

# IPEM LAW JOURNAL

The Annual Peer Reviewed and Refereed Journal of IPEM Law Academy

Vol. 7 December 2023

**The Paradox of 'Jus Ad Bellum' and 'Jus in Bello' in Modern World: Justifications of Just War vs. Forced Intervention**  
Mr. Richimoni Proma

**Realization of an Unenumerated Right under Article 21 of the Indian Constitution**  
Dr. Sumithra R.

**Gender Parity in Employment Opportunities as a Human Right for Indian Woman: Challenges and Way Forward**  
Dr. Brinda Gobind Gurbuxani

**Gender Equality in the Workplace: Challenges and Strategies for Women's Advancement**  
Dr. Rahul Mishra

**The Social and Legal Paradox relating to Marital Rape in India: Addressing the Structural Inequalities**  
Dr. Monica Narang & Ms. Ashna Bhasin

**Unpacking the Surrogacy Regulation Act 2021: A Critical Analysis of India's Newest Legislation on Gestational Surrogacy**  
Prof. Dr. R. Haritha Devi, S. Ramana Subramanian, S. Dhanus & S. Deepasree

**Gender Justice at Work: Examining the Effectiveness of the Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013**  
Ms. Ekta Dwivedi & Dr. Garima Tiwari

**Human Rights and Technology: New Challenges for Justice and Accountability in Perspective of India**  
Mr. Sohan Singh

**Balancing Act: Exploring Global Challenges and Strategies in Implementing Human Rights from an International Perspective**  
Dr. Rita Bansal

**Forced Displacement and Human Rights: A Study of International Law and Case Laws**  
Dr. Aqueeda Khan & Ms. Shweta Tyagi

**Right to Die in India with Special Reference to Human Rights**  
Mr. Vibhanshu

**आधुनिक शिक्षा प्रणाली की वर्तमान स्थिति : एक विश्लेषण**  
डॉ. विजय श्रीवास्तव



# IPEM LAW JOURNAL

The Annual Peer Reviewed and Refereed Journal of  
IPEM Law Academy

Volume 7 December 2023 ISSN 2581-3129 (Print)

