
REPRODUCTIVE AUTONOMY IN QUESTION MAPPING THE LEGAL AND ETHICAL FAULTLINES IN INDIA'S SURROGACY LAW

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ABSTRACT

India rethought its surrogacy laws in 2021 when it passed the Surrogacy (Regulation) Act. The law's stated goal of reducing reproductive labour exploitation and commercialisation begs the problems of reproductive autonomy, physical integrity, and the changing definition of motherhood. This essay takes a close look at the surrogacy laws in India and how they show the conflict between moral policing by the state and personal autonomy in reproductive decisions. Using precedents from landmark cases like Justice K.S. Puttaswamy v. Union of India and other international human rights treaties, this article asks whether the rules as they stand are compatible with a rights-based approach. It delves deeper into the law's discriminatory character, analysing how it affects transnational intended parents, LGBTQ+ people, and unmarried women, and it criticises the state for supporting heteronormative family forms. A more inclusive, ethically balanced, and autonomy-respecting legal framework for surrogacy in India is proposed in this paper through a comparative study of worldwide best practices and an examination of developing international standards, such as those at the Hague Conference on Private International Law.

Introduction:

The practice of surrogacy has its roots in the Latin term "surrogare," meaning "to replace," and has traditionally included one woman having a child in exchange for another. A woman may participate in surrogacy if she consents to carry and deliver a child for another couple who are facing infertility. Definitions vary somewhat among sources. While ethical studies like as the Warnock Report emphasise the concept that the intended parents are expected to raise the child after birth, legal definitions often characterise it as a kind of arrangement or agreement. In general, there are two types of surrogacy: gestational, in which the surrogate has no genetic connection to the child, and traditional, in which the surrogate utilises her own egg. Additionally, surrogacy may be categorised as either commercial, which provides extra pay, or altruistic, which only covers medical and pregnancy-related costs.¹

The concept of a woman bearing a kid for another is not a novel one. Evidence of surrogacy-like behaviours may be found in ancient religious writings and legends from several societies. When Sarah, a biblical woman, was unable to conceive, she begged her servant Hagar to bear Abraham a child. Bilhah, Rachel's maid, and a similar tale also surface. We also find mentions of it in Indian mythology. The well-known story of Balarama involves Rohini receiving an embryo from Devaki. Niyog, in which a woman would have a child with someone other than her husband (often with his permission), is another example of an early kind of surrogacy arrangement. One such instance is the niyog (divine intervention) that allowed the Pandavas to be born in the Mahabharata. In 2002, India formally legalised surrogacy, and since then, it has been a popular choice for intended parents seeking a child abroad. Reproductive tourism, which originated in Asia, became a worldwide phenomenon in India due to the country's historically lax legal environment, medical skill, and relatively inexpensive expenses. But the legislation has developed to limit and formalise the practice in response to worries about exploitation and an absence of control.²

India has made its first complete effort to transition the surrogacy and assisted reproductive technology sectors from a laissez-faire to a strictly regulated paradigm with the passage of the

¹ Law Comm'n 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* (Aug. 2009), <https://indiankanoon.org/doc/168220859/>.

² *What Are the Laws of Surrogacy in India?*, Enroute Indian History (n.d.), <https://enrouteindianhistory.com/what-are-the-laws-of-surrogacy-in-india/>.

Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021. There are criminal sanctions in place to enforce strict age, marital status, and citizenship restrictions on both intended parents and surrogates, and the practice is limited to altruistic gestational surrogacy. Commercial agreements are also forbidden. Although the goal is to safeguard vulnerable women, critics say this change limits reproductive choice, makes LGBTQ+ couples and single people feel marginalised, and reinforces a heteronormative family ideal.

These legislative decisions clash with constitutional protections for privacy, dignity, equality, and freedom of profession, which have been acknowledged in cases such as Justice K.S. Puttaswamy v. Union of India and Article 21 cases. Additionally, they are at odds with India's obligations under CEDAW and the developing principles on parentage from the Hague Conference. Class and feminist criticisms sit above this, with the question of whether a complete prohibition on payment is an ethical protection against abusive baby markets or a patronising denial of autonomy to lower-class women being the most pressing. When the state takes on the moral responsibility of overseeing reproduction, who exactly benefits or suffers?

In light of this complex and sometimes contradictory background, this essay traces the development of surrogacy regulation in India's laws, places it in context with international standards, and questions the implications for human rights and the constitution. Our goal is to determine whether the existing system in India is helping or hurting the basic reproductive rights that the government claims to be protecting by combining technical progress, social justice arguments, historical precedent, and comparative observations.

