

Surrogacy in India: Constitutional Challenges, Ethical Concerns, and Comparative Legal Perspectives

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Abstract

The *Surrogacy (Regulation) Act, 2021* represents a major shift in India's approach to assisted reproduction, replacing its commercial surrogacy industry with a strictly regulated altruistic model. It permits surrogacy only for Indian heterosexual married couples and Overseas Citizens of India (OCI) cardholders with certified medical indications, while criminalizing commercial surrogacy entirely. The exclusion of single individuals, live-in partners, and LGBTQ+ community members has raised constitutional concerns under Article 21 and questions of equality and non-discrimination. Although the Act aims to prevent exploitation, protect surrogates and children, and ensure ethical transparency, its restrictive framework has created barriers, lacks provisions for mental health support, and stands in contrast to inclusive models in countries such as Canada, the United Kingdom, Israel, and several U.S. states. Recent policy changes, such as allowing married couples with medical conditions to use donor gametes, reflect the evolving nature of surrogacy regulation. This paper critically evaluates the Act's socio-legal implications, its alignment with constitutional rights, and its position within global surrogacy practices, proposing reforms to promote fairness, inclusivity, and balanced protection for all stakeholders.

Keywords: Surrogacy (Regulation) Act, 2021; Altruistic Surrogacy; Fundamental Rights; LGBTQIA+; Surrogacy Clinics; Intended Couples; Comparative Law.

1. INTRODUCTION

The *Surrogacy (Regulation) Act, 2021* was introduced to safeguard the interests of surrogate mothers, ensure the well-being of children born through surrogacy, and uphold ethical standards in assisted reproductive technology (ART) practices. The legislation imposes strict eligibility requirements, procedural safeguards, and penalties for violations. This research critically examines the Act's legal framework, particularly its regulation of altruistic surrogacy, along with its socio-legal implications and economic dimensions. Historically, many commercial surrogates in India have come from financially disadvantaged backgrounds, often entering into agreements without fully understanding their terms or consequences due to the complexity of contracts. In some cases, control over their reproductive choices has been exercised by their spouses, leading to exploitation. Critics argue that the prohibition of commercial surrogacy may infringe upon the constitutional right to personal liberty under Article 21 and disproportionately exclude LGBTQIA+ individuals, single persons, and widowed or divorced men. Globalization, coupled with low costs and minimal regulation, once exposed widespread abuse in India's surrogacy industry; however, the blanket ban on commercial surrogacy adversely impacted both domestic and international intended parents. From an economic standpoint, applying the Coase Theorem suggests that rather than prohibiting commercial surrogacy, the focus should be on eliminating transaction costs that impede the fair allocation of resources. Measures such as thorough background and health checks, robust legal protections for surrogates, strict penalties for misconduct, specialized insurance coverage, and comprehensive education on rights and risks could address exploitation without banning the practice outright. The central

challenge in surrogacy policy remains balancing competing interests: the state's duty to protect surrogates and children from harm, and individuals' reproductive autonomy.¹

The Act, which came into force in late 2021, marks a significant departure from India's previously unregulated commercial surrogacy market, replacing it with a tightly controlled altruistic model. Surrogacy is now restricted to Indian heterosexual married couples and Overseas Citizens of India (OCI) cardholders with verified medical needs. Commercial surrogacy—defined as arrangements involving payment beyond medical expenses and insurance—is explicitly prohibited and criminalized. The law further requires intended parents to meet marital, medical, and age criteria, while surrogates must be married women with at least one biological child, and may act as surrogates only once. These provisions aim to prevent exploitation, ensure transparency, and establish clear legal standards for parentage and custody. This paper explores the scope and implementation of the *Surrogacy (Regulation) Act, 2021*, critically assessing its constitutional validity, its alignment with international surrogacy norms, and its impact on the rights, welfare, and autonomy of all stakeholders involved in altruistic surrogacy in India.²

