SURROGACY LAWS IN INDIA: ETHICAL AND LEGAL ISSUES

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ABSTRACT

Surrogacy has emerged as one of the most significant developments in assisted reproductive technology, offering hope to individuals and couples who are unable to conceive naturally. It has become an important development in assisted reproductive technology. India was once a major destination for commercial surrogacy due to affordable medical services and the availability of surrogate mothers. However, the absence of a comprehensive regulatory framework resulted in concerns regarding the exploitation of women, commercialization of reproduction, and legal disputes involving children born through surrogacy. To address these issues, Parliament enacted The Surrogacy (Regulation) Act, 2021 and The Assisted Reproductive Technology (Regulation) Act, 2021[1], permitting only altruistic surrogacy under regulated conditions.

Despite these reforms, significant constitutional and ethical concerns persist. The restrictive eligibility criteria exclude several categories of intending parents, including unmarried persons and LGBTQ+ individuals, raising questions concerning equality, privacy, and reproductive autonomy under Articles 14, 19, and 21 of the Constitution[2]. Judicial decisions have further highlighted complexities relating to parentage, nationality, and child welfare. Using a doctrinal research methodology, this paper analyses the evolution of surrogacy law in India, evaluates the existing legal framework, and argues for a more inclusive approach that balances reproductive rights, social justice, and the best interests of the child.

Keywords: Surrogacy, Assisted Reproductive Technology, Reproductive Rights, Constitutional Law, Women's Rights, Bioethics.

[1] The Surrogacy (Regulation) Act, No. 47 of 2021, Acts of Parliament, 2021 (India); The Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, Acts of Parliament, 2021 (India).
[2] INDIA CONST. arts. 14, 19 & 21.

I.INTRODUCTION

Medical science has witnessed remarkable advancements in reproductive technology during the last few decades, fundamentally changing the traditional understanding of family and parenthood. Assisted reproductive technologies have enabled individuals suffering from infertility[3] and reproductive disorders to fulfil their desire for biological parenthood through scientific intervention. Among these techniques, surrogacy represents one of the most debated developments because it combines medical innovation with complex questions of law, ethics and constitutional rights.

Surrogacy generally refers to an arrangement under which a woman agrees to carry a pregnancy and deliver a child on behalf of another individual or couple, who become the intended parents after birth. Depending upon the nature of compensation involved, surrogacy may be categorised as altruistic or commercial. Altruistic surrogacy permits only reimbursement of medical expenses[4] and insurance coverage, whereas commercial surrogacy involves additional monetary compensation[5] paid to the surrogate mother for her services.

During the early 2000s, India became a popular destination for surrogacy because of affordable medical treatment and advanced fertility services. However, the rapid growth of the industry also raised concerns about the exploitation of economically vulnerable women, lack of proper regulation, and disputes relating to parentage and citizenship. These challenges highlighted the need for a comprehensive legal framework to regulate surrogacy in India.

Recognising these challenges, the Government of India gradually moved towards stricter regulation[6]of assisted reproductive technologies. After several legislative proposals and extensive public debate, Parliament enacted the Surrogacy (Regulation) Act, 2021 together with the Assisted Reproductive Technology (Regulation) Act, 2021. The legislation marked a significant policy shift by prohibiting commercial surrogacy and permitting only altruistic surrogacy subject to stringent eligibility conditions and regulatory oversight.

While these laws aim to prevent exploitation and protect surrogate mothers, they have been criticised for their restrictive approach. The exclusion of certain categories of intending

[3] Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005)
[4] The Surrogacy (Regulation) Act, 2021.
[5] Surrogacy (Regulation) Act, No. 47 of 2021, § 2(g) (India).
[6] Ministry of Health & Family Welfare, Government of India, Surrogacy (Regulation) Bill, Statement of Objects and Reasons (2019)

parents and the ban on commercial surrogacy have raised concerns regarding equality, reproductive autonomy, and individual choice.

The regulation of surrogacy therefore lies at the intersection of Family law, Constitutional law, medical ethics and Human rights. It requires balancing multiple competing interests, including protection of women from exploitation, safeguarding children's welfare, preserving public morality and recognising individual reproductive freedom.

