

SURROGACY LAWS AND THE INTERSECTION WITH WOMEN'S RIGHTS: BALANCING PROTECTION AND AUTONOMY

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Abstract

Surrogacy is a reproductive process where a woman carries a child on behalf of another couple or individual, often due to infertility or medical reasons. There are two main types: traditional, where the surrogate uses her egg, and gestational, where an embryo from the intended parents is implanted. In India, surrogacy has deep historical roots, dating back to mythological times, but its modern commercial form faced significant ethical concerns, including exploitation. To address these issues, the Surrogacy (Regulation) Act, 2021, permits only altruistic surrogacy, providing protections for surrogate mothers while banning commercial practices. This regulation aims to ensure ethical practices, safeguard the surrogate's rights, and prevent the commodification of reproduction.

Introduction

In India, parenthood is often regarded as a blessing, while infertility is viewed as a misfortune. The societal structure is deeply rooted in stable family units, with a particular emphasis on having a son to continue the family lineage. When a woman faces infertility, she is often stigmatized, labelled as "Banjh," a term that carries negative connotations. However, advancements in medical science and reproductive technology have brought hope to infertile couples, enabling them to have biological children. Assisted Reproductive Technologies (ART) offered by clinics in India include:

- In Vitro Fertilization (IVF)
- Pre-implantation Genetic Diagnosis (PGD)
- Intrauterine Insemination (IUI)
- Intra-Cytoplasmic Sperm Injection (ICSI)
- Genetic Donation
- Surrogacy

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Understanding the Term 'Surrogacy'

Surrogacy offers a solution for couples who are unable to carry a pregnancy themselves due to physical or medical reasons. In surrogacy, the surrogate mother carries the baby throughout the pregnancy and, after birth, hands the child over to the intended parents.

So, surrogacy is a process where a woman carries and delivers a child on behalf of a couple or another woman, with the intention of transferring the child to them after birth. The child born through surrogacy is legally considered the biological child of the intended parents and is entitled to all the rights and privileges of a child born through natural conception, as per applicable laws. There are two main types of surrogacies:

- **Traditional Surrogacy:** In this method, the surrogate mother is artificially inseminated using sperm from either the intended father or an anonymous donor.
- **Gestational Surrogacy:** This approach involves creating an embryo from the intended parents' egg and sperm, which is then implanted into the surrogate mother's uterus.

India's History of Surrogacy

- Infertile couples can turn to surrogacy, a process where a woman carries a child conceived through the transfer of embryos or gametes from the intended parents. Historically, this practice was known as Niyoga Dharma and has been part of Indian tradition for centuries.
- In Hindu mythology, Balram, the seventh child of Devki and Vasudev, was transferred as an embryo into Rohini, Vasudev's first wife, to protect him from being killed by Kansa.
- In the Mahabharata, after Gandhari's two-year pregnancy, she gave birth to a mass, which Rishi Vyasa divided into 101 parts. These parts were developed in a special medium, resulting in 100 sons, the Kauravas, and one daughter, Dushala, being born outside the womb.¹

The Surrogacy (Regulation) Bill, 2019

On July 15, 2019, Dr. Harsh Vardhan, the Minister of Health and Family Welfare, presented the Surrogacy (Regulation) Bill, 2019 in the Lok Sabha. The Lok Sabha passed the Bill on August 5, 2019. On November 21, 2019, the Rajya Sabha referred the Bill to a Select Committee chaired by Shri

1 Khushbu Sanoria, A Legal Analysis of Surrogacy in Indian Context, (Last visited on September 20, 2024), <https://ijirl.com/wp-content/uploads/2022/08/A-LEGAL-ANALYSIS-OF-SURROGACY-IN-INDIAN-CONTEXT.pdf>

Bhupender Yadav, which submitted its report on February 5, 2020.² The Bill allows only altruistic surrogacy in India, banning commercial surrogacy due to the severe exploitation of surrogate mothers and children. There had been numerous reports of unethical practices, including cases where surrogate mothers died and children were abandoned, along with the illegal trade of human embryos and gametes. The Bill mandates that surrogacy is only permitted if one or both partners are proven infertile. It defines infertility as the inability to conceive after five years of unprotected intercourse. Key provisions of the Bill include:

• **Section 4, Clause (ii)**

Surrogacy is permitted under the following conditions:

1. Either the wife, husband, or both partners must be proven infertile.
2. The surrogacy must be altruistic, not commercial.
3. Children born through surrogacy cannot be used for sale, prostitution, or any form of abuse.
4. Any other disease or condition specified by the board may also qualify.

