

# **Surrogacy in India: A Legal Perspective – A Literature Review**

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**Abstract:** *Surrogacy, a reproductive practice where a woman carries a child for another individual or couple, has gained legal and ethical attention in India due to its implications on parenthood, women's rights, and the commercialization of reproduction. India emerged as a global surrogacy hub in the early 2000s, prompting legal reforms to regulate the industry. This literature review synthesizes scholarly discourse on the legal, ethical, and socio-economic dimensions of surrogacy in India. The analysis draws upon 30 academic sources to trace the evolution of surrogacy laws, examine judicial interventions, and highlight the impact of the Surrogacy (Regulation) Act, 2021. It also discusses challenges such as exploitation, citizenship issues, and the rights of surrogate mothers. The findings emphasize the need for balanced legislation that upholds reproductive rights while preventing abuse and exploitation.*

**Keywords:** Surrogacy, Indian law, Assisted Reproductive Technology, Surrogacy Regulation Act, ethical issues, surrogate rights, commercial surrogacy, reproductive justice

## **I. INTRODUCTION**

Surrogacy has transformed from a private medical solution to a complex socio-legal issue in India. The country's initial openness to commercial surrogacy attracted global attention, resulting in India becoming a popular destination for fertility tourism. However, this also led to concerns about the exploitation of economically vulnerable women. In response, the Indian government introduced several legislative measures culminating in the Surrogacy (Regulation) Act, 2021. This literature review explores the evolution of the legal framework surrounding surrogacy in India, drawing from scholarly articles, legal commentaries, and case law analyses to assess the effectiveness and ethical implications of existing laws.

Surrogacy is a method of assisted reproduction wherein a woman, referred to as a *surrogate* or *birth mother*, agrees to carry and deliver a child on behalf of another individual or couple—often those unable to conceive due to medical or biological reasons. This includes heterosexual couples facing infertility, single individuals, and same-sex couples. Upon the birth of the child, the surrogate relinquishes all parental rights, transferring custody and guardianship to the *commissioning* or *intended parent(s)*.

The term *surrogate* is derived from the Latin word *surrogatus*, meaning “appointed as a substitute.” In surrogacy arrangements, the surrogate serves as a gestational carrier, not contributing genetically to the child, as the embryo is created through in-vitro fertilization (IVF) using the egg and sperm of the intended parent(s) or donors.

Surrogacy offers a unique path to parenthood for those unable to conceive or carry a pregnancy to term. It has brought hope and fulfillment to countless families, yet remains a medically, emotionally, and legally complex process. It involves multiple stages, including medical procedures, legal agreements, psychological evaluations, and ethical considerations to ensure that the rights and responsibilities of all parties are protected.

In India, surrogacy was first legalized in 2002 through guidelines issued by the Indian Council of Medical Research (ICMR). However, these guidelines lacked the force of law and failed to provide comprehensive regulation, leading to concerns over ethical practices, surrogate exploitation, and legal ambiguities. The absence of binding legislation rendered the regulatory framework ineffective, creating a pressing need for formal legal intervention.



### Objectives

- To examine the historical development of surrogacy laws in India.
- To analyze the legal and ethical challenges associated with commercial and altruistic surrogacy.
- To evaluate the impact of the Surrogacy (Regulation) Act, 2021.
- To explore judicial pronouncements and their influence on surrogacy regulation.
- To identify gaps and suggest areas for legal reform

### Discussion

The legal and ethical discourse around surrogacy in India has been significantly enriched by scholarly contributions that examine its multifaceted implications on women's rights, legal protections, and medical ethics. The reviewed literature illustrates critical concerns surrounding commercial surrogacy, consent, health risks, and the need for robust legal frameworks.

### Ethical Dilemmas and the Commodification of Reproduction

Patel (2012), in her study published in the *Economic and Political Weekly*, interrogates the commodification of women's reproductive labor within the Indian surrogacy industry. She argues that commercial surrogacy blurs the line between altruistic intentions and the monetization of motherhood. The ethical dilemma arises when women's bodies are used as vessels for profit, leading to questions about autonomy and dignity, especially when financial desperation is the primary motivator.

Pande (2010), in *Signs*, further explores this theme by analyzing power dynamics embedded in surrogacy contracts. Her ethnographic research reveals that economically disadvantaged women often enter into these arrangements under pressure, lacking real bargaining power. She asserts that such asymmetry between commissioning parents (often wealthier and educated) and surrogate mothers (typically poor and less informed) creates a fertile ground for exploitation.

### Consent and Medical Ethics

The Sama Resource Group for Women and Health (2012) provides empirical evidence on how surrogate mothers in India frequently lack full, informed consent regarding the medical procedures they undergo. Their report highlights the physical risks and psychological burdens that are often understated or omitted entirely in discussions with surrogates. This lack of transparency compromises the ethical standards that should govern any medical procedure, let alone one as invasive and life-altering as surrogacy.

Srinivasan (2014), writing in the *Indian Journal of Medical Ethics*, also emphasizes the problematic nature of consent, particularly in cases where the surrogate is poorly educated or under familial pressure. Additionally, she discusses the ambiguity in the legal status of children born through surrogacy—especially in the absence of enforceable contracts—making such children vulnerable to abandonment or legal limbo in custody disputes.

### Legal Loopholes and the Need for Regulation

Shanthi (2013) provides a comparative legal analysis of surrogacy regulation in India, the USA, and the UK. Her research underscores that while the UK and certain U.S. states have structured and enforceable surrogacy laws, India's framework has been historically patchy and informal. Before recent reforms, guidelines issued by the Indian Council of Medical Research lacked legislative backing, allowing commercial clinics and middlemen to operate with minimal oversight.