2. ETHICAL PERSPECTIVES ON SURROGACY: AUTONOMY, COERCION, AND FEMINIST CRITIQUES

Surrogacy in India raises intricate human rights concerns, particularly regarding whether women engage in it as an exercise of genuine autonomy or under familial compulsion—often from husbands or mothers-in-law—to fulfill material and financial needs. Feminist critiques of commercial surrogacy argue that it commodifies women's reproductive capacities, likening it to prostitution and framing surrogacy contracts as dehumanizing for disregarding the surrogate's perspective on her pregnancy. Conversely, altruistic surrogacy is often viewed as a compassionate and empowering option, while commercial arrangements may also provide psychological benefits, such as aiding emotional detachment from the fetus. Assisted reproductive technologies (ART) more broadly implicate rights to dignity, autonomy, privacy, and self-determination, placing them squarely within the ambit of Article 21 of the Constitution, which guarantees the right to life and personal liberty. Restrictions on surrogacy also raise questions under Articles 14 and 15, which enshrine equality before the law and prohibit discrimination, particularly given the exclusion of single persons, LGBTQIA+ individuals, and other non-traditional families. Artificial insemination, whether through a spouse's sperm (AIH) or donor sperm (AID), further prompts ethical debates, especially regarding donor anonymity and the tension between a parent's right to withhold genetic information and a child's right to know their origins, as recognized in Article 7 of the *United Nations Convention on the Rights of the Child* (1989). Collectively, these issues call for a surrogacy framework in India that safeguards against exploitation while upholding constitutional guarantees, responds to evolving societal norms, and aligns with inclusive global practices.³ The ethical debate surrounding surrogacy in India is deeply intertwined with questions of autonomy, consent, and the potential for coercion. While surrogacy can be framed as an exercise of reproductive autonomy—allowing women to make independent choices about their bodies—it is equally important to acknowledge the socio-economic realities in which many surrogates live. In numerous cases, women from economically disadvantaged backgrounds may enter surrogacy arrangements not out of free will but under direct or indirect pressure from spouses, in-laws, or societal expectations to contribute financially. This dynamic raises doubts about whether such consent is truly informed and voluntary.⁴

From a feminist perspective, commercial surrogacy has been criticized as a form of reproductive exploitation, commodifying women's bodies and reducing them to instruments for fulfilling the desires of others. This commodification, critics argue, reinforces patriarchal control and perpetuates gender inequality by disproportionately subjecting women—particularly those from marginalized communities—to reproductive labor. On the other hand, proponents contend that surrogacy, when governed by robust safeguards, can be a legitimate and empowering economic

¹A Critical Analysis of The Surrogacy (Regulation) and The Assisted Reproductive Technology (Regulation) Act 2021 of India, 11 *Int'l J. L.* 45 (2025), <https://www.lawjournals.org/assets/archives/2025/vol11issue7/11149.pdf>.

²Adsure RV, 'Surrogacy – Socio-Economic Implications (Positive & Negative Impact on the Women as well as on Society)' in Dr Bimal N Patel, Dr Mamata Biswal and Dr Anand Kumar Tripathi.

³Kevin T, 'The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law' (2008) 41 *Creighton Law Review* 185-206.

⁴Sharma, A. (2016). Reproductive autonomy and surrogacy in India: Debates and discourse. *Indian Journal of Medical Ethics*, 1(3), 182–188. <https://doi.org/10.20529/IJME.2016.051>.

opportunity, offering women financial independence and a sense of purpose in helping others become parents.⁵ Altruistic surrogacy, in particular, is often viewed more favorably within ethical discourse, as it is motivated by compassion rather than monetary gain. However, even altruistic arrangements may be susceptible to subtle forms of coercion within family or community networks. The challenge, therefore, lies in ensuring that all surrogacy arrangements—commercial or altruistic—are grounded in genuine consent, transparency, and the protection of surrogate mothers from exploitation. Achieving this balance requires not only legal oversight but also a broader societal shift toward respecting women's reproductive autonomy while dismantling the structural inequalities that constrain it. Victimology theory provides an additional lens, categorizing surrogates in exploitative arrangements as **secondary victims**—individuals whose victimization results from socio-economic systems, cultural norms, or legal structures rather than direct criminal acts. The theory highlights how women in surrogacy arrangements may lack the bargaining power to negotiate fair terms, remain uninformed of potential medical or legal risks, and face psychological harm post-pregnancy due to emotional detachment or loss. Structural victimization occurs when laws, instead of protecting women, inadvertently perpetuate their vulnerability—such as by banning commercial surrogacy without creating viable economic alternatives, pushing the practice underground where exploitation intensifies. Ethical analysis also intersects with global justice considerations. In transnational surrogacy arrangements, power imbalances between wealthy intended parents (often from developed nations) and economically disadvantaged surrogates in developing countries can exacerbate exploitation. Furthermore, the absence of uniform international standards on remuneration, health rights, and post-birth care for surrogates perpetuates inequities. To ensure ethical legitimacy, surrogacy policies must prioritize informed consent, robust legal protections, access to mental health support, and empowerment measures that address the socio-economic root causes of coercion. Ultimately, an ethical surrogacy framework in India must balance reproductive autonomy with safeguards against exploitation, aligning domestic laws with constitutional guarantees under Articles 14, 15, and 21, and relevant international human rights norms.⁶