Section 4, Clause (iii)

The intending couple must meet the following conditions to undergo surrogacy:

1. **Certificate of Essentiality:** A certificate from the District Medical Board proving infertility of either or both partners.
2. **Custody Order:** A court order from a Magistrate Court (first class or above) granting custody of the surrogate child to the intending parents.
3. **Insurance Coverage:** The surrogate mother must receive insurance coverage for at least 16 months, provided by an approved insurance company or agent.

Eligibility for the Surrogate Mother

To obtain an eligibility certificate, a surrogate mother must meet the following criteria:

1. Be married and have at least one biological child.
2. Be aged between 25 and 35 years.
3. Be a close relative of the intending couple.

2 PRS Legislative Research, *Comparison of the Surrogacy (Regulation) Bill, 2019 as passed by Lok Sabha and the Bill as passed by Rajya Sabha*, <https://prsindia.org/billtrack/prs-products/prs-comparison-table>

4. Only gestational surrogacy is permitted, meaning the surrogate cannot use her own gametes.
5. The surrogate must not have participated in surrogacy before.
6. She must be medically and psychologically fit, with a certificate to verify her suitability.

Eligibility for the Intending Couple

To be eligible for surrogacy, the intending couple must meet the following criteria:

1. The wife should be aged between 23 and 50 years, and the husband between 26 and 55 years.³
2. Both must be Indian citizens.
3. The couple must have been married for at least five years.
4. They should not already have a surviving biological, adopted, or surrogate child, except if the existing child is mentally or physically challenged or suffering from an incurable disease.

Section 6

The surrogate mother must be informed of all potential side effects and complications. She must provide written consent acknowledging her understanding and is allowed to withdraw her consent any time before the embryo is implanted.

Section 7

The intending couple is prohibited from abandoning the surrogate child, regardless of any birth defects, genetic issues, medical conditions, the child's sex, or in cases of multiple births. The surrogate child will have all the legal rights of a natural-born child and will be regarded as the biological offspring of the intending couple.

Section 9

The surrogate mother cannot be forced to terminate the pregnancy, except under legally prescribed conditions.

3 Surrogacy (Regulation) Bill, 2019, cl. 4(iii)(c)(I); the same age bands are retained in the Surrogacy (Regulation) Act, 2021 (Act 47 of 2021), s. 4(iii)(c)(I), <https://www.indiacode.nic.in/bitstream/123456789/17046/1/aaA2021-47.pdf>

• Section 10

All surrogacy clinics must be registered with the appropriate authority. Clinics are required to apply for registration within 60 days of the authority's appointment.

• Section 35

Engaging in or advertising commercial surrogacy, abandoning surrogate children, exploiting surrogate mothers, or trading human embryos is illegal. Violations, including conducting sex selection during surrogacy, are punishable by up to 10 years of imprisonment and a fine of up to ₹10 lakh.

Reasons For Banning Commercial Surrogacy in India

India's surrogacy industry once flourished with little regulation, leading to numerous unsafe and unethical practices. Surrogates were often subjected to exploitation, poor living conditions, and denied family support during their pregnancies. International demand further exacerbated these issues, as some agencies treated women as mere "baby factories," forcing them to live in isolation until they gave birth.

Additionally, surrogate mothers in India were typically paid a small fraction of what the intended parents paid to surrogacy agencies, receiving around \$4,000 to \$5,000. Poverty, financial hardship, and lack of education often drove these women to repeatedly engage in surrogacy, deteriorating their health over time as they became "baby-making machines." The emotional toll was compounded by the lack of necessary support services for the surrogates and their families. To address these issues and safeguard the well-being of all parties involved, the Indian government has sought to regulate the process and make it more humane and safer.⁴

Analysis of Surrogacy (Regulation) Bill, 2020

On February 26, 2020, the Union Cabinet approved the Surrogacy (Regulation) Bill, 2020, which allows any woman willing to become a surrogate mother to do so. Although the Bill faced delays due to the COVID-19 pandemic, it was anticipated to be introduced as the Surrogacy Bill 2021 in the lower house of the Indian Parliament. The Bill represents a notable improvement over the Surrogacy (Regulation) Bill, 2019, addressing several shortcomings, though it still follows a needs-based framework rather than a rights-based one. Before becoming law, the Bill requires presidential approval.

