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# EVOLUTION AND REGULATION OF SURROGACY IN INDIA: A LEGAL OVERVIEW WITH SPECIAL REFERENCE TO THE SURROGACY (REGULATION) ACT, 2021

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Surbhi Kumari, PhD Scholar, Sangam University, Bhilwara, Rajasthan

Dr. Omprakash Somkuwar, Assistant Professor, Sangam University

## ABSTRACT

Surrogacy has emerged as a significant reproductive option in contemporary society, particularly for individuals and couples facing infertility or medical constraints. In India, surrogacy practices initially developed in the absence of a dedicated legal framework, resulting in the country becoming a major hub for commercial surrogacy. This unregulated growth gave rise to serious legal, ethical, and social concerns, including the exploitation of economically vulnerable women, commercialization of reproductive labour, and uncertainty regarding parental rights and responsibilities.

In response, the Indian legislature enacted the Surrogacy (Regulation) Act, 2021, fundamentally altering the regulatory approach by prohibiting commercial surrogacy and permitting only altruistic surrogacy under strictly defined conditions. This paper traces the evolution of surrogacy in India and examines the legal framework introduced by the 2021 legislation. Adopting a doctrinal research methodology, the study relies on statutory provisions, judicial decisions, and scholarly literature to present a structured legal overview. Rather than advancing an extensive constitutional critique, the paper seeks to establish a clear conceptual and legislative foundation for future research on surrogacy regulation in India.

**Keywords:** Surrogacy, Assisted Reproductive Technology, Altruistic Surrogacy, Commercial Surrogacy, Surrogacy Regulation, India

## 1. Introduction

Advancements in medical science have transformed the concept of reproduction, making parenthood possible even in cases of infertility or medical incapacity. One such advancement is **surrogacy**, a method of assisted reproduction in which a woman carries and gives birth to a child for another person or couple.<sup>1</sup> While surrogacy offers hope to many intending parents, it also raises serious legal and ethical concerns, particularly relating to women's autonomy, consent, and economic vulnerability.

In India, surrogacy gained prominence in the early 2000s<sup>2</sup> due to comparatively lower medical costs, availability of surrogate mothers, and lack of a strict regulatory framework. Over time, the country came to be described as a global destination for commercial surrogacy. However, this unregulated growth exposed several problems, including exploitation of poor women, involvement of middlemen, lack of legal protection for surrogate mothers, and disputes relating to parentage and citizenship.

Recognizing these challenges, the Indian State gradually moved towards regulating surrogacy. This culminated in the enactment of the *Surrogacy (Regulation) Act, 2021*, which fundamentally altered the legal landscape by banning commercial surrogacy and allowing only altruistic surrogacy under specified conditions. This paper seeks to examine how surrogacy evolved in India and how the law has attempted to regulate it.

## 2. Concept and Forms of Surrogacy

Surrogacy, in simple terms, refers to an arrangement in which a woman agrees to conceive and carry a child on behalf of another individual or couple, with the intention of handing over the child after birth. Depending on the method and nature of the arrangement, surrogacy can be classified into different forms.

### 2.1 Traditional Surrogacy

In traditional surrogacy, the surrogate mother's own egg is used, and conception usually occurs through artificial insemination. As a result, the surrogate is genetically related to the child. This form of surrogacy is now less common due to legal and emotional complexities.<sup>3</sup>

### 2.2 Gestational Surrogacy

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<sup>1</sup> ICMR, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*.

<sup>2</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*.

<sup>3</sup> Law Commission of India, 228th Report on Need for Legislation to Regulate ART Clinics.

Gestational surrogacy involves the implantation of an embryo created through in vitro fertilization (IVF), using the gametes of the intending parents or donors.<sup>4</sup> The surrogate mother has no genetic link to the child. This is the most widely practiced form of surrogacy today and is also recognized under Indian law.

### 2.3 Commercial and Altruistic Surrogacy

Commercial surrogacy involves monetary compensation beyond medical expenses, whereas altruistic surrogacy permits only reimbursement of medical and insurance costs.<sup>5</sup> The distinction between these two forms lies at the heart of India's regulatory approach.

### 3. Evolution of Surrogacy in India

India did not have any specific law governing surrogacy for a long period. In the absence of statutory regulation, surrogacy arrangements were largely governed by contracts and medical practices.

The Supreme Court of India first acknowledged surrogacy in **Baby Manji Yamada v. Union of India (2008)**,<sup>6</sup> where it recognized commercial surrogacy as a legal practice in India at that time. Following this, India witnessed rapid growth in fertility clinics catering to both domestic and international clients.<sup>7</sup> However, several controversies soon emerged, including abandonment of children, exploitation of surrogate mothers, and issues relating to citizenship of children born through surrogacy.

In response, the Indian Council of Medical Research (ICMR) issued guidelines, but these were non-binding and insufficient to address the growing concerns. Gradually, the need for a comprehensive legislative framework became evident.

### 4. Need for Regulation

The unregulated surrogacy industry highlighted serious concerns:

- Lack of informed consent and autonomy of surrogate mothers
- Economic exploitation of women from marginalized backgrounds
- Absence of legal clarity regarding parentage and custody
- Role of intermediaries and unethical practices

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<sup>4</sup> Assisted Reproductive Technology (Regulation) Act, 2021.

<sup>5</sup> Surrogacy (Regulation) Act, 2021.

<sup>6</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

<sup>7</sup> Sama Resource Group for Women and Health, *Birthing a Market: A Study on Commercial Surrogacy in India*.

