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# **SURROGACY ACT: A VIOLATION OF** **REPRODUCTIVE RIGHTS**

AUTHORED BY - ANJALI NAIN  
& DHAKA VIRENDAR KUMAR

## **INTRODUCTION**

There is not a single international human rights agreement that effectively defines surrogacy right in the scientific and technical world of today. According to the findings of scholars working in larger cross-cultural situations, surrogacy has become a global concern. In order to create legal conformity, the problem must also be resolved internationally by passing international surrogacy legislation. Due to tremendous advances in science and technology, “assisted reproductive technology” (ART) procedures like in “vitro fertilization” (IVF), “artificial insemination” (AI), “intracytoplasmic sperm injection” (ICSI), and surrogacy are now widely accessible. Infertile couples, single people, and gay and lesbian people who want biological children have recently chosen surrogacy as their preferred method of treatment. The Surrogacy Bill of 2016 must be in accordance with the Indian Constitution.

### **Surrogacy**

Surrogacy is the process by which a woman carries a child for another woman and then gives the child to the commissioning couple after the delivery. Surrogacy involves a woman giving her agreement to conceive, carry, and deliver a child, as well as giving another family custody of the kid. According to Fellowes, there are four types of surrogacies, (2017): traditional, gestational, charitable, and commercial. In genetic surrogacy, often known as “conventional surrogacy”, the “surrogate mother” contributes her egg to the pregnancy. In contrast, the “intending mother” provides her egg in gestational surrogacy, whereas the “surrogate mother” has no genetic ties to the child.<sup>1</sup>

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<sup>1</sup> Choudhary, S. (2015). Surrogacy: Policy & Legal Framework in India. SSRN Electronic Journal.doi: 10.2139/ssrn.2612347.

A surrogate mother gets rewarded for bearing the child of the commissioning couple in commercial surrogacy. In contrast, a surrogate who provides their services for free is not compensated. In an “altruistic surrogacy”, the intended parents pay their surrogacy worker only for direct and immediate medical expenses and other surrogacy-related costs. Straight people or couples frequently use surrogacy to address the biological cause of female infertility. According to Garzone, unmarried gay men who want to produce children and raise them with genetic ties to themselves but are unable to do so due to legal constraints in their local communities are increasingly turning to surrogacy as an alternative to adoption.

## Surrogacy Laws in India

Over the last few years, India has emerged as the leading choice for reproductive tourism among non-citizen couples. This is due to a variety of issues, the most notable of which is that India does not have a surrogacy statute. The rise of assisted reproductive technologies (ARTs) and surrogacy in India is portrayed by the Times of India as a positive development in science and medicine that will help those who are unable to produce children through traditional ways of conception from families. According to an Indian government circular, India has emerged as the top “International Reproductive Tourism Destination” with “No Law Prohibit and No Law Permit” because it is simple for many women interested in becoming surrogate mothers to travel here, due to the factors such as excellent medical professionals, inexpensive procedure, and close monitoring of the Article 21 of the Indian Constitution, which states that everyone has the right to reproductive health care regardless of gender or nationality, is the most important legal regulation of surrogacy in India. This right is recognized in the majority of international human rights treaties, both established and recent, as well as regional agreements.<sup>2</sup>

For the time being, India has “No Law and No Precedent” available to reconcile these competing interests. According to Bhumika a renowned modern jurist, India was the first country in the world to legalize commercial surrogacy in 2002. The sole non-binding principles outlined in the Indian Council of “Medical Research's Assisted Reproductive Technologies” (ART) Bill of 2010

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<sup>2</sup> Timms, O. (2018). Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016. Indian Journal Of Medical Ethics. doi: 10.20529/ijme.2018.019.

now control the fertility business. However, because it is not a formal body, handicraft facilities often violate these constraints in their daily obligations. In 2009, the Law Commission of India presented its 228 Report, which suggested that surrogacy legislation be enacted to control assisted reproductive technology (ART) and establish the rights and obligations of parties to surrogacy-related agreements. The Assisted Reproductive Technology (Regulation) Bills of 2008 and 2010 were crafted with a number of methods to manage the ART business. However, there were numerous issues with these measures. The Indian government recently issued the New Indian Visa Regulation, 2012, making it illegal for international singles and homosexual couples to use surrogates in India.

On September 30, 2015, the ART Bill of 2014 and feedback from relevant parties were made available to the public for review. Surrogacy was raised in both the Jayashree Wad and Jan Balza cases. The Supreme Court of India agreed to hear arguments on the matter again since it involves a lot of complicated issues that necessitate legal remedies. On November 4, 2015, the Indian government's Ministry of Health and Family Welfare stated that commercial surrogacy would be prohibited for all foreigners in India.