4 Nishant Vimal, Surrogacy Laws in India, (May 22, 2019), https://blog.ipleaders.in/surrogacy-laws-india/#Surrogacy_Regulation_Bill_2016_and_its_Salient_Features

Key Features of the Proposed Legislation:

1. **Creation of Regulatory Bodies:** The Bill aims to regulate surrogacy through the establishment of a National Surrogacy Board at the central level, a State Surrogacy Board at the state level, and competent authorities or agencies for each Union Territory.
2. **Clinic Standards:** It mandates surrogacy clinics to meet minimum standards for physical infrastructure, laboratory and diagnostic equipment, as well as qualified professional staff.
3. **Ban on Commercial Surrogacy:** Based on recommendations from the Law Commission of India in its 228th report,⁵ the Bill seeks to ban commercial surrogacy, permitting only altruistic surrogacy to curb the exploitative "uterus rental" industry and safeguard surrogate mothers. It also restricts surrogacy for commercial reasons, disallowing its use for mere convenience when no medical necessity exists. This aligns India with countries like Australia, New Zealand, the UK, Canada, the Netherlands, and South Africa, where similar regulations are in place.
4. **Modification of Infertility Definition:** Unlike the 2019 Act, which required one of the intended parents to have "proven infertility" to be eligible for surrogacy, the 2020 Bill allows surrogacy based on medical reasons requiring gestational surrogacy, broadening its scope for intended parents.
5. **Eligibility for Widows and Divorced Women:** The Bill also allows Indian women who are widowed or divorced, between the ages of 35 and 45, to pursue surrogacy.

The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021, allows a legally married couple or a widowed/divorced woman between 35 and 45 years of age to opt for surrogacy if they have a valid medical condition requiring this procedure. The Act prohibits commercial surrogacy, imposing strict penalties, including imprisonment of up to 10 years and fines up to ₹10 lakh. Only altruistic surrogacy, where no monetary compensation is involved except for medical expenses, is permitted. Additionally, the surrogate mother must be a willing woman who does not use her own gametes.

5 Law Commission of India, *Report No. 228: Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* (August 2009).

• **Key Provisions of the Act**

The Surrogacy (Regulation) Act, 2021 consists of eight chapters and 54 sections aimed at regulating surrogacy in India. It received Presidential assent on 25th December 2021.⁶

• **Definitions**

1. **Altruistic Surrogacy (Section 2b):** Refers to surrogacy where the surrogate mother is only compensated for medical expenses, insurance, and prescribed costs, without any additional monetary rewards.
2. **Commercial Surrogacy (Section 2g):** Involves monetary compensation in cash or kind, which is strictly prohibited under the Act.
3. **Couple (Section 2h):** Defined as a legally married man and woman, with the man being over 21 and the woman over 18 years of age.
4. **Intending Couple (Section 2r):** A couple wishing to become parents through surrogacy, with the woman between 23-50 years and the man between 26-55 years old.
5. **Intending Woman (Section 2s):** A widowed or divorced woman between 35-45 years who wishes to opt for surrogacy.
6. **Surrogacy (Section 2zd):** Describes the process where a woman carries and gives birth to a child for the intending couple, and hands over the child after birth.

• **Surrogacy Clinics Regulation**

1. **Registration (Section 3):** All surrogacy clinics must be registered under this Act, and commercial surrogacy is strictly prohibited.
2. **Surrogacy Procedures (Section 4):** Unregistered clinics are barred from participating in any surrogacy-related activities. Procedures must be conducted only in registered clinics.

• **Surrogate Mother's Consent (Section 6)**

The surrogate mother must be informed of all potential risks and side effects of the procedure and provide informed consent in writing, in a language she understands.

• **Prohibition of Abandonment (Section 7)**

Intending parents cannot abandon a child born through surrogacy on grounds such as birth defects, genetic conditions, or health issues, either in India or abroad.

6 Surrogacy (Regulation) Act, 2021 (Act 47 of 2021), <https://www.indiacode.nic.in/bitstream/123456789/17046/1/aaA2021-47.pdf>

• *Rights of Surrogate Child (Section 8)*

The child born via surrogacy will be regarded as the biological child of the intending parents and will have all the rights of a natural-born child under Indian law.