## EDITORIAL PANEL

### Patron

**Mr. Anupam Goel**

Secretary

Institute of Professional Excellence and  
Management, Ghaziabad, Uttar Pradesh

### Mentor

**Prof. (Dr.) Sugandha Goel**

Executive Director

Institute of Professional Excellence and  
Management, Ghaziabad, Uttar Pradesh

**Mr. Shashank Choudhary**

Dean Academics

Institute of Professional Excellence and  
Management, Ghaziabad, Uttar Pradesh

**Prof. (Dr.) Vijay Srivastava**

Director, IPEM Law Academy  
Ghaziabad, Uttar Pradesh

### Chief Editor

**Prof. L. Pushpa Kumar**

Professor, Faculty of Law  
University of Delhi

### Editorial Board

**Dr. Tabrez Ahmad**

Dean, GD Goenka University

**Dr. G.B. Reddy**

Professor, Osmania University, Hyderabad

**Dr. Seema Singh**

Associate Professor, Faculty of Law,  
University of Delhi

**Dr. Digvijay Singh**

Associate Professor, South Bihar Central  
University, Gaya

**Dr. Sukhvinder**

Assistant Professor, Dr. BR Ambedkar  
National Law University, Sonapat

### Editorial Advisory Board

**Dr. Vaibhav Goel Bhartiya**

Dean, School of Law  
Subharti University

**Dr. Rama Sharma**

Assistant Professor & HOD  
Gautam Buddha University

**Prof. Prasannanshu**

Professor  
NLU Delhi

**Dr. Anupam Jha**

Professor  
University of Delhi

**Prof. Sunanda Bharti**

Professor  
University of Delhi

**Dr. Anjum Parvez**

Associate Professor

Faculty of Law, Uttaranchal University

**Dr. Lakshmi Priya Vinjamuri**

Associate Professor

Faculty of Law, Uttaranchal University

**Dr. Niteesh Kumar Upadhyay**

Associate Professor

Symbiosis Law School, Noida

**Dr. Abhinav Kumar Mishra**

Adjunct Professor

Lloyd Law College, Greater Noida

### Review Board

**Prof. (Dr.) Mohd. Imran**

Director, School of Law  
Sushant University, Gurgaon

**Dr. Sushim Shukla**

Associate Professor

Tirthankar Mahavidyala, Muradabad

**Dr. Vinod Kumar**

Associate Professor

Amity University, Jaipur

**Dr. Navtika Nautiyal**

Assistant Professor

National Forensic Science University,  
Ahmedabad

**Dr. Cholaraja Muddimannan**

Assistant Professor

Faculty of Law, University of Delhi

**Dr. Kavitha Chalakkal**

Assistant Professor

Inter University Centre for IPR  
Studies, Cochin University

**Dr. Minaxi Tomar**

Principal

IPEM Law Academy, Ghaziabad

**Mr. Suhail Khan**

Assistant Professor

IPEM Law Academy, Ghaziabad



# IPEM LAW JOURNAL

The Annual Refereed Journal of IPEM Law Academy of Institute of Professional Excellence and Management  
Vol. 7 December 2023

## CONTENTS

<b>The Paradox of 'Jus Ad Bellum' and 'Jus in Bello' in Modern World: Justifications of Just War vs. Forced Intervention</b> Mr. Richimoni Proma	1
<b>Realization of an Unenumerated Right under Article 21 of the Indian Constitution</b> Dr. Sumithra R.	6
<b>Gender Parity in Employment Opportunities as a Human Right for Indian Woman: Challenges and Way Forward</b> Dr. Brinda Gobind Gurbuxani	12
<b>Gender Equality in the Workplace: Challenges and Strategies for Women's Advancement</b> Dr. Rahul Mishra	17
<b>The Social and Legal Paradox relating to Marital Rape in India: Addressing the Structural Inequalities</b> Dr. Monica Narang&Ms. Ashna Bhasin	24
<b>Unpacking the Surrogacy Regulation Act 2021: A Critical Analysis of India's Newest Legislation on Gestational Surrogacy</b> Prof. Dr. R. Haritha Devi, S. Ramana Subramanian & Dhanus, S. Deepasree.	31
<b>Gender Justice at Work: Examining the Effectiveness of the Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013</b> Ms. Ekta Dwivedi &Dr. Garima Tiwari	39
<b>Human Rights and Technology: New Challenges for Justice and Accountability in Perspective of India</b> Mr. Sohan Singh	47
<b>Balancing Act: Exploring Global Challenges and Strategies in Implementing Human Rights from an International Perspective</b> Dr. Rita Bansal	53
<b>Forced Displacement and Human Rights: A Study of International Law and Case Laws</b> Dr. Aqueeda Khan&Shweta Tyagi	69
<b>Right to Die in India with Special Reference to Human Rights</b> Mr. Vibhanshu	76
<b>आधुनिक शिक्षा प्रणाली की वर्तमान स्थिति: एक विश्लेषण</b> डॉ. विजय श्रीवास्तव	91





# Unpacking the Surrogacy Regulation Act 2021: A Critical Analysis of India's Newest Legislation on Gestational Surrogacy

Prof. Dr. R. Haritha Devi<sup>1</sup>  
S. Ramana Subramanian<sup>2</sup>  
S. Dhanus<sup>3</sup>  
S. Deepasree<sup>4</sup>

## ABSTRACT

*"If you want to know how strong a country's health system is, look at the well-being of its mother". In India, the reproductive rights of women are limited to selective issues like child marriage, female foeticide, menstrual health, hygiene issues and sex selection. In addition to these issues, this right extends alternative reproductive methods like surrogacy. Surrogacy is an arrangement, whereby a woman agrees to labour on behalf of another couple or person, who will become the child's parent(s) after birth. In India, surrogacy is being regulated by the Surrogacy Regulation Act, 2021 which deals with protecting the rights of surrogate mother and surrogate child. It also talks about the eligibility criteria for the intended parents and the surrogate. While discussing about the above, the Act also poses a few practical problems which might deprive the marginalised group from the right to parenthood in unlikely conditions, restricting the scope of the procedure. The Act also remains silent on if the LGBTQ ++ community and live in couples can opt for surrogacy and the clause of the Act mandates that the surrogate mother should be genetically related to the intending parents. The Act poses an age bar for the intended parents and the surrogate limiting the scope of the process to the group lying beyond the bar. The Act also restrains unmarried women to have a surrogate child. Only altruistic surrogacy is permitted by the law which might be practically difficult at all times.*

