

Cryopreservation, IVF, and Surrogacy in India: A Critical Analysis of Medico-Legal and Ethical Challenges governed by the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021

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Abstract:

The rapid advancement of Assisted Reproductive Technologies (ARTs), including Cryopreservation, In-Vitro Fertilization (IVF), and Surrogacy, has reshaped the reproductive landscape in India. These technologies have enabled countless individuals and couples to overcome infertility and build families. Yet, the widespread increase in their use has also given rise to complex medico-legal and ethical dilemmas. In response, the Indian legislature introduced the regulation of Assisted Reproductive Technology (ART) Act, 2021 and the Surrogacy (Regulation) Act, 2021 to address growing concerns around medical safety, ethical exploitation, and legal ambiguity.

This paper critically examines the legal framework governing ART and surrogacy in India post-2021. It analyses how these laws attempt to regulate clinics, ensure informed consent, protect donor and surrogate rights, and prevent commercial exploitation. The study also explores contentious issues such as the exclusion of LGBTQ+ individuals and single parents, lack of clarity on parentage and citizenship in surrogacy cases, and the ethical challenges surrounding embryo cryopreservation and reproductive autonomy.

Through a comparative legal analysis with international practices and judicial precedents such as **Baby Manji Yamada and Jan Balaz**, The article maintains that even though the 2021 legislations provide much-needed oversight, they fall short in guaranteeing inclusive and rights-based reproductive justice. The research concludes by recommending reforms to make India's ART and surrogacy regime more equitable, medically accountable, and ethically sound.

Keywords: Cryopreservation, In-Vitro Fertilization (IVF), Surrogacy, ART Act 2021, Surrogacy Act 2021, Reproductive Rights, Medical Ethics, Legal Parenthood, Surrogacy Contracts, Embryo Freezing, LGBTQ+ Rights, India, Commercial Surrogacy, Bioethics, Constitutional Law, Medico-Legal Challenges.

1. Introduction

The emergence of Assisted Reproductive Technologies (ARTs) such as Cryopreservation, In-Vitro Fertilization (IVF), and Surrogacy has revolutionized the field of reproductive healthcare globally. These techniques offer significant hope to individuals and couples struggling with infertility, a condition affecting approximately 10–15% of married couples in India¹. However, while these scientific breakthroughs have enabled the right to procreation, they have also raised complex legal, ethical, and social dilemmas related to parentage, commodification of reproduction, exploitation of women, and the legal status of embryos and surrogate-born children².

India became a global destination for surrogacy, often termed the "surrogacy capital of the world", particularly between 2002 and 2015 due to the absence of regulation, lower medical costs, and the availability of poor women willing to become surrogates for economic reasons³. This unregulated boom led to several controversies and legal disputes, including transnational custody battles and ethical concerns over the commercialization of women's bodies.

In response, the Indian government enacted two landmark laws in 2021 the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 to streamline ART services, protect stakeholders, and prevent exploitation⁴. These laws became effective on January 25, 2022, marking a critical shift from permissive to highly regulated reproductive practices in India.

2. Conceptual Framework-Understanding Cryopreservation, IVF, and Surrogacy

2.1 Assisted Reproductive Technologies (ARTs): An Overview

Assisted Reproductive Technologies (ARTs) encompass a broad spectrum of medical interventions aimed at addressing infertility and enabling conception through artificial or semi-natural methods. ARTs primarily include In-Vitro Fertilization (IVF), Intracytoplasmic Sperm Injection (ICSI), Cryopreservation, and Surrogacy⁵. These methods have originated from experimental techniques into standard clinical practices across the globe, including in India.

India's apex medical research body ICMR defines ART as "all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy"⁶.

¹ Indian Society for Assisted Reproduction (ISAR), Annual Clinical Report, 2021

² Bhattacharya, S., "Assisted Reproduction and the Law in India: Emerging Trends", Journal of Medical Ethics & Law, Vol. 5, 2022.

³ The 2009 Report No. 228 by the Law Commission of India highlights the necessity for legal regulation of ART clinics."

⁴ Ministry of Health and Family Welfare, Government of India, Assisted Reproductive Technology (Regulation) Act, 2021 and Surrogacy (Regulation) Act, 2021.

⁵ (ICMR), Government-issued guidelines for ART Clinics, 2005.

⁶ ICMR, ART Guidelines, Ibid.

2.2 In-Vitro Fertilization (IVF)

IVF is a process whereby eggs are fertilized outside the woman's body, in a laboratory dish, and the resulting embryo is transferred into the uterus. The first successful IVF birth took place in 1978 in the United Kingdom with the birth of Louise Brown, and in India in 1978 with Kanupriya Agarwal (Durga) through the work of Dr. Subhas Mukherjee⁷. IVF typically involves the following steps:

- Ovarian stimulation
- Egg retrieval
- Sperm collection
- Fertilization in vitro
- Embryo transfer

In India, IVF services are widely available but largely unregulated until the enactment of the ART (Regulation) Act, 2021, which now requires registration of ART clinics, mandates informed consent, and prohibits preimplantation sex selection⁸.

