

## **Surrogacy and Reproductive Rights**

Surrogacy and reproductive rights represent one of the most debated intersections of law, ethics, and personal liberty in the modern world. Surrogacy refers to an arrangement in which a woman agrees to carry and give birth to a child on behalf of another person or couple, usually because the intended parents are unable to conceive or carry a pregnancy themselves. Reproductive rights, on the other hand, encompass the fundamental right of individuals to make autonomous decisions about their reproductive health, including the right to access contraception, fertility treatment, safe pregnancy and childbirth, and to decide freely whether and when to have children. Together, these concepts raise profound questions about bodily autonomy, gender justice, and the boundaries of law and morality.

Globally, the legal and ethical landscape surrounding surrogacy is remarkably diverse. Countries differ sharply in their approach, with some embracing regulated surrogacy and others banning it entirely. In the United States, the legality of surrogacy varies from state to state. States like California and Illinois have well-established frameworks that recognize the rights of intended parents and regulate commercial surrogacy through enforceable contracts, while others prohibit it. The United Kingdom and Canada permit only altruistic surrogacy, meaning the surrogate mother cannot receive payment beyond reasonable expenses. In Australia, a similar approach is adopted where altruistic surrogacy is allowed but commercial surrogacy remains illegal. By contrast, countries such as Russia, Ukraine, and Georgia have legalized commercial surrogacy and become major destinations for international surrogacy arrangements. On the other hand, many European countries, including France, Germany, Italy, and Spain, consider all forms of surrogacy contrary to public policy and human dignity. Several Asian nations that once served as global surrogacy hubs, like Thailand and Nepal, have imposed strict restrictions after cases of exploitation came to light.

These contrasting legal frameworks highlight deeper ethical dilemmas. Critics argue that commercial surrogacy can lead to the exploitation and commodification of women's bodies, especially in low-income communities. Cross-border surrogacy has also produced complex legal problems involving the citizenship and parentage of children born in one country to parents from another. Questions of informed consent and autonomy are critical, as many surrogates may not fully understand the implications of such agreements or may be coerced by economic pressures. At the same time, denying individuals the right to pursue surrogacy may infringe upon their reproductive autonomy and right to family life. International human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women all underscore the right to privacy, health, and family life, yet there remains no unified global stance on surrogacy. Consequently, its regulation continues to depend on domestic legal and cultural contexts.

In India, the journey of surrogacy law has been complex and evolving. For years, India was a global hub for commercial surrogacy due to advanced medical facilities and comparatively lower costs. The practice was largely unregulated until 2002, when the Indian Council of Medical Research (ICMR) issued non-binding guidelines permitting commercial surrogacy. The industry flourished, attracting foreign couples and generating substantial revenue, but it also led to serious concerns about exploitation of poor women, lack of legal clarity, and unethical medical practices. In response, the government imposed a ban in 2015 on foreign nationals seeking surrogacy services in India. Thereafter, a series of draft bills were introduced, culminating in the enactment of the Surrogacy (Regulation) Act, 2021.

The 2021 Act marked a major shift in policy, replacing commercial surrogacy with a strictly altruistic model. Under the law, only Indian married couples suffering from proven infertility are eligible to commission a surrogate. Single individuals, LGBTQ+ persons, foreign nationals, and live-in partners are excluded from accessing surrogacy services. The surrogate mother must be a married woman between 25 and 35 years of age who has at least one biological child of her own and can act as a surrogate only once in her lifetime. The Act also mandates the establishment of national and state surrogacy boards to monitor and regulate the process, ensuring that the child born through surrogacy is legally recognized as the biological child of the intending couple. The Assisted Reproductive Technology (Regulation) Act, also passed in 2021, complements this law by bringing fertility clinics and ART banks under regulatory oversight, mandating consent, registration, and ethical compliance.

While the intent of these laws is to protect women from exploitation and ensure ethical practices, they have sparked widespread criticism for being overly restrictive and exclusionary. Constitutional principles under Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty, have been interpreted by the Supreme Court to include reproductive autonomy and privacy, as seen in the landmark *Justice K.S. Puttaswamy v. Union of India* (2017) judgment. The right to equality under Article 14 and the right to freedom of expression under Article 19(1)(a) also have implications for reproductive rights. Critics argue that excluding single parents, LGBTQ+ persons, and widows from surrogacy access violates these constitutional guarantees by discriminating against individuals on the basis of marital status and sexual orientation. Furthermore, the requirement that only married women with children can act as surrogates reinforces patriarchal and stereotypical notions of womanhood and motherhood.

