

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

## **EDITORIALTEAM**

### **EDITORS**

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



#### **Dr. Namita Jain**

*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*



## Mrs.S.Kalpana

Assistant professor of Law

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **REPRODUCTIVE RIGHTS AND LEGAL BOUNDARIES: A CRITICAL ANALYSIS OF INDIA'S SURROGACY (REGULATION) ACT, 2021**

AUTHORED BY - AFSANA AZEEZ

Affiliation: Amity Law School, Noida

## **ABSTRACT**

India's position as a former global hub for commercial surrogacy has undergone a major transformation with the enactment of the Surrogacy (Regulation) Act, 2021. This research paper critically analyses the legislative evolution, core provisions, and broader implications of the Act, especially its impact on reproductive autonomy, accessibility, and ethical governance. While the Act was enacted to curb exploitation and commodification, it has also attracted criticism for its restrictive framework that excludes single men, LGBTQ+ individuals, and foreign nationals. The shift to altruistic surrogacy, while ethically motivated, raises questions about genuine consent, familial pressure, and the potential for black-market alternatives. This paper offers a legal critique of the Act, grounded in constitutional rights, feminist theory, and comparative analysis.

## **1. Introduction**

Reproductive rights<sup>1</sup>, encompassing the right to decide freely and responsibly on the number, spacing, and timing of children, are fundamental human rights recognized by various international conventions and treaties. However, the realization of these rights varies considerably across the globe, significantly influenced by cultural norms, religious beliefs, and legal frameworks. Surrogacy, an assisted reproductive technology (ART) where a woman carries and delivers a child for another individual or couple, has become a complex legal and ethical battleground, particularly in the context of cross-border reproductive care.

India, once considered a "surrogacy hub," witnessed a boom in commercial surrogacy fuelled by its relatively low costs, availability of surrogate mothers, and less restrictive regulations. This scenario, however, led to exploitation and vulnerability of surrogate mothers, ethical dilemmas surrounding the commodification of childbirth, and the lack of robust legal

---

<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

safeguards. In response, the Indian government introduced significant legislative reforms, culminating in the Surrogacy (Regulation) Act, 2021, aiming to regulate and restrict surrogacy practices.

### 1.1 The Evolution of Surrogacy Act:

Prior to specific legislation, surrogacy in India was largely unregulated, governed by general contract law and ethical guidelines issued by the Indian Council of Medical Research (ICMR). This lack of specific legal framework created a fertile ground for commercial surrogacy<sup>2</sup>, attracting international couples seeking ART services. The "Baby Manji Yamada"<sup>3</sup> case (2008), involving a Japanese couple pursuing surrogacy in India, highlighted the legal complexities and the need for a clear legal framework.

The rapid growth of commercial surrogacy in India brought forth several ethical and social concerns:

- **Exploitation of Surrogate Mothers:** Reports emerged of surrogate mothers facing inadequate healthcare, poor living conditions, and financial exploitation.
- **Commodification of Childbirth:** Critics argued that commercial surrogacy commodified the reproductive process, reducing it to a market transaction.
- **Legal Status of the Child:** Ambiguities surrounded the legal parentage and citizenship of children born through surrogacy arrangements, especially in cases involving foreign intended parents.
- **Lack of Post-Surrogacy Support:** Surrogate mothers often lacked access to adequate psychological and medical support after childbirth.

Recognizing these challenges, the Indian government-initiated efforts to regulate surrogacy through various bills and amendments. The Surrogacy (Regulation) Act, 2021, represents a significant shift in the legal landscape, aiming to address these concerns.

### 1.2 The Surrogacy (Regulation) Act, 2021: Key Provisions and Implications:

The Surrogacy Act, 2021, marks a significant milestone in the regulation of assisted reproductive technologies (ARTs) and surrogacy in particular. This Act is a response to the growing demand for surrogacy arrangements, both domestically and internationally, and the

---

<sup>2</sup> Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005.

<sup>3</sup> Baby Manji Yamada v. Union of India, AIR 2009 SC 84

need to protect the rights and interests of all parties involved, including surrogate mothers, intended parents, and children born through surrogacy.