This article analyses the legal framework of surrogacy in India and the challenges of balancing reproductive rights with the protection of women and children. It is important to analyse constitutional issues arising under Articles 14, 19 and 21 of the Constitution of India.

II. HISTORICAL EVOLUTION OF SURROGACY IN INDIA

The idea of surrogacy is not entirely new to Indian society. Although modern surrogacy is facilitated through advanced reproductive technology, the concept of one woman bearing a child for another can be traced to ancient traditions and mythological narratives.

The modern practice of surrogacy in India began to gain prominence during the late 1990s with the rapid development of Assisted Reproductive Technology (ART). Improvements in in-vitro fertilisation (IVF), embryo transfer and fertility treatment created new opportunities for individuals suffering from infertility. At the same time, India developed a strong medical infrastructure capable of providing reproductive services at comparatively affordable costs. This combination of advanced medical expertise and lower treatment expenses attracted intending parents from across the world.

By the early 2000s, India had become one of the leading global destinations for reproductive tourism. Despite its economic growth, the absence of comprehensive legislation created serious legal and ethical concerns. Surrogacy agreements were largely governed by private contracts with limited governmental supervision. There were no uniform standards regulating informed consent, healthcare facilities, compensation or post-delivery obligations. Consequently, several reports highlighted instances where surrogate mothers received inadequate medical care[7], lacked legal protection and were exposed to exploitative contractual conditions. Critics argued that poverty often compelled women to become surrogate mothers, raising questions regarding genuine consent and reproductive autonomy.

[7] Law Commission of India, 228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (2009).")

Recognising the urgent need for regulation, the Indian Council of Medical Research (ICMR) issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005[8]. These guidelines attempted to establish ethical standards for fertility clinics and medical practitioners by prescribing procedures relating to consent, confidentiality and clinical practice.

The Law Commission of India, in its 228th Report (2009)[9], undertook a comprehensive examination of surrogacy and recommended enactment of specific legislation to regulate assisted reproductive technologies and protect the rights of all stakeholders. The Commission supported altruistic surrogacy while expressing concern regarding the exploitation associated with commercial arrangements. It emphasised the necessity of protecting surrogate mothers, ensuring the welfare of children and providing legal certainty regarding parentage and contractual obligations.

The legislative process eventually culminated in the enactment of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021[10]. These enactments fundamentally transformed India's approach towards assisted reproduction by prohibiting commercial surrogacy and permitting only altruistic surrogacy under specified statutory conditions. The legislation introduced mandatory registration of fertility clinics, established National and State Boards for supervision and prescribed penalties for violations of statutory provisions.

The shift from commercial to altruistic surrogacy reflects India's policy objective of preventing exploitation while preserving the availability of reproductive assistance for eligible intending parents. Nevertheless, the restrictive nature of the legislation has generated significant academic criticism. Scholars have argued that complete prohibition of compensated surrogacy may encourage underground arrangements and may unnecessarily restrict reproductive choices available to individuals who genuinely require assisted reproduction[11].

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[8] Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005).

[9] Law Commission of India, 228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (2009). Law Commission of India, supra note 12.

[10] The Surrogacy (Regulation) Act, No. 47 of 2021; The Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021.

[11] Sonia Allan, The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations, 18 Med. L. Rev. 269 (2010).

III. LEGAL FRAMEWORK GOVERNING SURROGACY IN INDIA

3.1 Introduction

The legal regulation of surrogacy in India has evolved significantly with the enactment of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021. Prior to these laws, surrogacy operated with limited regulation, leading to concerns regarding exploitation, parentage disputes, and lack of accountability. The current framework permits only altruistic surrogacy and seeks to protect surrogate mothers, ensure ethical medical practices, and safeguard the interests of children born through assisted reproduction.

3.2 The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021 came into force to regulate surrogacy arrangements across India and prohibit commercial surrogacy. The Act seeks to prevent the commercialisation of women's reproductive capacity while allowing genuine cases of infertility to benefit from assisted reproduction.

