

REGULATING SURROGACY IN INDIA: BALANCING ETHICAL CONCERS WITH LEGAL REALITIES

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INTRODUCTION

Surrogate motherhood in India has been a hot topic of legal, ethical, and social discussions for quite some time. Once dubbed the “surrogacy capital of the world,” India became a go-to destination for countless intended parents from around the world, attracted by relatively lower costs and minimal regulations. However, this lack of oversight raised serious concerns about the potential exploitation of surrogate mothers, the commercial exploitation of women’s bodies, and the rights and welfare of children born through surrogacy. In light of these issues, the Indian government has introduced a set of laws that culminated in the Surrogacy (Regulation) Act, 2021, radically changing the legal and ethical landscape of surrogacy in the country.

The Surrogacy (Regulation) Act, 2021, marks a clear transition from commercial to altruistic surrogacy. Under this new law, only altruistic surrogacy is allowed. This means that surrogate mothers can only be reimbursed for medical expenses and insurance costs, with no extra financial rewards permitted. The law explicitly bans commercial surrogacy, aiming to guard against the exploitation of economically vulnerable women who might be attracted to financial offers. This shift tackles long-standing ethical issues surrounding the commodification of motherhood and the risks of coercion and abuse in commercial agreements.

Additionally, the Act lays out strict eligibility criteria for both intended parents and surrogate mothers. Only married heterosexual couples in India, married for at least five years and fitting certain age brackets (women aged 23-50 and men aged 26-55), can pursue surrogacy. They must provide a medical certificate confirming infertility and should not have any surviving biological children, unless they’re dealing with life-threatening conditions or disabilities. Single women—widowed or divorced—aged between 35 and 45 may also qualify, but single men and same-sex couples are clearly excluded, sparking ongoing debates about the fairness and inclusivity of India’s surrogacy laws.

As for surrogate mothers, the law requires that they be a close relative of the intended parents, married, between 25 and 35 years old, and have at least one biological child of their own. Moreover, a woman can only serve as a surrogate once in her lifetime, and every surrogacy arrangement must be sanctioned and registered with the proper authorities. The Act also creates national and state-level regulatory boards to oversee and monitor surrogacy practices, ensuring that all parties’ interests are protected.

Despite these legal protections, ethical challenges still loom large. Critics contend that the stringent eligibility criteria and the prohibition of commercial surrogacy could push the practice underground, which might increase the likelihood of unregulated and unsafe arrangements. Furthermore, the exclusion of single men, LGBTQ+ individuals, and foreign nationals from accessing surrogacy raises concerns regarding equality and reproductive rights.¹⁸

Moreover, the enforceability of surrogacy contracts, the legal status of children born through surrogacy, and the long-term welfare of surrogate mothers remain critical issues that require ongoing attention and policy adjustment.

The legal and ethical landscape of surrogate motherhood in India is influenced by a mix of historical practices, changing societal values, and the urgent need to protect vulnerable individuals. The Surrogacy (Regulation) Act, 2021, represents a crucial move towards combating exploitation and ensuring ethical practices. However, it also underscores the importance of continued dialogue and reform to balance the rights, responsibilities, and well-being of everyone involved in the surrogacy process.

KEYWORDS: Surrogacy (Regulation) Act, 2021, Altruistic surrogacy, Commercial surrogacy ban, Ethical concerns in surrogacy, Exploitation of surrogate mothers, Legal framework for surrogacy in India, Surrogacy eligibility criteria, Rights of surrogate mothers, Rights of intended parents, Child rights in surrogacy, Surrogacy contracts and enforceability, Regulatory boards for surrogacy, Socio-economic impact of surrogacy, Commodification of women and children, Reproductive justice, Surrogacy and human rights, International surrogacy market, Legal challenges in surrogacy regulation, Implementation of surrogacy laws, Protection against trafficking and exploitation, Medical and psychological risks in surrogacy, Surrogacy approval process, Surrogacy and family law, Monitoring and enforcement mechanisms, Recommendations for policy reform



¹⁸ Anu, Kumar Pawan, *et.al.*, “Surrogacy and Women’s Right to Health in India Issues and Perspective” 57 *Indian Journal of Public Health* 65-70 (2013).
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Historical Evolution of Surrogacy Practices in India

In the early 2000s, India became a key player in surrogacy arrangements, providing affordable reproductive services that drew clients from all over the world. The lack of comprehensive regulations, combined with advanced medical facilities and relatively low costs, positioned India as a hotspot for international commercial surrogacy. Initially, these surrogacy arrangements functioned under general guidelines issued by the Indian Council of Medical Research (ICMR).