The ethical challenge lies in balancing two competing imperatives: protecting women from potential exploitation in commercial surrogacy arrangements, and ensuring individuals' freedom to make autonomous reproductive choices. A purely prohibitive approach may drive the practice underground, increasing the risks of exploitation and lack of legal protection. At the same time, an unregulated commercial market can reduce surrogacy to a transactional arrangement that commodifies both women and children. The ideal approach must therefore be one that safeguards surrogate mothers through strict regulation, ensures fair

compensation, informed consent, and healthcare coverage, while also upholding the reproductive rights of intending parents, regardless of gender, marital status, or sexuality.

Contemporary debates on surrogacy also touch upon issues of globalization, citizenship, and parentage. In an interconnected world, cross-border surrogacy raises complex questions about the nationality and legal status of children born through such arrangements. India's current framework, while intended to prevent exploitation, does not adequately address these global dimensions. There is also a growing demand for inclusive policies that recognize diverse family structures, including those formed by single parents and same-sex couples, in line with constitutional principles of equality and dignity. Surrogacy and reproductive rights together illuminate the tension between state regulation, individual freedom, and social morality. India's legislative approach, though well-intentioned, errs on the side of excessive control, limiting access and choice under the guise of protection. As reproductive technologies evolve, the law must keep pace with changing social realities, ensuring that ethical safeguards do not come at the cost of autonomy and equality. True progress will lie in creating a legal framework that both prevents exploitation and affirms every individual's right to make free and informed choices about parenthood.

Surrogacy in India presents a deeply intricate blend of legal, ethical, and social dimensions that touch upon questions of autonomy, equality, and human dignity. While surrogacy offers a ray of hope to couples who are unable to conceive naturally, it also raises pressing concerns about exploitation, commercialization of motherhood, and the moral boundaries of reproductive technology. Over the years, India has witnessed a remarkable evolution in its approach to surrogacy, moving from being a global centre for commercial surrogacy to enforcing a highly regulated, altruistic model. The legal and ethical aspects of this transformation reveal both benefits and limitations for Indian citizens.

Legally, surrogacy in India has undergone a gradual transition. In the early 2000s, India became a hub for commercial surrogacy, attracting thousands of foreign couples due to its advanced medical facilities and low costs. The absence of specific legislation allowed private clinics to operate freely, and the practice was guided only by the non-binding 2002 Indian Council of Medical Research (ICMR) guidelines. This period saw a booming surrogacy industry but also gave rise to exploitation, with poor women renting their wombs under economic compulsion. The lack of legal clarity on issues such as parentage, custody, and citizenship of the child often led to disputes and hardships for both surrogates and intended parents.

In response to these growing concerns, the Government of India introduced the **Surrogacy (Regulation) Act, 2021**, which sought to regulate the practice comprehensively. The Act bans **commercial surrogacy** and permits only **altruistic surrogacy**, wherein the surrogate mother receives no financial compensation other than the reimbursement of medical expenses and insurance coverage. The law allows only Indian heterosexual married couples, where the wife is between 23 and 50 years and the husband between 26 and 55 years, to commission surrogacy on medical grounds of infertility. The surrogate must be a married woman with at

least one biological child of her own, aged between 25 and 35 years, and she may act as a surrogate only once in her lifetime.

The Act establishes **national and state surrogacy boards** to oversee the process, ensure ethical practices, and maintain transparency. A child born through surrogacy is deemed to be the biological child of the intending couple, eliminating ambiguity over parentage. The law also works alongside the **Assisted Reproductive Technology (Regulation) Act, 2021**, which governs IVF clinics, gamete banks, and fertility treatments, thereby creating a more cohesive regulatory framework. From a legal standpoint, these measures provide structure, accountability, and protection to all parties involved, particularly the surrogate mother and the child.

However, despite these legal safeguards, the ethical implications of India's surrogacy law remain contested. Ethically, surrogacy involves balancing two competing values: the protection of women from exploitation and the right of individuals to reproductive autonomy. The government's emphasis on altruism stems from the belief that commercial surrogacy commodifies women's bodies and transforms motherhood into a business transaction. Instances of poor women being coerced or exploited by middlemen and fertility agencies justified the need for legal control. The altruistic model, therefore, aims to preserve the dignity of women by ensuring that surrogacy is an act of compassion rather than a financial transaction.