2.3 Cryopreservation: Technology and Legal Implications

Cryopreservation refers to the process of freezing and storing gametes (sperm and eggs), embryos, or reproductive tissues at ultra-low temperatures for future use. This technique enables individuals to delay childbearing, preserve fertility before undergoing cancer treatments, or store surplus embryos from IVF cycles⁹. Legal and ethical issues associated with cryopreservation include:

- Ownership and disposition of embryos in case of divorce or death of one partner,
- Duration of storage, which is often undefined in law,
- Consent for future use of stored embryos or gametes.

The ART Act, 2021 attempts to address these issues by mandating that consent forms specify the duration and purpose of storage, and requires clinics to be registered with the National ART and Surrogacy Board¹⁰. However, the Act is silent on complex questions such as posthumous reproduction and disputes over embryo custody.

2.4 Surrogacy: Meaning and Forms

Surrogacy is an arrangement in which a woman agrees to carry and deliver a child for another individual or couple, who becomes the child's legal parent(s) after birth. Surrogacy may be grouped into two distinct types:

- **Traditional surrogacy:** The surrogate is genetically connected with the child, using her own egg and the intended father's sperm.

⁷ Mukherjee, R., "Rewriting Reproductive Futures: IVF in India," Economic and Political Weekly, Vol. 53, No. 22, 2018.

⁸ Assisted Reproductive Technology (Regulation) Act, 2021, s. 15, s. 21.

⁹ WHO, Fertility Preservation in Cancer Patients, Technical Report Series, 2020.

¹⁰ ART Act, 2021, s. 12, s. 22.

- **Gestational surrogacy:** The surrogate has no genetic link to the child; the embryo is created via IVF using the gametes of the intending parents or donors¹¹.

India witnessed a surrogacy boom in the early 2000s, with clinics in Gujarat, Maharashtra, and Punjab offering commercial surrogacy services to both Indian and foreign clients. The lack of regulation led to various types of problems surrogate exploitation, child abandonment, and "baby-selling" allegations¹². To combat these challenges, the 2021 law regulating surrogacy in India was passed, which:

- Prohibits commercial surrogacy
- Allows only altruistic surrogacy under strict conditions
- Limits eligibility to married Indian couples, and only permits surrogacy if one partner is infertile.¹³

This policy has drawn critical attention for being paternalistic and non-inclusive, particularly for LGBTQ+ individuals, single parents, and live-in partners¹⁴.

2.5 Legal Definitions under the 2021 Acts

Both the ART and Surrogacy Acts define key terms crucial for legal interpretation:

1. **"ART clinic":** Any facility providing ART services including IVF, ICSI, etc.¹⁵
2. **"Surrogate mother":** A woman who agrees to undergo surrogacy under the conditions laid out by the law.¹⁶
3. **"Altruistic surrogacy":** Surrogacy where the surrogate mother receives no monetary compensation other than medical expenses and insurance.¹⁷
4. **"Donor":** A person who donates sperm or oocytes for ART, but cannot claim parental rights.¹⁸

Such definitions are fundamental for understanding the legal boundaries and regulatory duties under the Acts.

2.6 Constitutional and Ethical Dimensions

From a constitutional perspective, ART and surrogacy intersect with fundamental rights under:

- **Article 21** (Right to life and personal liberty, which includes the right to reproductive autonomy)
- **Article 14** (Right to equality, challenged by the exclusion of unmarried and queer individuals)

¹¹ Law Commission of India, Report No. 228 on Surrogacy, 2009.

¹² Sarojini Nadimpally et al., *Birthing a Market: Commercial Surrogacy in India*, Sama, 2012.

¹³ Surrogacy (Regulation) Act, 2021, ss. 4–6.

¹⁴ Sharma, N., "Reproductive Rights and Queer Exclusion in India's Surrogacy Law," *Indian Journal of Law & Society*, Vol. 14, 2022

¹⁵ ART Act, 2021, s. 2(c).

¹⁶ Surrogacy Act, 2021, s. 2(zc).

¹⁷ Ibid, s. 2(b).

¹⁸ ART Act, 2021, s. 2(g).

- **Article 19(1)(g)** (Right to practice any profession, relevant for clinics and surrogate mothers)

Ethically, ARTs raise questions about:

- Bodily autonomy of surrogate mothers
- Consent and exploitation in socio-economic contexts
- Commodification of reproduction in a capitalist healthcare system

ICMR's Indian national standards for ART clinics (2005) had earlier attempted to address these concerns but lacked legislative enforceability.¹⁹

2.7. International Human Rights Frameworks and Reproductive Rights

The freedom to Found a Family: The Universal Declaration of Human Rights (UDHR), under Article 16(1), affirms that "Men and women of full age... have the right to marry and to found a family."²⁰ This right has been reiterated under various enforceable international agreements, such as ICCPR.²¹ In the context of infertility and involuntary childlessness, ARTs such as IVF and surrogacy emerge as vital tools to enable the realization of this right.

However, access to ARTs remains unequal. Across numerous nations, these services are limited to heterosexual, married couples, excluding LGBTQ+ individuals, unmarried individuals and those with disabilities, thus breaching the principle of non-discrimination.²²

The entitlement to health and control over reproductive choices: Article 12 Concerning the rights assured globally under the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."²³ Reproductive health, as interpreted by the Committee on Economic, Social and Cultural Rights, includes access to ARTs.²⁴ Denial or restriction of ARTs on arbitrary grounds, such as marital status or sexual orientation, may violate this right. The Programme of Action adopted at the International Conference on Population and Development (ICPD), Cairo 1994, explicitly recognised reproductive rights as encompassing "the right to decide freely and responsibly the number, spacing and timing of their children,"²⁵ which includes the freedom to access fertility preservation (cryopreservation) and reproductive assistance.