The legislation defines surrogacy as an arrangement in which a woman agrees to bear a child for an intending couple or intending woman with the intention of handing over the child after birth[12]. The Act permits only altruistic surrogacy, where the surrogate mother receives no monetary compensation apart from medical expenses and insurance coverage prescribed by law[13].

Commercial surrogacy, involving payment or financial reward beyond medical expenses, is expressly prohibited and punishable under the Act[14].

3.3 Eligibility Conditions for Intending Parents

The Act prescribes strict eligibility requirements for persons seeking surrogacy.[15] The Act permits surrogacy only for eligible intending parents and excludes unmarried partners, live-in couples and same-sex couples, leading to constitutional debates on equality and reproductive rights.

3.4 Eligibility of Surrogate Mother

[12] The Surrogacy (Regulation) Act, 2021, § 2(zd)
[13] *Id*. § 2(b).
[14] *Id*. §§ 38–45
[15] *Id*. § 4

The Act also prescribes qualifications for a surrogate mother[16]. A surrogate mother must meet statutory requirements and provide informed consent. Critics argue that limiting compensation to medical expenses may discourage participation.

3.5 National and State Surrogacy Board

The legislation establishes National Surrogacy Boards and State Surrogacy Boards to supervise implementation of the Act[17].The establishment of specialised regulatory institutions seeks to improve accountability and reduce misuse of assisted reproductive technologies.

3.6 Registration of Surrogacy Clinics

The Act mandates compulsory registration of clinics undertaking surrogacy procedures.[18]

No clinic may lawfully conduct surrogacy without obtaining registration under the statutory framework. Authorities possess powers to inspect clinics, monitor compliance and suspend registration where violations occur.

The registration mechanism seeks to maintain uniform standards of medical care and prevent unauthorised reproductive practices.

3.7 Prohibition of Commercial Surrogacy

One of the most significant features of the 2021 legislation is the complete prohibition of commercial surrogacy. The legislature prohibits commercial surrogacy to prevent the exploitation of economically vulnerable women and to preserve human dignity. Supporters view the ban as a protective measure, while critics argue that it limits women's reproductive autonomy and freedom to engage in compensated surrogacy. This debate highlights the conflict between individual reproductive rights and social welfare concerns.

3.8 Offences and Penalties

The Act prescribes stringent penalties for unlawful surrogacy practices[19].

Commercial surrogacy, exploitation of surrogate mothers, and related unlawful practices are punishable offences. Violators may face imprisonment, fines, and cancellation of registration, ensuring ethical regulation of surrogacy.

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[16] The Surrogacy (Regulation) Act, 2021, § 4(iii)(b)
[17] The Surrogacy (Regulation) Act, 2021, §§ 16–34.
[18] The Surrogacy (Regulation) Act, 2021 §§ 11(1)
[19]The Surrogacy (Regulation) Act, 2021, §§ 38–45

3.9 Assisted Reproductive Technology (Regulation) Act, 2021

The Assisted Reproductive Technology (Regulation) Act, 2021 complements the Surrogacy (Regulation) Act by regulating fertility clinics and assisted reproductive procedures including IVF and gamete donation[20].

The Act regulates the registration and functioning of ART clinics and banks, prescribes standards for the storage and handling of gametes and embryos, protects the rights of donors and patients, ensures confidentiality of records, mandates medical safety protocols, and imposes professional accountability on service providers. Its primary objective is to promote the ethical and safe use of assisted reproductive technologies while preventing malpractice and exploitation.

3.10 Critical Evaluation of the Present Legal Framework

The Surrogacy and ART laws of 2021 marked a significant step in regulating assisted reproduction in India. They introduced statutory oversight of fertility clinics, mandatory registration, and penalties for unethical practices. The laws aim to prevent exploitation and ensure accountability in reproductive services. However, the restrictive eligibility criteria have been widely criticised. The exclusion of unmarried individuals, live-in partners, and LGBTQ+ persons raises concerns regarding equality and reproductive rights. The complete ban on commercial surrogacy also remains debated. While intended to protect women from exploitation, critics argue that regulated commercial surrogacy could better respect autonomy. Therefore, although the current framework is a major legal advancement, future reforms may be needed to make it more inclusive and consistent with constitutional values.