The surrogacy market in India exploded, with estimates suggesting a valuation of around \$450 million according to the ICMR, though some unregulated estimates soared to about \$2.3 billion. This rapid growth led to phrases like "womb farm" and "baby factory," with the Law Commission of India calling it a "pot of gold" back in 2009. The combination of lower costs and lenient regulations attracted intended parents from across the globe, making India a prime choice for cross-border reproductive services. However, this unchecked growth brought significant concerns about the potential exploitation of financially vulnerable Indian women. Critics pointed out that the commercialization of surrogacy created an unsettling dynamic where less affluent women from the Global South were providing reproductive services mainly for wealthy individuals from the Global North. This disparity raised critical issues around power dynamics, informed consent, and whether financial motivations could lead to exploitative situations.

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Landmark Cases That Shaped Legal Developments

Several high-profile legal battles demonstrated the urgent need for thorough regulation of

surrogacy in India. The Baby Manji Yamada case from 2008 was particularly instrumental in uncovering the regulatory gaps in India's surrogacy framework. This case involved a child born to Japanese commissioning parents, who encountered marital issues before the child's arrival. The biological mother returned to Japan prior to the birth, leaving the child's legal status uncertain.

Following her birth, Baby Manji was initially cared for by her paternal grandmother in Anand but later moved to Rajasthan due to a health issue. The case led to a habeas corpus petition, raising questions about the legality of surrogacy arrangements in India. It spotlighted crucial concerns such as the citizenship rights of surrogate children, determining legal parentage, and the complications that arise in international surrogacy cases.

The Baby Manji case, alongside other instances of stateless children and contested parentage, put immense pressure on the Indian government to formulate a comprehensive regulatory framework for surrogacy practices. These cases highlighted the inherent vulnerabilities in an unregulated commercial surrogacy landscape, accelerating calls for legislative action to safeguard all parties, particularly surrogate mothers and the children born through these arrangements.²⁰

Legal Framework Development

India's approach to regulating surrogacy has witnessed significant changes over the last twenty years. Initially, the regulatory landscape relied mainly on non-binding guidelines from the Indian Council of Medical Research, which offered minimal oversight for the rapidly expanding industry. As ethical concerns mounted and the commercial surrogacy sector thrived, the call for formalized legislation grew louder.

The first concrete steps toward establishing comprehensive regulation began with the

¹⁹ Saurish Mukherjee and Srinidhi Balakrishnan, "Evolution of Surrogacy Laws in India and its Shortcomings with Analysis of Different Countries' Surrogacy Laws" *Ssm* 4-37 (2024).

Pritha Sen, "Surrogacy Laws in India Through the Years" 2 *Indian Journal of Integrated Research in Law* 1-15.

J.P.Rai, "Issues Relating to Surrogacy: Indian Perspective" 6 *Dehradun Law Review* 1-12 (2014).

²⁰ *Baby Manji Yamada v. Union of India (Uoi)*, (2008)13 SCC 518

S.Kiruti Ratchaya, "Surrogacy in India: Baby Manji Yamada Case and Surrogacy Regulation Bill, 2020" (2021)

introduction of draft bills in the early 2010s, although these initial efforts did not result in law. Eventually, the groundwork laid by these drafts led to the development of two key pieces of legislation: the Assisted Reproductive Technology Regulation Bill and the Surrogacy (Regulation) Bill.²¹

The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, which came into force on December 25, 2021, stands as the most detailed legislative framework overseeing surrogacy practices in India. This Act set up a multi-tiered regulatory system including a National Assisted Reproductive Technology and Surrogacy Board, along with State Boards and relevant authorities at various administrative levels.

