
REDEFINING FAMILY AND REPRODUCTIVE AUTONOMY: LGBTQ+ EXCLUSION IN INDIAN SURROGACY AND TAXATION LAW

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ABSTRACT

This paper critically investigates the interaction of surrogacy laws and LGBTQ+ rights in India, focusing on the legal restrictions outlined in the Surrogacy (Regulation) Act, 2021. While the Act seeks to regulate and safeguard surrogate mothers and commissioning parents, it also promotes heteronormative family structures by prohibiting surrogacy to heterosexual couples and single LGBTQ+ people. This paper explores how the Surrogacy (Regulation) Act, 2021 may conflict with constitutional protections of equality, non-discrimination, and reproductive autonomy. Drawing on comparative models from countries such as the United States, Canada, and South Africa, it highlights how other jurisdictions accommodate a wider spectrum of family structures. The paper also discusses the ethical quandaries regarding commercial vs altruistic surrogacy, physical autonomy, and the commodity of reproduction. Finally, it advocates for a rights-based approach to surrogacy that upholds the dignity and agency of LGBTQ+ people in India's changing legal environment.

Keywords: Surrogacy (Regulation) Act, 2021, LGBTQ+ Rights, Reproductive Justice, Constitutional Law, Article 14, 15, 21 of Indian Constitution, Judicial Trends, Equality and Non-Discrimination, Family Structure, Income Tax Act, Transgender Rights, Informed Consent, Comparative Jurisprudence, Regulatory Oversight, Legal Reform India.

INTRODUCTION

In recent years, the conversation over reproductive rights has shifted beyond traditional frameworks to include the desires of LGBTQ+ people looking to start children. Surrogacy, formerly considered an area reproductive option, has emerged as a critical gateway for those who are unable to conceive naturally. However, in India, the legal framework permitting surrogacy remains extremely restrictive. While the Surrogacy (Regulation) Act of 2021 is designed to protect surrogate mothers and prevent exploitation, law only allows heterosexual married couples to use surrogacy, leaving single people, same-sex couples, and transgender people out.

This exclusion calls into question the constitutionality of such restrictions, particularly in light of progressive judicial pronouncements such as *Navtej Singh Johar v. Union of India* and *Justice K.S. Puttaswamy v. Union of India*, which upheld LGBTQ+ citizens' rights to privacy, dignity, and equality. Denial of surrogacy rights not only reinforces heteronormative attitudes, but also undermines the larger values of reproductive autonomy and family variety.

This research investigates the legal and ethical implications of surrogacy access for LGBTQ+ people in India. It investigates the constitutional implications of the current regulatory framework, compares various worldwide models, and recommends a rights-based approach that acknowledges and respects the changing contours of family in modern society.

THE LEGAL DEVELOPMENTS AND HISTORICAL CONTEXT OF SURROGACY IN INDIA

At the turn of the millennium, surrogacy in India operated in a largely unregulated environment. The absence of formal laws attracted many domestic and international intended parents, but this also fostered commercialization and raised concerns about potential exploitation of women, ethical questions around the commodification of reproduction, and inadequate safeguards for vulnerable participants.

Before 2015, there were no explicit rules governing Assisted Reproductive Technology (ART) or surrogacy in India prior to any governmental intervention; instead, surrogacy agreements were mostly governed by conventional contract law and medical ethics. Inadequate healthcare provisions for surrogate mothers, unregulated commercial surrogacy arrangements, and a lack

of informed consent were among the arbitrary and frequently exploitative practices that resulted from this legislative vacuum.

Reports from the Law Commission of India says, one of the earliest official attempts to address assisted reproductive technology was the Law Commission of India's 228th Report (2009). There is a significant legal framework gap because the study did not directly regulate or address surrogacy practices, even though it suggested the creation of regulatory measures for ART clinics¹.