### **1.2.1 Historical Background**

Surrogacy has been practiced for centuries, but it was only in the late 20th century that advances in ARTs made it possible to create embryos outside the human body, leading to a surge in the number of surrogacy arrangements. However, the lack of clear regulations and guidelines governing surrogacy led to a number of ethical, legal, and social issues, including the exploitation of surrogate mothers, the commodification of children, and the uncertainty surrounding the legal parentage of children born through surrogacy.

In response to these concerns, several countries, including the United Kingdom, Canada, and Australia, introduced legislation regulating surrogacy. In India, the Assisted Reproductive Technologies (Regulation) Bill, 2020, was introduced in the Lok Sabha, proposing a comprehensive framework for the regulation of ARTs, including surrogacy. However, the Bill was criticized for its restrictive provisions and its failure to address the concerns of all stakeholders.

### **1.2.2 The Surrogacy Act, 2021: Key Provisions**

The Surrogacy Act, 2021, represents a significant departure from the earlier Bill, incorporating several key changes and developments. The Act defines surrogacy as a practice where a woman agrees to carry a pregnancy for another person or persons, who will be the child's intended parents. The Act regulates both altruistic and commercial surrogacy arrangements, with a focus on ensuring the safety and well-being of surrogate mothers and children born through surrogacy.

### **1.2.3 Evolution of the Surrogacy Act, 2021**

The Surrogacy Act, 2021, is the result of a long and complex evolution, involving extensive consultations and debates among various stakeholders, including medical professionals, lawyers, activists, and policymakers. The Act reflects a shift from the earlier restrictive approach to a more balanced and comprehensive framework, taking into account the rights and interests of all parties involved.

Some of the key developments in the evolution of the Surrogacy Act, 2021, include:

1. **Consultations and Debates:** The draft Surrogacy Bill, 2016, was widely criticized for its restrictive provisions, leading to extensive consultations and debates among various stakeholders. The Act incorporates several key recommendations and suggestions made during these consultations.
2. **Separation of Altruistic and Commercial Surrogacy:** The Act separates altruistic and commercial surrogacy, recognizing the need for regulation in both forms of surrogacy, while prioritizing the safety and well-being of surrogate mothers and children born through surrogacy.
3. **Emphasis on Surrogate Mother's Welfare:** The Act places a strong emphasis on the welfare of surrogate mothers, recognizing their contribution to the surrogacy process and providing for their medical and psychological support.
4. **Clear Guidelines for Parentage:** The Act establishes clear guidelines for the determination of parentage, providing legal certainty and recognition for intended parents and children born through surrogacy.

### 1.3 Key Provisions

The Surrogacy (Regulation) Act, 2021, along with the Assisted Reproductive Technology (Regulation) Act, 2021, form the core legal framework governing surrogacy and ART practices in India. The key provisions of the Surrogacy Act include:

- (a) **Prohibition of Commercial Surrogacy:** The Act expressly **prohibits commercial surrogacy**, making it illegal for any surrogate mother to receive monetary compensation beyond her **medical expenses** and **insurance coverage** as prescribed by law. The rationale behind this prohibition lies in the prevention of the **exploitation of economically vulnerable women**, which had become a rampant issue with India previously being considered a global hub for commercial surrogacy. Only **altruistic surrogacy**—driven by affection and selflessness without profit motives—is permitted under the Act. This shift aligns with India's broader constitutional ethos of safeguarding human dignity and bodily autonomy.
- (b) **Eligibility Criteria for Intended Parents<sup>4</sup>:** The Act imposes **strict eligibility conditions** for individuals wishing to commission a surrogacy. Only **Indian married couples**—specifically an infertile male and female who have been legally married for at least five years—are permitted to engage in surrogacy arrangements. Additionally,

---

<sup>4</sup> The Constitution of India, arts. 14, 21.

**single Indian women** (widows or divorcees) between the ages of **35 and 45 years** are also allowed to avail surrogacy services. However, **single men, unmarried couples, and LGBTQ+ individuals** are **explicitly excluded** from accessing surrogacy under the current law. This exclusion has attracted criticism on the grounds that it violates the constitutional principles of equality and non-discrimination under Articles 14 and 21 of the Indian Constitution.

- (c) **Eligibility Criteria for Surrogate Mothers:** To ensure the surrogate's physical, emotional, and psychological preparedness, the Act mandates that a surrogate mother must (i) Be a **close relative** of the intending couple (ii) Be **married** and have at least **one biological child** of her own (iii) Fall within the **age range of 25 to 35 years**. (iv) Be certified as **medically and psychologically fit** by a competent authority.