3. LEGAL EVOLUTION OF SURROGACY IN INDIA

Commercial surrogacy was legalized in India in 2002, initially attracting limited domestic participation compared to other countries. As a result, many foreign nationals sought surrogacy services in India due to the relatively lower costs and less complex legal framework. However, restrictions were imposed over time, prohibiting surrogacy for foreign nationals from countries where the practice was illegal, as well as for gay couples, single men, single women, and unmarried couples. The **Assisted Reproductive Technology (ART) Bill, 2008**, drafted by the Indian Council of Medical Research (ICMR) under the direction of the courts and administered by the Ministry of Health and Family Welfare, aimed to regulate surrogacy and prevent the misuse of reproductive technology. The Bill underwent multiple revisions—in 2010 and again in 2013—but the detailed 2013 draft was never made public due to ongoing debates. Provisions under the ART framework addressed gestational surrogacy, including requirements for enforcing gestational agreements and reimbursement of surrogate expenses, alongside provisions modeled on the Uniform Parentage Act, 2000 for determining legal parentage through court proceedings. In 2005, the **ICMR Guidelines** permitted single parents to commission surrogacy, emphasizing the importance of safeguarding children born through such arrangements, even when they share genetic ties with commissioning parents. The **Maternity Benefit (Amendment) Act, 2017** further recognized surrogacy by extending maternity benefits to intended mothers. The **Law Commission of India**, in its *228th Report*, recommended key contractual safeguards: life insurance for surrogates, legal recognition of surrogate children as legitimate, inclusion of only commissioning parents' names on birth certificates, protection of donor and surrogate privacy, prohibition of gender-based surrogacy, and application of the Medical Termination of Pregnancy Act, 1971 in abortion cases. The **Surrogacy (Regulation) Act, 2021** marked a significant shift, limiting surrogacy to altruistic arrangements for legally married Indian heterosexual couples and certain categories of women (widows or divorcees aged 35–45) with certified medical needs. Intended couples must be childless and meet age criteria—26–55 years for men and 25–50 years for women. Commercial surrogacy was criminalized, carrying penalties of up to 10 years' imprisonment and fines up to ₹10 lakhs, and surrogates must be genetically related to the intended parents. The **Surrogacy (Regulation) Rules, 2022**

⁵Stumpf, Andres E. "Redefining Mother: A Legal Matrix for New Reproductive Technologies." 96 *The Yale Law Journal* (1986) 186.

⁶DasGupta, S., & DasGupta, S. (2014). Globalization and transnational surrogacy in India: Outsourcing life. *Ethics & Social Welfare*, 8(2), 111–127. <https://doi.org/10.1080/17496535.2014.895398>.

outlined requirements for surrogacy clinic registration, staffing, and surrogate welfare measures, including mandatory 36-month health insurance coverage and a limit of three surrogacy attempts. Amendments in March 2023 allowed surrogacy using donor gametes in cases where either spouse was medically certified as infertile, though donor eggs remained restricted unless medically justified. The **Surrogacy (Regulation) Rules, 2024** further relaxed provisions, permitting married couples to use donor gametes with medical certification from a District Medical Board, and allowing single women—restricted to widows or divorcees—to opt for surrogacy under defined conditions.⁷ In 2024, India's surrogacy framework underwent notable changes and scrutiny. The Ministry of Health and Family Welfare amended the *Surrogacy (Regulation) Rules, 2022* to permit the use of donor gametes—egg or sperm—for married couples when either spouse is medically certified as infertile by a District Medical Board, marking a partial relaxation of the strict genetic-relationship requirement in altruistic surrogacy. In parallel, as of June 18, 2024, the government extended workplace benefits for female government employees involved in surrogacy, granting both surrogates and commissioning mothers with fewer than two surviving children 180 days of maternity leave, while commissioning fathers became eligible for 15 days of paternity leave and intended mothers gained access to childcare leave. At the same time, regulatory enforcement challenges persisted, as exposed by district-wide probes in Telangana and similar actions in Karnataka targeting unlicensed IVF and surrogacy clinics following fraud cases, aimed at ensuring compliance with the *Surrogacy (Regulation) Act, 2021* and ART regulations. Collectively, these developments reflect a gradual broadening of access to surrogacy for couples with medical limitations, a growing institutional acknowledgment of diverse family-building pathways, and the continuing need for stronger oversight mechanisms to safeguard ethical and legal compliance in the surrogacy sector.⁸

3.1. Surrogacy Law and Social Justice Dimensions

The *Surrogacy (Regulation) Act, 2021* represents a major shift in India's surrogacy framework, but it has also raised significant constitutional, ethical, and social justice concerns. The Act restricts surrogacy to legally married Indian heterosexual couples and certain single women (widows or divorcees aged 35–45) with proven medical need, imposes strict age limits, and prohibits couples who already have a biological, adopted, or surrogate child. Commercial surrogacy is criminalized, carrying penalties of up to 10 years' imprisonment and fines of up to ₹10 lakh, while only altruistic surrogacy—where the surrogate is genetically related to the intending parents—is permitted. While intended to prevent exploitation, these restrictions have been criticized for reinforcing patriarchal norms, limiting women's reproductive autonomy under Article 21 of the Constitution, and discriminating on the basis of marital status, gender, and sexual orientation. The exclusion of unmarried women, single men, live-in partners, and same-sex couples denies these groups the right to form families of their choice, raising concerns of violation of Articles 14 and 15. Critics also highlight the emotional complexities inherent in altruistic arrangements, particularly when a relative or close friend acts as a surrogate, potentially straining personal relationships. The absence of third-party agencies in altruistic surrogacy removes a neutral mediator who could ensure transparency, cover medical and miscellaneous expenses, and guide parties through the complex process. Judicial intervention has also shaped the surrogacy landscape. In March 2023, a government notification amended the law to ban the use of donor gametes, mandating that intending couples use their own. This was challenged as a violation of the right to parenthood. The Supreme Court clarified that the law is “woman-centric” and intended for those medically unable to conceive, but it temporarily stayed Rule 7 of the Act in a case involving a woman with Mayer–Rokitansky–Küster–Hauser (MRKH) Syndrome, allowing the use of a donor egg. The Court also interpreted the “genetically related” requirement as referring to the husband in cases of gestational surrogacy. From a social justice perspective, the Act's exclusionary criteria fail to balance the twin objectives of protecting surrogates and respecting individual reproductive rights. A more equitable framework would focus on inclusivity, transparent regulation, ethical safeguards, and alignment with medical advancements. Expanding eligibility criteria, ensuring informed consent,

