
THE RIGHT TO PROCREATION VIS-À-VIS SURROGACY IN INDIA

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ABSTRACT

Since the enactment of The Surrogacy (Regulation) Act, 2021, there arose numerous queries regarding the lacuna, exclusionary aspects, arbitrariness, and so on. Surrogacy is a boon to many that desire to have a child of their own, every individual has the 'Right to Procreate' and it is further ensured employing Assisted Reproductive Technology and Surrogacy. With greater innovations come novel problems, one such problem is commercial surrogacy, where economically weaker women¹ are subjected to illegal mining of their ovaries and unethical usage of the uterus. The said act lays a blanket ban on commercial surrogacy by only facilitating Altruistic Surrogacy which to a greater extent prohibits the exploitation of women. At the same time, its exclusionary vision on various categories of people in this society is intruding into the 'Right to Reproduce'. This article deals with the lacuna, legal protection, and internationally available to the omitted people.

Keywords: Commercial Surrogacy, Altruistic Surrogacy, Assisted Reproductive Technology, Surrogacy, Right to Procreate.

¹ India's Unregulated Surrogacy Industry by Priya Shetty, [https://doi.org/10.1016/S0140-6736\(12\)61933-3](https://doi.org/10.1016/S0140-6736(12)61933-3)

Introduction

In the wake of modernization, the world has seen a bundle of problems arising, one such is infertility². Various reasons contribute to increased cases of infertility. Stress, depression, alcohol addiction, smoking, substance abuse, unbalanced diet, improper rhythmic cycle, etc are some of the causes that induce infertility³. With novel problems come novel ideas for cures.

However, Surrogacy is been documented for a very long time. During Biblical times, Sarah and Abraham⁴ were known to have followed Traditional surrogacy, where Sarah couldn't conceive naturally and the couple seeks the help of Sarah's servant Hagar to be the mother of Abraham's child. However, this form of traditional surrogacy remained taboo up until the twentieth century due to the stigma associated with this society in looking upon infertile couples and children of the intending couples.

Also in Indian Vedic Scriptures, the concept of *Niyoga Pratha*⁵ is been observed and also documented. Even in Mahabharata Niyoga is documented, where the Widow Queens of Vichitravirya, Ambika, and Ambalika along with one of their maids gave birth to Dhritarashtra, Pandu, and Vidhura. Gandhari had her hundred sons and one daughter born out of the relics of her dead child being kept in 101 pots, this was considered to be a form of surrogacy.

Assisted reproductive technology came into the light to help and treat persons with impaired reproductive health. In most cases impaired reproductive health is due to psychological reasons⁶. Assisted reproductive technology is a boon to such intending parents who want to have a child of their own.

But as said, innovation comes with risk, the risk and problem raised out of Assisted reproductive technology is the 'illegal market'. Economically weaker women are being exploited and mined for their ovaries and uterus. With the help of various methods of diagnosis, wealthier and more influential intending couples find the sex of the baby in the uterus and if

² Naeem, A., Gupta, N., Naeem, U. et al. Amniotic stem cells as a source of regenerative medicine to treat female infertility. *Human Cell* 36, 15–25 (2023). <https://doi.org/10.1007/s13577-022-00795-1>

³ Biggs, S.N., Kennedy, J., Lewis, S.L. et al. Lifestyle and environmental risk factors for unexplained male infertility: study protocol for Australian Male Infertility Exposure (AMIE), a case-control study. *Reprod Health* 20, 32 (2023). <https://doi.org/10.1186/s12978-023-01578-z>

⁴ Genesis 16:1 – 16:16

⁵ Manu Smriti chapter 9 – 64 to 68. (n this process, a lady can get children from someone other than her husband if her husband is incapable of this due to any reason or the husband had died without his wife becoming pregnant through him).

⁶ Infertility as a psychological problem Magdalena Podolska, Mariola Bidzan, *Ginekol Pol* 2011;82(1).

that is not of their desired gender, the child would be aborted⁷. Also, in this patriarchal society, various incidents are recorded about sex-selective abortions, where only girl children are aborted if their gender is diagnosed prenatally.

In certain other instances, the child's sex is diagnosed prenatally and is nourished and delivered and is used for various illegal activities such as child pornography, child prostitution, child sale, etc.

