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LEGAL ASPECTS OF SURROGACY IN INDIA

Mohani Chaurasia

ABSTRACT

Surrogacy has emerged as an essential reproductive choice, generating legal, ethical, social, and constitutional issues. This study examines the concept of surrogacy and various aspects of it in the context of the evolution of surrogacy laws in India in the form of court rulings, Law Commission reports, executive guidelines, and legislative enactments leading to the Surrogacy (legislation) Act of 2021¹. The study critically evaluates the phenomenon of commercial surrogacy and how India turned out to be a global destination for reproductive tourism and a 'baby factory', as well as the factors necessitating legislation in that regard. The research focuses on the constitutional dimension of surrogacy including issues such as reproductive autonomy, privacy, equality and personal liberty as provided by the Indian Constitution. People belonging to LGBT community, unmarried couples and others are largely barred from accessing surrogacy. The study critically analyzes the Surrogacy (Regulation) Act, 2021 by looking at various judicial pronouncements and statutory provisions, and its compatibility with fundamental rights and contemporary concepts of reproductive justice and inclusion.

KEYWORDS: Surrogacy, Commercial Surrogacy, Reproductive Rights, LGBTQ+ Rights, Reproductive justice, Surrogacy (Regulation) Act, 2021, etc.

INTRODUCTION

Many couples across the world are facing difficulties to become parents due to infertility issues despite the advantages of being parents. Many societies consider being childless as taboo, thus making it hard for the couple to cope up with. Most couples rely on Assisted Reproductive Technology in becoming parents. Assisted Reproductive Technology entails the

¹ Act No. 47 of 2021

retrieval of eggs from the female ovary and the fusion of the eggs and sperms at the clinic before transferring them back to the woman or donating. IVF is a form of assisted reproductive technology where an egg and sperm are fertilized using medical procedures before they are planted in the woman's womb. Surrogacy is currently a feasible alternative for many infertile women due to biological issues, enabling them to give birth through another woman's womb. Surrogacy is the technique of giving birth of a child in the womb of another woman through the gametes of a couple unable to conceive normally. The Latin word "surrogatus" forms the origin of the English word "surrogate". The term refers to any individual acting in place of another person. As per Black's law dictionary², the process is carried out where one woman consents to be artificially inseminated with the sperm of the other woman's husband.

Surrogacy, according to the Warnock report (1984)³, is the practice where one woman carries a child for another woman so that the former hands over the child after birth.

Indian council of medical research (ICMR) has defined surrogacy as "a procedure where a woman consents to carry a pregnancy not genetically related to her and her husband and intends to carry term and hand over the child to the genetic parents for whom she acts as a surrogate."⁴ Surrogacy has been recognized as Assisted Reproductive Technology (ART) and has undergone research for its scientific possibilities.

There are two types of surrogacies which are commonly recognized as "Gestational surrogacy" and "Traditional surrogacy". The latter type, "gestational surrogacy" or "host surrogacy", is the most popular type of surrogacy. The gestational carrier is not biologically related to the baby she is carrying. The embryo, however, is produced through in vitro fertilization (IVF) in a laboratory. The embryo can be created using the intended mother's (or donor's) egg and the intended father's (or donor's) sperm. It is then transferred to the uterus of the surrogate at the fertility center. The traditional surrogacy involves the use of the same surrogate for egg donation and being the biological mother of the baby carried by her as well; the embryos are created through the process of intrauterine insemination using the sperm either of the intended father or donor. Traditional surrogacy is also termed as complete

²Just a moment...,

https://www.academia.edu/43132172/Potential_transformation_targeted_through_the_Surrogacy_Regulation_Bill_2019_An_overview.

³ Lord Winstanley, *Human Fertilisation: Warnock Report*, <https://api.parliament.uk/historic-hansard/lords/1984/oct/31/human-fertilisation-warnock-report>.

⁴ (Jan. 7, 2019),

https://www.icmr.gov.in/icmrobject/custom_data/1702966683_surrogacy_bill_regulation_december_to_january.pdf.

surrogacy or genetic surrogacy. Traditional surrogacy is much less common than gestational surrogacy due to its complexity.