**Keywords:** surrogacy, reproductive health, altruistic surrogacy, commercialization, lgbtqia++, live-in

### Introduction

The Surrogacy Regulation Act 2021, which ushers in a new age of control for gestational surrogacy, is seen as a significant legislative milestone in India. This ground-breaking statute begs for a critical examination that probes deeply into its complexities, intentions, and potential implications once the ink on it dries. Intense debate and high hopes have surrounded the development of the legislation, which is expected to bring much-needed regulation to a sector that sits at the nexus of reproductive rights, commercialization, and moral considerations.

India has long been acknowledged as a major hub for surrogacy, giving prospective parents from all over the world the chance to realise their parental aspirations there. However, there were plenty of issues and difficulties in this unregulated environment. In response to these worries, the Surrogacy Regulation Act is created, attempting to strike a careful balance between protecting the rights and wellbeing of surrogate mothers, preserving the legitimacy of the surrogacy procedure, and giving intended parents the chance to start families.

The Surrogacy Regulation Act 2021 is thoroughly examined in this critical analysis, with a focus on its main provisions, ethical foundations, and prospective effects on the surrogacy industry's dynamic environment. By dissecting this legislation's layers, we hope to shed light on its importance, reveal its intricacies, and add to the current discussion about how gestational surrogacy is governed in India.

### Surrogacy-Defined

The Latin term "*subrogare*" (which meaning to appoint in place of) is the world's etymological source. It refers to substituting one individual for another in a certain position. It simply means that a woman becomes pregnant in the context of reproduction, acting as a surrogate for a couple or a single parent who is unable to have children. Surrogacy has developed into a significant assisted reproductive technology that enables a woman with uterine anomalies to have a child since the development of in vitro fertilisation (IVF).

As per Section 2(zd) of The Surrogacy Regulation Act, 2021 "*surrogacy*" means a practice whereby one woman bears and gives birth to a child for an

<sup>1</sup>Professor, The Tamil Nadu Dr. Ambedkar Law University  
<sup>2,3,4</sup>Student, The Tamil Nadu Dr. Ambedkar Law University



*intending couple with the intention of handing over such child to the intending couple after the birth;*

### Types of Surrogacy

There are various types of surrogacies which includes:

**1. Natural/Traditional/Partial Surrogacy:**

In this kind of surrogacy, the intending father is genetically related to the child by donating the sperm. Also, if two females are the intending parents or a single parent is the intending parent the sperm can be donated by a third male.

**2. Gestational/Full Surrogacy:**

In this type of surrogacy, the surrogate mother is merely used as an embryo carrier; she has no genetic ties to the baby. The intended parent or unidentified donors provide the egg and sperm.

**3. Commercial Surrogacy:**

In this type of surrogacy, the surrogate mother provides her services as a surrogate mother to intended parents in exchange for money.

**4. Altruistic Surrogacy:**

In this type of surrogacy, the surrogate mother receives no financial compensation, and the commissioning parents only pay for her medical costs. Family and friends frequently use this sort of surrogacy.

### Viewpoints of Human Rights Council on Surrogacy

In March 2018, the Human Rights Council's 37th session featured a report by the Special Rapporteur on the sale and sexual exploitation of children. The research advocated against the selling of children born through surrogacy and highlighted power disparities and risks to both surrogate moms and their fetuses.

### Recommendations

- Adopt laws that clearly and comprehensively forbid the sale of children.
- Establish measures of protection to prevent the sale of children in the context of commercial surrogacy. In order to ensure that the ban on the sale of children is respected, these measures should either prohibit commercial surrogacy until and until appropriately regulated procedures are put in place, or strictly regulate commercial surrogacy.

- Set up safeguards to stop the selling of children when using surrogates for charitable purposes.
- Make sure that a court or other competent authority determines what is in the best interests of the child after the kid is born in all parentage and parental responsibility decisions involving a surrogacy agreement.
- Limit, closely regulate, and monitor all financial aspects of surrogacy agreements.
- Regulate any middlemen who are a part in surrogacy agreements, regardless of the surrogacy arrangement's legal standing under local, national, or international law, protect the rights of all children born through surrogacy.
- Encourage other human rights organizations to participate to talks around surrogacy with further research

### Surrogacy in Other Countries

The steep increase in prices in European countries has significantly decreased access to infertility services. Couples have now travelled to other countries with lower surrogacy charges as a result. Every country has its own surrogacy laws, with some banning the practice altogether. Some countries, including the UK, Germany, Sweden, and France, forbid surrogacy. The use of surrogates internationally is growing significantly, yet there are no international standards that all nations must abide by. In some countries, it was also required that the DNA of the surrogate child match that of the commissioning parents.