¹⁹ ICMR, National Guidelines for ART Clinics, 2005.

²⁰ Article 16(1) of the 1948 Universal Declaration of Human Rights

²¹ International Covenant on Civil and Political Rights, 1966, Art. 23.

²² Zegers-Hochschild F. et al., "The International Glossary on Infertility and Fertility Care," Human Reproduction, Vol. 32, No. 9, 2017.

²³ ICESCR, 1966, Art. 12.

²⁴ CESCR, General Comment No. 14, 2000.

²⁵ UN, International Conference on Population and Development, Cairo Programme of Action, 1994.

CEDAW and Women's Reproductive Rights: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has a crucial impact on promoting women's reproductive rights. Article 12 mandates States to "eliminate gender-based bias faced by women in the sector of health care," including access to family planning and related services.²⁶ The CEDAW Committee, in its General Recommendation No. 24, emphasized that the right to reproductive health is central to women's equality and autonomy.²⁷

In the context of surrogacy, especially commercial surrogacy, there is concern over the commodification of women's bodies and reproductive labour. Although CEDAW does not explicitly address surrogacy, it can be interpreted to support the protection of surrogate mothers from exploitation, and the need for informed consent and adequate healthcare.²⁸

The Rights of the Child in ART Practices: Children born through ARTs and surrogacy are also subjects of international human rights law. The Convention on the Rights of the Child (CRC) affirms the child's right to know and be cared for by their parents (Article 7) and the right to protection from sale or trafficking (Article 35).²⁹

This becomes particularly relevant in transnational surrogacy arrangements where legal parenthood, nationality, and custody may be contested. In cases such as **Baby Manji Yamada v. Union of India**,³⁰ the lack of legal clarity around surrogacy created significant human rights concerns for the child involved, including potential statelessness.

Emerging Soft Law and Ethical Guidelines: In addition to binding treaties, several soft-law instruments and ethical codes developed by intergovernmental bodies also influence ART regulation:

- UNESCO's Universal Declaration on Bioethics and Human Rights (2005) supports upholding human worth and equal treatment and justice in biomedicine.³¹
- The WHO (World Health Organization) supports equitable access to ARTs and emphasizes the ethical dimensions of fertility care.³²

However, the lack of harmonised global regulations means that ART practices particularly cross-border surrogacy and embryo transfer—operate in legal grey zones, raising concerns of reproductive tourism and forum shopping.³³

²⁶ CEDAW, 1979, Art. 12.

²⁷ CEDAW Committee, General Recommendation No. 24 (1999).

²⁸ Cook R.J., Dickens B.M., Fathalla M.F., "Reproductive Health and Human Rights," International Journal of Gynecology & Obstetrics, Vol. 89, 2005.

²⁹ Convention on the Rights of the Child, 1989, Arts. 7 & 35.

³⁰ Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

³¹ UNESCO, Universal Declaration on Bioethics and Human Rights, 2005.

³² WHO, "Global Infertility Guidelines," 2020.

³³ Sharma, A., "Reproductive Tourism in India: Ethical and Legal Issues," Indian Journal of Medical Ethics, Vol. 7, 2021.

3. Legal Framework and Legislative Analysis

3.1 Introduction

Until the early 2000s, India lacked a statutory framework governing Assisted Reproductive Technologies (ART) and surrogacy. Clinics operated autonomously, and surrogacy arrangements were based on private contracts, often leaving parties vulnerable to legal, ethical, and medical risks³⁴. In response to public interest litigations, international criticism, and recommendations by the Law Commission of India, Parliament enacted two landmark legislations: the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021³⁵. Both Acts aim to protect the interests of intending parents, surrogate mothers, children born through ART, and medical professionals.

3.2 Assisted Reproductive Technology (Regulation) Act, 2021

3.2.1 Objective and Scope: The ART Act, 2021 provides a comprehensive regulatory framework for the operation of ART clinics, sperm and egg banks, and the use of ART procedures such as IVF, cryopreservation, and gamete donation³⁶. Its objectives include:

- Ensuring ethical practices in ART services
- Protecting the rights of donors, intending parents, and children
- Preventing the misuse and commercialization of ARTs

It applies to all ART clinics and banks operating in India, irrespective of public or private ownership³⁷.

3.2.2 Key Provisions

- **Registration of Clinics and Banks:** Every ART clinic and gamete bank must be registered under the National ART and Surrogacy Board (NASB) and comply with prescribed standards³⁸.
- **Consent and Counselling:** The Act mandates that all ART procedures must be preceded by written, informed consent from the parties involved and accompanied by medical and psychological counselling³⁹.
- **Donor Regulation:** Gamete donors must be anonymous, and a sperm donor's sample cannot be reused multiple times for the same recipient. Oocyte donors must be married women with a minimum of one child of their own.⁴⁰

³⁴ Nadimpally, S., "Regulating ART in India: Need for a Rights-Based Approach", *Economic and Political Weekly*, Vol. 49(44), 2014.

