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SURROGACY LAWS IN INDIA: A LEGAL ANALYSIS

~ Naaz Ishrat

ABSTRACT

Surrogacy in India has moved from an unregulated commercial practice to a tightly controlled legal framework with the enactment of the Surrogacy (Regulation) Act, 2021. This article critically examines India's evolving surrogacy regime by analysing statutory provisions, judicial interventions, and recent regulatory developments up to December 2025. It traces the shift from permissive market-driven surrogacy to an altruistic model aimed at preventing exploitation, while highlighting the constitutional tensions such regulation creates with reproductive autonomy, privacy, and equality under Articles 14 and 21. Through key case studies such as Baby Manji Yamada, Jan Balaz, and recent Supreme Court scrutiny of age limits and second-child restrictions, the article argues that the law, though ethically motivated, remains exclusionary and over-restrictive. It concludes that a more balanced approach is needed, one that protects surrogate mothers without unduly limiting legitimate reproductive choices.

INTRODUCTION

Surrogacy is a process in which a woman carries and gives birth to a child for another person or couple who intend to become the child's legal parents. Over time, what began as a medical solution for infertility has turned into a major legal and social issue across the world. In India, surrogacy raises serious questions related to reproductive rights, women's autonomy, child welfare and constitutional protections such as equality and personal liberty. For many years, India was known as the "surrogacy capital of the world" because surrogacy services were affordable and largely unregulated. However, this also led to widespread concerns about exploitation and misuse. To address these problems, Parliament enacted the Surrogacy (Regulation) Act, 2021, which banned commercial surrogacy and allowed only altruistic arrangements. This article analyses the legal framework governing surrogacy in India by examining statutory provisions, judicial decisions and recent developments up to December 2025 while highlighting the ongoing tension between enabling parenthood and protecting vulnerable individuals.

EVOLUTION OF SURROGACY IN INDIA: FROM CULTURAL PRACTICE TO COMMERCIAL INDUSTRY

The idea of surrogacy is not entirely new to Indian society. References to practices similar to surrogacy can be found in ancient Hindu texts. One such example is the Niyoga system mentioned in the Mahabharata where a widow could bear a child to continue her deceased husband's lineage. However, modern surrogacy in India emerged only in the early 2000s, following advances in assisted reproductive technology (ART). During this period, India became an attractive destination for surrogacy due to low medical costs, skilled doctors, and the absence of strict legal regulation. In many cases, surrogacy in India cost only 20–30% of what it did in Western countries, drawing large numbers of foreign couples. The first attempt to regulate this area came in 2002 through the Indian Council of Medical Research (ICMR) Guidelines for ART Clinics. These guidelines briefly mentioned surrogacy but had no legal force. In 2005, the ICMR issued revised guidelines that formally recognised gestational surrogacy and permitted payment to surrogate mothers, effectively allowing commercial surrogacy. As a result, the industry expanded rapidly. By 2012, it was estimated that more than 1,000 clinics were operating in India, with over 25,000 children being born annually through surrogacy. Despite this growth, serious problems soon emerged. Reports revealed that many surrogate mothers lived in poor conditions, lacked proper medical care and were abandoned after delivery. Concerns were also raised about child trafficking and the lack of legal clarity regarding parentage and citizenship. In response, the Supreme Court imposed restrictions on commercial surrogacy for foreign nationals in 2015. Although the Surrogacy (Regulation) Bill was introduced in 2016, it lapsed. The issue was revisited in 2019, leading to the enactment of the Surrogacy (Regulation) Act, 2021, which came into force on January 25, 2022, along with the Assisted Reproductive Technology (Regulation) Act, 2021. Together, these laws shifted India from a commercial surrogacy model to a strictly regulated altruistic framework.

THE SURROGACY(REGULATIONS) ACT, 2021

The Surrogacy (Regulation) Act, 2021 is a comprehensive statute consisting of 54 sections divided into eight chapters. Its primary objective is to regulate surrogacy clinics, prevent exploitation and ensure ethical practices. The Act clearly bans commercial surrogacy and allows only altruistic surrogacy where no monetary compensation is permitted beyond medical expenses and insurance coverage. Under Section 2, altruistic surrogacy is defined as surrogacy carried out without financial gain. The Act also defines key terms such as “intending woman,” “intending couple,” and “surrogate mother.” Sections 3 and 11 to 14 make it mandatory for all surrogacy clinics to register with the appropriate authority, failing which their registration can be suspended or cancelled. Surrogacy is allowed only in cases of medical infertility, as provided under Section 4, and written informed consent is