The two distinct legal procedures that must be followed in surrogacy situations in the United States. Due to the time-consuming rules, it causes numerous issues and stress for the commissioning parents. In American surrogacy proceedings, there are two distinct legal processes that must be followed. The commissioning parents experience numerous difficulties as a result of the extensive paperwork. Sections 301 and 309 of the Immigration and Nationality Act (INA) govern a child's citizenship in the United States. The baby's genetic ties to the commissioning parents determine citizenship in full. Therefore, in order for the child to obtain US citizenship, there must be a genetic link to the father.

The majority of Australian states have surrogacy-specific legislation outlining the requirements. States and territories must comply by federal ethical standards set forth by the National Health and



## Unpacking the Surrogacy Regulation

Medical Research Council (NHMRC) in the absence of legislation.

### Salient Features of the Surrogacy Regulation Act, 2021

The Act establishes regulations for surrogacy in India. According to Section 2(zd) of The Act, the practice of surrogacy is when a woman conceives a child for another individual or couple and consents to give them custody of the kid after birth.

**Types of surrogacy that are permitted:** Section 2(b) of The Act exclusively permits altruistic surrogacy, in which the surrogate mother is not paid anything outside medical and insurance costs. Under the Act, commercial surrogacy is forbidden.

**Intent to Parent Eligibility Standards:** Section 4 outlined the Intent to Parent Eligibility Standards. The intended parents must be an Indian citizen heterosexual married couple who have been together for at least five years in order to qualify for surrogacy. Additionally, a government hospital certificate of infertility is required.

**Qualifications for a surrogate mother:** The Act's section 4 specifies the requirements for a surrogate mother's eligibility in subclause (b) of clause (iii). The surrogate mother must have a child of her own, be between the ages of 35 and 45, and be a close relative of the intended parents. Additionally, she needs to be married and have her spouse's approval.

**Surrogacy clinic registration:** Chapter IV listed the requirements for the registration of surrogacy clinics. All surrogacy clinics are required by the Act to register with the relevant authorities. All surrogacy agreements must be documented and submitted to the authorities by the clinics.

The Act's Chapter V provides for the creation of a **National Assisted Reproductive Technology and Surrogacy Board as well as State Assisted Surrogacy Boards.**

**Protection of surrogate mother's rights:** Section 2(b) of the Act guarantees the surrogate mother's rights. It stipulates that the surrogate mother must be entitled to prenatal care, financial support, and insurance coverage.

**Protection of surrogate child's rights:** According to Section 8 of the Act, a child born via surrogacy is

entitled to enjoy the same rights and privileges as a child born naturally under any currently in effect laws, giving them the same status as biological children.

**Penalties for numerous infractions,** such as conducting Penalties under Surrogacy Act, are prescribed by the Act under CHAPTER VII. The following are a few of the violations and punishments covered by the Surrogacy (Regulation) Act 2021:

**Commercial surrogacy** is prohibited by Section 38 of the statute and entails paying a surrogate mother to carry a child for another person. Anyone who engages in commercial surrogacy or supports it in any manner faces a maximum 10-year prison sentence and a fine of Rs. 10 lakhs.

**Surrogate mother exploitation** is forbidden by the law, including physical exploitation and any other form of emotional or physical abuse. Anyone found guilty of taking advantage of a surrogate mother faces a maximum 5-year prison sentence and a maximum fine of Rs. 10 lakhs.

**Kid abandonment:** According to the statute, a commissioning couple or intending couple that abandons the surrogate kid is subject to up to a 5-year prison sentence and a fine of up to Rs. 10 lakhs.