Legislative Evolution: The Surrogacy (Regulation) Act, 2021

Background:

India did not have a specific law controlling surrogacy until the Surrogacy (Regulation) Act, 2021 was passed. Anand, Gujarat, and other places like it became international hubs for reproductive services due to the legal void that allowed commercial surrogacy to flourish. The exploitation of economically disadvantaged women, ambiguity in the law about paternity, and international custody battles involving non-citizens are all problems that arose from the

uncontrolled environment.³ One landmark case that drew national and international attention was *Baby Manji Yamada v. Union of India*⁴, "where a Japanese couple faced legal complications following the birth of their child through an Indian surrogate. "The case highlighted the need for a comprehensive legal framework" by bringing attention to important questions like the citizenship, paternity, and guardianship of children born via foreign surrogacy agreements. Concerned about the lack of transparency, ethical monitoring, and legally binding norms in the surrogacy process, the Indian Congress passed the Surrogacy (Regulation) Act.⁵

Objectives of the Act:

Concerns over abuse and ethical issues in surrogacy prompted the introduction of the Surrogacy (Regulation) Act, 2021, which aimed to provide a legal framework for the practice in India. The primary objectives are:

- In order to prevent the abuse or exploitation of surrogate mothers and their children.
- Specifically, to protect surrogate women and guarantee that they are treated with respect and dignity throughout the surrogacy process.
- Put an end to commercial surrogacy and making it legal for surrogates to help those in need without charging anything beyond medical costs and insurance.
- To standardise and oversee the operation of surrogacy clinics, including regulations for eligibility, procedures for consent, and necessary paperwork.
- To ensure the legal status of surrogate children in India and to protect their rights and wellbeing.⁶

³ Himanshu Ratre, *Legal and Ethical Aspects of Surrogacy in India*, JLRJS (May 2023), <https://jlrjs.com/wp-content/uploads/2023/05/113.-Himanshu-Ratre.pdf>;

⁴ *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India)

⁵ *Legality of Surrogacy in India: Everything You Need to Know*, Khurana & Khurana (June 16, 2023), <https://www.khuranaandkhurana.com/2023/06/16/legality-of-surrogacy-in-india-everything-you-need-to-know/>; Bharat Sharma, *Latest Surrogacy Laws in India Explained | SRA, 2021*, Century Law Firm (n.d.), <https://www.centurylawfirm.in/blog/surrogacy-law-in-india/>; Surrogacy (Regulation) Act, 2021, Lawful Legal (June 19, 2024), <https://lawfullegal.in/surrogacy-regulation-act-2021/>.

⁶ See *Surrogacy (Regulation) Act, 2021: An Overview*, iPleaders Blog (Jan. 13, 2023), <https://blog.ipleaders.in/surrogacy-act/>; Himanshu Ratre, *Legal and Ethical Aspects of Surrogacy in India*, JLRJS

Shift from Unregulated to Regulated Surrogacy:

A shift from uncontrolled commercial operations to a legally supervised, altruistic-only paradigm has been marked by the passage of the Surrogacy (Regulation) Act, 2021. Key elements of this regulatory shift include:

- **Eligibility Criteria:** Surrogacy may only be pursued by married heterosexual couples in India who have been married for at least five years, as well as by specified groups of single women, such as widows and divorcees between the ages of 35 and 45. Foreign nationals, males who are not married, members of the LGBTQ+ community, and couples who live together are specifically not covered by the Act.
- **Altruistic Model:** Surrogacy is a legal option for some couples, but only if the surrogate is a close relative of the intended parents, has given birth at least once before, and is between the ages of 25 and 35. Aside from covering her medical expenses and insurance, she cannot accept any other kind of financial compensation. Additionally, a surrogate role is a one-time opportunity for a woman.
- **Regulatory Framework:** The law mandates the registration of surrogacy clinics and creates surrogacy boards at the national and state levels. The Act imposes severe punishments, including fines and jail, for failure to comply, and approvals are required from certain authorities.
- **Ban on Commercial Surrogacy:** The Act makes it illegal to engage in any surrogacy-related promotional or advertising activity that involves any kind of remuneration above the allowed expenditures.
- **Rights-Based Safeguards:** The goal of the legislation is to prevent surrogacy, intentional parenthood, and child abuse by clarifying previous legal ambiguities and limiting chances for abuse or compulsion.⁷

(May 2023), <https://jlrrs.com/wp-content/uploads/2023/05/113.-Himanshu-Ratre.pdf>; *An Overview of Surrogacy Regulation Act, 2021*, Das Legal (Oct. 5, 2023); Surrogacy (Regulation) Act, 2021, Lawful Legal (June 19, 2024), <https://lawfullegal.in/surrogacy-regulation-act-2021/>, <https://www.daslegal.co.in/an-overview-of-surrogacy-regulation-act-2021/>.

⁷ Gaurang Narayan et al., *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?*, 15 Cureus e37864 (Apr. 20, 2023), <https://doi.org/10.7759/cureus.37864>; Bharat Sharma,

Reproductive Autonomy vs State Moral Oversight:

Personal autonomy includes the right to choose one's own reproductive health care, including whether and how to have a family. The fundamental principles of equality, privacy, and dignity are intricately related to this right, which is also known as reproductive autonomy. According to this view, the state has no business interfering with private choices about reproductive health issues including surrogacy, abortion, or contraception. On the other hand, governments often step in to influence these decisions, claiming reasons such as cultural ideals, demographic interests, or ethical considerations. There may be tensions between individual liberty and the state's morality standards as a result of these initiatives.⁸

Constitutional Foundations and Judicial Recognition:

