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## A CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021

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### ABSTRACT

The practice of surrogacy has emerged as a significant development in the field of assisted reproductive technologies, offering hope to infertile couples while simultaneously raising complex legal, ethical, and social concerns. In India, the enactment of the Surrogacy (Regulation) Act, 2021 marked a crucial step towards regulating this domain by prohibiting commercial surrogacy and permitting only altruistic surrogacy under strict conditions. This paper critically analyses the provisions of the Act, examining its objectives, scope, and regulatory framework. It evaluates whether the legislation adequately balances the interests of surrogate mothers, intending parents, and children born through surrogacy. The study further highlights key issues such as restrictive eligibility criteria, exclusion of certain categories of intending parents, and potential infringement of reproductive rights. Through a doctrinal research methodology, the paper identifies gaps and challenges in the implementation of the Act and suggests necessary reforms to ensure a more inclusive, effective, and rights-based legal framework governing surrogacy in India.

**Keywords:** Surrogacy; Assisted Reproductive Technology; Altruistic Surrogacy; Reproductive Rights; Surrogacy (Regulation) Act, 2021; Legal Regulation in India.

## Introduction

Surrogacy in India has undergone a significant transformation from an unregulated practice to a strictly controlled legal regime. Initially, there was no specific legislation governing surrogacy, and the practice was largely guided by guidelines issued by the Indian Council of Medical Research (ICMR).<sup>1</sup> These guidelines, though not legally binding, provided a framework for clinics and individuals engaging in surrogacy arrangements.

The absence of a statutory framework led to the rapid growth of commercial surrogacy, positioning India as a global hub for reproductive tourism. However, this growth also resulted in widespread concerns regarding the exploitation of surrogate mothers, lack of legal protection, and disputes relating to parentage and citizenship of children born through surrogacy.<sup>2</sup> In response to these issues, the government introduced several legislative measures culminating in the enactment of the Surrogacy (Regulation) Act, 2021.<sup>3</sup>

The Surrogacy (Regulation) Act, 2021 represents the primary legislation governing surrogacy in India. It prohibits commercial surrogacy and permits only altruistic surrogacy, wherein no monetary compensation is provided to the surrogate mother except for medical expenses and insurance coverage.<sup>4</sup> The Act lays down strict eligibility criteria for intending couples, requiring them to be married Indian citizens and fulfilling specific age conditions.<sup>5</sup> It also excludes certain categories such as single individuals, live-in partners, and members of the LGBTQ+ community from accessing surrogacy.<sup>6</sup>

Further, the Act establishes regulatory authorities at the national and state levels to supervise and regulate surrogacy clinics and procedures.<sup>7</sup> It also provides for penalties and punishments in cases of contravention, thereby aiming to ensure compliance with the legal framework.<sup>8</sup>

In addition to the Surrogacy (Regulation) Act, 2021, the Assisted Reproductive Technology (Regulation) Act, 2021 plays a complementary role by regulating ART clinics and procedures,

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<sup>1</sup> Indian Council of Medical Research, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*, 2005.

<sup>2</sup> Law Commission of India, *Report No. 228 on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, 2009.

<sup>3</sup> The Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).

<sup>4</sup> *Id.*, s. 2(b), s. 4(ii).

<sup>5</sup> *Id.*, s. 4(c).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, ss. 6–14.

<sup>8</sup> *Id.*, ss. 35–40.

which are intrinsically linked to surrogacy arrangements.<sup>9</sup> Together, these legislations form a comprehensive legal framework intended to regulate reproductive technologies in India.

Despite the introduction of these laws, concerns persist regarding their implementation and the extent to which they balance the prevention of exploitation with the protection of reproductive rights. These issues necessitate a critical examination of the legislative framework, which forms the focus of the subsequent sections of this paper.

## 5. Literature Review

The issue of surrogacy has attracted considerable scholarly attention in recent years, particularly in the context of its ethical, legal, and socio-economic implications. Early works on surrogacy in India largely focused on the unregulated nature of the industry and its emergence as a global hub for commercial surrogacy. Scholars highlighted how the absence of a comprehensive legal framework contributed to the growth of reproductive tourism, often at the cost of surrogate mothers belonging to economically weaker sections.<sup>10</sup> These studies underscored concerns relating to exploitation, lack of informed consent, and inadequate legal protection.