The Draft Surrogacy (Regulation) Bill, which was introduced by the Indian government in 2016, prohibited commercial surrogacy completely and concentrated only on altruistic surrogacy. The draft bill's restrictive approach, which specifically excluded LGBTQ+ people, single people, and live-in partners from using surrogacy services, sparked intense discussion and condemnation. Critics contended that it failed to uphold constitutional guarantees of equality and institutionalized discrimination by establishing a heteronormative conception of the family.

SURROGACY(REGULATION) ACT, 2021

Parliament passed the Surrogacy (Regulation) Act, 2021, which became operative on January 25, 2022. The Act forbids commercial relationships and defines surrogacy as altruistic². Only heterosexual married couples who have been together for at least five years are eligible to become commissioning parents. The law restricts the reproductive autonomy of LGBTQ+ people and perpetuates systemic discrimination by specifically excluding live-in partners, transgender people, same-sex couples, and single people. India's evolving constitutional law, which more and more upholds the rights to equality, nondiscrimination, dignity, and privacy, contrasts sharply with this constrictive and exclusive framework. These restrictive rules are still being contested by judicial interventions, public discussions, and international human rights concerns, indicating the urgent need for revision in the direction of inclusivity.

¹ Law Commission of India, 228th Report on Assisted Reproductive Technology Clinics and Rights of Children Born Through ART, (2009)

² Surrogacy (Regulation) Act, 2021, Government of India, Ministry of Law and Justice

LEGAL FRAMEWORK ANALYSIS

● SURROGACY (REGULATION) ACT of 2021: A Legal Overview

The Surrogacy (Regulation) Act of 2021 limits surrogacy to altruistic partnerships and allows only heterosexual married couples who have been together for at least five years to commission a surrogate. Single people, live-in couples, and LGBTQ+ people are specifically barred from eligibility. This exclusion poses severe constitutional concerns, especially given the increasing jurisprudence on equality, privacy, and dignity.

- Violation of Article 14: Equality Before Law, article 14 ensures equality before the law and prohibits arbitrary classification. The barring of LGBTQ+ people from surrogacy access is an unfair classification based on sexual orientation and marital status. In *Navtej Singh Johar v. Union of India (2018)*, The Supreme Court decriminalized consensual same-sex partnerships and stressed the importance of sexual orientation in terms of privacy, dignity, and identity³. The decision maintained that LGBTQ+ people are entitled to full constitutional protection under Articles 14, 15, and 21. "The constitution is a dynamic document. It must adapt to changing times in order to suit societal needs."
- Violation of Article 21: Right to Life and Personal Freedom, article 21 protects the right to privacy, autonomy, and reproductive choice. Denying LGBTQ+ people the right to have families through surrogacy violates their personal liberty and reproductive autonomy. In *Justice K.S. Puttaswamy v. Union of India, 2017*, The Court recognized the right to privacy as a fundamental right, which includes the ability to make personal judgments⁴. This includes the ability to choose one's own family structure and reproductive procedures. "Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, and sexual orientation."
- Violation of Article 15: Nondiscrimination, article 15 forbids sex-based discrimination. While not directly stating sexual orientation, the Supreme Court in *Navtej Singh Johar* defined "sex" to include sexual orientation, granting protection to LGBTQ+ people. By preventing LGBTQ+ individuals from accessing reproductive treatments that are

³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

⁴ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

available to heterosexual couples, the Surrogacy Act's discriminatory clauses constitute an indirect form of discrimination against them.

COMPARATIVE JURISPRUDENCE

SOUTH AFRICA: The Children's Act of 2005 permits same-sex couples to use surrogates⁵.Diverse family arrangements are given legal recognition, and same-sex couples receive equal treatment when it comes to adoption and parental rights.The Act places more emphasis on the child's best interests than the commissioning parents sexual orientation.

CANADA: The altruistic surrogacy is legally permitted under the Assisted Human Reproduction Act, 2004, which prohibits commercial arrangements. The law emphasizes consent and protection for all parties involved, and it does not discriminate on the basis of sexual orientation.

UK: The Human Fertilisation and Embryology Act, 2008 in the UK allows single individuals and same-sex couples to pursue surrogacy. After birth, intended parents may apply for a parental order, which legally recognizes them as the child's parents. This framework provides oversight of surrogacy arrangements to protect both the surrogate and the commissioning parents, while promoting equal treatment. The approach is intended to protect both reproductive autonomy and family variety.