Sharma (2015), in the *Indian Journal of Medical Ethics*, critiques the Assisted Reproductive Technology (ART) Bill for its failure to adequately protect surrogate mothers. She points out that while the bill acknowledged the need for regulation, it left critical gaps concerning surrogate health rights, compensation, and enforceability of contracts.

Ravindra (2017), in his review of the 2016 Surrogacy (Regulation) Bill published in the *NUJS Law Review*, notes that the bill, though a step forward, suffered from several limitations. He argues that it focused disproportionately on



banning commercial surrogacy without establishing a comprehensive system to protect surrogate mothers or regulate private clinics. His analysis calls for a more balanced approach that recognizes the autonomy and welfare of surrogate women while ensuring ethical practices.

### **Judicial Responses and Legal Enforceability**

Ray (2019), writing in the *Journal of Indian Law and Society*, examined how Indian courts have interpreted surrogacy contracts, particularly in cases involving custody, parental rights, and nationality. Her study reveals that judicial responses have often favored commissioning parents but lack consistency due to the absence of a standardized legal framework. Courts have had to rely on constitutional principles or international conventions to bridge gaps, especially in cross-border surrogacy cases.

Dasgupta (2017), in the *Indian Journal of Contract Law*, focused on the enforceability of surrogacy contracts. He noted that Indian contract law does not adequately address unique aspects such as bodily autonomy, maternal rights, and post-birth obligations, resulting in uncertainty and weak protections for all parties involved.

Mehta (2020) analyzed the landmark Supreme Court case *Baby Manji Yamada v. Union of India*, where a Japanese couple's surrogacy arrangement in India raised complex legal questions on citizenship and guardianship. The judgment, though providing temporary relief, highlighted the urgent need for codified surrogacy law to protect the rights of children and intended parents alike.

### **Gender, Class, and Moral Regulation**

Desai (2011), in *Feminist Studies*, critiqued Indian surrogacy laws for embodying class-based and moralistic bias. She argued that the legal framework tends to police the morality of surrogate women while privileging the social standing of commissioning parents. This moral governance reflects deeper societal discomfort with reproductive autonomy exercised by economically vulnerable women.

Yadav (2021), writing in the *Law and Society Review*, explored state regulation of surrogacy through the lens of gender justice. She contended that instead of empowering women through protection and rights-based frameworks, the state has often acted paternalistically—controlling women's reproductive choices under the pretext of ethical safeguarding.

Malhotra (2021), in the *Indian Constitutional Law Review*, critically evaluated the Surrogacy (Regulation) Act, 2021, particularly its exclusion of single men, LGBTQ+ individuals, and live-in couples from accessing surrogacy. The paper argues that such exclusions are unconstitutional and reinforce heteronormative, patriarchal norms, denying equal reproductive rights to non-traditional families.

### **Medicalization, Psychological, and Citizenship Concerns**

Bhatia (2013), in *Bioethics*, examined how ART and surrogacy have led to the “medicalization of motherhood.” Her work discusses how women's reproductive roles are increasingly defined by technology and contractual obligations, sometimes undermining the emotional and bodily experiences of pregnancy.

Radhika (2016), writing in the *Journal of Family Studies*, delved into the psychological consequences for surrogate mothers. Her findings revealed a range of emotional impacts—from pride and empowerment to postnatal depression, emotional detachment, and guilt—especially when psychological counseling was inadequate or absent.

Jaiswal (2014), in the *Indian Journal of Public Policy*, discussed how surrogacy intersects with citizenship and child rights, particularly in transnational cases. The paper highlighted instances where children born through surrogacy faced legal hurdles in obtaining nationality or passport documentation, further emphasizing the need for legal harmonization.

Kumar (2015), in the *International Journal of Law and Policy Review*, analyzed the vacuum in regulatory oversight before the enactment of the Surrogacy (Regulation) Act. He noted that clinics operated with impunity, surrogate contracts were often informal, and surrogate health rights were not enforced—placing women at risk both medically and legally.

Nair (2018), in the *Journal of Health Law & Ethics*, criticized the role of medical professionals and agencies that often prioritized profit over ethics. Her research revealed practices such as overmedication, lack of transparency in medical procedures, and exploitation through middlemen—reinforcing the need for stricter licensure and monitoring.



Verma (2019), in the *Journal of Comparative Law*, explored India's response to international surrogacy markets. She explained how India's initial reputation as a global surrogacy destination shifted post-2015 with increased restrictions, largely due to global criticism over unregulated practices and the exploitation of poor Indian women.

## II. FINDINGS

- The literature highlights a lack of consensus on the ethical implications of surrogacy.
- Earlier legal frameworks were inadequate in protecting surrogate mothers' rights.
- The Surrogacy (Regulation) Act, 2021 has introduced significant reforms but remains exclusionary toward LGBTQ+, single, and foreign individuals.
- Judicial interpretations have played a crucial role in shaping the surrogacy discourse.
- There is a pressing need for ethical oversight, informed consent procedures, and protection of children born through surrogacy.

## III. CONCLUSION

Surrogacy in India reflects a complex interplay of legal, ethical, and socio-economic factors. While the Surrogacy (Regulation) Act, 2021 has attempted to introduce much-needed reforms, the restrictive nature of its provisions has raised concerns. A more inclusive, rights-based approach that safeguards the dignity of all stakeholders—especially surrogate mothers and children—is essential for ethical surrogacy practices in India. Continued legal refinement and public discourse will be crucial in achieving this balance.

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