The heart of the Act lies in the ban on commercial surrogacy and the establishment of altruistic surrogacy as the sole legal model in India. The Act clarifies that altruistic surrogacy involves arrangements where no payments, fees, or charges beyond medical and pregnancy-related expenses are given to the surrogate mother. This marks a clear departure from the previous commercial model that had dominated the surrogacy scene in India.

Additionally, the legislation imposes strict eligibility criteria for both intended parents and surrogate mothers. Intended parents must be Indian citizens and meet specific requirements concerning age, marital status, and medical necessity. Likewise, surrogate mothers must fulfill criteria related to age, prior childbearing experience, health, and their relationship with the intended parents.²²

²¹ Prithivi Raj, "Regulating Surrogacy in India: Legal Frameworks, Ethical Considerations and Lessons from Global Practices" *Sim* 1-24 (2024).
R.S Sharma, "Social, Ethical, Medical & Legal Aspects of Surrogacy: An Indian Scenario" *Indian Journal of Medical Research* (2014).
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Joseph Nixon and Olinda Timms, "The Legal and Moral Debate Leading to the Ban of Commercial Surrogacy in India" *3 Medicina Y Ética* (2019).
²² The Surrogacy (Regulation) Act, 2021 (Act of 2021), ss. 2,3,4,6,7,8,9
Daslegal Advocates, "An Overview of Surrogacy (Regulation) Act, 2021" (2021)
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The Assisted Reproductive Technology (Regulation) Bill

Alongside the Surrogacy (Regulation) Act operates the Assisted Reproductive Technology Regulation Bill of 2020, which tackles the broader landscape of fertility treatments that include surrogacy. This Bill sets out a regulatory framework for ART clinics and banks, ensuring standardized protocols and ethical practices throughout assisted reproduction.

The ART Bill requires the establishment of a National Registry and Registration Authority to maintain a centralized database of fertility clinics, which will help facilitate effective oversight. It also includes strict penalties for violations such as sex selection, illegal sale of human embryos or gametes, and operating without proper registration. Together with the Surrogacy Act, this legislation represents a comprehensive approach to regulating reproductive technologies in India.²³

Ethical Dimensions of Surrogacy Regulation

Balancing Reproductive Autonomy with Protection from Exploitation: A central ethical dilemma in surrogacy regulation is balancing reproductive autonomy against the need to protect vulnerable individuals from exploitation. Advocates for strict regulations argue that commercial surrogacy inherently exploits economically disadvantaged women, especially in a society plagued by socioeconomic disparities. They believe that financial incentives may unduly sway women's decisions, undermining the voluntary nature of consent. On the flip side, critics of the current regulatory framework argue that banning commercial surrogacy altogether could encroach on women's autonomy to make choices about their bodies and reproductive choices. They maintain that with appropriate safeguards, transparent contracts, and fair compensation, commercial surrogacy could

²³ The Assisted Reproductive Technology Regulation Bill of 2020, (Act of 2020), ss. 3-10
PIB Delhi, "Cabinet Approves the Assisted Reproductive Technology Regulation Bill 2020" (2020)

respect women's agency while providing vital economic opportunities.

The move towards altruistic surrogacy seeks to tread this ethical path by eliminating financial incentives while keeping the possibility of surrogacy agreements alive. Still, lingering questions remain about whether altruistic models can adequately meet the needs of intended parents and potential surrogates without risking the emergence of underground commercial practices.

Commodification Concerns: At the heart of ethical debates surrounding surrogacy is the worry about the potential commodification of reproduction, women's bodies, and, ultimately, children.

Critics argue that commercial surrogacy risks turning reproductive capacity into a service that can be bought and that children can be treated as products of contractual agreements.

The regulatory ban on commercial surrogacy is an attempt to address these concerns, striving to uphold the dignity of the reproductive process by eliminating direct financial incentives. By confining surrogacy to altruistic arrangements, the legislation aims to emphasize the relationship and compassion inherent in surrogacy rather than its transactional aspects.

However, ethical issues remain regarding whether the distinction between commercial and altruistic surrogacy truly mitigates commodification worries, especially as surrogate mothers still receive compensation for expenses. Some experts argue that the focus should shift to ensuring ethical treatment, informed consent, and fair practices rather than outright banning compensation altogether.