On August 24, 2016, Minister of External Affairs Sushma Swaraj released the draft “Surrogacy Regulation Bill, 2016”, which aims to prevent unethical surrogacy practices, protect the rights of surrogate children, and prevent surrogate mothers from being exploited. On November 21, 2016, the Surrogacy Regulation Bill, 2016, was introduced for consideration in the Lok Sabha House of Parliament. The Surrogacy (Regulation) Bill of 2016 prohibits commercial surrogacy but makes an exception for altruistic surrogacy. This is one of the most critical provisions of the bill. Prospective parents must be heterosexual Indian married couples who have been together for at least five years in order to qualify for the legalization of altruistic surrogacy in India. Surrogacy is currently not addressed by any statutes in our legal system, nor is it subject to any type of regulation. Sengupta (2016) believes it is prudent to assume that the Parliament will move forward with the development of surrogacy legislation.<sup>3</sup>

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<sup>3</sup> Bhaumik, S. (2012). The Legal Standpoint of Surrogacy in India. SSRN Electronic Journal. doi: 10.2139/ssrn.2036499.

## **Current Position of the Surrogacy Laws in India**

The ICMR Guidelines, 2005 now govern surrogacy laws in India. This is because there is currently no surrogacy law in India. These limits, however, cannot be justified or enforced in a court of law due to their lack of legislative importance. On November 21, 2016, the government introduced the Surrogacy (Regulation) Bill. The legislative body is now considering it. As a result, the Lok Sabha is currently discussing the 2016 Bill. As a result, “only altruistic surrogacy is legal for infertile Indian married couples at the moment”.

## **Surrogacy and Constitution Of India Right to Reproduction**

The Constitution protects the right to procreate. The right to choose how to have children is protected by the Constitution, regardless of ethnicity or gender. Every person has this right. As a result, it is a natural human right to be able to marry, establish a family, reproduce, and become pregnant. It is a vital part of a person's identity as well as a legally protected right. Articles 19 and 21 of the fundamental rights treat individual liberty and freedom of speech and expression, respectively, and can be used to define the reproduction right.

The rights of women to conceive, carry, and give birth may be included in these articles. If the freedom to reproduce is considered a fundamental right, then married couples who are unable to conceive biological children during a normal marriage have the right to use surrogacy or assisted reproductive technology. This is the scenario if the right to reproduce is considered a fundamental right. Surrogacy has not yet been addressed in India's Constitutional Law because it is a relatively new notion that is gaining popularity.

As a result, there is no room for ambiguity in the response, which states that motherhood should be recognized and protected in accordance with the Indian Constitution, whether gained artificially or spontaneously. Article 23 is meant to make antisocial behaviour in public places illegal. As a result, it works hard to keep the person hidden from both the public and the government. As a result, Articles 19 (1) (a) and 21 of the Constitution grant the freedom to have children via surrogacy or assisted reproductive technology (ART).

The Supreme Court of India has ruled that fundamental rights are of the utmost importance in all of its decisions. The court heard arguments in the case of *A. K. Gopalan v. the State of Madras*. The Supreme Court interpreted the terms “procedure established by law” in Article 21 as far as feasible and declared “the fundamental rights sacred”. It was also referred to as the “right that the people have been seeking” in the *State of Madras v. Chapakam Dorairajan*. A basic right, according to P.B. Gajendragadkar, is “a legally enforceable right that regulates the relationship between the State and the individual”. As a result, basic rights have been adequately recognized as the foundation of the Constitution.

The privacy concept was highlighted in the twenty-first century by the case *Govind v. State of M.P.*, which was brought under Article 21 of the Indian Constitution and applied to a few rights. The Supreme Court of India stated in the well-known case *Maneka Gandhi v. Union of India*<sup>4</sup> that the legal process must be equitable, fair, and reasonable. In this case, the court clearly recognized the right to privacy as a basic right under Article 21. In addition, the judge ordered that the proper legal procedure must be always followed. In recognition of the significance of the right to privacy, Article 21-B of the Indian Constitution is titled “RIGHT TO PRIVACY”. As a direct consequence of this, the Indian courts adopted a broad interpretation of the right to privacy and included the right to procreation as part of that right. This concept is more commonly referred to as reproductive autonomy. This was made possible through the application of a liberal reading of the constitutional right to privacy.

## Legal Position in India Towards Surrogacy

The surrogacy arrangement is said to provide a “medical remedy” to infertility; nevertheless, a wider description of it is a “social, ethical, and legal problem”. Despite being referred to as a solution, this is not the case. As a result, it is up to the legal system to resolve the issues raised by surrogacy and strike a balance between the competing interests of all parties involved.