³⁵ Law Commission of India, Report No. 228 on the Need for Legislation to Regulate ART Clinics, 2009.

³⁶ ART (Regulation) Act, 2021, Statement of Objects and Reasons.

³⁷ ART Act, 2021, s. 2(a).

³⁸ ART Act, 2021, s. 14–20

³⁹ *Ibid.*, s. 21.

⁴⁰ ART Act, 2021, s. 7.

- **Prohibition of Sex Selection:**In line with the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994, sex selection is strictly prohibited.⁴¹
- **Rights of Children Born through ART:**Children born via ART are deemed biological children of the intending couple, and donors shall have no parental rights or obligations.⁴²

Penalties:Violations may attract imprisonment up to 10 years and fines up to ₹25 lakhs.⁴³

3.2.3 Legal Gaps and Criticism

Despite its progressive aims, the ART Act has been criticized for:

- Excluding single men, LGBTQ+ individuals, and foreign nationals from access.⁴⁴
- Imposing over-regulation and bureaucratic licensing
- Failing to address the fate of unused or cryopreserved embryos in case of death or divorce.⁴⁵
- Lack of clarity on posthumous ART rights

3.3 Surrogacy (Regulation) Act, 2021

3.3.1 Background and Objectives:India's surrogacy industry was previously governed only by contractual arrangements and guidelines issued by the Indian Council of Medical Research (ICMR), which lacked legal force⁴⁶.The Law Commission in its 228th Report (2009) recommended a ban on commercial surrogacy and proposed a legislative framework for ethical, altruistic surrogacy⁴⁷.The Surrogacy (Regulation) Act, 2021, enacted in this context, aims to:

- Prevent commercial exploitation of surrogate mothers
- Protect reproductive autonomy of intending couples
- Ensure welfare of children born through surrogacy

3.3.2 Salient Features

Altruistic Surrogacy Only:Only altruistic surrogacy, where the surrogate receives no monetary compensation beyond medical expenses and insurance, is permitted⁴⁸.

Eligibility of Intending Parents:

- Must be Indian citizens
- Must be married (husband 26–55 years, wife 23–50 years)
- Must be certified infertile
- Cannot have a surviving child (biological, adopted, or surrogate).⁴⁹

⁴¹ ART Act, 2021, s. 24; PCPNDT Act, 1994.

⁴² ART Act, 2021, s. 29.

⁴³ Ibid., s. 37–39.

⁴⁴ Sharma, N., "LGBTQ+ Rights and India's Reproductive Law", Indian Journal of Constitutional Studies, Vol. 13, 2022.

⁴⁵ Iyer, A., "Cryopreserved Embryos and Legal Personhood: An Emerging Dilemma", Law & Bioethics Journal, Vol. 7, 2023.

⁴⁶ ICMR, ART Guidelines, 2005.

⁴⁷ Law Commission of India, Report No. 228, supra note 2.

⁴⁸ Surrogacy (Regulation) Act, 2021, s. 2(b).

⁴⁹ Ibid., s. 4(iii).

Eligibility of Surrogate Mother:

- Must be a close relative
- Must be a married woman with at least one child
- Can act as a surrogate only once in her lifetime.

Establishment of National and State Surrogacy Boards: These bodies regulate surrogacy practices and ensure compliance with ethical and legal standards.⁵⁰

Ban on Commercial and Foreign Surrogacy: The Act explicitly bans commercial surrogacy and prohibits foreign nationals or NRIs from commissioning surrogacy in India.⁵¹

3.3.3 Criticisms and Constitutional Challenges

While the Act seeks to prevent exploitation, it has been critiqued for:

- Being paternalistic and denying agency to willing surrogates
- Imposing heteronormative and marital restrictions, violating Articles 14 and 21.⁵²
- Creating ethical ambiguities in defining “altruism” in contexts of familial pressure
- Excluding same-sex couples and single parents, violating the Supreme Court’s decision in *Navtej Singh Johar v. Union of India*.⁵³

3.4 Overlap and Interplay between ART and Surrogacy Acts

The ART and Surrogacy Acts are interdependent, as surrogacy is legally treated as a subset of ART. Together, they create a dual regulatory regime:

- Clinics providing IVF for surrogacy must follow the provisions of both laws
- Registration under the ART Act is a precondition for conducting surrogacy procedures
- Donor anonymity under ART law applies to gametes used for surrogacy as well⁵⁴

However, inconsistencies remain for example, oocyte donors are permitted under the ART Act, but surrogate mothers must use embryos created from intending parents’ gametes under the Surrogacy Act, effectively excluding third-party donors in surrogacy.⁵⁵

4. Medico-Legal and Ethical Challenges**4.1 Introduction**

The introduction of ART and surrogacy into mainstream reproductive healthcare has created unprecedented medico-legal and ethical complexities, notably in nations like India, which remains a developing nation, where socioeconomic vulnerabilities, religious sensitivities, and

⁵⁰ Surrogacy Act, 2021, Chapter III.

⁵¹ *Ibid.*, s. 6.

⁵² Srivastava, R., “Altruism or Oppression? Feminist Perspectives on the Surrogacy Ban”, *Feminist Law Journal*, Vol. 11, 2022.

⁵³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁵⁴ ART Act, 2021, s. 12; Surrogacy Act, 2021, s. 4.