IV. JUDICIAL DEVELOPMENTS AND LANDMARK CASES ON SURROGACY IN INDIA

4.1 Introduction

Before the enactment of the Surrogacy (Regulation) Act, 2021, India lacked a comprehensive statutory framework governing surrogacy. Consequently, the judiciary played a significant role in addressing legal disputes arising from assisted reproductive technologies. Courts were frequently required to decide issues relating to parentage, citizenship, custody, reproductive autonomy and the welfare of children born through surrogacy arrangements. Although the

[20]The Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021 (India).

decisions were delivered in different factual contexts, they collectively shaped the development of surrogacy jurisprudence in India and influenced subsequent legislative reforms.

4.2 Baby Manji Yamada v. Union of India (2008)

The decision in Baby Manji Yamada v. Union of India is regarded as the first major judicial pronouncement concerning surrogacy in India[21]. In this case a Japanese couple entered into a surrogacy arrangement in India but divorced before the child's birth, creating issues regarding custody and nationality. The Supreme Court allowed the child's grandmother to take custody, prioritising the child's welfare. The case exposed major legal gaps concerning parentage, citizenship, and international surrogacy, highlighting the need for comprehensive surrogacy legislation in India.

4.3 Jan Balaz v. Anand Municipality (2009)

This case arose when a German couple entered into a surrogacy agreement with an Indian woman in Gujarat[22]. The case involved citizenship and legal status issues for twins born through cross-border surrogacy due to conflicting Indian and German nationality laws. It highlighted legal uncertainties regarding citizenship, parentage, and international surrogacy arrangements. The case strengthened the demand for clear and comprehensive surrogacy legislation in India.

4.4 Reproductive Autonomy and Constitutional Jurisprudence

Although not directly related to surrogacy, constitutional jurisprudence concerning privacy and reproductive choice has significantly influenced discussions on assisted reproduction.

The recognition of privacy as a fundamental right under Article 21[23] expanded the understanding of personal autonomy and decisional freedom in matters relating to family life and reproduction Courts have recognised reproductive decisions as part of dignity, bodily integrity, and personal liberty, while allowing reasonable legal restrictions.

4.5 Constitutional Questions Raised by the 2021 Legislation

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[21] *Baby Manji Yamada v. Union of India,* (2008) 13 SCC 518 (India).
[22] *Jan Balaz v. Anand Municipality,* AIR 2010 Guj.21 (India).
[23] *Justice K.S. Puttaswamy (Retd) v. Union of India* (2017) 10 SCC 1 (India).

The Surrogacy (Regulation) Act, 2021 has generated considerable constitutional debate. The restrictive eligibility criteria excluding several categories of intending parents have been criticised as potentially inconsistent with the guarantee of equality under Article 14[24]. Restrictions on surrogacy and the ban on commercial surrogacy raise constitutional concerns regarding reproductive autonomy and personal liberty under Article 21, and their validity may continue to be reviewed by courts.

4.6 Critical Analysis

Judicial decisions highlighted major gaps in India's surrogacy laws and emphasised child welfare. Although the Surrogacy (Regulation) Act, 2021 addressed many concerns, constitutional issues relating to equality, privacy, and reproductive autonomy continue to generate debate and may require further judicial scrutiny.

V. ETHICAL ISSUES AND CONSTITUTIONAL PERSPECTIVE

5.1 Ethical Dimensions of Surrogacy

Surrogacy presents a complex interaction between medicine, ethics and law. While it offers hope to persons unable to conceive naturally, it also raises concerns regarding bodily autonomy, commodification of reproduction and social justice. The ethical debate centres on whether pregnancy can legitimately become the subject of a contractual arrangement and whether economic disparities influence a woman's decision to become a surrogate.

