eliminate gender-based discrimination and to ensure women’s rights to freely decide on matters related to reproduction.¹⁴

Yet, the Act only permits women aged between 35 to 45 to seek surrogacy while denying same rights to other categories of women and all men. This marriage centric, gender-biased policy framework appears regressive when measured against progressive international standards that recognize bodily autonomy, gender equality, and non-discriminatory access to healthcare and family making opportunities. As reproductive rights are increasingly interpreted as human rights, India’s surrogacy law may fall short of aligning with both constitutional ethos and global legal commitment.

¹² G.A. Res. 217 (III) A, Universal Declaration of Human Rights, ART. 16(1) (Dec.10, 1948).

¹³ International Covenant on Civil and Political Rights art.17,23,Dec.16, 1966,999 U.N.T.S. 171.

¹⁴ Convention on the Elimination of All Forms of Discrimination Against Women arts.12, 16, Dec.18, 1979, 1249 U.N.T.S. 13.

Need for Inclusive and Balanced Surrogacy Laws

While the Surrogacy (Regulation) Act, 2021 seeks to address critical ethical concerns, its stringent nature heavily need reformation and reconsideration. More inclusive legal needs to be considered as to respect reproductive autonomy, promotes gender equality and recognizes diverse family structures. The Supreme Court has repeatedly upheld the importance of individual autonomy in decisions relating to marriage, family and parenthood which was seen most notably in *Navtej Singh Johar* and *Suchita Srivastav* as mentioned earlier. Additionally, the regulatory mechanisms must be streamlined, transparent, and supportive with mechanisms for grievance, redressal, informed consent as well as healthcare support for surrogate mothers. These progressive step will make India balance its objective of ethical surrogacy without infringing the constitutional rights of any individual and international human rights obligations.

In terms of international best practices, the countries like United Kingdom and Canada already have moved towards surrogacy models. In United Kingdom, under the Human Fertilization and Embryology Act, 2008, permits altruistic surrogacy for both heterosexual and same-sex couples as well as single individuals, subject to judicial parental orders.¹⁵ Similarly, Canada allows altruistic surrogacy for individuals regardless of marital status or sexual orientation under the Assisted Human Reproductive Act, 2004.¹⁶ India must adopt such practices from these models to design a safeguards, not barriers. The main focus must be on informed consent, medical screening, psychological counselling and transparency in contracts.

Conclusion

In India, Surrogacy has a complex path from being unregulated and unrecognized to getting a legislative intervention. The Surrogacy (Regulation) Act, 2021 reflects a law shaped more by fear of misuse than by trust in choice. For protecting surrogate mothers, the law has unintentionally excluded many marginalized individuals who seek seek the of joy of parenthood. True legal reform lies not in tightening moral boundaries, but in building frameworks of dignity, equity, and trust. Parenthood is not a privilege to be filtered through marital status or gender but it is a profound human experience that the law must facilitate with compassion and fairness. For a country that constitutionally embraces pluralism, autonomy,

¹⁵ Human Fertilisation and Embryology Act, 2008, c. 22, Section 54(UK).

¹⁶ Assisted Human Reproduction Act, S.C. 2004, c.2 (Can.).

and equal dignity, the future of surrogacy must shift from control to choice, from restriction to recognition, and from protection to empowerment.

India has the legal wisdom, judicial vision, and constitutional spirit to build a surrogacy regime that is both ethically sound and socially inclusive. What remains is the courage to legislate not only for the majority but also for the margins because justice, in its truest form, must extend to all who dare to hope for a family.