⁵⁵ Sinha, P., “Interplay of ART and Surrogacy Laws: Harmonisation Needed”, *Journal of Family Law Review*, Vol. 9, 2023.

legal ambiguities intersect. Despite the passing of the ART Act, 2021 and Surrogacy (Regulation) Act, 2021, several legal uncertainties, gaps in enforcement, and ethical controversies persist.⁵⁶

4.2 Legal Ambiguities and Disputes

4.2.1 Parentage and Legal Custody

One of the most pressing medico-legal concerns is the determination of legal parentage in ART and surrogacy cases. The ART Act, 2021 deems the intending couple as the legal parents, and states that gamete donors have no parental rights or obligations.⁵⁷ However, in real-world scenarios, disputes may arise if the couple divorces, one partner dies, or the child is born with a disability.⁵⁸

In **Baby Manji Yamada v. UOI**, the Supreme Court faced a crisis when the Japanese commissioning parents divorced before The delivery of the child, and the grandmother had to seek guardianship.⁵⁹ Similarly, in **Jan Balaz v. Anand Municipality**, questions arose about citizenship and nationality of the surrogate-born children, which Indian laws had no precedent for.⁶⁰

4.2.2 Custody of Cryopreserved Embryos

Cryopreservation enables long-term storage of embryos and gametes, but raises complex questions of ownership, consent, and disposition. What happens to embryos if the intending couple separates or one of them dies? The ART Act, 2021 remains largely silent on the legal fate of stored embryos, particularly in posthumous reproduction.⁶¹

Globally, courts in the US and UK have been addressing these types of disputes under property law, contract law, or human rights frameworks⁶², but India lacks judicial precedent or statutory clarity on this front.

4.3 Informed Consent and Autonomy

4.3.1 Medical Consent Protocols

Both the ART and Surrogacy Acts require prior informed agreement before initiating any procedure⁶³. However, in practice, there is often a lack of proper counselling, and women from

⁵⁶ Nadimpally, S., & V. Bharat, *Surrogacy and the Law: Navigating Ethical Boundaries*, Sama, 2018.

⁵⁷ ART (Regulation) Act, 2021, s. 29.

⁵⁸ Rao, A., "Legal Ambiguities in ART and Surrogacy: The Case for Reform," *Law and Medicine Review*, Vol. 9, 2022.

⁵⁹ *Baby Manji Yamada v. UOI*, 2008, 13 SCC 518.

⁶⁰ *Jan Balaz v. Anand Municipality*, AIR 2009 Guj 21.

⁶¹ ART Act, 2021, s. 12; see also: Sharma, P. (2022), "Cryopreserved Embryos and Consent Disputes," *Bioethics India*, Vol. 6(1).

⁶² *Evans v. UK*, European Court of Human Rights, Application no. 6339/05.

⁶³ ART Act, 2021, s. 21; Surrogacy Act, 2021, s. 6.

rural or poor backgrounds may not understand the full implications of the consent documents they sign.⁶⁴

A study by Sama Resource Group found that many surrogate mothers signed contracts they could not read or comprehend, frequently influenced by their spouses or agents.⁶⁵ This questions the genuineness of consent, especially in the context of commercial pressures or familial coercion.

4.3.2 Surrogate's Right to Refuse

The Surrogacy Act lacks explicit provisions allowing the surrogate mother to withdraw consent after embryo transfer, raising concerns about bodily autonomy and reproductive freedom.⁶⁶ In contrast, jurisdictions like the UK allow the surrogate to retain parental rights until legal transfer is made after birth.⁶⁷

4.4 Exploitation and Socioeconomic Coercion

4.4.1 Commodification of Reproduction

One of the core ethical dilemmas surrounding ART and surrogacy in India is the commodification of women's bodies, particularly under the previous regime of commercial surrogacy. Critics argue that even under “altruistic” surrogacy, it is possible that females are by familial or social obligations, especially when the surrogate must be a close relative.⁶⁸

This framework arguably transforms women into reproductive tools, undermining their autonomy and turning surrogacy into an unpaid labour of kinship.⁶⁹

4.4.2 Donor Anonymity vs. Child's Right to Identity

The ART Act ensures anonymity of gamete donors, which protects privacy. However, Babies born using assisted reproduction techniques are denied any right to know their genetic origins, unlike in jurisdictions such as Sweden and the UK where identity disclosure is mandatory once the child turns 18.⁷⁰

This prompts moral questions about the right to identity under Article 7 of the UN Convention on the Rights of the Child (UNCRC)⁷¹

⁶⁴ Sama Resource Group, *Birthing a Market: Commercial Surrogacy in India*, 2012.

⁶⁵ Ibid

⁶⁶ Surrogacy (Regulation) Act, 2021, s. 4; see K. Iyer, “Consent and Coercion in Altruistic Surrogacy,” (2022) *Indian Journal of Medical Ethics*.

⁶⁷ Surrogacy Arrangements Act 1985 (UK), s. 2.

⁶⁸ Surrogacy Act, 2021, s. 2(zc).

⁶⁹ Srivastava, R., “Family Ties and Reproductive Labor: A Critique of Altruistic Surrogacy in India,” *Feminist Legal Studies*, Vol. 28, 2022.

⁷⁰ HFEA (UK), *Donor Information and Anonymity Regulations*, 2004.