### Criticisms of the Surrogacy Regulation Act, 2021

#### I. Transgression of Women's Reproductive Rights

The ability of a woman to decide whether to have children or not to keep or stop an unplanned pregnancy and which method of family planning and contraception she wants is referred to as the right to reproductive choice. These rights have been broadened to include access to contraception, the right to a safe and legal abortion, the freedom to choose one's own reproductive options without fear of violence or coercion, and the freedom from harmful practices such as forced childbirth. In a number of judgments, the Supreme Court and the high courts have ruled that Article 21 of the Indian Constitution's right to life and personal liberty includes the right to reproductive autonomy. The ability to decide whether or not to have children is ultimately a profoundly personal choice on the part of the man or woman, the Andhra Pradesh High Court said in *B K Parasarathi v. State of Andhra Pradesh*. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court determined that a



woman's right to choose her reproductive options falls under the definition of "personal liberty" as stated in Article 21. The court continued by stating that it is vital to recognize that reproductive choices can be used to both reproduce and refrain from procreation. In *K. S. Puttaswamy (Retd.) and Others v. Union of India*, Justice K. S. Puttaswamy (Retd.) emphasized once more that women's reproductive freedom is protected by Article 21 of the Indian Constitution. The nine-judge bench of the Supreme Court of India emphasized the value of decisional autonomy in any privacy discussion. The nine-judge bench of the Supreme Court of India emphasized the value of decisional autonomy in any privacy discussion. In the cases of *Joseph Shine v. Union of India* and *Navej Singh Johar v. Union of India*, the courts established a constitutional requirement to invalidate laws that promote discriminatory stereotypes and restrict women's sexual autonomy, which includes the right to choose their own reproductive options. Despite all of these significant rulings, the Act still bans certain groups of women from the advantages of surrogacy, which is in direct violation of the bodily autonomy and reproductive rights of women, both of which have been upheld in several other nations.

## II. Children with Disabilities are Discriminated

By separating disabled and non-disabled children for the sake of surrogacy, the current Act discriminates against disabled children. The Act specifically states that if the parents have a disabled kid, they are permitted to use surrogacy, even though it is illegal for other parents who do not have impaired children to do so. It violates the *UN Convention on the Rights of Persons with Disabilities*, which states that children with disabilities should have equal access to all fundamental freedoms and human rights as other children and should not be subjected to any form of discrimination on account of their disability in particular.

## III. Banning Commercial Surrogacy is not the Alternative

According to the Surrogacy Regulation Act, 2021 only altruistic surrogacy is encouraged leading to the banning of commercial surrogacy. There are worries that just outlawing commercial surrogacy will push the sector underground and allow it to continue operating illegally. If there are willing parents and women willing to be surrogates, arrangements will be made, whether they are legal or unlawful. The act's

restrictions on surrogacy may increase the number of illicit surrogacy contracts, which could leave surrogate women more susceptible to abuse and exploitation. The surrogacy industry will be less likely to grow in grey markets if the law is well-regulated and it will be less probable that surrogates will be misused. There is a good chance that people will discover alternative means of satiating their demands if surrogacy is declared unlawful for the majority of the population. Using a surrogate for charitable purposes carries its own risks. In India, women rarely make the final decision in these circumstances. When a family feels the need for a child through surrogacy, mild persuasion may be used to convince a woman in the family to assume the role of surrogate. Additionally, in addition to persuading, psychological, emotional, and physical violence can be utilized against such a relative to use surrogacy while not wanting to. The Act restricts surrogacy to never-married or widowed women, who are more vulnerable to abuse if they are living alone, increasing the likelihood even further. It is recommended that managed commercial surrogacy be permitted within the Act's boundaries as opposed to explicitly barring commercial surrogacy and exclusively permitting altruistic surrogacy, as altruistic surrogacy has its limitations. This may result in family exploitation of women. The Act's criteria can be put into practice such that only government hospitals are permitted to undertake surrogacy, and the Act should also determine how much should be paid to the surrogate in order to prevent surrogates from being taken advantage of. This will allow underprivileged women who are required to work for free to defend their right to a living.