⁷Progress Educational Trust, *Six Months Surrogacy Leave for Female Government Employees in India*, Progress Educational Trust (June 18, 2024), <https://www.progress.org.uk/six-months-surrogacy-leave-for-female-government-employees-in-india/>.

⁸Progress Educational Trust, *Six Months Surrogacy Leave for Female Government Employees in India*, Progress Educational Trust (June 18, 2024), <https://www.progress.org.uk/six-months-surrogacy-leave-for-female-government-employees-in-india/>.

strengthening surrogate protections, and reintroducing regulated compensated surrogacy under strict oversight could create a balanced system that upholds dignity, autonomy, and the welfare of all parties involved.⁹

Chronological Evolution of Surrogacy Laws and Regulations in India (2002–2024)

Year	Law/Policy	Key Provisions
2002	Legalization of Commercial Surrogacy	Commercial surrogacy legalized; primarily utilized by foreign nationals due to lower costs and fewer legal complexities; limited domestic uptake.
2005	ICMR Guidelines	Permitted single parents to commission surrogacy; emphasized safeguarding the rights and welfare of children born via surrogacy.
2008	Assisted Reproductive Technology (ART) Bill, 2008	Drafted by ICMR under court direction; aimed to regulate surrogacy and prevent misuse of reproductive technology; administered by the Ministry of Health and Family Welfare.
2010	ART Bill Revision	First major revision to address regulatory gaps and strengthen enforcement measures.
2013	ART Bill Revision	Second revision submitted to the Cabinet; detailed draft withheld from public release due to ongoing debates and scrutiny.
2017	Maternity Benefit (Amendment) Act, 2017	Extended maternity benefits to commissioning mothers in surrogacy arrangements.
2021	Surrogacy (Regulation) Act, 2021	Allowed altruistic surrogacy only for legally married Indian heterosexual couples and certain categories of single women (widows/divorcees aged 35–45) with medical need; banned commercial surrogacy with penalties of up to 10 years' imprisonment and ₹10 lakh fine.
2022	Surrogacy (Regulation) Rules, 2022	Established requirements for surrogacy clinic registration, staff qualifications, mandatory 36-month health insurance for surrogates, and limit of three surrogacy attempts.
2023	Amendment to Surrogacy Rules	Allowed use of donor gametes if either spouse certified as medically infertile; donor eggs restricted unless medically necessary and certified by District Medical Board.
2024	Surrogacy (Regulation) Rules, 2024	Permitted married couples to use donor gametes with medical certification; allowed widows and divorcees to opt for surrogacy under defined conditions.

Source: Compiled by the author from *The Surrogacy (Regulation) Act, 2021*, *The Surrogacy (Regulation) Rules, 2022*, *2023 & 2024*, Assisted Reproductive Technology Bills (2008, 2010, 2013), Indian Council of Medical Research Guidelines (2005), and relevant judicial and policy updates.

⁹Gerard, Pradeep Devnath, and Senthikumar. "Surrogacy in India: Ethical and Legal Aspect." *Indian Journal of Forensic Medicine & Toxicology*, vol. 14, no. 4, 2024.

4. LEGAL PRECEDENTS AND THE EVOLUTION OF SURROGACY PRINCIPLES IN INDIA

The Indian judiciary has played a crucial role in shaping the legal framework on surrogacy, particularly in the absence of a comprehensive statutory regime until the enactment of the Surrogacy (Regulation) Act, 2021. Courts have consistently recognized that children born in India through gestational surrogacy are Indian citizens, regardless of the nationality of the commissioning parents. Furthermore, reproductive liberty has been upheld as a fundamental human right under **Article 21 of the Constitution**, encompassing the right to privacy, autonomy, and procreation.

