



# Surrogacy And The Child's Right To Truth: A Legal Enquiry

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**Abstract:** A major issue which is nowadays affecting married couples is infertility. These couples have started to choose assisted reproductive technology which is "surrogacy". This method of surrogacy has made it possible for the couples to procreate babies without sexual copulation. Surrogacy entails the procedure where a woman carries the kid of an infertile couple to term and handing over the baby once born. This method incorporates amalgamation of the sperm and egg in a culture dish, fertilizing the egg, and then implanting the resulting embryo into the woman's uterus. Since children represent a nation's future, they must be well-cared for and safeguarded. In order for children to grow up to be responsible citizens, they need to be raised in an atmosphere that supports their healthy growth. The nation must make every effort to safeguard their rights and guarantee that they are not infringed. They are entitled to a wholesome upbringing. This paper analyzes the child's right to know the truth in surrogacy, evaluating existing legal systems, pointing out deficiencies, and suggesting reforms to guarantee access to information about genetic background and identity.

**Index Terms:** Surrogacy, infertility, motherhood, children's rights, assisted reproductive technologies, artificial insemination.

## I.INTRODUCTION

One of the biggest issues affecting married couples' social and marital lives is infertility.<sup>1</sup> Couples like this, have benefited from assisted reproductive technology. With the advent of modern reproductive technologies and their widespread availability, parenthood- especially motherhood- which has traditionally been seen as a very personal and private experience has undergone a dramatic change.<sup>2</sup> However, assisted reproductive technologies have altered the basic concept of birthing and parenthood. With the introduction of modern reproductive technologies, infertile couples can now choose from a variety of choices, such as in-vitro fertilization, artificial insemination and surrogacy.<sup>3</sup> There are several reproductive technologies that can be used to reproduce human without engaging in sexual activity and among them, surrogacy is the most vexed concept.

<sup>1</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

<sup>2</sup> Source: <https://jazindia.com/index.php/jaz/article/view/2816> (Last accessed on 25.07.2025)

<sup>3</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

Increasingly, married infertile couples are turning to “surrogate parenting”, which involves hiring a woman to carry their kid to term and relinquishing parental control once the baby is born.<sup>4</sup> This arrangement, commonly referred to as “contract pregnancy”, challenges traditional notions of parenthood. Surrogacy involves the artificial insemination of a woman using a man’s sperm. In addition to carrying his child in her womb, the lady gives the child to the man and his wife to raise as their own after the child is born. This procedure involves combining the sperm and egg in a culture dish, fertilizing the egg, and then implanting the resulting embryo into the woman’s uterus.<sup>5</sup> Young couples are finding surrogacy to be a desirable alternative to adopting children, which helps to lower the high incidence of infertility. However, surrogacy has been more well-known over the last 15 years as a desirable reproductive option for infertile couples hoping to conceive a kid who is at least one of them biologically related. Because of its many benefits, surrogacy has become a very popular procedure worldwide. Thanks to advancements in techniques like artificial insemination and in-vitro fertilization, surrogacy has become a feasible option for infertile couples seeking to conceive.<sup>6</sup> This paper will emphasize the importance of a child’s right to truth in surrogacy arrangements by analyzing existing legal frameworks and proposing reforms to better protect the child’s right to know their origins and identity.

## II. HISTORICAL CONTEXT OF SURROGACY

The Elizabeth Kane case in 1980 brought the idea of surrogacy into the public eye. With the aid of technological breakthroughs, this technology aims to fulfill people’s dreams and desires to become parents to their own biological children.<sup>7</sup>

Many ancient cultures recognized the long-standing practice of surrogate motherhood. For instance, surrogacy was acknowledged by the ancient Babylonian Legal *Code of Hammurabi* (18<sup>th</sup> Century BC), which also established comprehensive rules outlining the circumstances under which it would be accepted. Similar customs were followed by other societies, including the Kgatla people of Southern Africa’s Bechuanaland and various indigenous Hawaiian communities.<sup>8</sup> Surrogate motherhood is viewed in some communities as a charitable and friendly gesture. Surrogacy was certainly done in European societies in the past, but neither society nor the law had ever openly acknowledged it. One example from the Old Testament is Sarah, Abraham’s barren wife, who convinces Abraham to have sex with her maid Hagar in order to “commission” her to bear her a child. Similarly, Rachel, Jacob’s infertile wife, persuades Jacob to have sex with her maid Bilhah in order to conceive a child. In these stories, the surrogate and commissioning women’s class differences mirror contemporary customs.<sup>9</sup>