The Indian judicial system is currently hearing three notable surrogacy cases. India, on the other hand, has its own kind of gift store. Surrogate mothers in India see themselves as recipients of gifts

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<sup>4</sup> *Maneka Gandhi v. Union of India*, AIR 1978 [SC 597](#)

rather than givers of them. Surrogate moms are given the opportunity to earn money as a form of a gift.

According to this study, surrogate mothers in India do not appear to be gift-givers. Instead, they urged people to think about surrogacy as “God's gift to needy but not greedy moms” and referred to it as a “Gift of God”. This completes the fourth component of the traditional Indian gift tale. Surrogate mothers are thought to regard the opportunity to become surrogate mothers as a blessing because it allows them to earn money to support their families. The Court informed the Central Government that it needed to produce answers to fourteen questions about commercial surrogacy. On October 14, 2015, Justices Ranjan Gogoi and N. V. Ramana advocated a ban on the export of human embryos and commercial surrogacy. The Court also asked fourteen questions about commercial surrogacy.

## **Right To Privacy, Reproductive Autonomy, And Bodily Integrity**

Furthermore, the Indian government's complete prohibition on commercial surrogacy would have a significant impact not just on India's growing women's rights laws, but also on the rest of the world. According to the Supreme Court of India's 2009 judgment in the case of *Suchita Srivastava v. Chandigarh Administration*<sup>5</sup>, the right to make reproductive decisions is protected by Article 21 of the Indian Constitution. This right includes the ability to carry a pregnancy to term, give birth, and raise a child.

The Supreme Court of India declared in the case of *K.S. Puttaswamy v. Union of India*<sup>6</sup> that the right to privacy, which is guaranteed by various parts of the Constitution, protects delicate personal decisions such as those governing reproduction. Given the circumstances, this decision was made . Women would be unable to use their reproductive abilities for financial gain if commercial surrogacy were completely forbidden. This restriction of choice may violate constitutionally protected rights to privacy, reproductive freedom, and physical integrity.

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<sup>5</sup> *Suchita Srivastava v. Chandigarh Administration, CIVIL APPEAL NO.5845 OF 2009*

<sup>6</sup> *K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161*

Both the Indian Constitution, which outlines certain rights for citizens and the various international treaties, of which India is a signatory at the federal level, are in conflict with the provisions of this bill. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights prohibit the involvement of the state in the private lives of women. The concept of the right to privacy as conceived by the ICCPR Committee takes into consideration the autonomy and bodily integrity of women. Because it violates these rights, the bill's broad restriction on commercial surrogacy should be disregarded as something that should be ignored. Even though commercial surrogacy has been completely prohibited by many countries in the Northern Hemisphere, there are three key reasons why the same activity is not appropriate in Indian society. First, even if commercial surrogacy were expressly forbidden, it is possible that it would still take place in secret. This is one of the primary sources of people's anxiety. When commercial surrogacy becomes more common, poor women will be forced to participate since they will have few other options for employment. The surrogates' health would be jeopardized, and there could be an increase in the number of infants abandoned as a result of the intended parents no longer being in control of the child's care.

The second issue with this plan is that it would allow potential surrogates to be used for illegal commercial surrogacy. Potential surrogates would almost certainly be unable to take legal action because they would be perceived as participating in the illegal behaviour they were facilitating. Last but not least, if commercial surrogacy is forbidden, India's already significant gender gap will increase significantly.

As previously said, making a living for women in India's predominantly patriarchal society is incredibly challenging, especially for those who are marginalized and without access to basic resources. Commercial surrogacy is one of the few ways for women in such challenging circumstances to earn money without competing with men, and prohibiting it will simply worsen India's wage disparities between men and women. Surrogacy is one of the few methods for women to earn money without competing against men.

## **Lacunae in the Surrogacy (Regulation) Act, 2021**

The SURROGACY REGULATION ACT, 2021, was passed by Parliament after the campaigners campaigned for years to attain this goal in order to implement and control the succession process. The Act did not take force after the notification was published in the Union Government's Official Gazette on January 25. To protect the surrogate mother's rights and honour, as well as to assist women who are unable to conceive despite a variety of reproductive therapies, India has passed a number of surrogacy legislation. These laws are designed to protect the surrogate mother's rights and reputation.