• *Surrogacy Clinics Registration (Sections 11-14)*

Surrogacy clinics must be registered within 60 days of the Act's commencement, with certificates of registration granted after thorough scrutiny. Registrations may be suspended or cancelled if requirements are not met, with an option for appeal within 30 days.

• *National Surrogacy Registry (Sections 15-17)*

The Act mandates the creation of a National Assisted Reproductive Technology and Surrogacy Registry to maintain records of all registered surrogacy clinics and ensure compliance with the law.

• *Board Meetings and Disqualifications (Sections 19, 21)*

The Act requires biannual meetings of the surrogacy board, with provisions for disqualifying members due to insolvency, misconduct, or incapacity.

• *Powers and Functions of the Board (Sections 25, 35, 37)*

The board advises the government on surrogacy matters, monitors the implementation of the Act, and ensures clinics operate according to the law. Appropriate authorities can summon violators, search premises, and seize relevant documents.

• *Punishments for Violating the Act (Section 40)*

If any person or entity prevents altruistic surrogacy, they face imprisonment of up to 5 years and fines of up to ₹5 lakh for a first offence, with subsequent violations attracting harsher penalties.

• *Offences and Records Maintenance (Sections 43, 46)*

Offences under the Act are categorized as cognizable, non-bailable, and non-compoundable. Clinics must maintain records for 25 years, and records must be made available for inspection if required.

• *Benefits of the Surrogacy (Regulation) Act, 2021*

1. **Fulfilling Experience:** Surrogates often find the opportunity to help others have a child deeply rewarding, viewing it as a life-changing and meaningful experience.

2. **Support Network:** Surrogates benefit from strong support groups, including other women who have undergone similar journeys, providing emotional and practical support.
3. **Pregnancy Experience:** Many surrogates enjoy the experience of pregnancy and, through surrogacy, can relive it without raising the child afterward.
4. **Compensation:** While only altruistic surrogacy is allowed, surrogates are compensated for medical expenses and receive insurance coverage during the process.
5. **Legal Protection:** Surrogates are protected by legally binding contracts that outline the responsibilities and rights of both parties involved.

• *Drawbacks of Surrogacy*

1. **Physically and Mentally Demanding:** Surrogacy involves extensive medical and psychological screening, along with the physical demands of pregnancy, which can be challenging.
2. **Lengthy Process:** The surrogacy process can take over a year, requiring surrogates to attend numerous appointments and undergo legal and medical procedures.
3. **Health Risks:** As with any pregnancy, there are health risks involved, including complications during or after the pregnancy.
4. **Medication Requirements:** Surrogates must take medications, including birth control and hormonal treatments, which some find challenging.
5. **Social Stigma:** Despite growing acceptance, surrogacy still faces social stigma, with some people unable to understand or support the surrogate's decision.

In conclusion, the Surrogacy (Regulation) Act, 2021 provides a legal framework for altruistic surrogacy while banning commercial surrogacy, aiming to protect the interests of both surrogates and intending parents, but the process comes with its own set of challenges and benefits.⁷

7 Anjali Sinha, Surrogacy Act, (April 25, 2023), https://blog.ipleaders.in/surrogacy-act/#Important_provisions_of_the_Act

Surrogacy And Women's Right to Health: The Indian Context

- Surrogacy has a long history in India, with commercial surrogacy, often referred to as "womb for rent," emerging as a burgeoning industry. The combination of an English-speaking environment and more affordable services has made India a popular destination for intended parents.
- The future of surrogacy in India presents a dual narrative: it can either empower rural women by lifting them out of poverty or lead to a dystopian scenario where developing countries become breeding grounds for babies. In many cases, it's difficult to discern whether women are exercising their rights or are coerced into becoming surrogate mothers due to familial pressures from husbands or in-laws seeking financial stability.
- Critics of surrogacy liken the practice to prostitution, arguing that it should be banned on moral grounds. They contend that surrogacy contracts dehumanize and alienate women, stripping away the legitimacy of their experiences during pregnancy. Many surrogates attempt to distance themselves emotionally from the child, viewing their pregnancy solely as a means to earn essential income. This transactional nature of surrogacy is said to exploit women's reproductive capacities for the financial gain of wealthier clients.
- Currently, outsourcing surrogacy is an exploitative practice in India, where no legal protections exist for surrogate mothers in cases of complications during birth or forced abortions. Since the legalization of commercial surrogacy in 2002, India has positioned itself as a leader in this field. Critics argue that this trend exploits impoverished women in a country already grappling with high maternal mortality rates. Estimates suggest that the surrogacy industry in India is approaching \$445 million annually.
- The ethical, moral, social, and legal implications of surrogate motherhood raise profound questions about the status of both the women involved and the children born through these arrangements. Legal experts warn that if surrogacy becomes a pathway for wealthier individuals from developed nations to select poorer women in India for childbirth, it risks turning into a form of economic exploitation akin to "biological colonization."⁸