Astoundingly, the notion of surrogate parenthood is not new; it has its origins in ancient legends. Yashoda and Gandhari, two significant surrogate mother figures in Indian mythology, demonstrate how widespread this concept is throughout many cultures.<sup>10</sup> A popular story about Lord Kartikeya, also known as Subramanya Swamy, links his birth to a symbolic form of ancient surrogacy. As the son of Lord Shiva and Goddess Parvati, he was created to lead the celestial army.<sup>11</sup> Shiva gave his seed(bija) to Goddess Ganga, who acted as a surrogate. Unable to carry the embryo, she eventually released it, and the fire God Agni placed it on Saravana grass- similar to a modern incubator. The Saptarshi matrikas then nurtured the child. This tale mirrors modern surrogacy, highlighting challenges like premature termination of pregnancy or the surrogate’s inability to carry to term.<sup>12</sup>

<sup>4</sup> Source: <https://jazindia.com/index.php/jaz/article/view/2816> (Last accessed on 25.07.2025)

<sup>5</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

<sup>6</sup> ibid

<sup>7</sup> ibid

<sup>8</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

<sup>9</sup> ibid

<sup>10</sup> Source: <https://jazindia.com/index.php/jaz/article/view/2816> (Last accessed on 25.07.2025)

<sup>11</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

<sup>12</sup> ibid

This paradigm shift has led to the development of a thriving reproductive industry, of which surrogacy is now a crucial component. How parenting has evolved in our more globalized culture is reflected in the evolution of surrogacy, from ancient mythology to contemporary celebrity sponsorships. In the modern day, surrogacy has grown in acceptance, even among celebrities.<sup>13</sup>

The efforts of American lawyer Noel Keane resulted in the establishment of the first surrogacy contract in the United States in 1976. Since that revolutionary moment, surrogacy has grown dramatically on a global scale. The concept of surrogacy may seem contemporary, yet its roots are very old.<sup>14</sup> However, it received a major boost with the introduction of artificial insemination and assisted reproductive technologies. India became well-known in the surrogacy arena in 1978 after Kanupriya, the second IVF child in the world and India's first, was born in Kolkata. This event commemorated the official beginning of surrogacy in India.<sup>15</sup>

### III. IDEA OF SURROGACY

For people unable or unwilling to reproduce in the conventional way, surrogacy is a crucial kind of assisted human reproduction. In surrogacy, a woman consents to become pregnant through assisted human reproduction. In surrogacy, a woman consents to become pregnant through assisted conception, bears the resulting foetus, and gives up all parental rights of the kid at birth.<sup>16</sup> This is one of the most dramatic new reproductive technologies. Married women who are unable to conceive for a variety of physical, genetic, or medical reasons really benefit from this assisted reproductive technology.

For a variety of causes, such as cancer, high blood pressure, dangerous skin conditions or the loss of womb and ovaries, a woman may occasionally be unable to bear her own genetic children. These mothers could still raise their partner's biological child by employing a surrogate.<sup>17</sup> It is not shocking that there have been incidents of figure-conscious women using this technique to preserve their beauty in our commercial and materialistic society, allowing other women to bear them a child in the process. The husband may also be persuaded to enter into a surrogate arrangement by his career.<sup>18</sup>

The word "surrogacy" comes from the Latin word "surrogatus", which meaning to replace or put in another person's place. In essence, surrogacy is the outsourcing of parenthood. One woman accepts to bear a child on behalf of another under the terms of a surrogacy agreement.<sup>19</sup> The intended parents receive the child from the surrogate mother once it is born. Such actions give rise to numerous moral and legal dilemmas. Only a small number of nations have passed legislation regulating these practices; some, like Spain, Germany, and France, have outright prohibited surrogacy, and still fewer have passed legislation regulating both surrogacy and assisted reproductive technology.<sup>20</sup>

Surrogacy is described as "an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband" by *Black Law's Dictionary*. She consents to becoming pregnant, bringing the kid to term, and then giving up her parental rights to become the child's biological father and wife. However, this definition solely covers artificial insemination surrogacy, also referred to as traditional surrogacy, one type of surrogacy agreement.<sup>21</sup> The contract whereby a woman consents to get pregnant and bear a child for another person or people, to whom she will provide custody of the child at or soon after delivery, is another definition of surrogacy provided by *the New South Wales Law Reform Commission*.