Yet, this restrictive approach also raises significant ethical and constitutional concerns. By limiting access to surrogacy only to married heterosexual couples and excluding single parents, live-in partners, widows, divorcees, and LGBTQ+ individuals, the law arguably violates the principles of equality and personal liberty guaranteed under **Articles 14 and 21** of the Indian Constitution. The Supreme Court, in cases such as *Justice K.S. Puttaswamy v. Union of India* (2017), has recognized reproductive autonomy as an essential component of the right to privacy. Denying individuals the ability to form families through surrogacy on the basis of marital status or sexual orientation infringes upon this autonomy. Furthermore, the requirement that a surrogate must be a married woman with a biological child reinforces traditional gender norms and limits women's freedom to make independent reproductive choices.

From an ethical perspective, the altruistic surrogacy model also presents practical challenges. Expecting women to undertake the physical, emotional, and social burden of pregnancy without adequate compensation can be viewed as exploitative in itself. It disregards the value of a woman's labour, time, and the health risks involved in pregnancy. Critics argue that fair compensation, when transparently regulated, would respect a surrogate's autonomy more than an outright prohibition of commercial arrangements. Moreover, by criminalizing financial compensation, the Act risks driving the practice underground, potentially giving rise to unregulated and unsafe surrogacy markets, which would defeat its very purpose of protection.

The legal framework does, however, offer some clear benefits to citizens. It establishes accountability by requiring clinics and ART banks to be registered and monitored, ensuring transparency in procedures. It also provides legal certainty regarding the parentage of the child, which protects both the surrogate and the intended parents from future disputes. Additionally, by prohibiting international surrogacy arrangements, the law shields Indian women from being exploited by foreign clients, as had been common before 2015. For many intended parents, the law's emphasis on ethical regulation ensures that the process remains safe, legitimate, and socially acceptable.

On the other hand, the restrictive eligibility criteria have excluded a large segment of Indian citizens from availing surrogacy. Single individuals who wish to experience parenthood, same-sex couples seeking to build families, and women who cannot conceive but are not married are denied this opportunity. In a progressive and diverse society, such exclusions raise serious questions about equality and inclusiveness. The law, in its current form, reflects a conservative vision of family that may not align with India's constitutional ethos of liberty and dignity for all.

In essence, the legal and ethical aspects of surrogacy in India reveal a delicate tension between **protection and prohibition**. The law has succeeded in curbing unethical practices and providing clarity where ambiguity once reigned, but it has also curtailed personal freedom and failed to accommodate the evolving social realities of family and parenthood. For the citizens, these laws are both beneficial and restrictive — beneficial in the sense that they promote safety, accountability, and dignity, but restrictive in their denial of reproductive choice to those who fall outside the narrow definition of an eligible couple.

Ultimately, surrogacy in India demands a more balanced legal approach — one that ensures ethical safeguards without undermining individual autonomy. The goal should not merely be to prevent exploitation but to empower women and families through informed choice, transparent regulation, and respect for diversity. Only then can surrogacy truly serve as a humane and inclusive instrument of reproductive justice, beneficial to all citizens in both letter and spirit.

Legal experts in India have offered a wide range of opinions on the **implications of the current surrogacy laws**, particularly the **Surrogacy (Regulation) Act, 2021**, and its impact on reproductive rights, gender justice, and constitutional equality. Their analyses reveal both appreciation for the law's intention to prevent exploitation and criticism of its exclusionary and overly restrictive nature.

Many legal scholars acknowledge that the Act emerged from a genuine need to **regulate the surrogacy industry**, which had become notorious for unethical practices. **Dr. N.S. Gopalakrishnan**, a prominent legal academic, has pointed out that India's earlier absence of regulation led to "a contractual and commercial understanding of motherhood that undermined women's dignity." He supports the state's attempt to introduce legal oversight,

stating that regulation was essential to protect surrogate mothers from exploitation by clinics and commissioning parents, especially foreign clients. According to him, the Act's emphasis on altruistic surrogacy helps restore the **moral foundation of the practice**, ensuring that motherhood is not commodified.

However, several experts caution that in trying to prevent exploitation, the law has **overstepped into the domain of personal autonomy**. Senior advocate Indira Jaising, known for her work on women's rights, argues that the Act "replaces exploitation with exclusion." She emphasizes that reproductive choices fall within the ambit of the **right to privacy under Article 21**, and by restricting surrogacy to married heterosexual couples, the state effectively denies citizens the freedom to decide how to form a family. Jaising points out that such exclusions violate both **Article 14 (Right to Equality)** and **Article 15 (prohibition of discrimination)**, as they discriminate against single individuals, same-sex couples, and unmarried women. She suggests that the law reflects **moral paternalism**, imposing a state-approved notion of what constitutes a "legitimate family."