⁷¹ United Nations Convention on the Rights of the Child (UNCRC), Article 7

4.5 Discrimination and Exclusion

The eligibility criteria under the 2021 Acts permit only Indian married heterosexual couples to access surrogacy or ART, thereby excluding:

- Single men and women
- Unmarried live-in partners
- Foreigners and OCI cardholders
- LGBTQ+ individuals

This heteronormative and exclusionary approach contravenes the Supreme Court's verdicts in **Navtej Singh Johar v. UOI (2018)** and **Justice K.S. Puttaswamy v. UOI (2017)**, both of which emphasized reproductive autonomy, dignity, and non-discrimination.⁷²

Such provisions Have been brought under scrutiny by the Supreme Court in recent petitions arguing that these exclusions violate Articles 14, 15, and 21 of the Constitution.⁷³

4.6 Ethical Frameworks in Global Context

Internationally, ethical oversight of ART and surrogacy is guided by frameworks like:

- WHO's Global Infertility Guidelines (2020)
- FIGO's Ethics Committee Report on Surrogacy (2015)
- ECHR jurisprudence on procreative rights

For instance, The UK's regulatory body for fertility and embryology treatments (HFEA) provides a model for regulated yet inclusive ART governance, allowing single, same-sex, and unmarried partners to access services under a licensed and ethical system.⁷⁴ India's legislation, by contrast, reflects a conservative and moralistic stance, focusing more on regulation than rights.

5. Judicial Trends and International Comparisons

5.1 Introduction

Judicial interpretation plays a pivotal role in shaping the understanding and enforcement of laws relating to reproductive technologies and surrogacy. In India, while statutory regulations like the ART Act, 2021 and Surrogacy Act, 2021 are relatively recent, the judiciary has previously intervened in complex cases involving parentage, citizenship, and ethical concerns. At the global level, courts in the UK, USA, and European Union have also adjudicated critical issues of reproductive rights, donor anonymity, and posthumous reproduction. This chapter analyses landmark judgments and compares India's judicial approach with international jurisprudence.

⁷² Navtej Singh Johar v. UOI(2018) 10 SCC 1; Justice K.S. Puttaswamy v. UOI(2017) 10 SCC 1.

⁷³ Singh, A. (2023), "Litigating Reproductive Equality," LiveLaw India, April 2023.

⁷⁴ Human Fertilisation and Embryology Authority (UK), Code of Practice, 2021.

5.2 Landmark Judicial Trends in India

Baby Manji Yamada v. UOI(2008): This case involved a Japanese couple who commissioned surrogacy in India. During the pregnancy, they divorced, and the intended mother renounced her parental rights. Legal complications arose concerning guardianship and citizenship of the child, Baby Manji.⁷⁵

India's apex court of India held that surrogacy was not illegal in India during that period and granted guardianship to the grandmother, allowing her to take the baby to Japan. The case brought attention to the absence of legal regulation and the vulnerability of surrogate-born children in cross-border arrangements.⁷⁶

The Jan Balaz case (2009): In this case, German nationals Jan Balaz and his wife engaged a surrogate in Gujarat. The twins born were denied German citizenship, and Indian authorities refused passports due to lack of clear legal recognition⁷⁷. The Gujarat High Court granted Indian passports, ruling that the children were born on Indian soil, but the Union Government appealed, indicating diplomatic sensitivity and legal vacuum.⁷⁸ This case underscored the conflict of laws between the surrogate's nationality, place of birth, and intended parents' citizenship. It also brought to light the lack of national and international legal alignment on surrogacy.

Supreme Court's Expansion of Reproductive Rights

In **Suchita Srivastava v. Chandigarh Administration (2009)**, The Court ruled that a Women's Autonomy in making reproductive choices comes under the scope of Article 21 -Right to Life and Personal Liberty, which includes the right to procreate and to abstain from procreation⁷⁹. This case forms the constitutional backbone for evaluating bodily autonomy and consent in ART and surrogacy contexts.

5.3 Recent Legal Challenges and Constitution-based Judicial hurdles

Several legal challenges under constitutional Statutory norms have been initiated challenging provisions of the ART and Surrogacy Acts, 2021, particularly for:

- Excluding single women, LGBTQ+ individuals, and foreign nationals
- Forcing altruistic surrogacy through close relatives
- Violating rights to equality, dignity, and autonomy

The Delhi High Court and Supreme Court are currently examining these petitions, invoking precedents like **Navtej Singh Johar v. UOI (2018)**⁸⁰ and Justice **K.S. Puttaswamy v. UOI**

⁷⁵ Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

⁷⁶ Ibid

⁷⁷ Jan Balaz v. Anand Municipality, AIR 2009 Guj 21.

⁷⁸ Ibid

⁷⁹ Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

⁸⁰ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

(2017)⁸¹, both of which affirm reproductive and decisional autonomy as facets of fundamental rights.

5.4 Comparative International Legal Frameworks

5.4.1 United Kingdom

The 1990, Act Embryology and Fertilisation Human (HEFA) (as amended) governs ARTs in the UK. It allows:

- IVF for married and unmarried couples, including same-sex partners
- Clear parentage rules, where the intending parents are legally recognized
- Identity disclosure of donors when the child turns 18.⁸²

Surrogacy within the UK framework is legal on an altruistic basis. However, the Surrogacy Arrangements Act, 1985 prohibits commercial surrogacy and advertising. The surrogate remains the legal mother until parental orders are granted post-birth.⁸³ Courts evaluate the best interest of the child, and the surrogate's autonomy is protected.