Critics of commercial surrogacy argue that financial incentives may pressure economically vulnerable women into reproductive labour that they would not otherwise undertake. In contrast, supporters contend that a competent adult should be free to make informed decisions concerning her own body, provided adequate legal safeguards exist.

Another ethical issue concerns the psychological impact of relinquishing a child after birth. Although surrogacy agreements are entered into voluntarily, emotional attachment developed during pregnancy may create difficulties for the surrogate mother and the intending parents.

5.2 Constitutional Perspective

Article 14: Equality Before Law

[24] INDIA CONST. arts. 14 & 21

Article 14 guarantees equality before law and equal protection of laws. The restrictive eligibility conditions under the Surrogacy (Regulation) Act, 2021 have generated debate regarding whether exclusion of certain categories of persons satisfies the constitutional test of reasonable classification.

Article 21: Life and Personal Liberty

The Supreme Court has interpreted Article 21 broadly to include dignity, privacy and decisional autonomy.[25] Reproductive choice forms an important aspect of personal liberty. Any restriction on access to assisted reproduction must therefore satisfy standards of fairness, reasonableness and proportionality.

5.3 Human Rights Perspective

International human rights principles recognise reproductive health and family life as important aspects of human dignity[26] Surrogacy regulation should therefore protect surrogate mothers from exploitation while simultaneously respecting reproductive autonomy and safeguarding the interests of children born through assisted reproduction.

VI. COMPARATIVE STUDY

6.1 United Kingdom

The United Kingdom permits altruistic surrogacy while prohibiting commercial arrangements[27]. Surrogacy agreements are generally unenforceable, and legal parenthood is transferred through judicial orders after birth. The British approach emphasises child welfare and judicial supervision.

6.2 United States

The legal position varies across states. Certain states recognise commercial surrogacy contracts, while others prohibit or restrict them[28]. The American approach reflects greater emphasis on contractual freedom and reproductive autonomy.

6.3 Australia

[25] Justice K.S. Puttaswamy v (Retd) v. Union of India (2017)10 SCC 1 (India).
[26] Universal Declaration of Human Rights arts. 12, 16, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[27] Surrogacy Arrangements Act 1985 (U.K.)

[28] John A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies (Princeton Univ. Press 1994).

Australia generally follows an altruistic model and prohibits commercial surrogacy[29]. State legislation regulates eligibility, consent and transfer of parentage while protecting surrogate mothers from exploitation.

6.4 Comparative Assessment

India's legal framework is comparatively more restrictive than several jurisdictions. Although protection of vulnerable women remains an important objective, future reforms may benefit from incorporating international best practices relating to counselling, insurance, dispute resolution and protection of reproductive rights.

VII. CRITICAL ANALYSIS

The Surrogacy (Regulation) Act, 2021 provides a structured framework for regulating surrogacy and preventing exploitation. While the Act strengthens oversight through regulatory mechanisms, concerns remain regarding its restrictive eligibility criteria and the complete ban on commercial surrogacy. These restrictions may limit reproductive choices and encourage unregulated arrangements.

The legislation should therefore be periodically reviewed to ensure consistency with constitutional principles of equality, dignity and autonomy while preserving safeguards against exploitation[30].

VIII. CONCLUSION

Surrogacy has transformed reproductive medicine by creating opportunities for parenthood that were previously unavailable. At the same time, it raises profound legal, ethical and constitutional questions concerning women's rights, reproductive autonomy and child welfare. India's transition from commercial to altruistic surrogacy reflects an attempt to prevent exploitation and promote ethical medical practice.

The current statutory framework has undoubtedly strengthened regulation and accountability. However, concerns regarding inclusiveness, reproductive freedom and constitutional equality continue to generate debate. A balanced approach that combines effective regulation with respect for individual autonomy and human dignity would better achieve the objectives of social justice and reproductive rights.

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[29] Surrogacy Act 2010 (N.S.W.) (Austl.).
[30] INDIA CONST. arts. 14 & 21.

Future legislative reforms should therefore focus on creating a transparent, inclusive and rights-based framework capable of protecting surrogate mothers, intending parents and children while remaining consistent with constitutional principles and international human rights standards.[31]

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