Moreover, a woman is permitted to act as a surrogate **only once** in her lifetime. These criteria aim to minimize health risks and emotional trauma associated with the surrogacy process, while also promoting ethical practices by discouraging the commercialization and repeated exploitation of women's reproductive capabilities. The Act mandates the establishment of National and State Surrogacy Boards to regulate surrogacy clinics and enforce the provisions of the law. All surrogacy clinics must be registered with the National Registry. The intended parents are declared the legal parents of the child born through surrogacy. The Act prescribes stringent penalties for violations, including imprisonment and fines.

#### **1.4 Implications of the Act:**

The **Surrogacy (Regulation) Act, 2021**, represents a critical juncture in India's legislative history concerning assisted reproductive technologies. While the Act was enacted with the intent of preventing exploitation and ensuring ethical practices, it has far-reaching implications on access to surrogacy, legal rights, and societal structures. This section critically examines the major consequences of the Act, highlighting both its intended protections and unintended challenges.

##### **i. Reduced Accessibility to Surrogacy:**

One of the most immediate and significant implications of the Act is the **drastic reduction in access to surrogacy services** for many prospective parents. By banning commercial surrogacy and imposing stringent eligibility criteria, the Act has effectively narrowed the pool of individuals who can legally pursue surrogacy in India.

Under the new framework, only Indian heterosexual married couples who have proven infertility, and single Indian women (widows or divorcees between 35 and 45 years), are eligible to commission surrogacy. **Single men, live-in couples, LGBTQ+ individuals, and foreign nationals** are categorically excluded. The mandatory requirement of infertility and the prerequisite of a five-year marriage duration further complicate access, even for eligible couples.

This restricted access has profound implications. Couples or individuals who do not meet these narrow criteria are left with limited options, forcing them either to seek surrogacy services abroad, which can be prohibitively expensive, or to abandon their hopes of biological parenthood altogether. Thus, the law, while safeguarding ethical concerns, inadvertently **denies reproductive autonomy** to a large segment of the population.

**ii. Shift Towards Altruistic Surrogacy:**

A core component of the Act is the shift from commercial to **altruistic surrogacy**. While altruistic surrogacy theoretically promotes an ethical, non-commercialized environment, it also brings with it a set of unique challenges. Under the Act, a surrogate mother must be a **close relative** of the intending couple and must undergo the process without receiving any financial compensation apart from medical expenses and insurance coverage. This heavy reliance on close familial bonds **raises concerns about emotional coercion and undue pressure**.

In traditional Indian families, where hierarchical structures and obligations are deeply rooted, there is a significant risk that women may feel compelled to act as surrogates out of a sense of duty or fear of familial disapproval rather than genuine voluntary consent.

Moreover, altruistic surrogacy arrangements could burden women with emotional stress, especially if familial expectations conflict with their personal desires. The absence of financial incentives, coupled with societal expectations, may render these women **vulnerable to exploitation within family systems**, an issue that the law, ironically, seeks to eliminate.

**In Suchita Srivastava v. Chandigarh Administration**<sup>5</sup>, a mentally challenged woman became pregnant as a result of rape. The Chandigarh Administration wanted to terminate the pregnancy without her consent, citing her mental disability.

The Supreme Court, however, emphasized the **right of a woman to make reproductive choices** as part of personal liberty under **Article 21** of the Constitution. The Court ruled that even women with mental disabilities have the right to continue or terminate a pregnancy, as reproductive rights are fundamental rights.

**Relevance to Surrogacy:** This case strongly establishes that **forced reproductive decisions**, even under family or societal pressure, violate fundamental rights. It indirectly supports the argument that **familial or emotional coercion** (like feeling obligated to be a surrogate for a relative) can infringe on a woman's **personal autonomy and bodily integrity**.

**iii. Potential for Illegal Practices:**

An inevitable outcome of **restrictive laws** is the rise of **illegal practices** and **black-market arrangements**. By heavily regulating and limiting legal surrogacy options, the Act may inadvertently push intended parents towards unregulated surrogacy markets. Unlicensed clinics and surrogacy agents may exploit the desperation of couples who do not qualify under the Act, offering secretive and often unsafe surrogacy services. In these underground settings, surrogate mothers are even more vulnerable to exploitation, with no legal protections, proper medical care, or enforceable rights.