On the other hand, there are significant omissions and gaps in the Act, which we will go into greater detail about in the following paragraphs. I would like to bring your attention to the fact that the Act needs to be revised wherever necessary to make it more comprehensive and clearer so that it can fulfil the requirements set forth by the people. The non-binary gender exclusion, the prohibition on commercial surrogacy, the requirement that traditional surrogacy be included, and the difficulty that medical professionals may have due to the law's vagueness over who is and is not authorized to use surrogacy services are the primary complaints regarding the Act.

Even though surrogacy is a relatively new practice in India, our legendary forefathers may have indulged in it for hundreds of years. Balaram, Devaki, and Vasudeva's seventh child, was also Lord Krishna's brother, and Vasudeva gave birth to Balaram through Rohini, Vasudeva's first wife, to protect Rohini from Devaki's brother Kansa. As a result, surrogacy is never condemned in Indian mythology; rather, it is regarded as a tool for creating or maintaining families.

The Surrogacy (Regulation) Act, of 2021 is India's first law governing surrogacy, yet social hostility to the operation persists. This is especially true if the intended mother or the intended parents requires an egg donor due to a lack of viable eggs. Both couples seeking surrogacy as a means of birthing and medical professionals have expressed reservations about the Act. This is due to the Act's significant flaws. Because of its limited and unclear phrasing, the progressive law that attempts to make surrogacy available to those who are infertile has failed to be progressive. The Act intends to make surrogacy available to those who are unable to conceive.

In the PIL of *Arun Muthuvel vs. Union of India*, Muthuvel who is CEO of Iswarya Fertility Services Private Limited has filed a petition to the government that 35-year-old single women should have the right to use surrogacy as an assisted reproductive procedure to have children. He claims that neither of the challenged Acts achieves their principal goal of limiting surrogacy and other assisted reproduction methods. The primary purpose is to prevent surrogacy and other assisted reproductive technologies from being abused.

The appeal also highlights “blatant discrepancies between the statutes”, which are defined as “arbitrary classification and categorization” that are “not only unreasonable but also unconstitutional”.

The two pieces of legislation are also said to exclude same-sex relationships and other LGBTQ people, single women who have not been widowed or divorced, single women who have been widowed and/or divorced and are younger than 35 or older than 45, single men, couples experiencing secondary infertility, couples in which neither partner falls within the defined age brackets, and couples in which neither partner falls within the defined age brackets.

The Surrogacy (Regulation) Act, 2021, and the Surrogacy Rules, 2022, according to the public interest litigation (PIL), are arbitrary and discriminatory, a direct violation of women's reproductive rights and the legally protected right to privacy, and thus violate Articles 14, 15(1), and 21 of the Constitution. According to the PIL, these constraints are not only difficult to implement, but also arbitrary and unfair.

## **Exclusion of LGBTQIA+ community**

The Act confines surrogacy services to married men and women, the Act exemplifies our society's ongoing gender bias. As a result, same-sex and non-binary couples will never be able to experience the joys of parenting. The Supreme Court of India invalidated Section 377 of the Indian Penal Code, which criminalizes homosexuality, in *Navtej Singh Johar v. Union of India*<sup>7</sup>(2018), however some same-sex couples are unable to meet the requirements of Section 2(h) of the Act.

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<sup>7</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321

This section emphasizes that a pair must include both a man and a woman, as well as the fact that only heterosexual married couples are eligible to use surrogacy services.

Every Indian person has the right to equality in society because of the fundamental rights given by the Indian Constitution. Recognizing the LGBTQ community is critical for advancing equality in society. This privilege was developed in order to honor the LGBTQ community. The Supreme Court of India heard arguments on the question of surrogacy for the first time in the case of *Baby Manji Yamada v. Union of India*<sup>8</sup>. In that case, the court acknowledged both the practice of using a surrogate to bear children and the possibility that the biological parent in question was either a homosexual couple or a single parent. The Act's approval renders the latter completely useless. Both heterosexual and homosexual couples, as well as the entire non-binary population, need to be allowed to enjoy the social status and luxury of having children in the current society.

### **Need to include traditional surrogacy**

Gestational surrogacy and conventional surrogacy are the two types of surrogacies that have the greatest amount of public awareness. In contrast to traditional surrogacy, in which the surrogate mother is also the child's biological mother, gestational surrogacy involves the implantation of an embryo on behalf of the intended parents. In traditional surrogacy, the surrogate mother also gives birth to the child. The difference between traditional surrogacy and gestational surrogacy is that in traditional surrogacy, the surrogate mother is also the child's biological mother.

The 2021 Statute only permits gestational surrogacy because it is against the law for any woman to act as a surrogate by donating her gametes. This provision of the law can be found in Section 4(iii)(b)(III) of the legislation. The Act's Section 8 stipulates that the surrogate child shall be treated as the biological child of the intending couple or the intending woman and shall have the same rights and privileges as a natural child in accordance with the laws that are in effect at the time. These rights and privileges shall be accorded to the surrogate child in accordance with the laws that are in effect at the time. This clause's intention was to make it possible for women who have used surrogacy to carry their own children.