The fundamental difference between gestational and traditional surrogacy is whether the surrogate is biologically related to the child (or not). But this small difference plays an enormous role in the process of surrogacy. To choose between traditional and gestational surrogacy, consider the following things⁵:

- **Medical Procedure:** The two procedures involved in both forms of surrogacy are IVF and IUI. The IUI process is relatively simpler, since the surrogate need not undergo many fertility treatments⁶. In addition, since the eggs of the women are not used in the creation of the embryo, the women do not need to take any fertility drugs or go through the egg retrieval process.
- **Legal Process:** Surrogacy laws in traditional surrogacy are much harder to deal with than the laws in gestational surrogacy. When it comes to traditional surrogacy, the woman acting as the surrogate becomes the child's natural mother, therefore, she has to surrender all her parental rights when delivering the child. In some jurisdictions, there has to be a step-parent adoption on behalf of the non-natural parent of the child to be able to have parental rights.
- **Wait Time:** It should be noted that most experts in this area only work on cases of gestational surrogacy. In addition, many surrogates prefer gestational surrogacy because it is not as complicated legally and emotionally.
- **Prices:** Usually, gestational surrogacy is more expensive compared to ordinary surrogacy. It is mainly associated with the differences in the medical procedure itself; IUI is cheaper than IVF and involves fewer medical interventions.
- **Risks:** There are also many more chances of emotional and legal troubles with traditional surrogacy than with gestational surrogacy. In a normal case of surrogacy, the surrogate mother is the biological mother of the baby, and thus she might be emotionally attached to the baby and would find it difficult to give him/her up to the

⁵ *Gestational vs. Traditional Surrogacy*, Southern Surrogacy <https://www.southernsurrogacy.com/surrogacy-information/gestational-vs-traditional-surrogacy/>.

⁶ *IUI (Intrauterine Insemination)*, (Mar. 7, 2022), <https://my.clevelandclinic.org/health/treatments/22456-iui-intrauterine-insemination>.

intended parents. Also, since she holds the rights of parenthood over the child, she can potentially dispute the surrogacy contract in the court of law.

There are two forms of surrogacy, depending on the mode of compensation to the surrogate. The first form is commercial surrogacy, where the surrogate is paid to carry the baby of the intended parents in her uterus and pay for all her medical bills. Commercial sale of embryos was also an issue of concern because of the possibility of the whole process being commodified. The other alternative is the altruistic one, in which a family member or close friend carries the baby out of goodwill.

RISE OF COMMERCIAL SURROGACY

Commercial surrogacy is a couple using the services of a surrogate mother in return for money before the passing of the Surrogacy (Regulation) Act, 2021. Commercial surrogacy and womb-renting practices have been common in India. They were an economically lucrative business for ART centres with the facilities to perform IVF. The body of the woman has been treated as a baby-making machine, bringing up many ethical, legal, and emotional questions. The growing trend of surrogacy has led to exploitation of vulnerable women to use their wombs for economic purposes. Since surrogacy was legalized in India in 2002, poor women would offer to be surrogate mothers for rich individuals from other countries such as the US and UK. Due to the high demand, agents would take advantage of both the surrogate mother and the couples in search of a surrogate baby. There has been tremendous growth in the use of Assisted Reproductive Technologies (ART), especially surrogacy in India. India experienced its first incidence of surrogacy in the early years of the twenty-first century. Reproductive tourism in India with \$500 million in income, through the liberal attitude of the country towards surrogacy, has transformed India into a "global baby factory,"⁷ offering a safe haven to couples looking for surrogacy. The government's stance regarding surrogacy has undergone tremendous change in the last few decades. There were no regulations regarding surrogacy until 2002. In 2002, the Indian Council of Medical Research (ICMR) came out with preliminary national guidelines on the accreditation, regulation, and licensing of ART clinics in India. These guidelines were accepted by the Indian government in 2005. It is important to note that these regulations do not prohibit business arrangements.

⁷ Today, India. "The Baby Factory: Surrogacy, the blooming business in Gujarat." *India Today*. August 23, 2013. Accessed June 23, 2026. <https://www.indiatoday.in/magazine/cover-story/story/20130902-surrogacy-blooming-business-in-gujarat-shah-rukh-aamir-khan-765351-2013-08-22>.