The emergence of an underground surrogacy economy would defeat the very purpose of the legislation, creating a **shadow system** where the risks of abuse, human trafficking, and unsafe medical practices are exponentially higher. Thus, while the Act was intended to curb exploitation, its over-restrictiveness risks **exacerbating the vulnerabilities** it seeks to mitigate.

**iv. Impact on Medical Tourism:**

Prior to the enactment of the Surrogacy (Regulation) Act, India was considered a **global hub for affordable and accessible surrogacy services**, attracting intended parents

---

<sup>5</sup> Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

from across the world. **Medical tourism**, particularly surrogacy tourism, contributed significantly to India's healthcare economy, generating revenue and employment for medical professionals, surrogacy agents, and associated service providers.

The new law, by banning foreign nationals from commissioning surrogacy in India and strictly regulating the practice for domestic couples, has led to a **sharp decline in international medical tourism**. Clinics that previously specialized in offering surrogacy services to overseas clients are now either shutting down or diversifying into other areas of reproductive healthcare.

While this decline addresses concerns about the exploitation of Indian women by wealthy foreigners, it also **negatively impacts India's economy**, reduces employment opportunities in the healthcare sector, and removes India from a prominent position in the global reproductive technology landscape.

Furthermore, intended parents who once saw India as an affordable alternative must now seek surrogacy arrangements in other countries, often at much higher costs, leading to further **global inequalities** in access to reproductive services.

v. **Legal Challenges:**

The **constitutionality of the Surrogacy (Regulation) Act, 2021**, has already been called into question, and legal challenges have been initiated on several fronts. Critics argue that the Act violates fundamental rights enshrined in the Indian Constitution, particularly:

(a) **Article 14** (Right to Equality): By excluding single men, LGBTQ+ individuals, and live-in couples, the Act discriminates based on marital status, sexual orientation, and gender identity. It creates an unequal legal framework that privileges one form of family structure over others.

(b) **Article 21** (Right to Life and Personal Liberty): The right to reproductive autonomy and the right to found a family are integral aspects of personal liberty. By restricting who can access surrogacy services, the Act arguably infringes upon an individual's reproductive choices.

Several petitions have been filed challenging the Act on these grounds. Human rights advocates and LGBTQ+ rights organizations argue that the Act is **regressive**, reinforcing

heteronormative family structures and excluding non-traditional families from the opportunity to experience parenthood.

Additionally, the Act's insistence on a surrogate being a "close relative" imposes a burden on family relationships and ignores the autonomy of women outside familial structures who may wish to become surrogates voluntarily.

If successful, these legal challenges could pave the way for **progressive amendments** to the law that recognize a broader range of family forms and prioritize the rights and dignity of all individuals, regardless of gender, marital status, or sexual orientation.

### 1.5 Surrogacy Laws: A Global Context:

Surrogacy, as a method of assisted reproduction, has prompted diverse and often polarized legal responses worldwide. Countries differ significantly in how they regulate, permit, or prohibit surrogacy based on cultural values, ethical considerations, religious beliefs, and concerns over exploitation and child welfare. These legal frameworks can broadly be categorized into four primary models: complete prohibition, permission of altruistic surrogacy, regulated commercial surrogacy, and jurisdictions with no specific legislation. Understanding the global context of surrogacy laws offers crucial insights into the challenges and possibilities facing national regulatory efforts, including India's Surrogacy (Regulation) Act, 2021.

#### 1. Prohibition of surrogacy:

Several countries have adopted a **strict prohibitory stance** towards surrogacy, outlawing all forms, whether commercial or altruistic. Nations such as **Germany, France,<sup>6</sup> Italy, Spain, and Sweden** have categorically banned surrogacy through legislative frameworks that often also criminalize participation in surrogacy arrangements.

In **Germany**, for instance, the Embryo Protection Act of 1990 makes it illegal for doctors to assist in surrogacy. The country's legal approach is grounded in the belief that surrogacy commodifies the female body and violates human dignity, principles deeply rooted in Germany's constitutional framework post-World War II.

Similarly, **France's Civil Code** prohibits surrogacy under the principle that maternal affiliation is established by the woman who gives birth, making any contract for surrogacy null and void.