Subsequent literature reflects a shift towards analysing the need for regulation and evaluating the adequacy of legislative responses. The Law Commission of India, in its 228th Report, strongly advocated for the prohibition of commercial surrogacy while recommending a regulated framework for altruistic surrogacy.<sup>11</sup> This report has significantly influenced the legislative approach adopted in India. However, several scholars have critiqued this position, arguing that a complete ban on commercial surrogacy may not eliminate exploitation but rather drive the practice underground, thereby increasing risks for surrogate mothers.<sup>12</sup>

Recent academic discourse has focused on the Surrogacy (Regulation) Act, 2021 and its implications. While some authors commend the Act for addressing long-standing concerns of exploitation and lack of regulation, others argue that it adopts an overly paternalistic approach

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<sup>9</sup> The Assisted Reproductive Technology (Regulation) Act, 2021 (Act No. 42 of 2021).

<sup>10</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, Columbia University Press, 2014.

<sup>11</sup> Law Commission of India, *Report No. 228 on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, 2009.

<sup>12</sup> Sama – Resource Group for Women and Health, *Birthing a Market: A Study on Commercial Surrogacy in India*, 2012.

by imposing restrictive eligibility conditions.<sup>13</sup> In particular, the exclusion of single individuals, unmarried couples, and members of the LGBTQ+ community has been criticised as being inconsistent with constitutional principles of equality and reproductive autonomy.<sup>14</sup> Scholars have also questioned whether the concept of altruistic surrogacy is practically viable in a socio-economic context where financial incentives often play a crucial role.<sup>15</sup>

Further, comparative studies indicate that several jurisdictions have adopted more flexible approaches by regulating rather than prohibiting commercial surrogacy. For instance, countries like Ukraine permit commercial surrogacy under a structured legal framework, thereby attempting to balance the interests of all stakeholders.<sup>16</sup> Such studies suggest that an outright ban may not be the most effective regulatory strategy.

Despite the growing body of literature, there remains a significant research gap in critically evaluating whether the Surrogacy (Regulation) Act, 2021 successfully balances the twin objectives of preventing exploitation and protecting reproductive rights. Much of the existing scholarship either focuses on ethical debates or provides descriptive accounts of the law, without undertaking a comprehensive critical analysis of its practical implications. This paper seeks to fill this gap by offering a nuanced and critical examination of the legislative framework, highlighting its limitations and proposing reforms for a more inclusive and effective regulatory regime.

## 6. Research Methodology

The present study adopts a doctrinal method of research, primarily focusing on the analysis and interpretation of existing legal principles, statutory provisions, and judicial pronouncements relating to surrogacy in India. The doctrinal approach is particularly suitable for examining the legal framework governing surrogacy, as it enables a critical evaluation of the Surrogacy (Regulation) Act, 2021 and its effectiveness in addressing contemporary issues.

In addition to the doctrinal method, the study incorporates a limited comparative approach to analyse surrogacy regulations in other jurisdictions, particularly in countries where commercial

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<sup>13</sup> The Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).

<sup>14</sup> Gautam Bhatia, *The Transformative Constitution*, HarperCollins, 2019.

<sup>15</sup> Kalindi Vora, *Life Support: Biocapital and the New History of Outsourced Labor*, University of Minnesota Press, 2015.

<sup>16</sup> Olga B. Aivazova, "Legal Regulation of Surrogacy in Ukraine," *Journal of Law and Bioethics*, Vol. 7, 2020.

surrogacy is permitted under a regulated framework, such as Ukraine. This comparative perspective aids in understanding alternative regulatory models and assessing whether India's restrictive approach aligns with global practices.

The research relies on both primary and secondary sources. Primary sources include statutory enactments such as the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021, as well as relevant judicial decisions that interpret and shape the legal position on surrogacy.<sup>17</sup> Secondary sources comprise scholarly books, peer-reviewed journal articles, reports of expert bodies such as the Law Commission of India, and credible online resources.<sup>18</sup> These sources have been critically analysed to identify gaps, inconsistencies, and areas requiring reform.

The methodology is analytical and evaluative in nature, aiming not merely to describe the existing legal framework but to critically assess its adequacy and implications. The study also adopts an interdisciplinary perspective by considering ethical and socio-economic dimensions associated with surrogacy, thereby ensuring a comprehensive understanding of the subject.