One of the earliest landmark cases, **Jan Balaz v. Union of India** (2013)¹⁰, resulted in a ban on commercial surrogacy for foreign nationals, marking a shift toward preventing the exploitation of women and children. In **Lior Avi Ben David & Anr. v. Union of India & Ors.** (2014)¹¹, the Court underscored the need for clear guidelines on the citizenship status of children born through surrogacy. Similarly, in **Javed v. State of Haryana**¹², while upholding the "two-child norm" for participation in Panchayati Raj elections, the Supreme Court acknowledged reproduction as a fundamental right, implicitly recognizing surrogacy as a legitimate means to exercise this right.

In **Devika Biswas v. Union of India** (2021)¹³, the Supreme Court explicitly affirmed the right to reproduction as integral to Article 21's guarantee of the "right to life." The Court also criticized the exclusion of LGBTQIA+ individuals, single persons, and elderly couples from surrogacy, terming it a violation of reproductive autonomy. This position was reinforced in **K.S. Puttaswamy v. Union of India** (2017)¹⁴, where the Court held that state interference in reproductive decisions infringes on the right to privacy and personal liberty.

In **Arun Muthuvel v. Union of India** (2022), the Court described the surrogacy law as "woman-centric" and stayed provisions restricting the use of donor eggs, thereby safeguarding the reproductive rights of women with rare medical conditions.

Recent developments in **2025** have further tested the boundaries of surrogacy law. The Supreme Court is currently examining petitions challenging the age limits imposed under the Act, especially for couples who initiated surrogacy arrangements before the law took effect. In another case, the Court issued notice on a petition filed by a divorced man contesting the gender-based eligibility criteria that permit divorced women, but not divorced men, to commission surrogacy. The **Bombay High Court** has, in parallel, declined to grant interim relief to a divorced woman with children, directing her to approach the Supreme Court due to the policy-sensitive nature of the matter. In **February 2025**, the **Kerala High Court** clarified that a woman between the ages of 23 and 50 is eligible for surrogacy under Section 4(c) of the Surrogacy Act, resolving ambiguities regarding the lower and upper age thresholds. These rulings collectively demonstrate the judiciary's role in expanding interpretative space for reproductive rights while balancing statutory objectives against constitutional guarantees.¹⁵

5. SURROGACY ACROSS BORDERS: COMPARATIVE LAWS, HUMAN RIGHTS, AND THE RIGHT TO LIFE

The global discourse on surrogacy reflects deep legal, ethical, and human rights concerns, with particular emphasis on the *right to life*, *human dignity*, and *bodily autonomy*. International human rights instruments, judicial precedents, and ethical frameworks consistently recognize that the human body should not be commodified. The *Convention on Human Rights and Biomedicine* clearly prohibits any financial gain from the human body and its parts, underscoring the principle that life and reproductive capacity cannot be reduced to a commercial transaction. Countries such as Germany and Switzerland uphold this standard by prohibiting all forms of commercial surrogacy, viewing it as inherently exploitative and incompatible with human dignity. Similarly, the *Convention on the Elimination of All Forms of Discrimination*

¹⁰**Jan Balaz v. Union of India**, W.P. (C) No. 4941 of 2013 – Ban on commercial surrogacy for foreign nationals.

¹¹**Lior Avi Ben David & Anr. v. Union of India & Ors.**, (2014) 9 SCC 784 – Citizenship issues for children born via surrogacy.

¹²(2003) 8 SCC 369.

¹³ (2016) 10 SCC 726.

¹⁴(2017) 10 SCC 1.

¹⁵*Supreme Court to examine age limit in India's surrogacy laws*, Hindustan Times (Jan. 7, 2025)

Against Women (CEDAW) conceptualizes motherhood as a *social function* rather than a commercial one. Feminist critiques echo this, warning that commercial surrogacy transforms a woman's reproductive capabilities into a marketable commodity and risks turning children into products. This commodification detaches the act of childbearing from the broader emotional, social, and cultural dimensions of motherhood, reducing women to "instruments of reproductive exchange" and rendering the womb a rentable asset.¹⁶

Lack of Global Regulatory Consensus

Despite the ethical concerns, surrogacy remains unregulated at the global level, and national laws vary widely¹⁷:

- **Complete Prohibition:** Countries including Spain, Bulgaria, France, Germany, Italy, Portugal, and Taiwan ban all forms of surrogacy—both altruistic and commercial—based on the principle that reproductive services should not be outsourced or monetized.
- **Altruistic-Only Models:** Canada, Denmark, New Zealand, Brazil, Britain, and Australia prohibit commercial surrogacy but permit altruistic arrangements under strict legal safeguards, usually requiring that surrogates be closely related to the intended parents.
- **Fragmented Regulation:** The United States, Mexico, and Australia lack federal laws on surrogacy, leaving regulation to individual states or territories. This results in varying policies, ranging from permissive commercial surrogacy to outright bans.
- **Commercial Surrogacy Hubs:** Before the 2022 Russian invasion, Ukraine was a leading global surrogacy destination, attracting thousands of foreign clients annually. Georgia continues to allow commercial surrogacy for heterosexual couples, explicitly excluding surrogate mothers from parental rights. Russia, though historically permissive, has recently restricted surrogacy access for foreign nationals amid concerns about exploitation.
- **Restrictive Shifts in Asia:** Thailand banned commercial surrogacy for foreigners in 2015 after high-profile cases of abuse, while Cambodia, initially lacking regulation, has moved toward strict controls to prevent exploitation.
- **Emerging Regulation:** Colombia permits commercial surrogacy but faces pressure to enact stronger legislation to safeguard surrogates, intended parents, and children.