---

<sup>6</sup> German Embryo Protection Act, French Civil Code

French courts have historically refused to recognize parentage established through foreign surrogacy arrangements, although recent European Court of Human Rights rulings have prompted limited reforms.

In **Italy**, the Law on Assisted Reproduction (Law No. 40/2004) criminalizes surrogacy, imposing severe penalties including fines and imprisonment.

These prohibitions are often justified on ethical grounds, citing the protection of women's rights, prevention of exploitation, and maintenance of traditional familial structures. However, critics argue that outright bans drive individuals to seek surrogacy services abroad, leading to legal uncertainties and potential human rights violations when children born via foreign surrogacy are denied citizenship or parentage recognition.

## **2. Altruistic Surrogacy Permitted:**

Some countries allow **only altruistic surrogacy**, where the surrogate does not receive any monetary compensation beyond reimbursement for reasonable medical and pregnancy-related expenses. **The United Kingdom, Canada, and Australia** (with state-specific variations) represent this model.

In the **United Kingdom**, the Surrogacy Arrangements Act 1985<sup>7</sup> permits altruistic surrogacy while prohibiting commercial arrangements. Intended parents must apply for a **parental order** after the child's birth to transfer legal parentage from the surrogate to themselves. The UK's regulatory framework emphasizes informed consent, non-commercialization, and the best interests of the child. Agencies facilitating surrogacy cannot charge for matching services but may offer administrative support.

**Canada's Assisted Human Reproduction Act, 2004**, similarly allows altruistic<sup>8</sup> surrogacy but criminalizes payment to surrogates or intermediaries beyond permissible expenses. Each Canadian province manages parentage laws differently, creating some legal complexity. In **Australia**, altruistic surrogacy is legal across most states, but laws vary: In **New South Wales** and **Victoria**, comprehensive regulations govern surrogacy agreements, parental orders, and eligibility. Some states (e.g., **Queensland**) permit altruistic surrogacy but ban advertising for

---

<sup>7</sup> UK Surrogacy Arrangements Act, 1985

<sup>8</sup> Canadian Assisted Human Reproduction Act, 2004.

surrogates. Cross-border surrogacy remains controversial, with some states penalizing residents who engage in commercial surrogacy abroad.

Altruistic surrogacy models seek to protect surrogate mothers from financial exploitation. However, critics point out challenges such as a **shortage of willing surrogates**, potential emotional coercion, and legal uncertainties during the post-birth parental transfer process.

### 3. Commercial Surrogacy Permitted with Regulation:

In contrast, a few countries permit **commercial surrogacy**, but with varying degrees of regulatory oversight. **The United States, Russia, Ukraine, and Georgia** (historically) are notable examples.

In the **United States**, surrogacy laws are highly decentralized and vary state by state: States like **California** and **Nevada** are known for surrogacy-friendly laws, permitting both altruistic and commercial surrogacy for all intended parents, regardless of marital status or sexual orientation.

Conversely, states like **Michigan** prohibit commercial surrogacy and impose penalties for violators. California's model is often cited as a **best practice** in protecting the rights of all parties involved: intended parents can secure **pre-birth or post-birth orders**, ensuring their legal parentage without surrogate interference. Commercial contracts are legally enforceable, provided that they comply with strict ethical and procedural requirements. In **Russia and Ukraine**, commercial surrogacy is legal and relatively accessible.

In **Ukraine**, married heterosexual couples and single women can access surrogacy services, with the intended parents being immediately recognized as the child's legal parents. Ukraine's straightforward legal procedures and relatively lower costs made it a major surrogacy destination before political instability and war disrupted the sector.

**Georgia** (before its recent legal changes) also had liberal surrogacy laws allowing both domestic and foreign intended parents to engage in commercial surrogacy. Clinics offered comprehensive packages, including fertility treatments, legal support, and birth services.

Despite their permissiveness, these countries have also faced criticism regarding the **exploitation of economically vulnerable women**, particularly in light of cases where

surrogates' rights and wellbeing were insufficiently protected.

#### 4. No Specific Legislation:

In some jurisdictions, **surrogacy is not explicitly regulated**, creating significant **legal uncertainties** and risks of exploitation. Countries like **Belgium, Ireland**, and many African nations fall into this category. In **Belgium**, for example, surrogacy is neither prohibited nor explicitly regulated. Hospitals develop their own guidelines, often requiring altruistic arrangements and ethical committee approval. This informal system leads to **lack of uniformity**, with legal recognition of parentage depending on post-birth adoption procedures.