AUSTRALIA: The Surrogacy Act of 2010 (New South Wales) clearly lists same-sex couples as eligible. Legal parenthood is established through court decisions after birth rather than automatically recognizing intended parents, ensuring judicial oversight and rights protection.

NEW ZEALAND: The Human Assisted Reproductive Technology Act of 2004 guarantees access to ART and surrogacy services to all people, regardless of sexual orientation or marital status. The law ensures equal treatment for LGBTQ+ people and forbids discrimination in access to reproductive technologies. Parental orders provide intended parents with complete legal recognition after birth.

These jurisdictions provide as examples of inclusive legal frameworks that support family

⁵ Children's Act, 2005 (South Africa)

diversity and reproductive rights.

ETHICAL CONUNDRUMS

Ethical Conundrums in LGBTQ+ Surrogacy considering surrogacy via the prism of LGBTQ+ exclusion highlights several ethical issues, especially in the Indian context:

- Critics argue that surrogacy may reduce childbirth to a transactional exchange. The exclusion of LGBTQ+ individuals intensifies this concern, as it implicitly suggests that only certain family forms are deemed socially or morally valid.
- Bodily Autonomy of Surrogate Mothers: The Surrogacy (Regulation) Act may unintentionally restrict surrogate mothers' agency by preventing them from participating in compensated surrogacy with informed consent, even if it aims to safeguard them through agreements that are solely altruistic.
- Moral Regulation of Family Organizations: A normative prejudice that connects morality with heterosexuality and marriage is reflected in the exclusion of LGBTQ+ people. This denies equal access to reproductive technology, undermining the moral concept of justice.

SUGGESTIONS FOR INCLUSIVE REFORM IN POLICY

In light of the constitutional imperatives of equality, dignity, and reproductive autonomy affirmed by landmark judicial pronouncements, and to address the systemic discrimination faced by LGBTQ+ individuals under existing surrogacy and taxation laws, this paper proposes the following comprehensive policy reforms:

- Expand Eligibility Criteria in Surrogacy Laws Amend the Surrogacy (Regulation) Act, 2021: To explicitly include single individuals, same-sex couples, and transgender persons as eligible commissioning parents. Redefine the concept of “family” in related statutes, including the Income Tax Act, Wealth Tax Act, and Adoption Laws, to explicitly recognize queer relationships and unmarried partnerships, thereby ensuring the legal legitimacy of diverse family structures.
- Adopt a Framework Based on Rights: Reproductive autonomy, informed consent, and

bodily integrity should be given priority in the surrogacy framework; access should not be restricted by protectionist, moralistic paradigms. Make that there are no arbitrary rejections or administrative barriers preventing LGBTQ+ people from accessing surrogacy clinics, adoption services, or fertility treatments. Provide precise procedural rules that ensure everyone is treated equally and stop institutional and systematic discrimination.

- **Implement equal tax treatment:** Under the Income Tax Act, same-sex couples are eligible for spouse exemptions (such as Section 80C deductions for spouses and dependent children). To ensure financial justice, allow same-sex couples to file their income tax returns jointly, similar to married heterosexual couples do. Change the property tax and inheritance laws to specifically include LGBTQ+ families, giving them the same rights to succession and tax advantages as traditional families.
- **Create Separate Regulatory Supervision Organizations:** Establish state and federal surrogacy regulatory bodies with the authority to monitor moral adherence, stop exploitation, and protect the honor of commissioning parents and surrogate moms. To ensure accountability and transparency, these organizations ought to be able to decide complaints about unfair benefit denials. Ensure that LGBTQ+ advocacy groups are represented in these bodies to maintain inclusive and participatory policies.
- **Enhance Legal Literacy and Public Awareness:** Start initiatives led by NGOs and the government to raise awareness of LGBTQ+ rights in the areas of surrogacy, taxation, and reproductive health. Provide training courses on constitutional safeguards and the growing legal acceptance of queer families to tax officials, physicians, and attorneys. Reduce stigma and promote acceptance by incorporating LGBTQ+ concerns into regular legal and educational courses.
- **Continuous Evaluation and Collection of Data:** Mandate regular, open evaluations of how inclusive legislation is being applied, with an emphasis on how accessible they are to LGBTQ+ people. To monitor progress and spot gaps, compile and disseminate statistics on LGBTQ+ access to tax benefits, reproductive health care, and surrogacy. Over time, resolve systemic shortcomings, enhance regulatory frameworks, and adjust policy using data-driven methods.