Cross-Border and LGBTQ+ Challenges

International surrogacy, where intended parents travel abroad for the procedure, introduces additional complexities. In the United States, legal experts in family law and LGBTQ+ rights often caution against entering into foreign surrogacy agreements—even if legal in the destination country—because of potential challenges in establishing parentage and citizenship. LGBTQ+ intended parents have, in some cases, been unable to bring their child home because their parentage was not recognized under their home country's laws. Similar barriers exist in Europe, where several states refuse to register birth certificates from foreign jurisdictions listing two parents of the same sex. These legal uncertainties have direct human rights implications, particularly under *Article 7 of the United Nations Convention on the Rights of the Child*, which affirms a child's right to know and be cared for by their parents. When legal parentage is disputed, children can be left in a state of legal limbo, affecting their nationality, inheritance rights, and access to social services.¹⁸

¹⁶N.F. Bromfield & K.S. Rotabi, *Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 *Global Soc. Welfare* 123 (2014), <https://doi.org/10.1007/s40609-014-0019-4>.

¹⁷**Indian Express**, *Donor Gametes Are Allowed: What the New Rule on Surrogacy Says*, Feb. 24, 2024 (reporting on the March 2023 amendment that banned donor gametes but was later amended), <https://indianexpress.com/article/explained/explained-law/donor-gametes-are-allowed-what-the-new-rule-on-surrogacy-says-9177795>.

¹⁸UNESCO Observatorio, *Russia Bans Surrogacy for Foreigners* (Dec. 2022) (describing newly enacted law limiting surrogacy to Russians)

Ethical Tensions: Right to Life vs. Commercial Exploitation

The international debate is often framed around two competing imperatives:

1. **Protecting Life and Dignity:** Ensuring that neither the surrogate nor the child is treated as an economic asset.
2. **Respecting Reproductive Autonomy:** Recognizing that individuals and couples—including LGBTQ+ families—should have the freedom to decide how to form their families.

Countries that adopt total bans emphasize the first principle, while those with regulated frameworks attempt to balance both. However, feminist scholars argue that even “regulated” commercial surrogacy can create structural inequalities, where financially disadvantaged women disproportionately serve as surrogates for wealthier domestic or foreign clients.¹⁹

Notable International Judicial Precedents²⁰

- **Iranian Supreme Court – ‘Recognition of Foreign Surrogacy’ (2024)**
In a key ruling from October 2024, France’s Cour de Cassation decreed that foreign surrogacy arrangements recognized abroad must have their legal effects upheld in France, without transforming them into equivalent French legal categories. This preserves the foreign surrogacy’s integrity within the domestic system
- **Paradiso and Campanelli v. Italy (European Court of Human Rights, 2017):** The court upheld Italy’s removal of a child born via surrogacy abroad, citing national public policy against surrogacy, even though the intended parents had cared for the child for months.
- **Mennesson v. France (ECHR, 2014):** France was found to have violated children’s rights by refusing to recognize the legal relationship between children born through surrogacy in the U.S. and their intended parents.
- **Calvert v. Johnson (California, 1993):** One of the earliest U.S. cases affirming that a gestational surrogate with no genetic link to the child has no parental rights.
- **Baby Manji Yamada v. Union of India (Supreme Court of India, 2008):** Though domestic, this case had international implications, as it involved a Japanese couple commissioning surrogacy in India, raising questions about cross-border parentage.

Moving Toward Global Ethical Standards

While it is unlikely that a universal surrogacy treaty will emerge soon, international human rights norms—particularly those under the *International Covenant on Civil and Political Rights* and CEDAW—could guide a framework balancing reproductive autonomy with safeguards against exploitation. Key recommendations emerging from policy research include²¹:

- Requiring transparent, written contracts recognized in both the surrogate’s and the intended parents’ jurisdictions.
- Ensuring surrogates have independent legal and psychological counseling before entering agreements.
- Providing equal access to surrogacy for all individuals, regardless of marital status, gender, or sexual orientation, consistent with the principles of non-discrimination under international law.
- Establishing international cooperation mechanisms for recognizing parentage and nationality in cross-border surrogacy cases.

¹⁹International Federation of Social Workers, *Ethical Challenges in International Surrogacy* (2023), <https://www.ifsw.org/ethical-challenges-in-international-surrogacy>.