ART Bill 2008⁸ attempts to outline the rights and obligations of the surrogacy agreement parties in addition to a regulatory law concerning the procedures. In this case, the act also outlined the rights and responsibilities of patients, donors, surrogates, and first-time recipients of a child through ART. It is surprising that at first, the law regarding ART allowed surrogate mothers to receive compensation for their services. The law mentioned that there was no need for the surrogate mother to be related to the commissioning parents and that it did not need to be concealed. In those days, one could see that the content of the bill was about regulation, but not abolishing commercial surrogacy until 2008.

In 2015, India prohibited commercial surrogacy because of the negative influence it has on both the surrogate and the children. Couples from abroad who use surrogacy in India take advantage of its cheapness. International couples could not conduct surrogacy in India according to government rules. Surrogacy (Regulation) Bill 2016⁹ authorized altruistic surrogacy while prohibiting commercial surrogacy. The Surrogacy (Regulation) Act, 2021 (Ministry of Law and Justice 2021) is expected to be a full-fledged act covering all the aspects of the subject matter. This Act will be intended to take care of increasing child abandonments in India, which has become the new hub of surrogacy, as well as exploitation of women and middlemen who bring human embryos and gametes to India. According to SRA 2021, only altruistic surrogacy by "close relatives" is an accepted means of delivery of the baby outside the body of the biological mother (Ministry of Law and Justice 2021)¹⁰. Commercial surrogacy, which involves the use of human gametes and embryos, buying and selling of surrogate services for consideration, is going to be made unenforceable, while allowing altruistic surrogacy without any consideration or benefit to the surrogates except medical expenses and insurance¹¹.

RESEARCH PROBLEM

While the Surrogacy (Regulation) Act, 2021 has been passed to ensure that women are not exploited in any manner and to regulate surrogacy in the country, various issues still exist in terms of its efficacy and constitutional legality. The Act allows only altruistic surrogacy and lays down stringent eligibility requirements for intending parents, thus leaving out various individuals from benefiting from the provision of surrogacy services. This has created controversies about the rights to reproductive autonomy, equality, privacy, and the rights of

⁸ The Draft Assisted Reproductive Technology (ART) (Regulation) Bill, 2008

⁹ The Surrogacy (Regulation) Bill 2016

¹⁰ Corresponding. "The Surrogacy (Regulation) Act, 2021: A Critique." *PMC* . Accessed June 23, 2026. <https://pmc.ncbi.nlm.nih.gov/articles/PMC9816354/>.

¹¹ *ibid*

surrogate mothers. Although the legislation has been introduced in order to protect the rights of vulnerable women, it becomes relevant to see if the outright ban on commercial surrogacy and the strictness of the legislation provide the correct balance between state regulation and individual rights. Thus, the main research problem of the paper would be to find out if the present legal framework regulating surrogacy in India properly addresses the interests of everyone in consonance with the Constitution and international human rights norms.

RESEARCH OBJECTIVES

- To analyze the legislation in India relating to surrogacy, particularly the laws of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021.
- To analyze the constitutional implications of surrogacy regulation in India, with an emphasis on Article 14, 19, and 21 of the Indian Constitution.
- To critically analyze the banning of commercial surrogacy and the endorsement of altruistic surrogacy in India.
- To analyze the issues involved in enforcing the laws related to surrogacy in India.
- To analyze the rights of the LGBTQ+ community and live-in relationship couples to surrogacy.

SCOPE OF THE STUDY

This study will deal with the issue of regulation of surrogacy in India, particularly, the law pertaining to Surrogacy (Regulation) Act, 2021. This research will analyze the rights and obligations of all parties involved in surrogacy, including prospective parents, gestational mothers, and children born through surrogacy. The issues relating to constitutionality, ethics, and human rights associated with surrogacy, along with court pronouncements that have affected the Indian law on surrogacy, will be considered in the study. This research is limited to the Indian legal context and does not extend into the medical and scientific aspects of ART.

METHODOLOGY

The present study uses a doctrinal method of research that revolves around the analysis of legal principles, laws, decisions made in courtrooms, and secondary sources. It is both descriptive as well as analytical in nature and attempts to conduct an inquiry into the

legislations that govern surrogacy in India. The research makes use of secondary sources of information including the Constitution of India, Surrogacy (Regulation) Act, 2021, Assisted Reproductive Technology (Regulation) Act, 2021¹², Reports of Law Commission of India¹³, judicial decisions, books, research papers, journals, government publications, etc.