**Justice A.P. Shah**, former Chief Justice of the Delhi High Court, has echoed similar concerns. He observes that the surrogacy law is "morally loaded" and inconsistent with constitutional morality. He argues that the Indian Constitution upholds the principles of dignity, liberty, and equality, and that legislation should not privilege one form of family over another. According to Justice Shah, "the law fails to recognize the evolving realities of Indian society, where single parenting, same-sex families, and live-in relationships are no longer exceptions." He warns that such restrictive laws could face constitutional challenges in the future, especially after the Supreme Court's judgments in *Navtej Singh Johar v. Union of India* (2018) and *K.S. Puttaswamy v. Union of India* (2017), both of which affirm individual autonomy and equality as central to constitutional interpretation.

**Professor Flavia Agnes**, a feminist legal scholar, takes a nuanced view. She acknowledges that while the earlier unregulated surrogacy market did exploit poor women, the solution should not have been a complete prohibition of commercial surrogacy. Instead, she advocates for a **regulated compensation model**, similar to organ donation laws in developed countries, where payment is made transparently under strict supervision. Agnes believes that denying payment for the surrogate's physical and emotional labour is itself unethical, as it "romanticizes motherhood and invisibilizes women's reproductive work." She further notes that most women who acted as surrogates did so out of financial need, and the ban on commercial surrogacy has eliminated a source of livelihood without necessarily addressing underlying gender inequalities.

From a constitutional standpoint, **Professor Upendra Baxi** has described the 2021 Act as an example of "state overreach into the private sphere." He argues that the law's paternalistic framework violates the spirit of *Puttaswamy*, which recognized reproductive autonomy as a facet of privacy and bodily integrity. Baxi also points out that the exclusion of LGBTQ+ individuals from surrogacy access contradicts the Supreme Court's recognition of their rights

in *Navtej Singh Johar and Deepika Singh v. CAT (2022)*, where the Court affirmed that non-traditional families deserve equal protection under the law. He warns that the current legislation, if not amended, could be struck down or read down by constitutional courts for being **discriminatory and regressive**.

Other experts such as **Dr. Jaya Sagade**, a scholar in gender and law, focus on the ethical dimension of the Act. She argues that while altruism appears morally appealing, it may inadvertently **exploit emotional and familial relationships**, as surrogates are now expected to act out of “compassion” rather than autonomy. She questions whether altruism can be truly voluntary when it often involves social and familial pressures. Sagade also emphasizes that ethical policymaking must ensure **informed consent, fair treatment, and psychological support** for surrogates, none of which the current law adequately guarantees.

Medical-legal experts have also pointed out the **practical and procedural implications** of the Act. The requirement for multiple certificates of eligibility, approval from surrogacy boards, and stringent conditions have made the process cumbersome and inaccessible for many couples. **Dr. Ranjana Kumari**, director of the Centre for Social Research, notes that the bureaucratic nature of the Act has driven some intended parents toward illegal or overseas surrogacy arrangements, undermining the very regulatory purpose of the law. She emphasizes the need for a more **balanced and realistic framework** that safeguards against exploitation while respecting citizens’ reproductive rights.

In sum, legal experts broadly agree that India’s surrogacy law, though well-intentioned, suffers from **constitutional, ethical, and practical flaws**. It reflects a protectionist approach that prioritizes moral conservatism over reproductive autonomy. The consensus among many constitutional scholars is that future reforms must align the law with India’s evolving jurisprudence on privacy, equality, and family diversity. Rather than banning commercial surrogacy outright, experts propose a **strictly regulated compensatory model**, greater inclusivity for all individuals regardless of marital or sexual status, and stronger mechanisms to ensure surrogate mothers’ health, consent, and post-delivery welfare.

Thus, the legal and ethical implications of India’s surrogacy framework underscore a broader tension between **state control and individual liberty**. While the law aims to protect women and children, its rigid moral and social assumptions limit citizens’ reproductive freedom. As legal experts repeatedly stress, the challenge for India lies not in choosing between regulation and freedom, but in harmonizing both—ensuring that ethical protection does not come at the expense of personal autonomy and constitutional rights.