## IV. Contravention of Right to Livelihood

Gametes and embryos from humans cannot be bought, sold, or traded. However, it could be argued that this new definition of "commercial surrogacy" violates Article 19 (1) (g) of the Constitution by including traditional surrogacy. The prohibition harms the interests of the surrogate mother, as this may be her only means of support. Only the reasonable constraints indicated in Article 19 (1) (g) may be utilized to restrict the privilege conferred by Article 19 (2). The Act's limitations do not seem fair, which is a violation of Article 19 (1) (g). According to the ruling in *Consumer Education and Research Centre v. Union of India*, outlawing commercial surrogacy completely would also be a violation of



## Unpacking the Surrogacy Regulation

Article 21 stating that "under Article 21, the expression 'life' has a wider scope, which includes the 'right to livelihood'". *Olga Tellis v. Bombay Municipal Corporation* acknowledged the same.

### V. Conditional Criteria for Intending Women or Children

It's crucial to remember that the term "intending couple" refers to a married pair of Indian origin who has a medical justification when it comes to the exclusion of particular groups of people from the meaning of the term "intending couple/woman." Additionally, A widowed or divorced Indian lady is not regarded as an "intending woman." A comparison of these two interpretations reveals that the Act forbids the use of surrogacy by foreigners, homosexual couples, live-in partners, and unmarried couples. Given that people of any marital status are permitted to adopt children and a child born into a live-in relationship has been given the status of these exclusions are unreasonable and may constitute a violation of Article 14 of the Indian Constitution legitimate child of the couple. The third gender's rights, which were acknowledged in the *National Legal Services Authority v. Union of India* case, are also disregarded by the Act.

### VI. Urgent Imperative: Addressing The Absence of Time Limit Fixation Provisions in Critical Cases

The Act mandates that the courts address cases involving surrogacy. However, there is no mention of a deadline in the Act. The backlog of routine matters already places undue pressure on the courts. A disagreement between the parties will influence deciding issues like parentage, acceptable costs, and insurance, among others, and would cause additional delay because there is no time limit set by the Act's provisions. The Act also establishes a paternity and custody order for a surrogate kid, which is to be decided by a Magistrate court. However, there is no set amount of time for the same.

### VII. Obtuseness In the Act

The Act makes no mention of the creation, supervision, or oversight of ART Bank. The Act mentions "appropriate authority," but the rules do not say who should be chosen to fill that position. No provision is made in the Act to make the surrogacy process public or to keep the surrogate's identity private. The Act specifies that a surrogate may only

serve as a surrogate once in her lifetime, however, there are no restrictions on the number of embryo transfers that may be carried out to assist the surrogate in carrying the child. According to the Act, surrogate abortion is only permissible with the surrogate's written agreement. However, no mention of a deadline is made. The Act makes no mention of how long the intended parents' custody must be transferred. If the child is given away right away, which is not required by the Act, the child's right to nurse is also violated.

### VIII. Exclusion of LGBTQ+ Community

The Act only permits a man and a woman alone who are lawfully married under Indian law to use surrogacy services and prevents LGBTQ+ Community Even though the Supreme Court overturned the criminalization of homosexuality under Section 377 of the Indian Penal Code in the case of *Navtej Singh Johar versus Union of India*, Same-sex marriages are still illegal in India, preventing that subset of same-sex couples from being eligible under section 2(h) of the Act. The provision further emphasizes that a couple must consist of a man and a woman, restricting a heterosexual married couple. To promote equality in society, which every Indian citizen has a right to because of the fundamental freedoms guaranteed to them by the Indian Constitution, it is imperative to recognize the LGBTQ community. The Supreme Court had to address a surrogacy-related issue for the first time in the 2008 case of *Baby Manji Yamada v. Union of India*. In that case, the court recognized surrogacy as a way to embrace parenthood and recognized that the parents might be either single parents or gay couples. The latter has been entirely refuted by the Act's implementation. Therefore, it is important to grant heterosexual couples, as well as homosexual couples and non-binary groups within the population, the status and privilege of having children.