Surrogacy is the practice where a woman, known as the surrogate or carrying mother, agrees to bear a child on behalf of another individual or couple- often referred to as the commissioning parents.<sup>22</sup> The

<sup>13</sup> Source: <https://jazindia.com/index.php/jaz/article/view/2816> (Last accessed on 25.07.2025)

<sup>14</sup> ibid

<sup>15</sup> ibid

<sup>16</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

<sup>17</sup> ibid

<sup>18</sup> ibid

<sup>19</sup> Source: <https://www.ijlmh.com/wp-content/uploads/Critical-Analysis-on-Human-Rights-of-Children-Born-through-Assisted-Reproductive-Technology-Surrogacy.pdf> (Last accessed on 23.07.2025)

<sup>20</sup> ibid

<sup>21</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

<sup>22</sup> ibid



commissioning mother may also be the genetic mother if her egg is used, while the genetic father can be her husband or a sperm donor. Surrogacy involves either artificial insemination or implanting a fertilized embryo into the surrogate's womb. It is not a cure for infertility but a method of having a child genetically related to at least one parent. This method is used by a wide range of people- including infertile couples, singles, same-sex partners, and even post- menopausal women- and, although increasingly common today, has roots in ancient times.<sup>23</sup>

#### IV. PERCEPTION OF CHILD RIGHTS

The idea that children should have the right to know where they came from seems very logical at first glance.<sup>24</sup> Children born through surrogacy often have several people involved in their origins, such as intended parents, surrogates, and gamete donors. Whether and how children learn about this depends largely on their parents' willingness to share the information in an age-appropriate way.<sup>25</sup> Research shows that while some parents are open with their children from an early age, others hesitate for various reasons—especially when donor gametes are involved. Many countries lack laws giving surrogate-born children the right to know about their origins, and those born through international surrogacy face even greater difficulties in accessing this information.<sup>26</sup>

International human rights law, including the UN Convention on the Rights of the Child (CRC), is often cited to support children's right to know their biological origins, but its main Articles do not explicitly guarantee this right.<sup>27</sup> The UN Committee on the Rights of the Child has interpreted Article 7 as supporting such access, though there is no clear provision or enforcement mechanism in the CRC. In contrast, European human rights law, especially Article 8 of the European Convention on Human Rights (ECHR), more clearly supports a child's right to know their parentage.<sup>28</sup> The European Court of Human Rights has ruled that access to personal and parental information is part of the right to private life, as shown in cases like **Gaskin v United Kingdom**<sup>29</sup> and **Mikulic v Croatia**<sup>30</sup>. However, these rights must be balanced with the interests of others, such as putative fathers.

- ***A Child's Prenatal Rights:*** The CRC defines a child as anyone under 18, not granting rights to foetuses. Only the American Convention on Human Rights offers rights from conception. Assisted reproduction can result in discarded or misused embryos, and there is a lack of regulation. Strict rules are needed for handling eggs and embryos in clinics.<sup>31</sup>
- ***The Rights of Children, Sperm, and Donor Eggs:*** Donor privacy is protected, but CRC Article 7 gives children the right to know their biological origins, and Article 8 supports preserving their identity and family relationships.
- ***Rights of Children to know their Parents:*** Courts like those in Germany recognize that donor-conceived children can know who their genetic parents are, prioritizing this over donor anonymity. This right benefits health by informing children of inherited conditions. CRC Article 24 upholds children's right to health, backing access to genetic information.
- ***Pre-Sex Determination:*** Some couples request a child of a specific sex through Assisted Reproductive Technology (ART), often preferring boys in India. The ART Bill, 2017, forbids ART clinics from providing pre-determined sex selection, addressing this discrimination.
- ***Delayed Pregnancy and the Rights of Children:*** Using preserved eggs, sperm, or embryos after a parent's death creates legal uncertainties about parentage, legitimacy, and inheritance. Laws do not

<sup>23</sup> ibid

<sup>24</sup> Source: <https://www.researchgate.net/publication/228236224> (Last accessed on 26.07.2025)

<sup>25</sup> Source: <https://academic.oup.com/lawfam/article/38/1/ebab009/6325353?login=false> (Last accessed on 27.07.2025)

<sup>26</sup> ibid

<sup>27</sup> Source: <https://www.researchgate.net/publication/228236224> (Last accessed on 26.07.2025)