8 Pawan Kumar, Inder Deep Sharma and Nandini, Surrogacy and Women's Right to Health in India: Issues and Perspectives, (April 2013), https://journals.lww.com/ijph/fulltext/2013/57020/surrogacy_and_women_s_right_to_health_in_india_3.aspx

Glass Ceiling and Women's Rights

Provisions For Unmarried Women

- Unmarried pregnant women in India can legally choose to have an abortion under the 2021 amendment to the Medical Termination of Pregnancy Act, 1971,⁹ affirming a woman's right to control her own body. However, the surrogacy legislation restricts unmarried women from accessing surrogacy services. While there are documented cases of human rights abuses in commercial surrogacy, there are also instances where it has enabled women to achieve financial independence and improve their families' futures.
- A woman's reproductive choice is a fundamental right, integral to her freedom as outlined in Article 21 of the Indian Constitution.¹⁰ By tying surrogacy eligibility to marital status, the law undermines reproductive autonomy and limits access to its benefits to a specific segment of society. Furthermore, setting age limits for surrogate or intended mothers infringes on their reproductive rights.

Surrogacy and the LGBTQIA+ Community:

- The 2021 Act prohibits same-sex couples from accessing altruistic surrogacy, reflecting a narrow, stereotypical view of family that assumes a lack of autonomy for women. Indian laws and cultural norms dictate that parents must be of different sexes for a child's optimal development.
- Yet, this stance is contradictory since it allows ART services for widowed and divorced women, effectively discriminating against LGBTQIA+ individuals. Despite recognizing reproductive autonomy as a fundamental right, the Act fails to provide equal rights for same-sex couples and their families.
- While the Indian judiciary has made strides in upholding the rights of the LGBTQIA+ community, such as in the landmark Navtej Singh Johar case,¹¹ gaps remain in surrogacy legislation.
- Surrogacy arrangements have allowed many same-sex couples from abroad to start families in India, but the current legal framework forces many to seek alternatives in countries like Mexico or the

9 *Medical Termination of Pregnancy (Amendment) Act, 2021* (Act 8 of 2021).

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

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

U.S. Although decriminalizing homosexuality was a positive step, comprehensive public policy change is still necessary to ensure equal rights for LGBTQIA+ individuals.¹²

Exclusion of Live-In Relationships

- The Act does not extend its regulatory framework to live-in partners, despite the legality of such relationships upheld by the courts. While the Supreme Court has recognized the validity of live-in partnerships,¹³ the question remains as to why these couples are denied the right to pursue surrogacy.
- The recent Medical Termination of Pregnancy Amendment Act 2021 replaced "husband" with partner, signalling progress. However, it is hypocritical to support live-in relationships yet deny these couples the right to parenthood, reinforcing outdated societal notions of family.

Concerns Over Altruistic Surrogacy

- There is growing concern that banning commercial surrogacy may lead to a rise in unregulated or illegal practices. The desire for profit in the infertility healthcare industry could exacerbate exploitation, as seen in cases where vulnerable individuals are coerced into selling their eggs.
- Prohibiting commercial surrogacy could violate Article 19(1)(g) by restricting the bodily autonomy of consenting adults seeking to earn a living. A balanced approach that includes regulated commercial surrogacy could better protect human rights.

Health Implications for Surrogates and Their Children

The Act fails to adequately address the long-term health risks faced by surrogate mothers and their children. Issues like drug abuse, maternal complications, and the psychological toll of surrogacy are not sufficiently covered. While ensuring psychological fitness is part of the screening process, the lack of mandatory psychiatric assessments reflects a gap in understanding the mental health implications for surrogates.

