



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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SURROGACY LAWS IN INDIA

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INTRODUCTION

Surrogacy is an agreement in which a woman, called a surrogate mother, carries and gives birth to a child for another person or couple, known as intended parents. It helps those people who are unable to get pregnant or carry a baby on their own to have a child. There exist two types of Surrogacy: Traditional and Gestational. Traditional surrogacy is when a mother's own egg is used, and she is helped medically to become pregnant with the intended father's sperm. Because her egg is used, she is the biological mother of the child. While Gestational surrogacy is when a baby is created in a laboratory using the egg and sperm of the intended parents or donors. The embryo is placed in the surrogate mother's womb. She only carries and gives birth to the baby and has no biological link to the child.

Prior to 2021, Surrogacy in India became popular among intended parents from developed countries because it was much cheaper and easily available. Indian surrogacy clinics offered full packages costing around \$10,000 to \$28,000, which included medical treatment, payment to the surrogate mother, and hospital delivery of the baby. While there are no published data, the commercial surrogacy market in India was valued at approximately USD 2 billion annually, driven largely by international demand.

However, the fast growth of surrogacy in India also created serious problems. Many surrogate mothers were exploited, there were weak or no clear laws, and several ethical issues came up. Because of these concerns, the government felt the need to control and regulate surrogacy. As a result, the Surrogacy (Regulation) Act, 2021 was introduced, which banned commercial surrogacy and allowed only altruistic surrogacy in India to protect women from exploitation.

EVOLUTION OF SURROGACY IN INDIA: FROM COMMERCIAL HUB TO REGULATION

In the early 2000s, assisted reproductive technologies expanded rapidly, the clinics began offering surrogacy packages to both Indian and foreign clients, as it indirectly allowed commercial surrogacy. The Confederation of Indian Industry estimated that surrogacy generated more than \$2 billion annually, supported by thousands of IVF clinics.

From the early 2000s to the early 2010s, India became a global destination for international commercial surrogacy. This attracted heterosexual couples, same-sex couples, and single parents from abroad. However, several serious issues arose, including deaths of surrogate mothers and egg donors, visa and citizenship disputes, and cases of child abandonment. Concerns were raised regarding exploitation, poor government supervision, and legal problems. Although draft Assisted Reproductive Technology ART Bills were prepared in 2008, 2010, and 2014, and ICMR guidelines were issued in 2005 but no proper national law existed at that time.

Government started restricting surrogacy from July 2012, visa rules for foreign intended parents were also tightened, and in 2013, India banned surrogacy for foreign homosexual couples and single parents. And in November 2015, medical visas for surrogacy got suspended. This effectively stopped foreign clients from using surrogacy services in India while domestic commercial surrogacy continued.

In 2016, the government introduced the Surrogacy (Regulation) Bill, which proposed banning commercial surrogacy and allowing only altruistic surrogacy for heterosexual married Indian couples with infertility. Under this, the surrogate mothers had to be women aged 25-35, already have at least one child, and be close relatives of the intended parents. They were not allowed to receive payment, except for medical expenses and insurance.

A revised Surrogacy (Regulation) Bill, 2019 was introduced in Lok Sabha. Based on Rajya Sabha Select committee's suggestions, another revised Bill was introduced in 2020. While it still allowed only altruistic surrogacy, it expanded eligibility to include widows and divorced women aged 35–45. It also removed the requirement of five years of infertility and relaxed some surrogate eligibility conditions.

All these finally led to the passing of the Surrogacy (Regulation) Act, 2021, which banned commercial surrogacy throughout India. The Act allows only altruistic surrogacy under strict conditions, states who can become intended parents and surrogate mothers, and sets up national and state boards to supervise surrogacy clinics and ensure that the law is properly followed, to prevent misuse and protect women and children.

THE SURROGACY (REGULATION) ACT, 2021: KEY FEATURES

The Surrogacy (Regulation) Act, 2021, was enacted by the Indian Parliament to regulate surrogacy in India. It came into force on 25 January 2022. The provisions of this Act are:

a. Under Section 2(zd), it defines surrogacy as a practice in which a woman carries and gives birth to a child for an intending couple, with the intention of handing over the child to the intending couple after birth.

b. Under Section 3, it requires surrogacy clinics to register compulsorily, and also bans commercial surrogacy. Doctors, clinics, and medical professionals are not allowed to conduct, promote, or advertise surrogacy in an illegal manner. Embryos or gametes can be stored only for lawful medical purposes such as IVF. Abortion during surrogacy is allowed only with the written consent of the surrogate mother and approval from the concerned Authority under the Medical Termination of Pregnancy Act, 1971. Sex selection is also strictly prohibited.

c. Section 4 permits surrogacy only in registered clinics and allows only gestational and altruistic surrogacy. The intending couple must obtain a Certificate of Essentiality, which includes a medical certificate from the District Medical Board, a court order confirming parentage and custody, and insurance cover for the surrogate mother for 36 months.