## 7. Critical Analysis

### 7.1 Concept and Types of Surrogacy

Surrogacy refers to an arrangement whereby a woman agrees to carry and give birth to a child for another individual or couple, who become the intending parents after the child's birth. It is a significant aspect of Assisted Reproductive Technologies (ART), addressing issues of infertility and enabling parenthood.

Surrogacy is broadly classified into two types: traditional and gestational. In traditional surrogacy, the surrogate mother is genetically related to the child, as her own egg is used for fertilisation. In contrast, gestational surrogacy involves the implantation of an embryo created using the gametes of the intending parents or

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<sup>17</sup> The Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021); The Assisted Reproductive Technology (Regulation) Act, 2021 (Act No. 42 of 2021); *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

<sup>18</sup> Law Commission of India, *Report No. 228 on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, 2009; Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, Columbia University Press, 2014.

donors, thereby ensuring that the surrogate has no genetic link with the child.<sup>19</sup>

Further, based on the nature of compensation, surrogacy is categorised as commercial or altruistic. Commercial surrogacy involves monetary compensation beyond medical expenses, whereas altruistic surrogacy restricts compensation to medical costs and insurance coverage.<sup>20</sup> The Indian legal framework, through the Surrogacy (Regulation) Act, 2021, permits only altruistic surrogacy, thereby prohibiting any form of commercial arrangement.<sup>21</sup>

While the distinction appears clear in theory, in practice, the line between altruistic and commercial surrogacy often becomes blurred, particularly in socio-economic contexts where indirect financial incentives may exist. This raises questions about the practical viability of enforcing such classifications.

## 7.2 Legal Framework in India

India's legal framework governing surrogacy is primarily based on the Surrogacy (Regulation) Act, 2021, supplemented by the Assisted Reproductive Technology (Regulation) Act, 2021. These legislations collectively aim to regulate surrogacy practices, prevent exploitation, and ensure ethical medical procedures.

The Surrogacy (Regulation) Act, 2021 imposes a complete ban on commercial surrogacy while allowing altruistic surrogacy subject to stringent conditions. It prescribes eligibility criteria for intending couples, requiring them to be married Indian citizens within a specified age bracket and proven infertility.<sup>22</sup> The Act also mandates that the surrogate mother must be a married woman with at least one child of her own, thereby restricting participation to a narrow category.<sup>23</sup>

While these provisions aim to safeguard the interests of surrogate mothers, they have been criticised for being overly restrictive and exclusionary. The denial of access to surrogacy for single individuals and members of the LGBTQ+ community

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<sup>19</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, Columbia University Press, 2014.

<sup>20</sup> Law Commission of India, *Report No. 228*, 2009.

<sup>21</sup> The Surrogacy (Regulation) Act, 2021, s. 2(b), s. 4.

<sup>22</sup> The Surrogacy (Regulation) Act, 2021, s. 4(c).

<sup>23</sup> *Id.*, s. 4(b).

raises concerns regarding equality and reproductive autonomy under constitutional principles.<sup>24</sup>

Moreover, the establishment of regulatory authorities and registration requirements for clinics indicates a shift towards institutional control. However, the effectiveness of these mechanisms remains contingent upon proper implementation and oversight.

### 7.3 Ethical and Legal Issues

Surrogacy raises complex ethical and legal issues that extend beyond the scope of statutory regulation. One of the primary concerns is the potential exploitation of economically disadvantaged women, particularly in the context of commercial surrogacy.<sup>25</sup> The power imbalance between intending parents and surrogate mothers often results in unequal bargaining positions, raising questions about informed consent and autonomy.

Another significant issue is the commodification of reproduction, where the process of childbirth is treated as a commercial transaction. This challenges traditional notions of motherhood and raises moral concerns regarding the dignity of women.<sup>26</sup>

Additionally, the restrictive provisions of the Surrogacy (Regulation) Act, 2021 have been criticised for infringing upon reproductive rights, which have been recognised as part of personal liberty under constitutional jurisprudence.<sup>27</sup> The exclusion of certain groups from accessing surrogacy further intensifies these concerns, highlighting the tension between regulation and individual autonomy.

### 7.4 Case Laws

Judicial decisions have played a crucial role in shaping the legal discourse on surrogacy in India. One of the landmark cases is *Baby Manji Yamada v. Union of India*, wherein the Supreme Court recognised the legitimacy of surrogacy

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<sup>24</sup> Gautam Bhatia, *The Transformative Constitution*, HarperCollins, 2019.