Rights and Welfare of Surrogate Children: When discussing landmark cases like Baby Manji Yamada, a crucial ethical concern that often comes up is the rights and welfare of children born through surrogacy. The lack of clear laws around parentage, nationality, and custody in the early days of unregulated surrogacy

highlighted the urgent need for well-defined protocols that put the best interests of the child first.

The current laws aim to tackle these issues by creating clearer definitions of legal parentage and ensuring that kids born through surrogacy have a designated legal status. By limiting who can become intended parents and making sure there's a medical necessity, the legislation seeks to prioritize the child's welfare in these arrangements. However, ethical questions linger about whether the existing regulations fully cover every aspect of a child's rights in surrogacy, particularly when it comes to their future access to information about their biological origins and circumstances of their birth.

Contract Enforceability and Legal Parentage: The enforceability of surrogacy agreements adds another layer of complexity within India's legal framework. The Surrogacy (Regulation) Act, 2021 looks at various components of surrogacy arrangements, but there are still confusing aspects about how these contracts relate to general contract law under the Indian Contract Act.

Surrogacy agreements must navigate potentially conflicting legal principles. On one side, contract law generally allows people to make agreements freely; on the other side, public policy can sometimes restrict contractual freedom, especially when it comes to vital matters of human dignity. While the regulatory framework tries to standardize important elements of surrogacy agreements, it still leaves some questions about how enforcement will work.

Determination of Legal Parentage: A key part of regulating surrogacy involves setting up clear rules for determining legal parentage. The Surrogacy (Regulation) Act states that children born from legal surrogacy arrangements are recognized as the legitimate children of the intended parents. This is a notable improvement from the uncertainty seen in

previous cases like Baby Manji Yamada, where establishing parentage was quite complicated.

By clarifying legal parentage, the current system works to protect the rights and interests of children born through surrogacy. Still, there could be challenges in cases where disputes arise or situations emerge that the laws didn't anticipate. How effective these provisions are will largely depend on how consistently they're interpreted and enforced.

Implementation Challenges and Practical Realities: The successful implementation of India's surrogacy regulations relies heavily on having effective administrative structures at both national and state levels. The law calls for the formation of a National Board, State Boards, and other relevant authorities to oversee surrogacy practices. However, creating this infrastructure will require significant resources, expertise, and proper coordination across different government tiers.

There are practical hurdles to overcoming, such as ensuring that regulations are applied consistently across states, setting up clear inspection and monitoring protocols, and developing robust record-keeping systems for surrogacy arrangements. Transitioning from a largely unregulated commercial sector to a strictly controlled altruistic model demands strong administrative systems to curb unauthorized practices.

Access and Equity Considerations: The move to altruistic surrogacy brings up important questions regarding access and equity in reproductive services. By limiting eligible surrogates to close relatives of intended parents, the current regulatory framework significantly reduces the number of available surrogates. This limitation can create considerable obstacles for individuals or couples who lack willing relatives to act as surrogates.

Moreover, the ban on commercial surrogacy might disproportionately affect less wealthy intended parents who cannot tap into

international commercial surrogacy options that remain accessible to wealthier individuals. This situation raises concerns about whether the current regulations end up creating a tiered system of access to surrogacy services based on one's socioeconomic status.²⁴

International Perspectives and Cross-Border Implications

India's transition from a key destination for international commercial surrogacy to banning such practices mirrors what's happened in several other countries. Neighboring nations like Thailand and Nepal have also moved from more permissive stances to stricter regulations following well-publicized controversies. Yet, there's a lot of variation in how countries regulate surrogacy, with some still allowing commercial models under strict oversight.

Countries that do permit regulated commercial surrogacy usually emphasize transparency, fair compensation, and solid legal frameworks to shield all involved parties. These models suggest alternative regulatory paths that aim to tackle ethical issues through oversight rather than outright prohibition. The comparative analysis shows the diverse strategies available for juggling ethical considerations with practical reproductive needs.

Cross-Border Reproductive Services

The ban on commercial surrogacy and the restrictions on international intended parents in India have led to a redirection of cross-border reproductive services to other jurisdictions. This

²⁴ Supra note 4 (Prithvi raj)

Liza Mayee Pradhan, "Ethics of Surrogacy: Rights and Responsibilities" Agence France-Presse, "India Bars Foreign Gay Couples, Singles from Surrogacy" *Ndtv* (2013).