The gradual development of reproductive autonomy as an essential component of the right to life and personal liberty provided under Article 21 has been acknowledged by Indian constitutional theology. In the landmark case of *Justice K.S. Puttaswamy v. Union of India* (2017)⁹ People have a right to choose how they want to live their most private lives, including their reproductive options, according to the Supreme Court. The court's ruling reiterated that the government has no business meddling in people's most intimate affairs and broadened the definition of privacy to include their actual physical autonomy.¹⁰ *Suchitra Srivastava v. Chandigarh Administration* (2009), in which the Court noted that a woman's ability to make reproductive choices is an integral component of her personal liberty under Article 21, provided the basis for this interpretation. A strong endorsement of physical integrity and decisional autonomy has been reflected in the judiciary's recurrent emphasis that the woman must have the option to continue or terminate a pregnancy.¹¹

Latest Surrogacy Laws in India Explained | SRA, 2021, Century Law Firm (n.d.), <https://www.centurylawfirm.in/blog/surrogacy-law-in-india/>; Surrogacy (Regulation) Act, 2021, Lawful Legal (June 19, 2024), <https://lawfullegal.in/surrogacy-regulation-act-2021/>.

⁸ Shubhangi Agarwalla, *Decisional Autonomy as Central to Privacy: Reproductive Rights in India*, IACL-AIDC Blog (June 14, 2019), <https://blog-iacl-aidc.org/2019-posts/2019/6/14/decisional-autonomy-as-central-to-privacy-reproductive-rights-in-india>.

⁹ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁰ *Suchitra Srivastava v. Chandigarh Admin.*, A.I.R. 2010 S.C. 235 (India).

¹¹ Gauri Pillai, *India's Push-and-Pull on Reproductive Rights*, Verfassungsblog: Verfassungsdebatte (Apr. 17, 2024), <https://verfassungsblog.de/indias-push-and-pull-on-reproductive-rights/>.

Areas of Tension:

- Abortion Access India's Medical Termination of Pregnancy (MTP) Act does legalise abortion, however it imposes restrictions according to gestational age and requires the approval of licensed medical professionals. Although certain groups of women now have more access thanks to the reforms passed in 2021, medical and legal authorities still look at people's reproductive choices with suspicion. The conflict between reproductive autonomy and regulatory control is one that has persisted for a long time.
- Surrogacy Law: Commercial involvement in surrogacy is outlawed by the Surrogacy (Regulation) Act, 2021, which limits the practice to only charitable agreements involving close relatives. The idea that women's autonomy and dignity are undermined by financial remuneration, which disregards their capacity to make educated, free choices, is the root of this restrictive approach. Another way the legislation perpetuates a conventional, heteronormative family model concept of parenting is by excluding same-sex couples, non-marital partners, and single males.¹²
- Sterilization and Population Control: Mass sterilisations and other forced measures like them have been commonplace in India's population strategies due to the country's long history of prioritising numerical objectives above reproductive choice. The Indian Supreme Court strongly disapproved of these methods in the 2016 case *Devika Biswas v. Union of India*, stating that women have a right to be free from coercion when it comes to their reproductive health. Regardless, some policy approaches still hold on to outdated views, like the idea that people should feel obligated to define their reproductive decisions in terms of the public good..^{13 14 15}

¹² *Devika Biswas v. Union of India*, AIR 2016 S.C. 4405 (India).

¹³ Center for Reproductive Rights, *Reproductive Rights in Indian Courts*, <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf>.

¹⁴ Shivangi Singh & Ekta Rose, *The Ethical Dimensions of Female Reproductive Autonomy in the Contemporary Indian Context*, 11 J. Emerging Technol. & Innov. Res. (JETIR) (June 2024), <https://www.jetir.org/papers/JETIR2406910.pdf>.

¹⁵ Shubhangi Agarwalla, *Decisional Autonomy as Central to Privacy: Reproductive Rights in India*, IACL-AIDC Blog (June 14, 2019), <https://blog-iacl-aidc.org/2019-posts/2019/6/14/decisional-autonomy-as-central-to-privacy-reproductive-rights-in-india>

Ethical and Social Critiques:

- **Moral Oversight Rooted in Tradition:** The state imposes many limitations because such standards are widely accepted in society, especially those that support traditional family structures. Policies that require a spouse's approval before a woman may have an abortion or sterilisation are examples of this, since they can transfer decision-making authority from the woman to her family or husband.
- **Impact on Marginalized Communities:** Adolescents, single women, and economically disadvantaged groups have it worse when it comes to access to reproductive healthcare. Stigma, provider judgement, and a lack of institutional support compound preexisting social and healthcare disparities experienced by these persons.
- **Autonomy vs. State Regulation:** Government regulations, such as those aimed at limiting commercial surrogacy or sex-selective abortion, are often justified by valid concerns; yet, these policies do not always take into account the mental and physical costs of reproduction. The autonomy of the pregnant woman must be prioritised, according to the courts, since pregnancy and its associated processes have a direct and profound effect on her body..¹⁶