These issues compelled the State to intervene and frame a law aimed at protecting surrogate mothers and regulating assisted reproductive practices.<sup>8</sup>

## 5. Overview of the Surrogacy (Regulation) Act, 2021

After years of debate and multiple draft bills, the Indian Parliament enacted the *Surrogacy (Regulation) Act, 2021* with the stated objective of preventing exploitation of surrogate mothers and ensuring ethical surrogacy practices.<sup>9</sup> The Act represents a clear shift in policy—from a largely unregulated and market-driven system to a **strictly controlled, welfare-oriented framework**.

The Act applies across India and seeks to regulate surrogacy clinics, procedures, and eligibility conditions for both surrogate mothers and intending parents. One of its most significant features is the **complete prohibition of commercial surrogacy**, permitting only altruistic surrogacy under specific circumstances.

The legislation must be understood not merely as a medical law but as a **social welfare statute**, aimed at addressing concerns of exploitation, trafficking, and misuse that had arisen during the period of unregulated commercial surrogacy.

## 6. Objectives of the Act

The Surrogacy (Regulation) Act, 2021 outlines several key objectives:

- **To prohibit commercial surrogacy** and related exploitative practices.
- **To allow altruistic surrogacy** in a regulated manner.
- **To protect the rights and health of surrogate mothers.**
- **To ensure ethical practices** in assisted reproductive technologies.
- **To prevent misuse, trafficking, and malafide arrangements** under the guise of surrogacy.

By prioritizing protection, the Act reflects the State's concern for vulnerable women, particularly those from economically weaker sections who were disproportionately represented as surrogate mothers during the commercial surrogacy era.<sup>10</sup>

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<sup>8</sup> Law Commission of India, 228th Report.

<sup>9</sup> Surrogacy (Regulation) Act, 2021

<sup>10</sup> Statement of Objects and Reasons, Surrogacy (Regulation) Bill, 2019.

## 7. Key Features of the Surrogacy (Regulation) Act, 2021

### 7.1 Ban on Commercial Surrogacy

The Act explicitly prohibits commercial surrogacy, including any form of monetary compensation beyond medical expenses and insurance coverage. Any advertising or promotion of commercial surrogacy is also barred. This provision marks a decisive departure from earlier practices.<sup>11</sup>

### 7.2 Permissibility of Altruistic Surrogacy

Only altruistic surrogacy is permitted, and even this is subject to strict conditions. The surrogate mother must be a close relative of the intending couple and must have previously given birth to a child of her own. These requirements are intended to prevent coercion and exploitation.

### 7.3 Eligibility of Intending Parents

The Act allows surrogacy only for:

- Heterosexual married couples who meet age and medical criteria
- Indian citizens

Single parents, live-in partners, foreign nationals, and same-sex couples are excluded. While this paper does not critically analyze these exclusions in depth, it notes that the Act adopts a **narrow definition of family**.<sup>12</sup>

### 7.4 Establishment of Regulatory Authorities

The Act provides for:

- National Surrogacy Board
- State Surrogacy Boards
- Appropriate Authorities

These bodies are responsible for policy formulation, monitoring, registration of clinics, and enforcement of the Act.<sup>13</sup>

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<sup>11</sup> Section 4, Surrogacy (Regulation) Act, 2021.

<sup>12</sup> Sections 2(g), 4(ii), Surrogacy (Regulation) Act, 2021.

<sup>13</sup> Sections 15–20, Surrogacy (Regulation) Act, 2021.

## 7.5 Registration of Surrogacy Clinics

All surrogacy clinics must be registered and comply with prescribed standards. Unregistered clinics or violations of norms attract penalties, including imprisonment and fines.

## 8. Protection of Surrogate Mothers

One of the central justifications for the Act is the protection of surrogate mothers. The legislation includes provisions relating to:

- Mandatory medical fitness
- Insurance coverage for a defined period
- Limits on the number of times a woman can act as a surrogate<sup>14</sup>

These safeguards aim to reduce physical and emotional harm. However, the law largely assumes that prohibition of payment itself is sufficient to ensure protection, an assumption that has been debated in academic discourse.

## 9. Possibility of Misuse and Malafide Practices

Although the Act is designed to prevent exploitation, strict restrictions may give rise to **unintended consequences**.<sup>15</sup> There is a risk that:

- Commercial surrogacy may continue in **hidden or informal forms**
- Middlemen may operate illegally
- Financial transactions may occur unofficially, beyond legal oversight

The absence of compensation beyond medical expenses may also discourage genuine participants, potentially pushing intending parents towards **cross-border surrogacy** or underground arrangements. This highlights the importance of effective enforcement and transparent regulatory mechanisms.

## 10. Significance of the 2021 Act

The Surrogacy (Regulation) Act, 2021 is significant because it:

- Establishes the **first comprehensive legal framework** for surrogacy in India
- Signals a **protective and welfare-oriented approach**
- Attempts to balance medical advancement with ethical considerations

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<sup>14</sup> Sections 4(iii) & 10, Surrogacy (Regulation) Act, 2021.

<sup>15</sup> Radhika Rao, "Surrogacy Law in India: Conflicts and Challenges", Journal of Law & Policy.

As a foundational law, it sets the stage for further constitutional, ethical, and comparative analysis, which will be explored in subsequent research papers.

## **11. Conclusion**

Surrogacy in India has evolved from an unregulated practice to a strictly controlled legal regime. The Surrogacy (Regulation) Act, 2021 represents the State's attempt to address exploitation, protect surrogate mothers, and regulate assisted reproductive technologies. While the Act prioritizes protection and ethical concerns, it also raises important questions regarding autonomy, inclusivity, and practical implementation.

This paper has provided a **legal overview of the evolution and regulation of surrogacy in India**, focusing on the background, objectives, and framework of the 2021 Act. As a foundational study, it lays the groundwork for deeper constitutional, ethical, and comparative critiques, which form the basis of future research on surrogacy laws in India.