### IX. Issue Regarding the Age of The Surrogate Mother

The Surrogacy Regulation Act specifies the age of the surrogate mother as follows,

*Section 4(b)(1)- no woman, other than an ever-married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise;*



As the act specifies that the surrogate mother should be between the age of 25 to 35 which stands as a drawback which can be criticised, though there might be lot of responses given when this has been raised as an issue in parliament while passing the bill of Surrogacy Regulation Act, 2021 that the women's are medically fit only between the age of 25 to 35 to carry a baby medically, this issue can be viewed in two aspects one with concern to women that as the act specifies that the surrogate mother should be genetically related to the intending couple who want opt for surrogacy, now the problem finding near relative in the family between the age of 25 to 35 is a huge task and if so there are relatives exists they have to give their consent which could not be guaranteed that always a relative will carry a baby through surrogacy. For example, if there is an orphan intending couple who want to get a baby through surrogacy then in such situation it is not possible for them to find a close relative where the fact states that the both intending couple is an orphan, the act failed to address on this issue, where here the right to parenthood has been violated by the Act to an orphan intending couple. The second aspect of this problem is with regards to the rights of the LGBTQ++ whereas mentioned above it is normally difficult for a natural intending couple to find a near relative in either of their family between the said age by the Act but that is double time difficult for a Transgender because as the societal stigma of the transgender where many of the transgender have been shuttled out of their home and more than 75% of the transgender are away from their family & relatives as per the statistics. Understanding the struggles of the transgender also by many significant precedents one such as *NALSA v. Union of India* and also in *Navtej Singh Johar v. Union of India* where in all these precedents the Hon'ble Judiciary guaranteed the rights of the transgender one such is the right of their parenthood. Due their transformation they cannot be naturally be pregnant but instead they can go for surrogacy but as per the Act even that stands as a major implication for the transgender's where their right has been violated.

#### X. Consent Under Surrogacy

Altruistic and commercial surrogacy agreements are enforceable under the Indian Contract Act, 1872. The significance of unrestricted, unfettered consent is emphasised. In altruistic situations, consent is presumed to be free unless there is a claim of unfair bargaining power or coercive influence. A presumption of undue influence is created in

commercial circumstances where the surrogate's blood or marriage relationship shows dominance, allowing the surrogate to withdraw from the contract. Surrogacy can alter a party's will to leave a child, as consent depends on understanding the nature and consequences of the act. Consent, indicated by intention, must be continuous in a long-term contract, as noted in the *Re Baby M case*. "*under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. she never makes a totally voluntary, informed decision, for quite clearly any decision before the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment*". During the course of the pregnancy, surrogates may form strong attachments that cause them to have a "change of heart," which suggests they may not give their assent to actions that may have unknowable long-term effects.

Courts may use Section 16(3) of the Indian Contract Act, 1872 in situations where it is deemed "unconscionable," particularly in surrogacy agreements. Procedural problems, strict terms, or low payment might all be indicators of this. However, it's important to avoid painting surrogacy as an unfair deal because this ignores charitable surrogacy arrangements and situations in which women want to become parents on their own or for no good reason.

#### Conclusion

The Surrogacy Regulation Act 2021 is a turning point in the gestational surrogacy industry's development in India. As we come to the end of our critical examination of this ground-breaking legislation, it is clear that this act represents a substantial advancement in addressing the numerous issues the surrogacy sector has to deal with. We have seen throughout our analysis of the Act how it attempts to achieve a careful balance. It strives to uphold the integrity of the surrogacy process, safeguard the rights and dignity of surrogate mothers, and provide intended parents with a route to parenthood. The Act aims to bring order to a previously uncontrolled industry with its eligibility requirements, surrogacy contracts, and regulatory framework for surrogacy clinics. This examination has however also highlighted some of the Act's complexity and moral conundrums. Whether the Act successfully struck a balance between the conflicting interests of autonomy and regulation, protection and commercialization, and the rights of surrogate mothers and intended parents, remains an open question. There is no doubt that the Surrogacy Regulation Act 2021 has sparked a crucial discussion



## Unpacking the Surrogacy Regulation

---

about the nexus between business, ethics, and reproductive rights. The world will closely watch how India's big step towards surrogacy regulation affects people, families, and the surrogacy sector as a whole. In conclusion While the Act is a good attempt to address the problems of gestational surrogacy, it also highlights how difficult it is to navigate the area

where reproductive rights and law meet. It is crucial to keep examining and discussing the intricacies as the Act's implementation progresses and its ramifications become clearer in order to guarantee that the rights and welfare of all parties are respected in the pursuit of morally and responsibly surrogate practises.