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shift prompts questions about whether strict national regulations indeed take care of ethical concerns or merely push potentially troubling practices to less regulated areas.

The global dimension of surrogacy brings to light the necessity for coordinated international strategies to set minimum standards and tackle intricate issues of citizenship, parentage, and child rights in cross-border arrangements. India's regulatory experience offers valuable lessons for crafting international frameworks that honor different cultural and ethical viewpoints while safeguarding fundamental rights.²⁵

Recommendations for Regulatory Improvement

To boost the effectiveness of India's surrogacy regulations, it's crucial to focus on building strong monitoring and enforcement mechanisms. This includes properly resourcing regulatory bodies, creating clear protocols for facility inspections, and setting up comprehensive data systems to keep track of surrogacy arrangements.

Improving enforcement capabilities would help deter unauthorized commercial setups and guarantee adherence to eligibility requirements and procedural guidelines. Extra attention should be paid to monitoring potential underground commercial surrogacy practices that could arise in response to stringent rules.

Revisiting Eligibility Criteria: The current restrictions on eligibility for intended parents and surrogate mothers should be reevaluated to balance the protective goals with access to reproductive services. Broadening the eligibility for surrogates beyond just close relatives while still keeping robust safeguards could enhance

access for intended parents without compromising ethical standards.

At the same time, it's essential to assess the reasonableness of the restrictions placed on intended parents' eligibility to ensure that legitimate medical needs aren't unnecessarily neglected. Any relaxation in criteria should come with stronger informed consent protocols and reinforced protections.

Enhancing Support Systems for Surrogates: The transition to altruistic surrogacy heightens the need for comprehensive support systems for surrogate mothers. This means making sure they have access to independent legal counsel, psychological support, and holistic healthcare throughout their pregnancy and after giving birth.

Regulatory systems should also address the long-term welfare of surrogate mothers, including health insurance provisions for any complications arising during or after the surrogacy process. By enhancing support systems, we can ensure that the altruistic model genuinely safeguards the interests of surrogate mothers.

Addressing Gaps in Contract Enforceability: Greater clarity around the legal status and enforceability of surrogacy agreements would strengthen India's regulatory framework. This might involve creating standardized contract templates that balance all parties' interests while covering potential contingencies.

Regulatory bodies should provide clear guidelines on essential contractual provisions, forbidden terms, and enforcement strategies. Setting up special dispute resolution processes can help manage conflicts that arise during surrogacy arrangements, while safeguarding the rights and interests of everyone involved, especially the children born through surrogacy.

Conclusion

India's changing stance on surrogacy regulation shows a serious attempt to find a balance between ethical dilemmas and the realities of law and practice. Moving from an

²⁵ Sanoj Rajan, "Ending Statelessness Arising Out of Surrogacy in India: The Latest Developments" *European Network on Statelessness* (2017).
Chinmoy Pradip Sharma, "Surrogacy Laws in India – Past Experiences and Emerging Facets" (2029)
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unregulated commercial surrogacy model to a carefully monitored altruistic one highlights real worries about exploitation, commodification, and the well-being of children. Yet, this shift also brings up crucial issues around reproductive freedom, access, and whether outright bans truly tackle these ethical challenges.

The success of the current set of regulations will rely heavily on how well they're implemented. This includes creating effective administrative frameworks, ensuring consistent enforcement, and providing adequate support for everyone involved in surrogacy arrangements. As this regulatory system develops, it will be vital to continuously assess and improve it to ensure it safeguards interests while honoring reproductive rights.

India's journey offers important insights for other regions dealing with the challenging ethical and legal aspects of assisted reproduction regulations. By embracing various viewpoints and staying open to implementation hurdles, India can enhance its approach to surrogacy, making sure it truly benefits surrogate mothers, intended parents, and most importantly, the children born from these arrangements.²⁶

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²⁶ Dr. Vaishali Gupta, "Surrogate Motherhood in India: A Legal Analysis" 6 *International Journal of Engineering and Management Research* 1-6 (2016).

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