EVOLUTION OF SURROGACY LAWS IN INDIA

Changes in the lifestyles of humans and poor living conditions have increased in diseases and health problems, and even infertility. This has triggered a need for artificial means to overcome infertility. Surrogacy has increased its popularity because of same-sex marriages becoming more acceptable and the right to family and offspring. India has become a favored place for surrogacy because of the increase in intended parents opting for it.

There are other ways through which people can become parents, such as adoption; however, surrogacy has been favoured by intended parents because of the following reasons:

- Surrogacy guarantees that the child has at least one parent's DNA or even both parents' DNA within his/her womb. In this case, the birth mother is not necessarily the biological mother. This way, the genetic link between the parent and child will remain intact.
- They can predict and avoid any kind of health issues in advance based on their history.
- The child/children will never be stigmatized as adopted by society.
- The intended parents will have all the information about the surrogate regarding her medical background, finance, and family history to predict the outcome for both the woman and child.
- Surrogacy agreements are drawn up before anything happens and this avoids any potential problems that may arise in an adoption process.

Indian women have agreed to be surrogates for various reasons. The first case of gestational surrogacy in India happened in 1994¹⁴ in Chennai. In 1997, a woman from Chandigarh agreed to be a surrogate mother for INR 50,000/- to pay for her husband who had been

¹² Assisted Reproductive Technology (Regulation) Act, 2021

¹³ Report No. 228 of 2009

¹⁴ Roy, Vaishna. "Surrogacy and law." *Frontline* . September 28, 2016. Accessed June 23, 2026. <https://frontline.thehindu.com/social-issues/surrogacy-and-law/article9140537.ece>.

paralysed¹⁵. In 1999, an Indian woman agreed to be a surrogate mother for a German couple. Between the years 2003 and 2006, there has been an increase in surrogacy cases in India. There were about 25,000 infants born in India via surrogacy in 2012, and this number is still increasing¹⁶.

The practice of surrogacy in India was legalised in 2002. Surrogacy was legalized because of laws that neither banned nor enabled surrogacy, The National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India was passed by the government and thereby legalized the procedure. This bill became operational in 2005. The document contained the procedures which the ART clinics should follow when practicing the surrogacy treatment. The rules allowed single and unmarried women to use ART without any legal restriction, and the children born of them also enjoy legal rights. However, these rules were just guidelines and not legally binding. The country was referred to as the “capital of surrogacy” in the world due to the increase in the number of surrogacy cases. But since the rules are not legally binding, they cannot be enforced. Furthermore, there were legal issues due to the contingency in policies. The ART Bill has been prepared in the year 2010 to resolve these issues. The introduction of the new visa by the Ministry of Home Affairs, called ‘Medical Visa’, has changed the dynamics of surrogacy in the country¹⁷. This will help the government to keep track of the international couples coming for surrogacy in India to make sure that they follow the government approved process of surrogacy. The loopholes in the bill led to much debate and discussions on the issue.

LAW COMMISSION OF INDIA

In India, surrogacy was legalized by the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in 2005. This led to a proliferation of surrogacy practice. There has been an extensive study on surrogacy in India conducted by the Law Commission of India (LCI) that included the operation of IVF clinics, the growth of surrogacy practices, the rights of the parties and those of the surrogate child. According to the Law Commission of India's Report No. 228¹⁸, August 2009, the following recommendations were made concerning surrogacy in India:

¹⁵ May 27, 1999. Accessed June 23, 2026. <https://ijme.in/wp-content/uploads/2016/11/459-5.pdf>.

¹⁶ “Just a moment....” Accessed June 23, 2026. [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)61933-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)61933-3/fulltext).