The surrogate mother must obtain an Eligibility Certificate. She must be married, aged 25–35 years, have at least one biological child, not use her own gametes, be medically and psychologically fit, and can act as a surrogate only once.

The intending couple must also obtain an Eligibility Certificate. The woman must be aged 23–50 years and the man 26–55 years, and they must not have any living child, except in cases of a child with a life-threatening medical condition approved by the authorities.

d. Section 7 prohibits abandoning a child born through surrogacy, whether in India or abroad, for any reason, including birth defects, genetic problems, medical conditions, sex of the child, or the birth of multiple children.

e. Section 8 talks about the rights of the child born through surrogacy, the child acts as a biological and legal child of the intending couple or the intending woman.

f. Section 35 provides for the appointment of an Appropriate Authority to regulate surrogacy. The Central Government appoints the Authority for Union Territories and State Governments for States within 90 days of the Act coming into force. The Authority includes a Chairperson (Joint Secretary or above in the Health Department), a Vice-Chairperson (Joint Director or above), an eminent woman from a women's organisation, a law officer (not below Deputy Secretary), and a registered medical practitioner.

g. Section 38 clearly states that practices like commercial surrogacy, using agents or intermediaries, publishing surrogacy advertisements, buying or selling embryos or gametes, sex selection, importing embryos or gametes, and exploiting or abandoning a surrogate mother or child are strictly prohibited. Anyone who breaks these rules can face imprisonment of up to 10 years and a fine of up to ₹10 lakh.

h. Section 40 deals with repeat violations. For a first offence, the punishment may extend to 5 years of imprisonment along with a fine of up to ₹5 lakh. If the offence is repeated, the punishment becomes more severe, with imprisonment of up to 10 years and a fine of up to ₹10 lakh.

ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021

The Assisted Reproductive Technology (Regulation) Act, 2021, was enacted on 18 December 2021, to regulate ART clinics and banks in India. It aims to prevent misuse of ART services and ensure safe, ethical, and proper reproductive healthcare. The Ministry of Health and Family Welfare oversees its implementation. This Act applies to ART clinics, ART banks, doctors, donors, and individuals using ART services in India. Its key provisions are:

- a. It provides the establishment of National and State ART Boards to supervise and regulate ART services.
- b. It establishes a National Registry of clinics and banks to maintain a database.
- c. It regulates the functioning of ART clinics and banks, setting standards for facilities and services.
- d. It mandates written informed consent from all parties seeking ART services
- e. It prohibits sex selection through assisted reproductive technology.
- f. It places restrictions on the use, storage, and sale of human gametes and embryos.
- g. It empowers the Central Government to make rules and the National Board to make regulations for carrying out the purposes of the Act.

The ART Act, 2021, works closely with the Surrogacy (Regulation) Act, 2021. While the Surrogacy Act decides who can use surrogacy and under what conditions, the ART Act ensures clinic compliance, proper handling of embryos, and safe embryo transfer standards. Both laws have common authorities and registries. This helps in better coordination, stronger monitoring of clinics, and effective prevention of misuse of reproductive technologies.

ELIGIBILITY CRITERIA AND RESTRICTIONS: CRITICAL ANALYSIS

The Act was enacted to regulate surrogacy practices and prevent the exploitation of women and surrogate mothers. However, despite its protective intent, several provisions of the Act raise serious constitutional, ethical, and practical concerns, especially regarding women's reproductive rights and equality.

- a. One of the main concerns is the complete ban of commercial surrogacy, though intended to prevent exploitation, this ban may push surrogacy into illegal and unregulated practices, which can increase the risk of abuse. It also takes away a woman's freedom to use her reproductive ability as a source of income, thereby limiting her autonomy. In *Devika Biswas v. Union of India*, the Supreme Court recognized that reproductive rights are part of Article 21, yet the Act places restrictions on these rights.
- b. The Act permits only altruistic surgery, which results in limited availability of surrogate mothers, as only a few relatives are willing to act as surrogates. This system may also strengthen patriarchal control, as women, especially within families, can be emotionally or socially pressured to become surrogate mothers.
- c. The Act excludes single persons, unmarried couples, same-sex couples, LGBTQ+ individuals, live-in partners, and foreign nationals. This violates Articles 14 and 21 by discriminating based on gender, marital status, and sexual orientation.
- d. Further, limiting a woman to act as a surrogate only once and that too for close relatives restricts her bodily autonomy. The heavy paperwork and strict rules, instead of truly protecting women, may force surrogacy into secret and unsafe arrangements.
- e. The Supreme Court affirmed that a woman's reproductive choice and bodily autonomy are integral to personal liberty under Article 21. However, the Surrogacy (Regulation) Act, 2021, limits these freedoms by excluding several women and groups from accessing surrogacy, making the law restrictive.