Similarly, **Ireland** historically lacked clear surrogacy legislation, although recent initiatives aim to bring structured legal recognition for surrogacy agreements. Until such laws are finalized, intended parents must navigate complex and uncertain pathways to establish parentage.

In **Africa**, most countries have no detailed surrogacy laws, leaving intended parents, surrogates, and children vulnerable to ad-hoc legal decisions. **South Africa** is an exception, where the Children's Act of 2005 regulates surrogacy agreements under court supervision, ensuring rights protection and transparency.

The absence of specific legislation often leads to:

- i. **Inconsistent judicial decisions.**
- ii. **Difficulty in establishing legal parentage.**
- iii. **Greater risk of exploitation** in unregulated markets.

Legal scholars argue that this vacuum underscore the necessity of a well-defined legal framework that balances ethical concerns with reproductive rights.

#### 1.6 Comparative Analysis:

A comparative analysis of India's surrogacy laws with those of other jurisdictions reveals important differences in legislative approaches, underlying policy rationales, and societal attitudes towards reproductive rights. India's **Surrogacy (Regulation) Act, 2021** reflects a deeply conservative and protectionist model, shaped by concerns over exploitation, commodification, and ethical considerations. However, when compared to laws in other parts of the world, notable divergences emerge in the areas of commercial surrogacy, eligibility

criteria, surrogate mother qualifications, and the legal establishment of parentage.

**(i) Restriction on Commercial Surrogacy:**

**India's complete prohibition of commercial surrogacy** places it in alignment with many **European countries** and **Canada**, but stands in contrast to more permissive jurisdictions like parts of the **United States, Ukraine, and Russia**.

In India, the ban on commercial surrogacy reflects the intention to prevent the exploitation of vulnerable women, particularly those from lower socioeconomic backgrounds. The law mandates that only **altruistic surrogacy**—where no financial compensation is offered apart from medical expenses and insurance—is permitted. This mirrors the model seen in countries like:

**United Kingdom** (Surrogacy Arrangements Act, 1985), **Canada** (Assisted Human Reproduction Act, 2004), **Australia** (state-wise legislation).

In **France, Germany, Italy, and Spain**, commercial surrogacy is entirely banned and deemed illegal, reinforcing ethical concerns about treating children and women's bodies as commodities.

However, in countries like the **United States** (in states like California, Nevada, and Connecticut), commercial surrogacy is not only permitted but also **regulated through enforceable contracts**. Surrogate mothers can receive compensation beyond expenses, and legal mechanisms are well-developed to protect the interests of both parties.

Similarly, **Ukraine and Russia** allow commercial surrogacy under strict regulations, offering clear legal frameworks to protect intended parents and surrogates alike. Prior to the war, Ukraine had become a major hub for international commercial surrogacy due to its liberal laws, affordability, and straightforward legal processes.

Thus, India's stance, while reflective of ethical concerns, **limits accessibility** and may push intended parents toward seeking surrogacy services abroad in less regulated settings.

**(ii) Eligibility Criteria for intended parents:**

India's **eligibility criteria** for intended parents are among the most **stringent in the world**. Only married Indian heterosexual couples, who have proven infertility and have been married for at least five years, or single Indian women (widows or divorcees aged 35-45), are allowed

to opt for surrogacy. **Single men, LGBTQ+ couples, and live-in partners** are expressly excluded. This restrictive approach contrasts sharply with the broader, more inclusive eligibility seen in many other countries.

For instance:

In **many U.S. states** (like California and New York), **surrogacy is accessible to married couples, unmarried couples, single individuals, and LGBTQ+ individuals** without discrimination.

**Canada** allows single individuals and same-sex couples to commission altruistic surrogacy. In the **United Kingdom**, intended parents can be single, married, in a civil partnership, or in a long-term relationship, and there are no restrictions based on sexual orientation. Even countries like **Ukraine**, which impose some restrictions (allowing only heterosexual married couples), have been more flexible compared to India's exclusion of Indian single men and LGBTQ+ individuals.

Thus, India's restrictive eligibility criteria reflect a **traditional, heteronormative concept of family structure**, whereas many global jurisdictions have moved toward **recognizing diverse family forms**. India's policy has been criticized for being **discriminatory** and inconsistent with evolving constitutional principles of equality, dignity, and reproductive autonomy.