To overcome these problems, the OHCHR (Office of High Commission for Human Rights) recommended its member countries in the year 2018 to frame special legislation to end the sale of children for illegal activities and regulate commercial surrogacy and children from out of such arrangements. Regulation of post-birth interests of the child, regulating all intermediaries in the process of surrogacy, encouraging other legal rights of the children in consonance with national and international laws to bestow the rights of child and elimination of discrimination of women.⁸

As a result, the Indian Government enacted the Surrogacy (Regulation) Act, 2021 on 25th December. The statute contains 8 chapters and 54 sections. Provisions of the act deal with regulating surrogacy and constituting the National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards, and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto.⁹

Concept of surrogacy under the Surrogacy (Regulation) Act, 2021

The term 'surrogate' in the English language means a 'substitute'. Section 2(b) of the Surrogacy (Regulation) Act, 2021 defines "altruistic surrogacy", altruistic surrogacy is when the surrogate receives no compensation other than any expenditure that may be prescribed or incurred owing to insurance coverage or medical expenses. Meanwhile, section 2(g) defines "commercial surrogacy", as the commercialization of surrogacy services, by buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fee, remuneration, or monetary incentives in cash or kind.

⁷ Misuse of prenatal diagnostic technology for sex-selected abortions and its consequences in India
Author links open overlay panel (B.R. Sharma, N. Gupta, N. Relhan)

⁸ A/HRC/37/60

⁹ Preamble, Surrogacy (Regulation) Act, 2021

Right to Reproduction – A Constitutional Right

Article 16(1) of the Universal Declaration of Human Rights 1948¹⁰ says, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and start a family”.

General Comment No. 22 on the Right to Sexual and reproductive health¹¹ issued by the UN Committee on Economic, Social and Cultural Rights, which observes that reproductive health, is an integral part of the right to health.

The Andhra Pradesh High Court in *B.K. Parthasarathi v. Govt. of Andhra Pradesh*¹², held that the State’s interference in procreation amount to a direct encroachment on one’s “right to privacy” which has been recognized as a facet of the right to life under Article 21 of the Constitution of India. It is also observed that women have the right to control their bodies, fertility, and motherhood choice. agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*¹³, which characterized the right to reproduce as “one of the basic civil rights of man”.

In *Devika Biswas v. Union of India*¹⁴, the Supreme Court recognized the right to reproduction as an important component of the “right to life” under Article 21. The reproductive rights of women include the right to carry a baby to term, give birth, and raise children

Right to Livelihood and Privacy

In *Consumer Education and Research Centre v. Union of India*,¹⁵ it was observed that Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider sense which includes the right to livelihood. In *Olga Telis v. Bombay Municipal Corporation*, it was held that no person can live without a means of living i.e., livelihood. In *Justice K.S. Puttaswamy (Retd) vs Union of India*¹⁶ on 26 September 2018, it

¹⁰ Article 16(1) of the Universal Declaration of Human Rights 1948 says, “Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to find a family. They are entitled to equal rights as to marriage, during the marriage, and at its dissolution.”

¹¹ General Comment 22 identifies four central characteristics of sexual and reproductive health care: availability, accessibility, acceptability (respectful of and sensitive to patients' particular identities and needs), and quality

¹² 2000 (1) ALD 199, 1999 (5) ALT 715

¹³ 316 U.S. 535 (1942)

¹⁴ Civil Writ Jurisdiction Case No.15563 of 2016

¹⁵ 1995 AIR 922, 1995 SCC (3) 42

¹⁶ (2017) 10 SCC 1, AIR 2017 SC 4161

was observed that privacy covers the personal autonomy relating to the body, mind, and making a choice.

Right to Equality

Article 1 of the Universal Declaration of Human Rights asserts the human sensitivity and moral responsibility of every State that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. In *Deepika Singh v. Central Administrative*¹⁷ (2022), the apex court acknowledged the changing idea of the ‘family’ by stating that family relationships may take the form of domestic, unmarried partnerships, or queer relationships. Such atypical manifestations of the family unit are equally deserving of protection under the law and benefits under social welfare legislation. While dealing with the rights of unmarried women to abortion up to 24 weeks, the SC held that the distinction between unmarried and married women is discriminatory.

Right to Personal Liberty

As per section 2(1)(r)¹⁸ and 2(1)(s)¹⁹ of the Surrogacy (Regulation) Act, 2021 only the intending couple, who is legally wedded, and intending woman who is a widow or divorcee can alone opt for surrogacy and leaving behind all others with the desire of having their own child. The Right to Personal Liberty is highly intruded here, In *Shafin Jahan vs. Asokan K.M. and Ors*²⁰, the Supreme Court upheld an individual’s right to marry a person of one’s own choice is an important facet of Article 21 and it includes the ability to make decisions on aspects which define one's personhood and identity. In *K.S. Puttaswamy vs. Union of India*,²¹ it was observed that the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live is protected by Articles 14, 19 and 21.