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<sup>8</sup> Baby Manji Yamada v. Union of India, WRIT PETITION (C) NO. 369 OF 2008.

Traditional surrogacy is an option for intended mothers who are unable to produce viable eggs on their own. It is also available to same-sex male couples, lonely guys, non-binary people, and those who do not identify as either gender. The Supreme Court of India considered the frequent surrogacy practice in the *Baby Manji Yamada case*<sup>9</sup>. The court accepted in this case that couples could choose to go the "straight road." This type of surrogacy is advantageous because it reduces the entire cost of the procedure. Traditional surrogacy requires fewer medical treatments on the surrogate mother than gestational surrogacy. There is no need to look for another egg donor if the egg that was supposed to be the mother cannot be fertilized because the egg supplied by the surrogate can be used instead. Because the egg and sperm are not removed from the uterus, the therapy is also less expensive. Instead, the possible father's (or donor is, depending on the circumstances) sperm is artificially inseminated via intrauterine or intracervical insemination.

Traditional surrogacy can only be performed if the surrogate is a close cousin or friend of either the intended parents or the intended mother due to the biological connection between the intended parents and the surrogate. The surrogate is responsible for carrying and delivering the child on behalf of the intended parents in a traditional surrogacy arrangement. For the intended parents to have custody of the child and raise them together, both the surrogate mother and the egg donor will have to give up their parental rights. As a result, the child can now be raised by his or her intended parents. In order to protect their parental rights after the child is born, the non-biological intended parent may be asked to sign and complete the adoption paperwork for the child

## Judicial Approach

In the case of *Baby Manji Yamada v. Union of India*<sup>10</sup>, the Supreme Court of India declared that a single male might function as the commissioning parent in a "commercial surrogacy" arrangement. As a result, the court granted custody to Manji's divorced father and her Japanese grandmother. According to the Gujarat High Court's judgment in *Jan Balaz v. Union of India*<sup>11</sup>, children born through Indian surrogates are deemed Indian citizens. As a result, the court suggested that these youngsters be issued Indian passports.

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<sup>9</sup> Baby Manji Yamada v. Union of India, WRIT PETITION (C) NO. 369 OF 2008.

<sup>10</sup> Baby Manji Yamada v. Union of India, WRIT PETITION (C) NO. 369 OF 2008

<sup>11</sup> *Jan Balaz v. Union of India, CA No. 8714/2010*

The Supreme Court relaxed the CARA's requirements in Stephanie *Joan Becker v. State and Others*<sup>12</sup>, allowing a 53-year-old single woman to adopt her 10-year-old orphaned daughter. In the absence of statute law, the Supreme Court of India must issue instructions for surrogacy regulation, similar to its decisions in *D. K. Basu v. State of West Bengal*<sup>13</sup> and *Vishakha v. State of Rajasthan*<sup>14</sup>. This is true since it is required. However, in both the Jan Balaz and Jayashree Wad cases, the Supreme Court of India upheld the issue of surrogacy since the surrogacy agreement comprises a variety of complicated difficulties that must be addressed by the relevant legislation. Both possibilities have these concerns.

## CONCLUSION

Every person has an innate right to use their reproductive capacity to generate new life. It is also protected under Article 21 of the Indian Constitution, which preserves the rights to life and personal liberty, in addition to a number of international human rights agreements. Everyone has the right to marry and have children. The government developed drafts of the Assisted Reproductive Technology (Regulation) Bills in 2008, 2010, and 2014; nevertheless, these proposals were deemed inadequate for the current scenario, generating several concerns.

One of the key motives for joining a committed romantic relationship in Indian culture is the desire to start a family as soon as possible. The majority of divorces and separations are caused by infertility. Furthermore, the surrogacy arrangement reflects societal choices and can only be altered by societal preferences. To meet the demands of modern society, public morality must recognize the possibility of surrogacy. However, suitable legislation is required to handle the legal concerns. Human rights, such as the right to procreate, should be provided without restriction to all individuals and should not be restricted. As a result, more research on this topic is required.

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<sup>12</sup> *Joan Becker v. State and Others, CIVIL APPEAL No.1053 of 2013*

<sup>13</sup> *D. K. Basu v. State of West Bengal, WITH WRIT PETITION (CRL) NO. 592 OF 1987*

<sup>14</sup> *Vishakha v. State of Rajasthan, AIR 1997 SC 3011*