Global Human Rights Perspective

Individual autonomy in reproductive affairs is highly valued in international human rights norms. It is essential that women be free from governmental interference or pressure when making choices about their reproductive health, according to the United Nations Working Group on Discrimination Against Women. These decisions impact a woman's life in profound and intimate ways. Governments are obligated, under the principle of equality under international law, to remove any obstacles, whether they be legal, economic, or cultural, that prevent people from freely and adequately choosing their reproductive health care providers. Regardless, present-day Indian law often displays a more conservative, morality-driven

¹⁶ Working Grp. on Discrimination Against Women in law and in practice, *Women's Autonomy, Equality and Reproductive Health* (OHCHR, Oct. 2017), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>.

attitude, at odds with the inclusive and autonomy-based frameworks advocated by international human rights organisations.¹⁷

Constitutional Perspectives: Right to Privacy and Bodily Integrity:

The landmark decision in Justice *K.S. Puttaswamy v. Union of India* (2017)¹⁸ recognised the right to privacy as a basic right guaranteed by the Indian constitution, marking a watershed moment in the country's constitutional history. Article 21, which ensures the right to life and personal liberty, among other freedoms under Part III of the Constitution, is profoundly rooted within the realm of privacy, according to the verdict delivered by a unanimous nine-judge panel. By reversing prior rulings that had declined to acknowledge privacy as essential, the decision gave constitutional legitimacy to ideas like physical integrity, human dignity, and personal autonomy.¹⁹

Privacy, Reproductive Rights, and Surrogacy:

The Supreme Court's decision in Puttaswamy solidified the link between privacy and bodily autonomy, acknowledging that the ability to make decisions about one's own body is fundamental to personal freedom and dignity. The choice to become a surrogate or choose surrogacy falls firmly within this constitutionally protected area of reproductive decision-making. Therefore, the constitutional requirements of justice, necessity, and proportionality must be applied to any legislation governing such choices. In this light, the Surrogacy (Regulation) Act, 2021's provisions have been carefully examined. The Act's detractors say it does more harm than good by making it harder for some groups, such the LGBTQ+ community, single males, and live-in partners, to receive surrogacy services. Further, the Act mandates extensive governmental intervention in what are essentially private matters, which begs the question of how far the state may go in controlling individual reproductive choices under the guise of public welfare or ethical preservation.²⁰

¹⁷ *The Constitutional Right to Reproductive Autonomy Under the 14th Amendment*, Center for Reproductive Rights (n.d.), <https://reproductiverights.org/constitutional-right-reproductive-autonomy-14th-amendment/>.

¹⁸ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁹ *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1, AIR 2017 SC 4161 (India), <https://nluwebsite.s3.ap-south-1.amazonaws.com/uploads/justice-ks-puttaswamy-ors-vs-union-of-india-ors-5.pdf>

²⁰ Sanjana S. Mudhol & Richa Dwivedi, *An Intersection of Right to Privacy and Surrogacy Law: Experiences from Other Countries*, 6 Int'l J. Health Sci. (Supp. 4) 11886 (2022), <https://doi.org/10.53730/ijhs.v6nS4.11420>.

Jurisprudence and Global Perspectives: India's recognition of the right to privacy has developed gradually through a series of Supreme Court judgments. Early cases like *Kharak Singh v. State of Uttar Pradesh*(1963)²¹ and *Gobind v. State of Madhya Pradesh*(1975)²² laid the groundwork for acknowledging privacy as a constitutional right, later expanded in *Puttaswamy*. The Court has always held that there must be sufficient constitutional grounds for any invasion of personal privacy. The concepts of legality, need, and proportionality must be met by any such intervention if it is to further a lawful government goal. In order for surrogacy legislation to adhere to these principles, they must be purposefully crafted to limit individual rights to an absolute minimum while yet serving a manifest public interest. Different nations' surrogacy laws represent different perspectives; some countries' laws allow both commercial and altruistic models, while others either outright ban surrogacy or allow it under very restrictive circumstances. When compared to this, India's approach is far more stringent in terms of eligibility and regulation. Because of this, some think the legislation does not go far enough in protecting reproductive freedom and individual autonomy.

International Human Rights Framework and India's Obligations:

The Surrogacy (Regulation) Act, 2021 and other surrogacy laws in India need to be reviewed in light of the country's responsibilities under human rights treaties. Privacy, equality, non-discrimination, and the right to form a family are among the principles that India is dedicated to protecting as a signatory to global instruments like the UDHR, the ICCPR, and the ICESCR. These issues intersect with reproductive autonomy and surrogacy access.²³

Alignment and Gaps: The Surrogacy (Regulation) Act, 2021 limits surrogacy to benevolent purposes and specifies that only married heterosexual couples in India and a small group of single women (including widows and divorcees) are eligible to participate. Surrogacy services in India are off-limits to some groups, including the LGBTQ+ community, unmarried couples, and foreign citizens. Despite the state's defence of these limits as safeguards to prevent economic exploitation, opponents claim that the legislation violates fundamental international human rights commitments. So, for example, the right to marry and have a family is protected

²¹ *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295 (India).

²² *Gobind v. State of M.P.*, A.I.R. 1975 S.C. 1378 (India).