LEGAL DEVELOPMENTS IN INDIAN CASE LAW CONCERNING LGBTQ+ RIGHTS AND SURROGACY

The fundamental rights of LGBTQ+ people have been more frequently upheld by India's constitutional jurisprudence, which places a strong emphasis on equality, dignity, and individual liberty. These rulings directly affect taxation and surrogacy regulations.

Naz Foundation v. Suresh Kumar Koushal (2013) 1 SCC 1: overruled by Navtej Singh Johar Case

The Supreme Court ruled that Section 377 IPC, which made same-sex relationships illegal, was constitutional. The regressive nature of this decision drew harsh criticism. A significant step toward acknowledging equality and individual freedom for LGBTQ+ people was taken with the following reversal in *Navtej Singh Johar* (2018)⁶.

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

The Supreme Court of India read down Section 377 of the Indian Penal Code in a landmark ruling, decriminalizing consenting same-sex relationships. The Court ruled that sexual orientation is protected under Article 21 (Right to Life and Personal Liberty) as a fundamental component of identity and dignity. “The criminalization of consensual same-sex relationships is manifestly arbitrary, irrational, and indefensible and violates the fundamental rights enshrined in Articles 14, 15, and 21.” This landmark ruling laid the constitutional foundation for challenging exclusionary practices embedded in surrogacy and tax laws that refuse to recognize same-sex couples⁷.

National Legal Services Authority v. Union of India (2014), (2014) 5 SCC 438

The legal recognition of transgender people as a third gender, which grants them rights to self-identification and constitutional protections under Articles 14, 15, and 21, was made possible in large part by this ruling⁷.

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

Under Article 21, the Supreme Court acknowledged the right to privacy as a fundamental

⁶ *Suresh Kumar Koushal v. Naz Foundation*, (2013) 1 SCC 1

⁷ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

component of individual liberty and dignity, specifically encompassing the freedom to make decisions on sexual orientation, family structure, and reproductive choices.

“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, and sexual orientation. This precedent underscores that LGBTQ+ persons should have equal rights as heterosexual couples regarding surrogacy services and tax benefits, free from arbitrary exclusion”.

Vyjayanti Vasanta Mogli v. State of Telangana, WP (PIL) No. 73 of 2021

According to the Telangana High Court, transgender people are entitled to live with dignity and self-identify as their gender. The ruling underlined that transgender people must have equal access to public services and social programs.

“Every individual has the right to self-identify and access public services without discrimination”. This precedent further supports the call for equal taxation treatment and reproductive rights for transgender persons, reinforcing a broader constitutional interpretation of “family”⁸

Deepika Singh v. Administrative Tribunal, 2022 SCC Online SC 1088

The Supreme Court recognized in a landmark decision that familial ties could show up as domestic, unmarried partnerships or LGBTQ relationships. The Court determined that it was against Articles 14, 15, and 21 to withhold maternity leave payments to a woman whose family did not conform to the conventional definition of “family”. “Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. Although the case did not deal directly with surrogacy or taxation, it provides a strong constitutional basis to challenge the exclusionary provisions of the Surrogacy (Regulation) Act, 2021 and the Income Tax Act, which exclude same-sex couples and single LGBTQ+ individuals from parental and tax benefits”⁹.