¹⁷ *Supra* 10

¹⁸ *Supra* 13

1. There should be a contract controlling the surrogacy agreement. Costs may be reasonable but should not be for any commercial purpose.
2. In case one of the intended parents or woman passes away or the intended parents divorce, the surrogate child should receive some financial support.
3. The surrogate mothers should be insured for life.
4. Surrogacy should have a donor as one of the parents to ensure biological relations and prevent exploitation of the surrogate child. Adoption is the best choice for couples who do not have sperm or eggs.
5. The surrogacy law should recognize the intended parents as the legal biological parents of the child.
6. Sex selection should be prohibited in surrogacy.
7. The privacy of donors and surrogate mothers should be preserved.

SURROGACY (REGULATION) ACT, 2021

Surrogacy (Regulation) Act, 2021 (Ministry of Law and Justice 2021) is likely to turn out as a comprehensive document covering all issues concerning the topic. This act will solve the problems such as high rates of abandonment of children in India, being the emerging surrogacy destination country, and exploitation of women and middlemen who bring in human embryos and gametes. The SRA 2021 allows only altruistic surrogacy by using close relatives as the only form of delivery of babies through natural means apart from their biological mothers. It will seek to make commercial surrogacy unenforceable since this entails dealing with human gametes and embryos as well as buying and selling services of surrogates for money except insurance payments and allowing only altruistic surrogacy where there will not be any remuneration to surrogates except payment of their medical expenses and insurance. According to Surrogacy (Regulation) Bill 2019, only authorized surrogacy clinics will undertake the medical processes of surrogacy.

Abortion cannot be carried out in these clinics without the consent of the surrogate mothers and permission by the respective authorities. It also does not allow sex selection of the child and storage of human gametes and embryos. A woman can only act as a surrogate mother once in her lifetime. Apart from having a certificate of good health, she needs to have a certificate that confirms her mental and physical health status. Besides, since the surrogates cannot use their gametes, then gestational surrogacy becomes the only available choice. The

intending couple should also get a "certificate of eligibility"¹⁹ and "certificate of essentiality"²⁰ from the licensed agency in order to access the therapy. The only time when a certificate of essentiality is given is when an intended couple suffers from infertility, apart from other requirements.

Certificate of eligibility is given to a couple whose marriage anniversary is for at least five years and are Indian nationals, and aged between 26 and 55 for the male and 23 and 50 for the female. They should also not have children, except those with physical and mental disabilities. Pursuant to Section 4(ii)(a)²¹, which was created under Section 17²² of the Act, the National Assisted Reproductive Technology and Surrogacy Board should issue certificates of recommendation to the intending couple as well as to the surrogate. Section 2(h) of the Act says that "intending couple means an Indian husband and wife who are lawfully wedded to each other and are above the age of twenty-one years and eighteen years respectively"²³. Any surrogate-born child shall be treated as the biological child of the intending couple. In case of any child being born using the surrogacy process, the intending couple shall not abandon such a child either within or outside India for any genetic or birth defects, medical conditions that may occur subsequently, on the basis of gender of the child, multiple births, etc. According to SRA 2021, surrogacy is permitted only for the intending couples who can be proved to be infertile and not for the purposes of business. As per the 2021 Act, a couple is described as an "Indian man and woman who are married and are more than 21 years and 18 years old, respectively." The provisions are not applicable to any individual involved in a live-in relationship. The Act promotes marriage through the definition of a couple under Section 2(h).

ASSISTED REPRODUCTIVE TECHNOLOGY ACT 2021

The passing of the Assisted Reproductive Technology (Regulation) Act, 2021²⁴, by an act of Parliament on December 20, 2021, is definitely a necessary move in the right direction. Prior to this Act, state accreditation authorities had the power to penalize ART clinics for breaching ICMR guidelines. This Act will protect the rights of infertile couples and surrogate mothers in its present form. The Act provides financial protection to the oocyte donor by providing

¹⁹ Section 4(iii)(c) of Surrogacy (Regulation) Act, 2021

²⁰ Section 4(iii)(a) of Surrogacy (Regulation) Act, 2021

²¹ Section 4(ii)(a) of Surrogacy (Regulation) Act, 2021

²² Section 17 of Surrogacy (Regulation) Act, 2021

²³ Section 2(h) of Surrogacy (Regulation) Act, 2021

²⁴ Act No. 42 of 2021

insurance coverage for a period of twelve months (sec 22 (1) (b)²⁵). The surrogate mother carries out the function of gestation until the birth of the child, and after that, she releases her rights over the child in accordance with the Act. Apart from discussing the important issue of assisted reproduction research and laying down the standards for the utilization of human gametes, embryos, and gonadal tissues for research purposes, this Act will regulate ART clinics and ART banks. The registration of the many ART clinics and banks existing in various regions within the nation will become the greatest barrier to the implementation of the Act. Also, both the national and state ART and surrogacy boards will find it challenging to ensure compliance with all aspects of the Act especially in terms of the strict imposition of fines and other sanctions in case of non-compliance. This is because health is a state responsibility, thus, each state must formulate its own policies depending on its situation.