12 Alexander Muacevic and John R Adler, *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?* (20 April 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10199460/>

13 *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600; *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755.

Discrimination Based on Ability

The Act allows couples with a child diagnosed with an incurable illness to access surrogacy services but lacks clear guidelines on defining such disabilities. This vagueness creates barriers for those affected by ableism. Additionally, the emotional and financial dynamics between siblings in families with disabled children are overlooked.

Impact on Medical Tourism

The previous allowance of surrogacy in India fostered "procreative medical tourism," attracting many foreign couples seeking fertility treatments. The current Act, which bans foreigners from accessing surrogacy, disrupts this market while failing to address the economic opportunities surrogacy provided for many impoverished women. Rather than an outright ban, a regulated framework could ensure fair compensation and rights for surrogate mothers.

Proposed Solutions

- To support surrogates, introducing short-term disability insurance could help compensate for lost wages, although it may not cover all income loss. Clarifying eligibility for maternity benefits would also be necessary.
- Additionally, ensuring that surrogates receive independent legal representation could help secure fair compensation and address future health-related issues. Overall, a balanced approach to surrogacy that respects the rights and well-being of all parties involved is essential.

Committee formed to address issues

- The Committee has recommended removing the clause that defines "infertility" and the requirement for a five-year waiting period before issuing an infertility certificate, thus facilitating easier access to surrogacy.¹⁴
- It also suggested eliminating the provision that restricts surrogacy to close relatives, arguing that it overlooks the reality in many Indian families where women have limited decision-making power, potentially coercing them into providing reproductive labour. While the Committee has addressed some issues in the 2019 Bill, several restrictive and discriminatory provisions remain. Notably, it continues to adopt a needs-based rather than a rights-based approach to accessing surrogacy.

14 Rajya Sabha Select Committee, *Report on the Surrogacy (Regulation) Bill, 2019* (presented 5 February 2020).

- These recommendations come at a time when the Supreme Court has been expanding the interpretation of "liberty" under Article 21 to encompass reproductive choices. By banning commercial surrogacy, the Bill fails to consider the intersectional effects on women's rights to their own bodies.
- The altruistic model expects women to endure the physical and emotional challenges of surrogacy without financial compensation, relying solely on "compassion." This expectation is paternalistic and unrealistic, ultimately denying women a legitimate source of income. As a result, fewer women may be willing to serve as surrogates, indirectly limiting the options available to intending parents.
- Moreover, the proposed Bill excludes LGBTQ+ individuals, live-in couples, and single parents from accessing surrogacy. Even those who qualify must obtain a "certificate of essentiality" proving that it is biologically impossible for them to conceive otherwise. It neglects to consider medical conditions that, while not rendering women infertile, could make pregnancy more complicated and riskier.
- The Bill also fails to account for cases where women may choose not to pursue pregnancy due to career commitments. For instance, a sportswoman whose prime career years coincide with her childbearing age faces a difficult choice between taking a break from her limited active career or opting for motherhood. This situation raises a critical question: Should a woman have to make such a compromise?

We argue that the answer is no. It is essential to recognize surrogacy as a right rather than a mere need. The outdated moral arguments framing surrogacy as a last resort are out of touch. Suggesting that the "joy of bearing one's own child cannot compare to having one through surrogacy" reflects patriarchal values. In a rights-based framework, the state is obliged to enhance reproductive rights and freedoms, ultimately improving reproductive health.

Current regulations around surrogacy ignore the financial impact on surrogates, who must often pause their careers during pregnancy. Instead of romanticizing altruistic surrogacy as a "noble act," a compensated surrogacy model should be adopted. In this model, intending parents would cover all medical expenses related to the pregnancy and postpartum care,

and also provide compensation for the surrogate's lost income. Additionally, surrogates should be reimbursed for pregnancy-related expenses, such as maternity clothing and nutritional supplements.¹⁵

Without such reforms and recognition of surrogacy as a reproductive right, India's surrogacy regulations will fail to safeguard the bodily autonomy of surrogates and the parenting rights of intending parents. Although India is experiencing a significant cultural shift towards more feminist values, the proposed surrogacy legislation represents a setback in the ongoing quest for equality.