In *National Legal Services Authority vs. Union of India*²², The judgment rendered by the Court recognized the rights of transgender persons as a third gender, apart from the gender binary, in

¹⁷ Civil Appeal No 5308 of 202

¹⁸Section 2(1)(r) of the Surrogacy (Regulation) Act, 2021 says, “intending couple” means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy;

¹⁹ Section 2(1)(s) of the Surrogacy (Regulation) Act, 2021 “intending woman” means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy

²⁰ Criminal Appeal No. 366 of 2018

²¹ Writ Petition (Civil) No. 494 of 2012

²² Writ Petition (Civil) No.400 of 2012

order to effectively protect and safeguard their rights under the Constitution, also it reaffirmed that psychological gender should take primacy over biological gender, and medical procedures could not be a precondition for legal recognition of gender identity and held that transgender/third gender persons were entitled to fundamental rights under the Constitution of India. It is clear that the third gender is also entitled to Fundamental Rights. But the said act clearly infringes the Fundamental Rights of single parents, same-sex couples, live-in couples, and incarcerated persons by not providing them an option for choosing surrogacy.

In *Navej Singh Johar and Ors. vs. Union of India*²³, the supreme court held that the choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice and an expression of their autonomy and self-determination. Further, although the LGBT community constituted a sexual minority, they were equally protected under Part III of the Constitution. In Section 3²⁴ of the Transgender Persons (Protection of Rights) Act, 2019 it's clearly mentioned that no person can deny or discontinue or treat unfairly with regard to access, provision or enjoyment, or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public. Section 8 of the act sets the obligation of the appropriate government to take steps to secure the full and effective participation of transgender persons and their inclusion in society. Section 7²⁵ and Section 8²⁶ of the Hindu Adoption and Maintenance Act, 1956 guarantees adoption by unmarried males and females also Section 56(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015, a couple or a single parent can adopt an orphan/ abandoned/surrendered child. Meanwhile, the Surrogacy (Regulation) Act, 2021 arbitrarily excludes certain classes of citizens from its gamut.

²³ Writ Petition (Criminal) No. 76 of 2016

²⁴ The appropriate Government shall formulate welfare schemes and programmes which are transgender - sensitive, non-stigmatizing, and non-discriminatory. (4) The appropriate Government shall take steps for the rescue, protection, and rehabilitation of transgender persons to address the needs of such persons.

²⁵Section 7 of the Hindu Adoption and Maintenance Act, 1956 reads, “ Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption: Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Explanation. — If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso”

²⁶Section 8 of the Hindu Adoption and Maintenance Act, 1956 reads, “Capacity of a female Hindu to take in adoption. —Any female Hindu— (a) who is of sound mind, (b) who is not a minor, and (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.”

Prohibiting unmarried couples, incarcerated persons, live-in couples, and same-sex couples from availing of Surrogacy

In the act is that while laying down the criteria of eligibility of the intending parents, the emphasis has been on a medical condition necessitating 'gestational surrogacy', meaning where the surrogate mother carries the child for the intending couple/woman by implanting the embryo in her womb, and where the child is not genetically related to her. Section 4(iii)(b) (I) of the Act states, "No woman other than an ever-married woman having a child of her own and between the age of 25-35 on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise. The above two provisions fly in the face of the other. Also, if the altruistic surrogate mother were to donate her egg, the nature of surrogacy would stand altered from gestational to traditional surrogacy. Such genetic ties between the child and the surrogate mother within the same family are bound to create a mess, medically and otherwise. The surrogacy law needs an overhaul as it seems to be out of sync with the progressive thought of superior constitutional courts, which have always held women's reproductive autonomy and every citizen's procreative rights in the highest esteem.