²⁰Harriet Barber, *Surrogacy Ring Accused of Exploiting Vulnerable Women in Argentina*, *The Guardian* (Oct. 22, 2024), <https://www.theguardian.com/world/2024/oct/22/surrogacy-ring-argentina>.

²¹*United States Surrogacy Laws Vary Widely by State*, NATIONAL CONFERENCE OF STATE LEGISLATURES (updated Aug. 2023), <https://www.ncsl.org/human-services/surrogacy-laws>.

The international landscape thus remains a patchwork of legal, ethical, and cultural attitudes. Until a more harmonized approach emerges, intended parents, surrogates, and children will continue to navigate a web of uncertainties, highlighting the urgent need for laws that protect dignity while respecting the right to form a family.

6. CRITICISM OF THE CURRENT LEGISLATIVE FRAMEWORK

The current surrogacy regime in India, shaped by the Surrogacy (Regulation) Act, 2021, the Surrogacy (Regulation) Rules, and the Assisted Reproductive Technology (Regulation) Act, reflects a protectionist approach aimed at preventing exploitation and safeguarding children's rights. However, its restrictive eligibility criteria, procedural gaps, and definitional inconsistencies have raised significant constitutional, ethical, and practical concerns. The law often shifts from a rights-based to a needs-based framework, narrowing the reproductive freedoms guaranteed under Articles 14 and 21 of the Constitution and following are the major criticism²²:-

1. The prohibition of commercial surrogacy, while intended to prevent the exploitation of economically disadvantaged women and protect the welfare of children, undermines women's autonomy in reproductive decision-making and their right to parenthood by failing to balance protection with personal liberty.
2. By undervaluing women's reproductive labour and restricting eligibility to narrow categories, the Act reinforces patriarchal norms and violates constitutional protections of reproductive rights, while altruistic surrogacy involving relatives or friends often creates emotional complications for surrogates, intended parents, and children.
3. The absence of licensed intermediaries in altruistic surrogacy results in financial, procedural, and emotional uncertainties, as parties must navigate medical and legal complexities without structured professional support.
4. Excluding unmarried persons, single men, same-sex couples, and live-in partners from accessing surrogacy constitutes discrimination based on gender, marital status, and sexual orientation, contravening Articles 14 and 21.
5. Several provisions, such as the definitions of "couple" and "intending woman," directly conflict with fundamental rights under Articles 14 and 21, and under Article 13 such inconsistencies render the law unconstitutional.
6. Conflicting eligibility age requirements between the Surrogacy Act and the ART Act create confusion and hinder consistent enforcement.
7. The genetic link requirement for surrogate mothers contradicts provisions prohibiting such links between the surrogate and child, revealing definitional inconsistencies.
8. The requirement to obtain infertility certificates from District Medical Boards and related provisions under the ART Act risk disclosure of sensitive personal information, potentially violating the right to privacy under Article 21.
9. The absence of harmonised international surrogacy laws leaves children born to foreign or single parents vulnerable to legal uncertainty and citizenship disputes, even with a biological link to the commissioning parent.
10. Permitting surrogacy only for couples with a child suffering from an "incurable" illness without defining qualifying disabilities creates ambiguity and risks discriminatory outcomes based on ableist assumptions.
11. The ban on commercial surrogacy ignores its potential as a livelihood for marginalised women, driving the practice underground and increasing risks of exploitation in the absence of regulated compensation.

²²"Surrogacy rules changed in India; couples, single women to benefit but conditions apply." LiveMint. Accessed 10th May. Availableat:<<https://www.livemint.com/news/india/surrogacy-rules-changed-in-india-couples-single-women-to-benefit-but-conditions-apply-11708685284686.html>>.

12. The law fails to adequately address long-term health risks for surrogates and children, such as infections, teratogen exposure, and psychological impacts, and does not mandate formal psychiatric evaluation by qualified mental health professionals.
13. The exclusion of LGBTQIA+ individuals and live-in partners from surrogacy access, despite the decriminalisation of homosexuality in *Navtej Singh Johar v. Union of India*, reflects a disconnection between constitutional advances in equality and legislative policy.

7. SUGGESTIONS AND CONCLUSION

While the State's legitimate objective under the Surrogacy and ART Acts is to ensure that surrogate mothers receive safe assisted reproductive technology (ART) treatments in authorised facilities, the scope of the Surrogacy Act should be broadened to allow any willing individual—regardless of marital status, gender, or sexual orientation—to engage in altruistic surrogacy. Current restrictions ignore evolving social realities and, by imposing blanket prohibitions on commercial surrogacy, risk reinforcing cultural prejudices rather than eliminating exploitation. Such prohibitions fail to recognise that informed and regulated compensation could actually reduce the risks of coercion, provide economic security to surrogates, and preserve reproductive autonomy. A shift towards sophisticated, rights-based regulation, fully compliant with constitutional guarantees, is urgently required. The definition of infertility in the legislation should be aligned with the World Health Organization's standard, replacing the current "five years" requirement with "one year," with consequential amendments in related provisions. This change would bring the law in line with global medical practice and make surrogacy more accessible to those who require it, without imposing unnecessarily prolonged periods of involuntary childlessness. All parties to a surrogacy arrangement—intended parents and surrogates—should undergo comprehensive background checks, including socio-economic profiling, verification of health status, age, family history, and past criminal records. This would not only safeguard the welfare of the surrogate mother and the child but also prevent potential exploitation and fraud.