5.4.2 United States

The US has a state-based legal framework. For example:

- California permits both commercial and altruistic surrogacy, recognizes surrogacy contracts, and allows LGBTQ+ and single parent commissioning.⁸⁴
- New York recently legalized compensated surrogacy under the Child-Parent Security Act, 2021,⁸⁵
- US courts typically prioritize contractual clarity, informed consent, and non-discrimination, making the legal environment more inclusive and predictable.

5.4.3 Australia

Australia allows only altruistic surrogacy and prohibits payments beyond reasonable expenses. Some states permit same-sex couples and single parents to access ART and surrogacy. The laws are often evaluated through bioethics committees and state tribunals.⁸⁶

5.5 Lessons for India

From the comparative jurisprudence and foreign legal models, the following insights emerge:

- **Inclusivity:** Legal frameworks should not exclude individuals based on marital status, gender identity, or nationality.

⁸¹ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁸² Human Fertilisation and Embryology Act, 1990 (UK), amended 2008; see also HFEA Guidelines.

⁸³ Surrogacy Arrangements Act, 1985 (UK), s. 2; see also: Re X (A Child) [2020] EWHC 1115.

⁸⁴ Cal. Fam. Code § 7960–7962.

⁸⁵ Child-Parent Security Act, 2021 (New York).

⁸⁶ The 2020 ethical standards issued by Australia's top medical research authority for the clinical and research use of assisted reproductive technologies.

- **Contractual Safeguards:** Surrogacy contracts must include clear consent, exit rights, and parental responsibilities.
- **Autonomy of Surrogates:** Surrogates should be allowed to change their minds, with proper legal and psychological support.
- **Rights of the Child:** Children must be ensured legal parentage, citizenship, and access to genetic history.
- **Judicial Supervision:** Courts or quasi-judicial authorities should oversee arrangements, ensuring ethical compliance and dispute resolution.

6. Critical Evaluation and Suggestions

6.1 Introduction

The Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 were passed to safeguard the interests of stakeholders and regulate the rapidly expanding reproductive health industry in India. While these laws have introduced necessary accountability, standardization, and ethical oversight, they have also drawn criticism for their exclusionary, restrictive, and overly moralistic approach.⁸⁷ This chapter offers a critical appraisal of the two Acts, identifies gaps, and presents suggestions to improve the legal regime in line with constitutional values and global human rights standards.

6.2 Strengths of the 2021 Legal Framework

6.2.1 Institutional Regulation and Standardization

Both Acts have mandated the establishment of National and State Boards, ensuring centralized regulatory supervision.⁸⁸ ART clinics and banks now require mandatory registration, ensuring adherence to prescribed protocols.⁸⁹

6.2.2 Protection Against Exploitation

By banning commercial surrogacy and regulating gamete donation, the laws aim to curb trafficking, organised rackets, and the exploitation of vulnerable Women, especially belonging to poor economic backgrounds.⁹⁰

6.2.3 Legal Clarity on Parentage and Donor Rights

The ART Act provides clarity on parental rights, ensuring that donors have no legal obligations and that offspring born through assisted reproductive techniques are legitimate offspring of the intended couple.⁹¹

⁸⁷ Nadimpally, S., "The Faultlines of India's Surrogacy Laws," EPW, Vol. 57(2), 2022.

⁸⁸ ART Act, 2021, Chapter IV; Surrogacy Act, 2021, Chapter III.

⁸⁹ ART Act, 2021, ss. 12–20.

⁹⁰ Law Commission of India, Report No. 228 on Surrogacy, 2009.

⁹¹ ART Act, 2021, s. 29.

6.3 Major Criticisms and Legal Gaps

6.3.1 Exclusionary Eligibility Criteria

The eligibility conditions under both Acts violate the right to equality under Article 14 and reproductive autonomy under Article 21. They exclude:

- LGBTQ+ individuals
- Single men and women
- Live-in partners
- Foreign nationals and NRIs⁹²

This exclusion is regressive and inconsistent with the Supreme Court's progressive interpretation pertaining to individual freedom in **Navtej Singh Johar v. UOI** and **Justice K.S. Puttaswamy v. UOI**.⁹³

6.3.2 Lack of Autonomy for Surrogate Mothers

The Surrogacy Act does not allow surrogate mothers to withdraw consent after embryo implantation, which undermines bodily autonomy.⁹⁴ In contrast, legal frameworks in the United Kingdom and Australia permit withdrawal of consent before legal parentage is transferred.⁹⁵

6.3.3 Restrictive Altruistic Model

By mandating only altruistic surrogacy from close relatives, the Act:

- Burdens women within families, creating coercion in the name of altruism
- Assumes that altruism exists without economic inducement in familial setups⁹⁶

Such a narrow model can drive the practice underground and revive the black market for surrogacy arrangements.⁹⁷

6.3.4 Unresolved Issues in Cryopreservation

The ART Act lacks provisions on:

- Disposition of cryopreserved embryos on divorce or death
- Posthumous reproduction rights
- Embryo ownership disputes

The absence of a clear legal framework for cryopreservation leads to uncertainty and conflict, as seen in international cases like *Evans v. UK* (2007) before the European Court of Human Rights.⁹⁸

⁹² Sharma, A., "Reproductive Rights of LGBTQ+ Individuals," *Indian Journal of Constitutional Law*, Vol. 11, 2022.