Loopholes

- **Surrogate and Child Exploitation:** The Act aims to protect both the child's right to be born and to end the exploitation of impoverished surrogate mothers. However, it fails to effectively balance these two objectives.
- **Reinforcement of Patriarchal Norms:** The Act perpetuates traditional patriarchal norms that disregard the economic value of women's work, consequently impacting their basic reproductive rights as guaranteed under Article 21 of the Constitution.
- **Denial of Legitimate Income to Surrogates¹⁶:** By banning commercial surrogacy, the Act removes a legitimate income source for surrogates, thereby reducing the number of women willing to take on this role. This, in turn, indirectly limits parenting options for couples seeking to adopt.
- **Emotional Complications:** When a friend or relative serves as a surrogate in an altruistic arrangement, it can lead to emotional challenges for both the intended parents and the surrogate child. The dynamics of their relationship may become strained during the surrogacy process and after the birth, while altruistic surrogacy also restricts the intended couple's ability to select a surrogate, as many may be hesitant to engage in such an arrangement.

15 Eshan Sonak and Sanvi Bhatia, India's New Surrogacy Regulation Bill falls Short of Protecting bodily Autonomy and guaranteeing reproductive liberty, (21 April 2021), <https://blogs.lse.ac.uk/humanrights/2021/04/21/indias-new-surrogacy-regulation-bill-falls-short-of-protecting-bodily-autonomy-and-guaranteeing-reprodu>

16 Diksha Tekriwal, Lacunae in the Surrogacy (regulation) Act, (14 May 2022), <https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/>

- **Lack of Third-Party Involvement:** Altruistic surrogacy does not incorporate a third party, which is essential for ensuring that the intended couple covers medical and other related expenses. A third party can also provide necessary support throughout the complex surrogacy process, which may not be feasible in a purely altruistic model.

In summary, the Surrogacy Act of India prohibits commercial surrogacy and any monetary compensation for surrogates. This ban contradicts the ruling in *Suchita Srivastava v. Chandigarh Administration* (2009), which affirmed that Article 21 includes the right to choose one's reproductive options.¹⁷ The prohibition prevents women from utilizing their reproductive capabilities for financial gain, disregarding the mental, physical, and emotional labour, as well as the medical costs incurred during and after pregnancy.

The 102nd report of the Parliamentary Standing Committee on Health and Family Welfare in 2017 advocated for fair compensation for surrogates instead of abolishing commercial surrogacy.¹⁸ This perspective, along with Article 23 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Economic, Social, and Cultural Rights—both of which call for equitable payment for human labour—is overlooked by the Surrogacy Act.¹⁹

Additionally, since oocyte donors play a vital role in surrogacy, legal reforms should safeguard their rights. The Surrogacy (Regulation) Act, 2021, must also uphold the rights to equality and parenthood for LGBTQIA+ individuals wishing to engage in surrogacy. Donor identity disclosure should remain voluntary, and there should be mechanisms in place to ensure that payment arrangements protect vulnerable parties from exploitation.

Conclusion and Suggestions

In India, surrogacy is purely a contractual understanding between the parties so care has to be taken while drafting agreement so that it does not violate any of the laws like, e.g., points to be taken into consideration why does the intended parents opt for surrogacy, particulars of the surrogate,

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

18 Department-related Parliamentary Standing Committee on Health and Family Welfare, *102nd Report on the Surrogacy (Regulation) Bill, 2016* (Rajya Sabha Secretariat, presented 10 August 2017).

19 Universal Declaration of Human Rights, art. 23, G.A. Res. 217A (III) (1948); International Covenant on Economic, Social and Cultural Rights, art. 7, 993 U.N.T.S. 3 (1966).

type of surrogacy, mentioning about paternity in the agreement, the creation of registry for biological father of children in an adoption cases, rules set forth on how and when genetic testing can be done to determine paternity, compensation clause, unexpected mishappening to the surrogate mother, child's custody, regarding the jurisdiction for the disputes arising out of agreement. Indian government has drafted legislation in 2008 and finally framed an ART (Regulation) Act 2021. The proposed law needs proper discussion and debate in the context of legal, social and medical aspects. It is concluded that the government must seriously consider enacting a law to regulate surrogacy in India in order to protect and guide couples seeking such options. Without a foolproof legal framework implementation couples will invariably be misled and the surrogates exploited.