Robust, binding guidelines must be introduced to govern surrogacy contracts, ensuring that every surrogate mother receives a copy clearly outlining her rights, responsibilities, and protections. This is especially vital in cases involving foreign intended parents, to guarantee minimum legal and personal security for both the surrogate and the child. The altruistic surrogacy model, as currently practised, also raises significant emotional concerns. When a child develops a strong attachment to the surrogate, the separation after birth may cause considerable psychological distress for the surrogate mother, while also affecting the child's emotional development. Instead of an outright ban on compensated surrogacy, a regulated framework that permits reasonable, non-exploitative remuneration could better balance emotional, financial, and ethical considerations.

Ambiguities in the law must also be addressed, starting with a clear and uniform definition of "close relative," even if such relationships are ultimately prohibited in certain surrogacy arrangements. Mandatory psychological evaluation and legal counselling should be incorporated into the process for both surrogates and intended parents, akin to the mandatory protocols in countries such as the United States. Such measures would ensure informed consent, emotional preparedness, and better outcomes for all parties.

High-profile cases involving children born through surrogacy in India to parents from Germany, Japan, and Israel—and later embroiled in international legal disputes—underscore the urgent need for a robust surrogacy monitoring mechanism under a comprehensive legislative framework that addresses cross-border legal and citizenship complexities. Inconsistencies within the legislation must also be resolved: while some provisions set the minimum age for couples at 21 for men and 18 for women, others require that men be between 26–55 and women between 23–50 years. Such contradictions complicate enforcement and must be harmonised to ensure clarity and fairness.

Further, the requirement that a surrogate mother must be genetically related to the intending couple contradicts other provisions prohibiting any genetic link between the surrogate and the child, resulting in definitional inconsistencies. Privacy rights are also at risk, as the law requires couples to obtain infertility certificates from District Medical Boards and mandates insurance coverage for oocyte donors, which could lead to disclosure of sensitive personal information in violation of Article 21's privacy guarantees.

The legislation's eligibility restrictions amount to discrimination under Articles 14 and 21 of the Constitution, as they exclude unmarried individuals, same-sex couples, single men, and live-in partners. This exclusion not only perpetuates inequality but also denies these groups the right to form families according to their own choices. The Act also fails to provide clear definitions for disabilities under its ableism-based criteria, which permit surrogacy for couples with children having "incurable" physical or mental conditions but without specifying the qualifying thresholds. This vagueness fosters arbitrary decision-making and discriminatory practices.

Economically, banning commercial surrogacy disregards its potential as a legitimate livelihood option for women from marginalised backgrounds. In a country with high poverty rates, regulated and fair compensation for surrogacy could empower women financially while safeguarding them through stringent protections. The current ban risks pushing surrogacy into unregulated, underground markets where exploitation is more likely. Moreover, the Act overlooks potential health risks to both surrogate mothers and fetuses—such as exposure to teratogens, sexually transmitted infections, and long-term complications—while failing to mandate comprehensive psychiatric assessments as part of psychological screening.

The exclusion of LGBTQIA+ individuals and live-in partners is another glaring gap in the law, especially in light of the Supreme Court's landmark judgment in *Navtej Singh Johar v. Union of India* decriminalising homosexuality. While constitutional principles have moved towards inclusivity, legislative frameworks for surrogacy have lagged behind, continuing to privilege heteronormative and marital family structures.

Globally, surrogacy laws strive to prevent the commodification of childbirth and protect vulnerable women from exploitation. However, as demonstrated by the "Golden Triangle Test" (Articles 14, 19, and 21), India's Surrogacy (Regulation) Act, 2021 disproportionately limits access, framing surrogacy as a last resort for a narrow category of people while undermining reproductive autonomy. The solution lies not in prohibition but in adopting an inclusive, regulated model that acknowledges surrogacy as a legitimate reproductive choice, supported by transparent safeguards and equitable access. Encouragingly, the government's recent amendment allowing married couples with serious medical conditions to use donor gametes for surrogacy represents a step towards flexibility and inclusion. Building on this momentum, legislative reforms should be guided by constitutional compliance, evolving societal norms, and a balanced protection of the rights of all stakeholders in surrogacy arrangements.

Additional measures could include establishing a national surrogacy registry to ensure transparency, introducing cross-border surrogacy treaties to resolve citizenship disputes, and mandating independent surrogacy ombudsman offices to address grievances promptly. These steps, combined with a rights-based legal framework, could transform surrogacy in India into a model of ethical, inclusive, and constitutionally compliant reproductive governance.

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