<sup>28</sup> ibid

<sup>29</sup> *Gaskin v. United Kingdom*, (1990) 12 EHRR 36

<sup>30</sup> *Mikulic v Croatia*; [2002] 1 FCR 720

<sup>31</sup> Source: <https://www.ijlmh.com/wp-content/uploads/Critical-Analysis-on-Human-Rights-of-Children-Born-through-Assisted-Reproductive-Technology-Surrogacy.pdf> (Last accessed on 23.07.2025)

clearly define the rights of these children, and practices vary across countries. The Indian Evidence Act, 18972 (Section 112) presumes a child born within a valid marriage, or within 280 days after its dissolution, is legitimate. This means a child conceived and born more than 280 days after the father's death (even if using his preserved gametes) is not considered legitimate under Indian law. Some countries recognize posthumously conceived children as legitimate, but many, including India, do not have clear protections for them.<sup>32</sup>

## V. LAWS CONCERNING IDENTITY DISCLOSURE AND SURROGACY

There are no universally accepted international laws governing surrogacy, and its practice varies widely across different countries. According to an article by Helier on BBC News, some nations such as Germany, France, and Italy have banned all forms of surrogacy altogether. Conversely, countries like the UK, Ireland, and Denmark permit surrogacy only if the surrogate mother is not financially compensated. Commercial surrogacy occurs in countries including India, Russia, and certain U.S. states. Thailand introduced legislation regulating surrogacy in response to abuses highlighted by cases like Baby Gammy and Baby101. In India, although the Surrogacy Bill of 2019 allowed only altruistic surrogacy, the newer Bill permits any willing woman to become a surrogate while still prohibiting commercial surrogacy. Due to the lack of stringent legal frameworks, children born through surrogacy often encounter various legal challenges; some may even become stateless, with their rights to identity and nationality compromised when parentage is questioned. This situation results in violations of the rights guaranteed to children under the Convention on the Rights of the Child (CRC) and other international agreements.<sup>33</sup>

- **Indian Aspect:** India is now the surrogacy capital. There are currently no laws that forbid surrogacy. The Gujarati district of “Anand” is well-known for offering surrogacy services. India currently establishes the guidelines. Surrogacy was regulated by the Council of medical Research in 2005, but the rules are not being followed. There are numerous actively unethical methods. According to numerous international instruments, children’s rights to national identity and their right to their own country are fundamental human rights, although these rights are flagrantly abused<sup>34</sup>.

In India, surrogacy has drawn attention due to its constitutional ramifications as well as its complicated ethical and moral issues. The Indian Constitution’s Right to Life, Personal Liberty, and Privacy (Art.21) is one of the essential rights that is pertinent when examining the legal framework around surrogacy.<sup>35</sup>

The **Surrogacy (Regulation) Act, 2021** was enacted by India’s Parliament to introduce clear rules for surrogacy, aiming to safeguard the interests of surrogate mothers and children, and to eliminate the commercialization and exploitation often linked to the practice.<sup>36</sup>

In India, surrogacy is regulated by the Act. The Act’s principal provisions are:

- Definition of Surrogacy:** The Act (Section 2(zd)) describes surrogacy as when a woman carries and gives birth to a child on behalf of another individual or couple, handing over the baby to them after delivery.
- Permitted Surrogacy Type:** According to Section 2(b), only altruistic surrogacy is allowed. This means the surrogate mother cannot receive any payment or reward except for covering her medical costs and insurance; any form of commercial surrogacy is strictly forbidden.<sup>37</sup>
- Intending Parents’ Eligibility:** Section 4 sets out who can opt for surrogacy. Only Indian, heterosexual married couples who have been married for at least five years and possess a certificate proving infertility from a government hospital are eligible.

<sup>32</sup> ibid

<sup>33</sup> ibid

<sup>34</sup> ibid

<sup>35</sup> Source: <https://www.defactolaw.in/post/surrogacy-in-india-law-and-issues> (Last accessed on 28.07.2025)

<sup>36</sup> Source: <https://thelegalaffair.com/the-surrogacy-regulation-act-2021-an-overview-of-indias-new-surrogacy-laws/> (Last accessed on 29.07.2025)

<sup>37</sup> ibid

- iv. **Criteria for Surrogate Mothers:** As per Sub-clause (b) of clause (iii) of section 4, surrogate mothers must be close relatives of the intended couple, aged between 35 and 45 years, have at least one biological child, be married, and must also have their husband's consent.<sup>38</sup>
- v. **Surrogacy Clinic Registration:** Chapter IV of the Act requires all surrogacy clinics to register with the designated authorities. These clinics must keep records of every surrogacy arrangement and regularly submit these to regulators.