### References

- Andrews, L. (1988). *Surrogate Motherhood: The Challenge for Feminists*. *The Journal of Law, Medicine & Ethics*, 16(2), 72.
- B.K. Parasarathi v. State of Andhra Pradesh* (1999).
- Babbar, K., & Sivakami, M. (2022, February 19). *The Surrogacy Regulation Act 2021: Another Attempt to Reproduce A Heteronormative Patriarchal Society. Feminism in India*. <https://feminisminindia.com/2022/02/02/the-surrogacy-regulation-act-2021-another-attemptto-reproduce-a-heteronormative-patriarchal-society/>
- Baby Manji Yamada v. Union of India* (2009).
- Braho, H. (2015). *Motherhood Surrogacy: Progress or Exploitation?* *European Journal of Sustainable Development*, 4(2).
- Consumer Education and Research Centre v. Union of India*. (1995). 3 S.C.C. 42.
- Das, S. S., & Maut, P. (2014). *Commercialization of surrogacy in India: A critical analysis*. *JCC Law Review*, 14-29.
- Ghosh, A., & Khaitan, N. (2017, October). *A Womb of One's Own: Privacy and Reproductive Rights*. *EPW*, 52, 42.
- Jain, D., & Shah, P. K. (2020). *Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India*. *Cardozo Journal of Law & Gender*, 39, 3.
- Jodhta, B. K. (2017). *Surrogacy in India: Issues and Perspective*. *Nyaya Deep: Official Journal of NALSA*, 18(1 & 2), 10-15.
- Jodhta, B. K. (2020). *Surrogacy Law in Making: The Indian Scenario*. *Banaras Law Journal*, 49, 9-30.
- Joseph Shine v. Union of India* (2018).
- K. S. Puttaswamy (Retd.) and Others v. Union of India* (2017).



Margalit, Y. (2011). *Redefining Parenthood – From Genetic Essentialism to Intentional Parenthood*. SSRN Electronic Journal.

Mark, S. M. (2021). *Commercial Surrogacy with Special Reference to Capabilities Approach*. GLS Law Journals, 3(1), 71-81.

Nadig, V. (2020, September 20). *Profession and Privacy: Critiquing the Surrogacy Bill*. Law and Other Things Blog. <https://lawandotherthings.com/profession-and-privacycritiquing-the-surrogacy-bill/>

*National Legal Services Authority v. Union of India* (2014).

*Navtej Singh Johar v. Union of India* (2018).

*Olga Tellis v. Bombay Municipal Corporation* (1986).

Patil, S. (n.d). *Surrogacy Contracts: The Legal Regime in India and Other Countries*. Legal Service India. <https://www.legalserviceindia.com/>

*Pros and Cons of Altruistic Surrogacy*. (2019, June 6). Conceive Abilities Blog. <https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy>

Seetharaman, G. (2015, November 8). *Ban on surrogacy for foreigners: How govt's recent decision will push a booming industry into black market*. The Economic Times. <https://economictimes.indiatimes.com/news/politics-and-nation/ban-on-surrogacy-forforeigners-how-govts-recent-decision-will-push-a-booming-industry-intoblackmarket/articleshow/49703554.cms?from=mdr>

Shah, A. (2018, December 20). *The New Surrogacy Bill Won't Let Live-in and LGBTQ Couples Become Parents*. News18. <https://www.news18.com/news/india/the-new-surrogacybill-wont-let-live-in-and-lgbtq-couples-become-parents-1979055.html>

Shalev, C. (2000). *Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women*. Health and Human Rights, 4(2), 38-39.

Singh, M. (2020, May). *Surrogacy in India and its Legal Aspects*. Pen acclaims, 10, ISSN 2581-5504. <https://www.penacclaims.com>

Srivastava, A. (2021). *The Surrogacy Regulation (2019) Bill of India: A Critique*. Journal of International Women's Studies, 22(1), 140.

*Suchita Srivastava v. Chandigarh Administration*. (2009). 9 S.C.C. 1.

*Surrogacy* (n.d.) Better Health, Victoria. <https://www.betterhealth.vic.gov.au/health/healthyliving/surrogacy>

*Surrogate Motherhood in India: An Analysis of Surrogacy (Regulation) Act, 2021* by Jaswal, P. S., & Kaur, J.

*United Nations General Assembly*. (2006, December 13). *UN Convention on Rights of the Persons with Disability*. U.N.G.A. Res. A/RES/61/106, Preamble, Article 3 and 7.

*Wajid Khan v. Raja Ewaz Ali Khan* (1891).