In the State of Bombay And Ors. Vs F.N.Balsara²⁷, It is well settled that Article 14 forbids classification for the purpose of the legislation. It is equally well settled that in order to meet the test of Article 14 (i) classification must be based on intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of a group and (ii) the differentia must have a rational nexus to the objects sought to be achieved by the executive or legislative action under challenge. The Surrogacy (Regulation) Act, 2021 doesn't pass the test of intelligent differentia and rational nexus as this act only applies to legally married Indian men and women above the age of 21 years and 18 years respectively as per Section 2(1)(h)²⁸ of the act. As of today, it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. Japanese baby Manji Yamada's case and the Israel gay couple's case who fathered a child in India are clear examples to establish that this is possible. The act makes it impossible for same-sex couples to embrace parenthood through surrogacy owing to their inability to fulfil the criterion of being married. It follows that transgender and gender non-conforming individuals are also excluded from the act, it also

²⁷ 1951 AIR 318, 1951 SCR 68

²⁸ Section 2(1)(h) of the Surrogacy (Regulation) Act, 2021 defines couple as, "couple" means the legally married Indian man and woman above the age of 21 years and 18 years respectively;

forbids singles and heterosexual cisgender couples who may be in a “live-in relationship” i.e., cohabiting but not legally married, from opting for surrogacy. Hence precluding single cohabiting couples, and transgender from opting for parenthood through surrogacy simply because they are not married is seemingly an encroachment on their privacy and an unwarranted infringement of their right to equality. By snooping with the right of procreation of an individual, the wished-for law not only impinges upon the “right to find a family”, but it also contradicts the principle enshrined, celebrated, and enumerated in Article 16²⁹ of the Universal Declaration of Human Rights (UDHR) which is a stark violation.

The reproductive choices of all persons must be respected, protected, and promoted irrespective of their marital status, gender identity, gender expression, sexual orientation, and previous reproductive choices while providing utmost respect to their privacy and dignity. Reproduction laws must, under all circumstances, be free of child-centric, heterosexual social constructs. Most importantly, laws dealing with reproductive choices in general, and surrogacy laws in particular must respect the agency of all persons concerned and under no circumstance resort to paternalism. Restricting single persons, non-heterosexual couples, and live-in couples from utilizing surrogacy services, and allowing only infertile, childless couples to use them is inherently moralistic. Restricting the right only to India, fixing arbitrary age limits, and limiting a woman’s right to be a surrogate only once during her lifetime, especially when there are no similar restrictions on natural childbirth, IVF, or other ARTs, are all highly paternalistic.

The Act only encroach upon their personal liberty, rather it goes to shake the root of principles of equality enshrined under Article 14 of the Constitution of India. It is a meddling stipulation reminiscent of the police state instead of a welfare state as it is a form of modern slavery to use an Indian woman as a breeding machine without the benefit of any form of care. In *Madras v. V.G. Row*³⁰, Supreme Court stated that with regard to fundamental rights, Supreme Court has been given the role of Sentinel on the Qui vive; which means the watchful guardian of the fundamental rights of citizens.

²⁹ Article 16 of the Universal Declaration of Human Rights, 1948 says, “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

³⁰ 1952 AIR 196, 1952 SCR 597

Right to Procreation under Article 21

The right to Procreation is guaranteed under Article 21 of the Indian Constitution. Just because of being incarcerated in prison, a person's Right to Reproductive Autonomy mustn't be curtailed. The Hon'ble courts in their various judgments have periodically stressed the importance of the rights of prisoners. Mere imprisonment doesn't disqualify a person from being a human being. *Neelabati Bahera v State of Orissa*³¹ stated that it is axiomatic that convicts, prisoners, or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons.

In the case of the State of A.P. Vs Challa Ramakrishna Reddy³², it was held that a prisoner is entitled to all his/her fundamental rights unless his/her liberty has been constitutionally curtailed. The Supreme Court has emphasized that a prisoner, whether a convict, under trial or detenu, does not cease to be a human being and, while lodged in jail, he/she enjoys all his/her fundamental rights guaranteed by the Constitution of India including the right to life guaranteed by the Constitution of India. Even if a person is convicted and deprived of his/her liberty under the procedure established by law; a prisoner still retains the residue of constitutional rights.

The Constitution of India does not expressly provide the provisions related to the prisoners' rights but in the case of *T.V. Vatheeswaran Vs State of Tamil Nadu*³³, it was held that Articles 14, 19 & 21 are available to the prisoners as well as freemen. Prison walls do not keep out fundamental rights. In the case of *Maneka Gandhi Vs Union of India*³⁴, the Supreme Court propounded a new dimension of Article 21 of the Constitution of India wherein it stated that the right to life or life does not confine itself to mere physical existence but also includes the right to live with human dignity.