²³ Working Grp. on Discrimination Against Women in Law and in Practice, *Women's Autonomy, Equality and Reproductive Health* (OHCHR, Oct. 2017), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>.

in Article 16 of the UDHR, individuals are also protected from arbitrary interference with their privacy and family life in Article 17 of the ICCPR, and the right to parenthood is affirmed as a universal value in Article 10 of the ICESCR. It is arguable that these ideals, especially those pertaining to non-discrimination and equality, are undermined by India's surrogacy policy, which routinely denies access depending on marital status, gender identity, or nationality.²⁴

Ethical and Social Implications: The Surrogacy (Regulation) Act, 2021 has some detractors who worry that women would be less empowered to make autonomous decisions about their finances and reproductive health due to the law's tight qualifying requirements and outright ban on commercial surrogacy. Such all-encompassing prohibitions run the danger of driving surrogacy agreements underground, where there are no legal safeguards, rather than eradicating exploitation. Surrogate mothers should be protected by legislation that is neither too stringent nor too lenient, according to international rights organisations and legal experts. Equal access to surrogacy services for all people, regardless of marital status, sexual orientation, or gender identity, and models that prioritise informed consent are all things they stand for. To better address ethical issues and promote reproductive autonomy, they propose a paradigm that is more inclusive and respects rights.²⁵

India's Regulatory Approach:

Several admirable protections are there in India's existing surrogacy legislation. By restricting unauthorised clinics and agents and mandating medical coverage for surrogate mothers, it aims to eradicate unethical activities. The goal of these regulations is to prevent surrogacy from becoming an exploitative business for women. The law's limited reach, however, raises grave issues. Some worry that it might discriminate against disadvantaged or non-traditional families due to its stringent qualifying rules and criminal consequences, which could go against India's commitments to international human rights. Many believe that the current framework does not go far enough in protecting individuals, especially when compared to the inclusive and rights-

²⁴ Nishka Kapoor, *Surrogacy in India: The Need for Inclusive Laws*, OHRH (Sept. 21, 2022), <https://ohrh.law.ox.ac.uk/surrogacy-in-india-the-need-for-inclusive-laws/>

²⁵ Francesca Nardi, *Two Sides to Every Coin: India's New Ban on Commercial Surrogacy*, O'Neill (Georgetown Univ. Law Ctr.) (Aug. 15, 2019), <https://oneill.law.georgetown.edu/two-sides-to-every-coin-indias-new-ban-on-commercial-surrogacy/>

based approach that is emphasised in international standards.²⁶

Exclusionary Impact of the Current Law:

Several parts of India's surrogacy policy continue to unfairly limit access, especially for LGBTQ+ individuals, foreign nationals desiring parenting, and single women. Despite certain new safeguards, the law continues to support a conventional and limited view of family that does not include those who do not fit the stereotypical heterosexual and married profile. Among the most noticeable exclusions is the outright denial of surrogacy services to LGBTQ+ persons and same-sex couples. This legal position contradicts the spirit of progressive judgments like *National Legal Services Authority v. Union of India*²⁷ and *Navtej Singh Johar v. Union of India*²⁸, where Articles 14 and 21 of the Constitution guarantee the rights to equality, dignity, and privacy, as upheld by the Supreme Court. These decisions do not change the fact that the law is still biased against varied families and prevents whole populations from having children.²⁹

The present surrogacy statute also directly excludes single women. Reproductive aid is denied to women who have never been married but would want to have children since the Act only allows access to married heterosexual couples and, in very rare instances, to widows or divorcees. This limitation represents an antiquated and inflexible view of what makes a valid family, which fails to take into account the changing nature of parenting and caring in modern society. Many academics feel that this legislative framework upholds patriarchal and heteronormative values that devalue single parenthood. In addition to excluding unmarried women from society, these rules limit reproductive freedom by making it illegal for them to want to have a family.³⁰

²⁶ Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 Asian Bioethics Rev. 5 (2023), <https://doi.org/10.1007/s41649-022-00222-5>; available at PMC 9816354.

²⁷ *National Legal Services Authority v. Union of India*, A.I.R. 2014 S.C. 1863 (India).

²⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

²⁹ Shaurya Mahajan & Pihu Jain, *Expanding the Circle of Love: Embracing Inclusivity in Surrogacy*, PoliLegal (Mar. 28, 2024), <https://polilegal.com/post/expanding-the-circle-of-love-embracing-inclusivity-in-surrogacy/>

³⁰ Karan Babbar & M. Sivakami, *The Surrogacy Regulation Act 2021: Another Attempt to Reproduce a Heteronormative Patriarchal Society, Feminism in India* (Feb. 2, 2022), <https://feminisminindia.com/2022/02/02/the-surrogacy-regulation-act-2021-another-attempt-to-reproduce-a-heteronormative-patriarchal-society/>.