CONSTITUTIONAL AND HUMAN RIGHTS ISSUES

Surrogacy is an amalgamation of constitutional rights, social norms, and reproduction rights. The Indian Constitution, which is the backbone of the legal framework, protects certain surrogacy rights. Article 21²⁶ of the Indian Constitution protects the right to life and personal liberty, which includes reproductive autonomy according to Justice K.S Puttaswamy v. Union of India 2017²⁷. The case created a constitutional precedent by protecting the right to privacy, which includes reproductive choices as well. Equitable treatment and non-discrimination issues arise in the context of surrogacy. Article 15²⁸ states that no one can be discriminated against because of religion, race, caste, gender, or place of birth, while Article 14²⁹ states the right to equality before the law. Barring the LGBTQ+, unmarried individuals, and people who are not Indian citizens from surrogacy services through the Surrogacy Regulation Act, 2021 creates doubts about the Act's compliance with the constitutional equality and non-discrimination articles. Inclusion of a ban on commercial surrogacy in the Surrogacy Bill seems problematic since it is against Article 19(1)(g)³⁰ which provides right to carry on trade or any other occupation. The ban on commercial surrogacy might be in violation of the right of surrogate mother to exercise her right to autonomy and profession despite the aim of the

²⁵ Section 22(1)(b) of Assisted Reproductive Technology (Regulation) Act, 2021

²⁶ Art 21 of the Indian Constitution, 1950

²⁷ Justice K.S Puttaswamy v. Union of India (2017) 10 SCC 1

²⁸ Art 15 of the Indian Constitution, 1950

²⁹ Art 14 of the Indian Constitution, 1950

³⁰ Art 19(1)(g) of the Indian Constitution, 1950

bill to safeguard from the exploitation of female body. The judicial decisions have played a significant role in changing the constitutional scheme of surrogacy.

EXCLUSION OF THE LGBTQ+ COMMUNITY

The Act brings into light the discrimination that exists against women in our society and bars same-sex couples and non-binary couples from partaking in the happiness of motherhood by allowing only those couples who are legally married according to Indian laws as man and wife to go through the process of surrogacy. This Act is blatant discrimination against the LGBTQ community and single fathers wishing to have a baby. LGBT (lesbian, gay, bisexual, transgender, queer) people make up 15% of the population, whereas 20% of surrogacy seekers are single parents³¹ (Navtej Singh Johar v. Union of India (2018)³² – Supreme Court strikes down Sec 377³³ of the Indian Penal Code restricting homosexuality). In order to bring about equality in society, which is the right of every citizen of India under the fundamental rights in the Indian Constitution, the LGBTQ community must be recognized. In the landmark judgement of Baby Manji Yamada vs. Union of India in 2008³⁴, the Supreme Court encountered the first ever issue concerning surrogacy. This was the case when the Supreme Court acknowledged surrogacy as an option of accepting parenthood and accepted the idea of a single parent or homosexuals becoming parents. The latter has been proven wrong by the implementation of the Act. Therefore, it is very important to give the right and privilege of having children to hetero, homosexual, and non-binary groups of people³⁵.

JUDICIAL TRENDS AND CASE LAWS

- **Baby Manji Yamada vs. Union of India (2008)³⁶**

In this historic case, the gap in the laws on surrogacy that prevailed in India was brought out into the open. Despite the separation of the parents, the Supreme Court secured the safe exit of Baby Manji through its recognition of the validity of surrogacy agreements. Manji is a child of Japanese parents conceived through

³¹ Babbar, Karan. "The Surrogacy Regulation Act 2021: Another Attempt To Reproduce A Heteronormative Patriarchal Society?." February 1, 2022. Accessed June 23, 2026. <https://feminisminindia.com/2022/02/02/the-surrogacy-regulation-act-2021-another-attempt-to-reproduce-a-heteronormative-patriarchal-society/>.