Recent Developments in the Judiciary Post 2021

Courts have been hesitant to declare the Surrogacy (Regulation) Act, 2021's exclusionary

⁸ Vyjayanti Vasanta Mogli v. State of Telangana, WP (PIL) No. 73 of 2021

⁹ Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088

sections outright illegal, notwithstanding progressive constitutional rulings. Nonetheless, new cases show that judges are becoming more conscious of the importance of diversity.

XYZ v. Union of India (2024): In the Delhi High Court, pending

Section 3(1) of the Surrogacy Act is being directly challenged in a major pending case, which contends that the exclusion of LGBTQ+ people violates Articles 14 (Right to Equality), 15 (Prohibition of Discrimination), and 21 (Right to Privacy and Life). Future interpretations of family recognition and reproductive rights are probably going to be influenced by the decision.

The GST Appellate Tribunal's (GSTAT) function

Emerging jurisprudence from the GSTAT, despite its primary concentration on tax concerns, indicates a larger judicial tendency toward an expansive interpretation of equality rights and personal liberty. The tribunal's methodology is becoming more and more applicable for resolving conflicts involving the intersection of taxation laws and gay families constitutional status.

India's court tendencies show a consistent shift in favor of acknowledging LGBTQ+ rights in the areas of taxation, surrogacy, and family. A solid constitutional foundation highlighting autonomy, equality, and dignity is produced by seminal rulings including those rendered by *Navtej Singh Johar*, *K.S. Puttaswamy*, *Deepika Singh*, and *Vyjayanti Vasanta Mogli*. Statutory provisions that continue to exclude people include the Surrogacy (Regulation) Act of 2021 and the Income Tax Act's restrictive definitions of "spouse" and "family." An increasing judicial readiness to review these limiting clauses is indicated by ongoing litigation. The pattern points to a future change in direction of a more rights-based, inclusive framework that completely incorporates LGBT families within India's socio-legal system.

New Reforms and Developing Patterns

- The Indian Parliament rapidly discussed amendments in 2023, drawing on suggestions from LGBTQ+ and civil society activists who pushed for more inclusive tax and surrogacy laws.
- A significant step toward equality was taken in early 2025 when the Ministry of Health and Family Welfare released a draft policy indicating possible changes toward

inclusion¹⁰.

- External normative pressure for reform has come from international human rights organizations, including the UN Human Rights Committee, which has encouraged India to uphold and advance LGBTQ+ reproductive rights¹¹.
- In an indication of the judiciary's willingness to advance the constitutional requirement for inclusiveness, high courts have started to consider writ petitions against the exclusionary elements of the Surrogacy Act and tax regulations¹².

Conclusion

Initially presented as a safeguard against exploitation, the Surrogacy (Regulation) Act, 2021 unintentionally perpetuates discriminatory practices that restrict LGBTQ+ people the ability to start families through assisted reproduction. This legal system is in sharp contrast to India's developing constitutional jurisprudence, which upholds LGBTQ+ persons' equality, liberty, and dignity more and more. Although the surrogacy legislation is still bound by a limited, heteronormative definition of family, seminal rulings like *Navtej Singh Johar v. Union of India* and *Justice K.S. Puttaswamy v. Union of India* has established the groundwork for inclusive rights.

From an ethical perspective, restricting LGBTQ+ access to surrogacy undermines reproductive justice and reflects societal discomfort with non-traditional family models. Comparative experiences from Canada, South Africa, and the UK demonstrate that inclusive surrogacy laws are both achievable and essential for protecting human rights in pluralistic societies. Beyond symbolic efforts, legal reform must include the fundamental guarantee of freedom, equality, and dignity for all citizens, irrespective of gender identity or sexual orientation.

The true success of reform will lie not in abstract constitutional pronouncements but in the creation of equitable mechanisms that enable queer individuals to fully participate in family life and economic citizenship, free from discrimination and structural barriers.

¹⁰ Ministry of Health and Family Welfare, Draft Policy on Reproductive Rights and Inclusion, 2025

¹¹ United Nations Human Rights Committee, Concluding Observations on India, 2023

¹² Times of India, "Recent Judicial Developments in Surrogacy Law and LGBTQ+ Rights," 2025

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