International intended parents, who saw India as a medically sophisticated and cost-effective place to start a family, have been hit hard by the country's ban on commercial surrogacy. When it came to overseas surrogacy, India used to be a hotspot for couples dealing with medical infertility or legal hurdles back home. The country's relatively cheap healthcare and relaxed regulations made it an attractive option. The Surrogacy (Regulation) Act, 2021, however, makes it clear that non-citizens cannot take part in surrogacy agreements, drastically limiting the options available to non-citizens seeking a family. The whole structure is far more restricted since the Act not only excludes overseas parents but also sets onerous criteria even on Indian spouses. The ban's official justifications fail to take surrogate mothers' perspectives into account, despite its stated goal of protecting women from exploitation and halting the commercialisation of reproduction. Many surrogates found the financial security and personal agency that surrogacy offered, making it more than just a transaction. Some surrogates opposed the limits, particularly after the 2015 temporary ban, since surrogacy had helped them and their families make more money. Many are concerned that if foreign involvement is outright banned, it would lead to surrogates and intended parents engaging in informal, unregulated partnerships without legal safeguards, leaving them more susceptible to abuse.³¹

Comparative Global Best Practices in Surrogacy Regulation:

There is a great variety of cultural norms, ethical standards, and legal traditions reflected in surrogacy laws across the world. These systems range from highly judicially controlled rigid frameworks to more liberal versions that depend on private contracts. As India's regulatory strategy develops, it may learn from these other countries' mistakes and find methods to make its own changes that are more inclusive and grounded in human rights.

Because of their liberal laws or lax regulations, certain nations have become famous hubs for surrogacy. International intended parents are flocking to Kenya, for instance, since the country welcomes all kinds of families—single parents, same-sex couples, and those engaging in commercial and altruistic surrogacy—with open arms. General contract law governs such transactions, even if the nation does not have particular surrogacy legislation. Kenya is a great

³¹ Manya Gupta & Shiromi Chaturvedi, *The Indian Ban on Commercial Surrogacy*, Student Policy Review (Harvard Kennedy School.) (June 19, 2020), <https://studentreview.hks.harvard.edu/the-indian-ban-on-commercial-surrogacy/>.

alternative because of its price and flexibility, but you will need to be cautious when navigating the legal system due to the lack of specific regulations.³²

In **Georgia**, there is a model that is more thorough. Intended parents, including those from other countries, are accorded legal paternity from birth, and both commercial and altruistic surrogacy are lawful. The law recognises intended parents as legal guardians and surrogacy contracts are binding. Because of this institutional backing, Georgia is becoming a leading surrogacy destination on a global scale.

Greece follows a court-regulated, altruistic model that allows surrogacy for single women and heterosexual couples. Intended parents are granted legal parentage by court authorisation prior to embryo implantation; nevertheless, commercial remuneration is not permitted. The model that shines out is the one that Greece has developed, which combines clear laws with protections for procedures and makes it accessible to international nationals without requiring residence.

Argentina is notable for its progressive, inclusive surrogacy framework. Recognising intended parenthood based on procreational purpose rather than biological link has been the case in the nation since 1999. Its legislative framework guarantees robust protection for children and surrogates and promotes a variety of family structures, including same-sex couples and single parents. The Argentine legal system is a model of how socioeconomic diversity and reproductive freedom may coexist.

Canada, although it opens the practice to LGBTQ+ people, single parents, and non-citizens, the Assisted Human Reproduction Act only permits altruistic surrogacy. Clear legal guidance on parentage is provided by the system, which also requires formal agreements. As a model, it has received a lot of appreciation for the ethical control it provides while yet making surrogacy services accessible to everyone.

The surrogacy industry in the US is well established and has a wide range of legal options. Surrogacy regulations differ from one state to the next; nevertheless, under stringent legal guidelines, states such as Florida, California, and New York permit both for-profit and nonprofit surrogacy partnerships. Legal protections are provided by pre-birth orders and

³² *Surrogacy Laws in Different Countries*, FertilityWorld (n.d.), <https://fertilityworld.in/blog/surrogacy-laws-in-different-countries/>

usually enforceable contracts between intended parents and surrogates, especially for LGBTQ+ people and those who are not married. Although the procedure is still costly, the American model stands out because of its inclusion, legal framework, and flexibility.

In **Colombia** and **Mexico**, surrogacy operates under broader, more adaptable legal principles. Although not completely legislated on a national level, both nations recognise contracts and permit varied family configurations to participate. The Mexican Supreme Court ruled in 2021 that surrogacy is a protected medical technique accessible to everyone, regardless of marital status, nationality, or sexual orientation, while Colombian law automatically provides citizenship to children born via surrogacy. But since the law is different in different parts of the country, you really need a lawyer.³³

Ukraine has been a popular choice for surrogacy abroad for quite some time, especially among married heterosexual couples. Commercial arrangements aided by agencies are legal, and intended parenting is clearly recognised at birth. But there are major ethical and practical hurdles because of the conflict with Russia, which has halted the surrogacy sector and left some intended parents in the middle of the process.

Someone, regardless of gender or orientation, may lawfully engage in altruistic surrogacy in the UK. The intended parents must get a parental order after delivery, nevertheless, since the surrogate retains legal paternity after birth. Despite the system's emphasis on ethical supervision and child safety, its breadth is kept relatively conservative by restrictions on commercial surrogacy and foreign access.