### (iii) **Surrogate Mother Eligibility:**

India's requirement that the surrogate mother be a close relative is unique. Other countries typically allow unrelated women to act as surrogates, often subject to psychological evaluations and medical screening. Another significant distinction lies in the eligibility requirements for surrogate mothers. India's law stipulates that the surrogate must be a **close relative** of the intending couple, must have **at least one biological child**, and must undergo psychological and medical evaluations. She is also restricted to acting as a surrogate **only once** in her lifetime.

### (iv) **Legal Parentage:**

While most jurisdictions recognize the intended parents as the legal parents of the child born through surrogacy, the specific procedures and requirements for establishing legal parentage vary. The determination and recognition of **legal parentage** — that is, who is legally recognized as the child's parents — is a critical aspect of surrogacy laws, and here too, India's

framework aligns partially but not completely with international practices. Under India's Surrogacy Act, the **intended parents** are declared the **legal parents** of the child born through surrogacy. The surrogate mother has **no parental rights** once the child is born, provided that the surrogacy has been approved by the relevant authorities and satisfies legal requirements.

**United States:** In many states, **pre-birth orders** can be obtained to declare the intended parents as the legal parents even before the child's birth. These orders are enforceable and provide clear legal status immediately upon delivery, reducing ambiguity.

**United Kingdom:** In the UK, the surrogate mother is automatically recognized as the child's legal mother at birth, regardless of genetic connection. Intended parents must apply for a **parental order** to become the legal parents. This process can be lengthy and requires the surrogate's formal consent after the child's birth.

**Canada:** Similar to the US, Canadian provinces like Ontario allow intended parents to be recognized without requiring adoption, provided that all parties comply with regulatory frameworks, including independent legal counsel and informed consent.

Thus, India's model of directly assigning parentage to intended parents' post-surrogacy completion is relatively progressive compared to countries like the UK but lacks the **flexibility and pre-birth assurance mechanisms** found in the US. The absence of pre-birth orders could potentially lead to legal disputes if procedures are not properly followed.

#### (v) **Ethical Considerations and Challenges:**

The regulation of surrogacy raises several complex ethical considerations:

1. **Reproductive Autonomy:** The right of individuals to make autonomous decisions about their reproductive lives is a fundamental principle. Restrictions on surrogacy, particularly for certain categories of individuals, raise concerns about limiting reproductive freedom.
2. **Exploitation of Vulnerable Women:** The potential for exploitation of surrogate mothers, particularly in commercial surrogacy arrangements, is a significant ethical concern. Ensuring fair compensation, access to healthcare, and psychological support for surrogate mothers is essential.

3. **Commodification of Childbirth:** Critics argue that commercial surrogacy commodifies the reproductive process, reducing it to a market transaction. Balancing the desire to assist infertile couples with the need to protect against the commodification of human life is a major challenge.
4. **Best Interests of the Child:** The welfare and best interests of the child born through surrogacy must be paramount. Ensuring stable and loving homes for these children is a critical ethical imperative.
5. **Cultural and Religious Values:** Cultural and religious values often influence attitudes towards surrogacy. Finding a balance between respecting diverse beliefs and protecting fundamental human rights is a complex task.

## CONCLUSION

While the Surrogacy (Regulation) Act, 2021 was enacted with the noble intent of protecting women from exploitation, it suffers from overregulation and lack of inclusivity. The law undermines reproductive autonomy by narrowing eligibility and failing to address socio-economic dynamics of consent. India must consider amendments that balance ethical concerns with individual freedoms, recognize diverse family structures, and ensure safe, voluntary surrogacy practices within a rights-based framework.

## REFERENCES

1. Surrogacy (Regulation) Act, 2021
2. Baby Manji Yamada v. Union of India, AIR 2009 SC 84.
3. Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.
4. K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
5. Devika Biswas v. Union of India, (2016) 10 SCC 726.
6. ABC v. State (NCT of Delhi), (2015) 10 SCC 1.
7. Jayashree Wad v. Union of India, 2018 SCC OnLine Bom 3973.
8. United Nations Convention on the Rights of the Child.
9. Assisted Human Reproduction Act, Canada.
10. Surrogacy Arrangements Act 1985, United Kingdom.