RIGHTS AND PROTECTION OF SURROGATE MOTHERS

The Surrogacy (Regulation) Act, 2021, aims to protect the rights and health of surrogate mothers by laying down several safeguards. One of the key protections is guaranteed in Section 6, which requires informed consent of the surrogate mother. The surrogate must sign a written agreement after complete counselling. Doctors explain all pregnancy risks, side effects, and complications. Apart from this, she also has the right to withdraw before the embryo is placed in her womb.

To ensure physical safety, the law requires that the surrogate mother be given insurance coverage for 36 months. This insurance must cover health problems after delivery and should be provided by an insurance company or agent approved by the Insurance Regulatory and Development Authority (IRDA).

Only the registered clinics are allowed to conduct surrogacy procedures, ensuring that medical standards are maintained.

It also imposes certain restrictions on surrogate mothers. A woman can act as a surrogate only once in her lifetime, and she must not use her own gametes for surrogacy.

These rules aim to prevent repeated pregnancies and possible health risks, as well as avoid emotional and legal complications arising from genetic links.

JUDICIAL RESPONSES AND RECENT DEVELOPMENTS

Before the Act came, cases like Baby Manji Yamada and Jan Balaz clearly showed that India did not have proper laws on the citizenship and legal status of children through cross-border surrogacy. Courts have attempted to ensure that such children do not become stateless and have repeatedly emphasized that the best interests of the child must take precedence. This, as well as pressure from the judiciary, compelled Parliament to enact laws regulating surrogacy.

After the 2021 Act, many petitions were filed against its strict and rigid rules. The Supreme Court has also examined the restriction on using donor gametes. In December 2022, the Court stayed Rule 7 for genuine medical cases, citing the rights to privacy and reproductive autonomy. Later amendments in 2024 permitted the use of donor gametes for medical purposes. The Court has also raised concerns about the rigid application of age limits, especially where couples had already started treatment before the Act came into force.

It has been argued that the Act violates Articles 14, 15, and 21 of the Constitution. Many people argued that excluding single men, unmarried women, live-in partners, same-sex couples, and LGBTQ+ persons from surrogacy is unfair and discriminatory. They rely on important Supreme Court judgments like Navtej Singh Johar v. Union of India and Supriyo v. Union of India, which recognize sexual orientation and different kinds of family structures. Based on these cases, critics say that allowing surrogacy only for married heterosexual couples is outdated and does not reflect modern constitutional values.

Some High Courts have also raised concerns about delays in forming National and State Surrogacy Boards and about how strictly the eligibility rules are being applied. In February 2025, the Kerala High Court clarified that women between 23 and 50 years of age are eligible for surrogacy.

Overall, recent court decisions show that while courts support the goal of preventing exploitation, they are still examining whether the Act places too many restrictions and violates the rights to equality, dignity, and reproductive freedom under Article 21.

CONCLUSION

The Surrogacy (Regulation) Act, 2021 was made with a good intention, to stop the exploitation of women and protect children born through surrogacy. It came after many problems in the earlier unregulated system, such as misuse by clinics, poor treatment of surrogate mothers, and legal

confusion about parentage. In this sense, the law is an important step. However, its strict rules have also created new problems.

The Act allows surrogacy only for a very small group of people and excludes single persons, LGBTQ+ individuals, live-in partners, and others. This is unfair and goes against the ideas of equality and personal freedom under Articles 14 and 21 of the Constitution. The complete ban on commercial surrogacy also takes away a woman's choice to use her reproductive ability with proper payment and protection. Instead of stopping exploitation, this may push surrogacy into illegal and unsafe practices. The rule that only a close relative can be a surrogate may also pressure women within families.

To improve the law, surrogacy should be allowed for more people, including single individuals and LGBTQ+ persons. Rather than a total ban, limited and well-regulated payment to surrogates should be allowed, along with strong safeguards, health insurance, and counselling. Clear rules, better supervision, and respect for women's choices are needed.

In short, surrogacy laws in India should protect women without controlling them and should support families without discrimination.

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