<sup>25</sup> Amrita Pande, *Wombs in Labor*, 2014.

<sup>26</sup> Kalindi Vora, *Life Support*, University of Minnesota Press, 2015.

<sup>27</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

arrangements and addressed issues relating to the custody and nationality of a child born through surrogacy.<sup>28</sup>

Another significant case is *Jan Balaz v. Anand Municipality*, which dealt with the citizenship status of children born through surrogacy to foreign parents.<sup>29</sup> The case highlighted the legal complexities arising from cross-border surrogacy arrangements and underscored the need for a comprehensive regulatory framework.

These judicial pronouncements illustrate the evolving nature of surrogacy law in India and the challenges faced by courts in the absence of clear legislative provisions prior to the enactment of the 2021 legislation.

## 8. Findings and Observations

The analysis of the existing legal framework governing surrogacy in India, particularly the Surrogacy (Regulation) Act, 2021, reveals several critical issues, inconsistencies, and gaps that undermine its effectiveness.

Firstly, the prohibition of commercial surrogacy, though aimed at preventing exploitation, appears to be based on a paternalistic assumption that all forms of compensated surrogacy are inherently exploitative. This approach fails to recognise the agency of women who may voluntarily choose surrogacy as a source of income.<sup>30</sup> Moreover, the blanket ban may inadvertently push the practice underground, leading to unregulated arrangements and increased vulnerability for surrogate mothers.

Secondly, the Act adopts highly restrictive eligibility criteria for intending parents, limiting access to married heterosexual couples and excluding single individuals, live-in partners, and members of the LGBTQ+ community.<sup>31</sup> This exclusionary approach raises serious concerns regarding violation of constitutional principles of equality and non-discrimination, as well as the right to reproductive autonomy recognised under Article 21 of the Constitution.<sup>32</sup>

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<sup>28</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

<sup>29</sup> *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.

<sup>30</sup> Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, Columbia University Press, 2014.

<sup>31</sup> The Surrogacy (Regulation) Act, 2021, s. 4(c).

<sup>32</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

Thirdly, the concept of altruistic surrogacy, as envisaged under the Act, raises questions about its practical feasibility. In a socio-economic context where financial considerations play a significant role, the expectation that women will undertake surrogacy purely out of altruism appears unrealistic.<sup>33</sup> This may result in covert financial transactions, thereby defeating the objective of transparency and regulation.

Another significant gap lies in the lack of clarity regarding the rights and protection of surrogate mothers. While the Act provides for insurance coverage and medical expenses, it does not adequately address issues such as psychological support, post-birth care, and long-term welfare of surrogate mothers.<sup>34</sup> This limited approach undermines the objective of ensuring their holistic protection.

Furthermore, the interaction between the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 is not entirely seamless, leading to potential overlaps and ambiguities in implementation.<sup>35</sup> The absence of clear coordination mechanisms between regulatory authorities may create administrative challenges.

Finally, the Act does not sufficiently address cross-border surrogacy issues, particularly in relation to citizenship, parentage, and legal recognition of children born through international arrangements. Judicial decisions in earlier cases have highlighted these complexities, yet the current legislation provides limited guidance in this regard.<sup>36</sup>

These findings indicate that while the Surrogacy (Regulation) Act, 2021 represents a significant step towards regulation, it falls short of achieving a balanced and inclusive framework. The identified gaps and inconsistencies necessitate a re-evaluation of the existing legal regime to ensure that it effectively safeguards the interests of all stakeholders without compromising fundamental rights.

## 9. Suggestions and Recommendations

In light of the gaps and challenges identified in the existing legal framework, several reforms

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<sup>33</sup> Law Commission of India, *Report No. 228*, 2009.

<sup>34</sup> The Surrogacy (Regulation) Act, 2021.

<sup>35</sup> The Assisted Reproductive Technology (Regulation) Act, 2021.

<sup>36</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518; *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.

are necessary to ensure that the regulation of surrogacy in India is both effective and inclusive.