Surrogacy is handled in a wide variety of ways across the world, from systems that are based on contracts to processes that are overseen by the courts. Countries like Canada, Greece, and even several states in the US show that inclusivity and legal certainty are not mutually exclusive. India may learn from these foreign models as it reviews its legal model and seeks to modify it in a way that respects autonomy, promotes justice, and accommodates changing family structures.³⁴

³³ *Surrogacy Laws in Different Countries*, *Supra* note.

³⁴ *Where in the World Is Surrogacy Allowed?*, Brilliant Beginnings (n.d.), <https://brilliantbeginnings.co.uk/international-surrogacy-options/>.

Permissive Surrogacy Hubs

Despite a lack of comprehensive legislative regulation, surrogacy is now legal in a number of nations, including Ghana, Kazakhstan, Nigeria, Colombia, Mexico, and Cyprus. To regulate surrogacy agreements, these countries usually use informal local traditions or generic contract concepts. Although there is potential for worldwide interest in this flexibility, there are also concerns involved. Questions including how to react to unexpected changes in the law, what paperwork is necessary, and how to demonstrate legal parenting may become murky in the absence of a defined legal framework. A number of countries that were once thought of as being surrogacy-friendly have recently cracked down hard on the practice or outright outlawed it altogether in response to growing ethical and legal debates surrounding the practice.³⁵

Learnings from Global legal practices:

- **Inclusivity:** In an effort to break away from traditional heteronormative family structures, some countries have legalised surrogacy, including the United States, Canada, Argentina, and Kenya.
- **Legal Certainty:** Georgia, Greece, and many U.S. states provide clear legal parentage and enforceable contracts, reducing disputes and ensuring child welfare.
- **Ethical Safeguards:** Informed consent and surrogate welfare are helped along by judicial scrutiny in Greece and the UK, and by regulated agency procedures in the US and Canada.
- **Cost and Accessibility:** International intended parents are drawn to surrogacy possibilities in Kenya and Georgia because of their cost-effectiveness and high success rates.³⁶

Emerging International Standards:

Surrogacy laws are changing rapidly over the world, especially in international circumstances. Instead of trying to dictate whether surrogacy is lawful, international organisations and courts

³⁵ *Where in the World Is Surrogacy Allowed?*, Brilliant Beginnings (n.d.), <https://brilliantbeginnings.co.uk/international-surrogacy-options/>.

³⁶ *Where in the World Is Surrogacy Allowed?*, Brilliant Beginnings (n.d.). Supra.

are trying to solve the complicated problems that develop when the intended parents and children live in separate countries. Ensuring that the legal tie between intended parents and children born via surrogacy is uniformly recognised across borders is the primary focus of these efforts. The Hague Conference on Private International Law (HCCH) is spearheading this effort, and it has been guiding expert talks on the topic of surrogacy law's application to international private law since 2015. In order to discuss the best way to establish and recognise legal paternity in surrogacy agreements that cross national lines, these events have brought together representatives from different areas. Mainly, we want to produce a standardised legal document that makes establishing legal parenthood across nations easier and more predictable. With this in place, there would be less chance of children being left without a legally recognised parent or being stateless, which would be safer for everyone. Crucially, the HCCH takes no stance on the matter of surrogacy. Rather, in accordance with the principles outlined in the United Nations Convention on the Rights of the Child, it is mandated to provide continuity and acknowledgement of parenthood while putting the child's wellbeing at the centre. Concurrently, the European Parliamentary Research Service has stressed the need for a unified judicial reaction to international surrogacy. The European Union briefing drew on earlier Hague Conventions on civil cooperation and adoption to propose a comparable legal instrument that may facilitate the acknowledgement of parentage and the mitigation of disputes between national laws. On the other hand, it emphasises the significance of protecting the legal status, rights, and family stability of children born under such arrangements while also preserving national sovereignty.³⁷

The Working Group of the Hague Conference on Private International Law (HCCH) met for the fourth time in April 2025 to continue the work on an international instrument for the acknowledgement of legal parentage, with a focus on surrogacy cases that transcend international borders. We anticipate holding at least one more session before the end of 2025 to continue the Group's continuing work. At the CGAP conference in March 2026, a detailed report outlining the developments of these conversations is expected. The HCCH's mission is to resolve issues of private international law, such as the recognition and enforcement of

³⁷ Hague Conf. on Priv. Int'l L., *Parentage / Surrogacy Project*, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited June 23, 2025); *Surrogacy: Will the Hague Convention Force Legalization of Surrogacy in Member States?*, Ordo Iuris (July 24, 2023), <https://en.ordoiuris.pl/family-and-marriage/surrogacy-will-hague-convention-force-legalization-surrogacy-member-states>.

parentage across borders, and not to take a normative stand on the question of surrogacy's permissibility or restriction within domestic legal systems, as emphasised by CGAP.³⁸