compulsory under Section 6. Section 7 prohibits abandonment of children born through surrogacy, while Section 8 grants such children the same legal rights as biological children. Section 9 limits embryo implantation to a maximum of three embryos and Section 10 requires that any termination of pregnancy comply with the Medical Termination of Pregnancy Act. The Act also lays down strict eligibility conditions. Intending couples must be married Indian citizens for at least five years, with the woman aged between 23 and 50 years and the man between 26 and 55 years. They must be certified as infertile even after treatment. Widows and divorcees aged 35 to 45 years are allowed to use surrogacy with their own eggs and donor sperm but single unmarried women are excluded. Surrogate mothers must be married women between 25 and 35 years of age have at least one living child, and can act as surrogates only once in their lifetime. Genetic screening and insurance coverage are mandatory to protect their health. The Act establishes the National Assisted Reproductive Technology and Surrogacy Board and corresponding State Boards to formulate policy and monitor implementation. Appropriate Authorities are empowered to enforce compliance. Commercial surrogacy and related offences attract severe penalties, including imprisonment of 8 to 10 years and fines ranging from ₹5 to ₹10 lakh. Provisions relating to record maintenance, search and seizure, and rule-making ensure effective enforcement. The Act works closely with the ART Act, 2021, creating a unified regulatory system for assisted reproduction.

IMPORTANT COURT DECISIONS ON SURROGACY IN INDIA

Indian courts have played a crucial role in shaping surrogacy law, especially during the period when no legislation existed. One of the most significant cases is *Baby Manji Yamada v. Union of India* (2008). In this case, a Japanese couple commissioned a surrogate in Gujarat but divorced before the child was born. The father sought custody, while Indian adoption law did not permit single men to adopt girl children. The Supreme Court allowed the child to leave India with her grandmother and strongly pointed out the absence of any legal framework governing surrogacy. This case highlighted serious issues related to citizenship, parentage, and exploitation. Another important case is *Jan Balaz v. Anand Municipality* (2009), where twins born to an Indian surrogate for a German couple faced citizenship issues. While the Gujarat High Court ordered birth certificates in the parents' names, the Supreme Court refused to grant passports and allowed only a temporary exit permit. The children eventually acquired German citizenship through adoption. This case exposed the conflict between domestic laws and international surrogacy arrangements. Although not directly about surrogacy, *Suchita Srivastava v. Chandigarh Administration* (2009) recognised reproductive choice as part of personal liberty under Article 21. This judgment strengthened the idea that women have the right to make decisions about pregnancy, a principle reflected in the Act's consent provisions. Similarly, the privacy judgment in *Justice K.S. Puttaswamy v.*

Union of India (2017) affirmed reproductive privacy under Article 21 and influenced later debates on medical certification and autonomy in surrogacy laws.

POST-2021 DEVELOPMENTS AND JUDICIAL REVIEW (2024-2025)

After the enactment of the 2021 Act, further developments occurred through rules and judicial intervention. The Surrogacy (Regulation) Amendment Rules, 2024 allowed widows and divorcees to use donor sperm with their own eggs but prohibited donor gametes for married couples. This decision was challenged for being discriminatory, and the Supreme Court stayed the donor gamete ban in January 2024. In *ABC v. Union of India* (October 2025), the Supreme Court ruled that age limits under the Act cannot apply retrospectively to couples who had frozen embryos before 2022. The Court held that embryo freezing shows clear intent to pursue surrogacy and that imposing age limits later would violate reproductive rights under Article 21. This decision protected over 500 ongoing cases while retaining age limits for future arrangements. In November 2025, the Supreme Court also agreed to examine the validity of provisions restricting surrogacy for couples seeking a second child due to secondary infertility. The case challenges whether such restrictions unjustly interfere with reproductive choices. The outcome of this case may significantly influence future reforms.

PROBLEMS AND CRITICISM OF THE CURRENT SURROGACY LAW

Despite improvements, the current law faces criticism. The exclusion of LGBTQ+ couples, single men, and unmarried women raises concerns under Article 14. Studies show that nearly 70% of surrogate mothers relied on surrogacy for financial reasons before the ban, questioning whether altruistic surrogacy reflects social realities. Implementation is also weak, with only about 200 clinics registered nationwide by 2024. Delays in forming regulatory boards and unresolved issues for NRIs further complicate enforcement.

THE WAY FORWARD FOR SURROGACY LAWS IN INDIA

India's surrogacy laws show a clear shift from an unregulated commercial system to a tightly controlled ethical framework. While the 2021 Act addresses exploitation and protects child welfare, gaps in inclusivity and implementation remain. As recognised by the Supreme Court, surrogacy involves deeply personal aspects of family and dignity under Article 21. Future reforms must balance regulation with reproductive autonomy, drawing from international best practices to create a fair and humane system.

CONCLUSION

India's surrogacy laws have moved from an unregulated commercial system to a strictly regulated altruistic framework aimed at preventing exploitation and protecting child welfare. The Surrogacy (Regulation) Act, 2021 provides much-needed legal

clarity, influenced by judicial interventions that highlighted gaps in parentage, citizenship, and consent. However, the law's restrictive eligibility criteria and exclusions raise concerns regarding equality and reproductive autonomy under Article 21. Recent judicial scrutiny shows an ongoing effort to balance regulation with individual rights. Future reforms must focus on inclusivity, effective enforcement, and respect for reproductive choice to ensure that surrogacy law remains fair, ethical, and constitutionally sound.

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