⁹³ *Navtej Singh Johar v. UOI* (2018) 10 SCC 1; *Justice K.S. Puttaswamy v. UOI* (2017) 10 SCC 1.

⁹⁴ Surrogacy Act, 2021, s. 4.

⁹⁵ Surrogacy Arrangements Act, 1985 (UK); *Re P (Surrogacy: Residence)* [2008] EWCA Civ 867.

⁹⁶ Srivastava, R., "Kinship and Coercion: The Altruistic Trap in India's Surrogacy Law," *Feminist Legal Studies*, 2023.

⁹⁷ Iyer, A., "Informal Surrogacy and Legal Invisibility," *Indian Law Review*, Vol. 6(1), 2022.

⁹⁸ *Evans v. UK*, (2007) 46 EHRR 34.

6.3.5 Donor Anonymity vs. Child's Right to Identity

The child's right to know their genetic origins is not recognised in Indian law. While the ART Act mandates donor anonymity, jurisdictions such as the UK have moved towards identity disclosure once the child turns 18, respecting Article 7 of the UN Convention on the Rights of the Child.⁹⁹

6.4 Suggestions for Legal Reform

6.4.1 Expand Eligibility Criteria

The law should allow:

- Single individuals (male or female)
- Live-in partners
- LGBTQ+ couples

to access ART and surrogacy services, in line with the right to equality and non-discrimination under the Constitution.

6.4.2 Introduce Surrogate Autonomy and Consent Safeguards

The surrogate mother must be:

- Allowed to withdraw consent at least until the second trimester
- Given independent legal and psychological counselling
- Protected from coercion by family or intermediaries

6.4.3 Permit Regulated Compensated Surrogacy

A regulated compensation model (like in New York and California) could:

- Safeguard surrogate mothers from exploitation
- Recognize surrogacy as labour, deserving fair remuneration
- Prevent the emergence of illegal commercial markets

6.4.4 Clear Framework for Cryopreservation

The ART Act should specify:

- Storage limits and renewal protocols
- Rights in case of death or divorce of intending parents

Whether embryos can be donated, destroyed, or used posthumously

International instruments like FIGO Ethical Guidelines and ECHR jurisprudence may be used as a model.

6.4.5 Recognise Child's Right to Genetic Identity

Children born through ART should:

- Be informed of their donor origins at adulthood (with safeguards)
- Have access to non-identifying genetic and health data

⁹⁹ United Nations Convention on the Rights of the Child (UNCRC), Article 7; HFEA (UK) Guidelines, 2004.

- Be protected from genetic fraud or misrepresentation¹⁰⁰

This is consistent with international patterns and ensures psychological and medical well-being.

6.4.6 Judicial Oversight and Dispute Resolution

Courts or designated Family Welfare Tribunals should:

- Review surrogacy agreements
- Handle parentage disputes
- Protect interests of all parties through fast-track, child-sensitive procedures¹⁰¹

7. Conclusion

The advancement of assisted reproductive technologies has fundamentally reshaped the legal and ethical understanding of parenthood. In India, the regulation of Assisted Reproductive Technology (ART) Act, 2021 and the Surrogacy (Regulation) Act, 2021 were enacted to bring accountability, transparency, and ethical oversight to a previously unregulated sector¹⁰². While these laws aim to protect the interests of surrogate mothers and children, they simultaneously raise serious concerns about exclusion, autonomy, and constitutional validity.

The legislation restricts access to married heterosexual Indian couples, effectively excluding single individuals, LGBTQ+ persons, and foreign nationals from availing reproductive services.¹⁰³ This contravenes Articles 14 and 21 of the Indian Constitution and the Supreme Court's progressive interpretation of reproductive rights in cases like *Suchita Srivastava v. Chandigarh Administration*.

Moreover, the Surrogacy Act does not allow surrogate mothers to withdraw consent after embryo implantation, posing a threat to bodily autonomy and informed consent¹⁰⁴. Issues related to cryopreservation, such as posthumous reproduction and custody of embryos, remain largely unaddressed.

In contrast, countries like the UK, USA, and Sweden offer models of inclusive and balanced regulation that protect both autonomy and child rights.¹⁰⁵ These global frameworks could guide India's reform process.

Reproduction is not merely a biological act it is also a legal and ethical phenomenon. A progressive legal approach, grounded in constitutional morality and international human rights standards, is essential. The current Indian laws must be urgently re-evaluated to ensure that the principles of justice, equality, and dignity are upheld in the realm of reproductive healthcare.

¹⁰⁰ HFEA UK, "Donor Information Disclosure," 2021.

¹⁰¹ Law Commission of India, Report No. 263 on Family Courts, 2018.

¹⁰² ART Act, 2021; Surrogacy Act, 2021.

¹⁰³ Sharma, A., Indian Journal of Constitutional Law, 2022.

¹⁰⁴ Surrogacy Act, 2021, s. 4.

¹⁰⁵ HFEA UK; Child-Parent Security Act, 2021 (New York); Swedish Identity Act, 2005.