The intricate nature of contemporary families, which includes same-sex couples and single parents, is prompting some nations to reevaluate their surrogacy rules. This development is indicative of a larger movement towards inclusive and equitable legal recognition of family configurations that do not conform to the conventional nuclear family. Legislators are focusing on clear legislation and ethical supervision due to the concomitant developments in reproductive technologies and evolving societal standards. In addition to being easily available, surrogacy agreements should be open and honest, provide a safe environment, and respect the rights of the intended parents, surrogates, and children.³⁹

On March 24–25, 2025, in Cape Town, the 3rd International Surrogacy Forum convened a diverse group of individuals from across the world to deliberate on the changing landscape of surrogacy. Among them were politicians, researchers, surrogacy specialists, and legal experts. Trends and difficulties in surrogacy regulation in African countries were the centre of attention. Speaking out against the stigmatisation of infertility and surrogacy, several speakers emphasised the increasing importance of clearly defined legal frameworks and the role of the judiciary. The development of pre-birth instructions as a component of the legal procedure for assigning paternity has been emphasised in important contributions from South Africa and Ghana". The rights-oriented and organised approach that is embraced by South African law was discussed by Judge Andre Le Grange of the South African High Court. Bobby Banson filled us updated on the latest developments in Ghana's regulatory environment from his home country. The Reproductive Health Care Bill, introduced by Kenyan lawmaker Millie Grace Akoth Odhimbo Mabona, seeks to improve surrogacy regulation and address the social pressures that people face while trying to conceive. Legal expert Undiga Emuekpere of Nigeria brought attention to the persistent problem of African diaspora families locating gamete donors, which affects their ability to get reproductive healthcare. At the same time, the conference discussed the interplay between surrogacy laws in the United Kingdom and Nigeria,

³⁸ See *Conclusions and Decisions of the 2025 CGAP Meeting: An Overview*, Eur. Ass'n of Priv. Int'l L. Blog (Mar. 7, 2025), <https://eapil.org/2025/03/07/conclusions-and-decisions-of-the-2025-cgap-meeting-an-overview/>; *HCCH Monthly Update – April 2025*, Conflict of Laws (May,1,2025), <https://conflictoflaws.net/2025/hcch-monthly-update-april-2025/>; Hague Conf. on Priv. Int'l L., *Fourth Meeting of the Parentage/Surrogacy Project Working Group*, <https://www.hcch.net/en/news-archive/details/?varevent=1063> (last visited June 23, 2025).

³⁹ *Surrogacy Trends in 2025: What Will Change in Global Surrogacy?*, Acorn Surrogacy (Dec. 2024), <https://acornsurrogacy.com/surrogacy-trends-in-2025-what-will-change-in-global-surrogacy/>.

particularly the procedures that British citizens must follow to satisfy the standards set by British courts. Last but not least, IAFL President Rachel Kelsey updated the audience on the Hague Conference's work on a universal legal instrument governing surrogacy and parentage, which is expected to be finalised in April 2025. The meeting as a whole demonstrated the trend towards surrogacy regulations that are more uniform, inclusive, and morally grounded, particularly in African nations.⁴⁰

Conclusion:

Constitutional rights, gender equality, and changing family dynamics all meet in India's surrogacy legislation. Despite its importance in reducing exploitative and immoral surrogacy operations, the Surrogacy (Regulation) Act, 2021 has caused many to question how far the government should be able to regulate people's reproductive choices. Unwittingly, the legislation bans all types of commercial surrogacy and restricts access to a restricted notion of family, which marginalises transnational intended parent groups, LGBTQ+ persons, and single males, whose rights have been more acknowledged in Indian constitutional law.

Lessons may be learnt by comparing worldwide approaches. It is feasible to craft surrogacy laws that are inclusive, ethical, and protective of all parties involved; countries like Argentina, Greece, and Canada have shown this. In this age of cross-border reproductive arrangements, it is more important than ever to create legal systems that are consistent both locally and globally, as shown by developments like the Hague Conference's continuing work.

An alarming discrepancy becomes apparent upon deeper examination of the surrogacy and adoption rules in India. Current surrogacy laws prohibit single people, particularly single males, from beginning a family via assisted reproduction, despite the fact that these individuals are trusted to adopt and nurture children with care and stability. This discrepancy goes against the Constitutional guarantees of equality and individual liberty and seems unjust. Why should not surrogacy be governed by the same reasoning as adoption, where the safety of the kid is paramount? Modern families and changing societal and moral norms make it impossible to deny certain people the opportunity to have a family just because they are single. India must

⁴⁰ Marisa Allman, *3rd International Surrogacy Forum 2025*, 36 Group (Apr. 1, 2025), <https://36group.co.uk/article/3rd-international-surrogacy-forum-2025/>

end its practice of determining parental eligibility based on marital status if it is serious about promoting rights-based family rules that are inclusive.

As India continues to navigate its path forward, it must ask: Can regulation exist without overreach? Can protection be achieved without exclusion? The solutions may be found by embracing a rights-based, inclusive strategy that gives equal weight to the opinions of intended parents, surrogate mothers, and the children's best interests. It is not only a matter of personal preference; it is a matter of constitutional obligation, ethical responsibility, and a manifestation of our common humanity to review and amend the current surrogacy legislation.