Conjugal Rights of Inmates

In *Inder Singh v. the State*³⁵ (Delhi Administration) (1978), the Supreme Court stressed the importance of allowing parole to be used liberally, especially in the event of grave offenses. There was a provision in the Delhi Rules on Parole to balance the necessity of providing

³¹ 1993 (2) SCC, 746

³² (2000) 5 SCC 712: AIR 2000 SC 2083

³³ 1983 (2) SCC 68

³⁴ AIR 1978 SC 597

³⁵ 1978 AIR 1091, 1978 SCR (3) 393

inmates with the option to reconnect with society and retain their family ties through parole while also preventing similar occurrences from occurring. It states that prison inmates accused of terrible crimes such as murder, rape, or dacoity will not be eligible for interim parole.

However, in the case of *Dinesh Kumar v. Govt. of NCT of Delhi* (2012), this was found to violate Article 14 of the Indian Constitution. The Court granted parole to a murder offender in a recent case of *Mohd. Sabir v. State of Punjab and Ors.* (2021), stating that parole is a state-given privilege that cannot be revoked for arbitrary grounds. In most circumstances, the executive acts mechanically, without using his or her brains or appreciating facts. They refuse parole on grounds such as breach of the peace or the potential that the prisoner may commit a crime while on parole.

The Supreme Court had extended AG Perarivalan's parole for a week and ordered the state of Tamil Nadu to provide an escort for his medical tests. Perarivalan was convicted in the 1991 assassination of former Prime Minister Rajiv Gandhi. The judgment of the Madras High Court in *Meheraj Vs. State of Tamil Nadu & others*, H.C.P. (MD) No.365 of 2018 wherein it was opined that the right to have conjugal relations is not an absolute right and what is available to a convict is his right to obtain infertility treatment, and that a convicted person cannot enjoy the same rights those available to a common man because there must be a distinction drawn between a law-abiding citizen and law-violating prisoner.

The right to procreate of an incarcerated person is not only his right but also the right of the wife and it explores the right of the child born out of such an arrangement.

Ameliorate consequences of unwarranted prejudice in homosexual parenting

There is no empirical foundation to advance the argument that gay or lesbian adults are unfit parents³⁶. On an interesting note, couples who identify themselves as lesbians that are parenting together have been seen to be dividing family labor and household equally and have shown satisfaction with their couple's relationship³⁷. Also, the research conducted on the study of gay fathers has suggested that they likely share the responsibilities indulged in child care equally and report to be happy couples in their relationship³⁸. There are no reasons to believe that

³⁶ Anderssen, Amlie, & Ytteroy, 2002; Brewaeys & van Hall, 1997; Parks, 1998; Patterson, 2000; Patterson & Chan, 1996; Perrin, 2002; Stacey & Biblarz, 2001; Tasker, 1999; Victor & Fish, 1995

³⁷ Bos et al., 2004; Brewaeys et al., 1997; Chan, et al., 1998a; Ciano-Boyce & Shelley-Sireci, 2002; Hand, 1991; Johnson & O'Connor, 2002; Koepke, Hare, & Moran, 1992; Osterweil, 1991; Patterson, 1995a; Sullivan, 1996; Tasker & Golombok, 1998; Vanfraussen, Ponjaert-Kristoffersen, & Brewaeys, 2003

³⁸ Johnson & O'Connor, 2002; McPherson, 1993

lesbian mothers or gay fathers are unfit to be good parents³⁹, on the contrary, they prove to be better parents as likely as heterosexual parents in providing a supportive home environment for children⁴⁰.

Conclusion

The act of inclusiveness is missing in this statute by providing only for the intending couples and intending women and excludes every other person from availing of surrogacy as this statute regulates surrogacy. The Right to Procreate is a fundamental right available to every person and it must not be abrogated by a regulatory statute. Even the adoption rules pave way for the single parent, same-sex couples, and others to adopt a baby. The few suggestions that we make through this article is to include same-sex couple, live-in couple, and single parent under this statute to fulfill the desire of having children of their own and to provide for the incarcerated persons the right to avail surrogacy under the statute, as it is very well proven from various studies and researches that same-sex couple are also better parents and the honorable courts through its various judgments have reiterated that fundamental rights are still intact to incarcerated persons.

³⁹ Armesto, 2002; Barret & Robinson, 1990; Bigner & Bozett, 1990; Bigner & Jacobsen, 1989a, 1989b; Bos et al., 2003, 2004; Bozett, 1980, 1989; Patterson, 1997; Patterson & Chan, 1996; Sbordone, 1993; Tasker & Golombok, 1997; Victor & Fish, 1995; Weston, 1991

⁴⁰ *Lesbian and Gay Parenting* is the successor to *Lesbian and Gay Parenting: A Resource for Psychologists* (1995)