³² Navtej Singh Johar v. Union of India (2018) 10 SCC 1

³³ Section 377 of the Indian Penal Code, 1860

³⁴ Baby Manji Yamada vs. Union of India AIR 2009 SUPREME COURT 84

³⁵ August 6, 2024. Accessed June 23, 2026. <https://jlrs.com/wp-content/uploads/2024/08/80.-Prerna-Bharti.pdf>.

³⁶ *Supra* 30

surrogacy. The case highlighted the importance of a well-organised legal structure to regulate surrogacy.

- **Jan Balaz v. Anand Municipality (2010)**³⁷

Citizenship of surrogate children from India was the main issue here. The decision made by the Gujarat High Court regarding issuing of Indian passports to surrogate-born children has raised questions related to citizenship and international surrogacy. This case revealed the necessity of legislation in relation to the surrogate children's rights.

- **Justice K.S. Puttaswamy vs. Union of India (2017)**³⁸

While this judgement had no relation whatsoever with surrogacy, it recognized privacy as a fundamental right in India through Article 21. It was made clear that an individual had the right to choose and take decisions regarding his body and could use surrogacy for the purpose of reproduction.

- **Vijaya Kumari & Another v. Union of India (2025)**³⁹

According to the decision of the Supreme Court, it was illegal to deny the right of parenthood to couples who started the process of surrogacy due to the limitation of age in the Surrogacy (Regulation) Act, 2021. In the pre-existing scenario before the introduction of the Surrogacy (Regulation) Act, 2021, there were three couples, intending to be parents through surrogacy, who had already started the process of surrogacy. According to the Supreme Court decision, the couples intended to have a surrogate child were entitled to have their fundamental right protected by law. The Bench exempted the petitioners from getting certified on the qualifying age for the continuation of the process of surrogacy.

CRITICAL ANALYSIS OF SURROGACY LAWS IN INDIA

The proposed Surrogacy (Regulation) Bill might also face a constitutional challenge based on the violation of Article 21⁴⁰ privacy restrictions. The traditional notion of family has been substituted by intention-based parenting and private ordering, focusing on the freedom of individuals. In Puttaswamy case, the Supreme Court highlighted the reproductive autonomy of families, which refers to personal choices about procreation as an important constituent of

³⁷ Jan Balaz v. Anand Municipality (2010)

³⁸ *Supra* 23

³⁹ Vijaya Kumari & Another v. Union of India 2025 INSC 1209

⁴⁰ Art 21 of the Indian Constitution, 1950

privacy rights. Moreover, equality before law is mentioned in Article 14 of the Constitution and implies that there should not be any arbitrary law in the country without proper legal reasoning for discrimination of some particular acts⁴¹. It means that the state cannot, through the law, refuse a certain segment of population from having surrogacy (regardless of how it defines it legally) without providing an explanation. Besides the committed spouses, the prospective child remains the only stakeholder who has any vested interest in the surrogacy case. It is more crucial for the well-being of the prospective child to be considered rather than any legal entitlement to being a parent. According to the Supreme Court ruling, the best interest of the child consists of the factors such as stability and security, love and affection, as well as an environment conducive to proper development. No evidence proves that a devoted gay couple is unable to bring up children in the same manner as a heterosexual spouse.

CONCLUSION

The issue of surrogacy has never been a contentious one in India until now, when the unethical practices are realized. There have been no regulations on surrogacy that have been strictly controlled since the inception of the practice. They have failed to curb the commercialization and exploitation of the practice as much as hoped. The report brought out the efforts by the Indian government to control the surrogacy industry. The laws in India have evolved to tackle the problems ranging from commercial surrogacy, stateless babies through foreign partners and the regulation of ART providers. It has taken almost two decades to develop this act, overcoming a number of mistakes and omissions in the process. However, this has led to restrictions to a number of people who are innocent. The Act does not take into consideration the concerns of a community with various sexual orientations and identities, forgetting all the effort to decriminalize Section 377 of the CrPC.

⁴¹ E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3