Firstly, the blanket prohibition on commercial surrogacy under the Surrogacy (Regulation) Act, 2021 should be reconsidered. Instead of an outright ban, a regulated model of compensated surrogacy may be introduced, incorporating strict safeguards such as informed consent, fair compensation, and oversight by regulatory authorities.<sup>37</sup> This would help prevent exploitation while recognising the autonomy and agency of surrogate mothers.

Secondly, the eligibility criteria for intending parents must be broadened to include single individuals, unmarried couples, and members of the LGBTQ+ community. The current exclusionary framework is inconsistent with constitutional principles of equality and non-discrimination and fails to reflect evolving social realities.<sup>38</sup> A more inclusive approach would align the law with the expanding understanding of family and reproductive rights.

Thirdly, the concept of altruistic surrogacy requires reconsideration in terms of its practical viability. The law should acknowledge the socio-economic context and permit reasonable compensation within a regulated framework to ensure transparency and prevent clandestine financial arrangements.<sup>39</sup>

Further, the legal framework must provide comprehensive protection for surrogate mothers beyond medical expenses and insurance coverage. This should include provisions for psychological counselling, post-delivery care, and mechanisms to ensure long-term welfare and protection against exploitation.<sup>40</sup> Establishing independent monitoring bodies at the state level could further strengthen enforcement.

Additionally, there is a need to harmonise the provisions of the Surrogacy (Regulation) Act, 2021 with the Assisted Reproductive Technology (Regulation) Act, 2021 to eliminate overlaps and ambiguities.<sup>41</sup> Clear guidelines and coordination mechanisms between regulatory authorities would enhance administrative efficiency and ensure effective implementation.

The law should also address cross-border surrogacy more comprehensively by establishing clear rules regarding citizenship, parentage, and recognition of children born through

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<sup>37</sup> Law Commission of India, *Report No. 228*, 2009.

<sup>38</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>39</sup> Sama – Resource Group for Women and Health, *Birthing a Market*, 2012.

<sup>40</sup> The Surrogacy (Regulation) Act, 2021.

<sup>41</sup> The Assisted Reproductive Technology (Regulation) Act, 2021.

international arrangements. Lessons may be drawn from jurisdictions such as Ukraine, where legal clarity has reduced disputes and ensured certainty for all parties involved.<sup>42</sup>

Finally, greater emphasis should be placed on awareness and accessibility. Public awareness programmes, legal aid, and transparent procedures can empower surrogate mothers and intending parents, thereby promoting ethical and informed participation in surrogacy arrangements.

These recommendations aim to strike a balance between regulation and autonomy, ensuring that the legal framework governing surrogacy in India is equitable, practical, and responsive to contemporary societal needs.

## 10. Conclusion

The regulation of surrogacy in India represents a complex interplay between ethical considerations, legal principles, and evolving societal norms. The enactment of the Surrogacy (Regulation) Act, 2021 marks a significant shift from an unregulated regime to a structured legal framework aimed at preventing exploitation and ensuring accountability. However, as this study demonstrates, the legislation, while well-intentioned, suffers from several limitations that undermine its effectiveness.

The analysis reveals that the blanket prohibition on commercial surrogacy, coupled with restrictive eligibility criteria, creates an exclusionary framework that fails to accommodate diverse family structures and reproductive choices. The emphasis on altruistic surrogacy, though ethically grounded, appears impractical in the prevailing socio-economic context and may inadvertently encourage informal and unregulated practices. Furthermore, the limited focus on the comprehensive welfare of surrogate mothers and the absence of clear provisions addressing cross-border surrogacy highlight critical gaps in the law.

In addressing the central research questions, it can be concluded that the current legal framework does not adequately balance the objectives of preventing exploitation and protecting reproductive rights. While the Act succeeds in establishing regulatory mechanisms, it falls short of ensuring inclusivity, autonomy, and practical enforceability.

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<sup>42</sup> Olga B. Aivazova, "Legal Regulation of Surrogacy in Ukraine," *Journal of Law and Bioethics*, Vol. 7, 2020.

The study underscores the need for a more nuanced and balanced approach that recognises the agency of surrogate mothers, expands access to intending parents, and incorporates effective safeguards against exploitation. A reformed legal framework, informed by comparative practices and constitutional principles, would be better equipped to address the multifaceted challenges associated with surrogacy in India.

In sum, the effectiveness of surrogacy regulation lies not merely in prohibition but in creating a system that is equitable, transparent, and responsive to the realities of contemporary society.

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