In summary, the Act is designed to tightly regulate surrogacy in India by allowing only non-commercial, family-based arrangements, setting strict eligibility guidelines for participants, and keeping all surrogacy-related clinics under official oversight.<sup>39</sup>

**Rights under the Constitution and Surrogacy:** Everyone's Right to Life and Personal Freedom is guaranteed by Article 21 of the Indian Constitution. The Judiciary has defined this right broadly to include a variety of liberties and rights. The freedom to make decisions regarding one's reproductive health and family life is part of the freedom to life in the context of surrogacy. It suggests that people are free to choose whether to use surrogacy as a method of childbearing<sup>40</sup>. Reproductive options are strongly related to the concept of personal liberty, which also includes the right to privacy and dignity. As a choice for reproduction, surrogacy must to be safeguarded as a matter of personal liberty, free from unjustified intervention.

Although the Right to Work is not specifically listed as a basic right in the Indian Constitution, it is a logical progression of the Right to Life and Personal Liberty. When viewed as a type of economic labour, surrogacy raised concerns about a woman's ability to support herself. Being a surrogate mother can offer many surrogate moms possibilities and financial security for their family.<sup>41</sup>

**Sovereignty and Rights in Reproduction:** One crucial aspect of individual liberty is the right to make reproductive choices. It includes having the freedom to choose whether, when, and how to have children. One way that individuals or couples might exercise their reproductive rights is through surrogacy. It can be argued that these rights are being violated if surrogacy is restricted without a good reason.<sup>42</sup>

The term "Reproduction Autonomy" describes a person's freedom to choose their own family planning and reproductive health without outside pressure or intervention.<sup>43</sup> In the **B.K. Parthasarathi v. Government of Andhra Pradesh Case**<sup>44</sup>, the Andhra Pradesh High Court acknowledged reproductive autonomy as a basic right. The significance of a person's autonomy over surrogacy is reaffirmed by this ruling.

- **International Aspect:** Children born through international surrogacy often face challenges in accessing information about their origins due to varying laws and practices across countries regarding donor and surrogate anonymity. The Hague Conference on Private International Law (HCCH) has highlighted these concerns while working on international legal frameworks to recognize foreign parentage judgments. Similarly, the UN Special Rapporteur opposes anonymity for donors and surrogates, arguing that this restricts children's right to know their origins and urges countries to carefully review foreign surrogacy-related parentage orders.<sup>45</sup>

<sup>38</sup> ibid

<sup>39</sup> ibid

<sup>40</sup> Source: <https://www.defactolaw.in/post/surrogacy-in-india-law-and-issues> (Last accessed on 28.07.2025)

<sup>41</sup> ibid

<sup>42</sup> ibid

<sup>43</sup> ibid

<sup>44</sup> *B.K. Parthasarathi v. Government of A.P. & Ors*, AIR 2000 AP 156

<sup>45</sup> Source: <https://academic.oup.com/lawfam/article/38/1/ebab009/6325353?login=false> (Last accessed on 27.07.2025)



Australian perspectives also point to issues with inconsistent record-keeping of genetic information, which can deny children the right to understand their genetic heritage. Some healthcare professionals in Australia, interpreting ethical guidelines banning commercial surrogacy, refrain from discussing overseas surrogacy matters. This results in parents and children lacking accurate information about anonymous donations, affecting children's sense of identity.<sup>46</sup>

Article 8(2) of the UN Convention on the Rights of the Child (CRC) mandates that States protect and assist children who have been deprived of their identity, which includes access to origin information in both domestic and international surrogacy. The Nuffield Council on Bioethics recommends that States act as stewards, maintaining sufficient donor information to meet children's needs for knowledge about their origins, balancing privacy and access.<sup>47</sup>

An ideal solution involves international cooperation among States to collect and share comprehensive information about surrogacy arrangements, including details of intending parents, surrogates, and donors. Children born through international surrogacy should have the same rights to access this information as those born domestically, ensuring they can know their origins and identity throughout their childhood.<sup>48</sup>

According to the UN Convention on the Rights of the Child (CRC), surrogate children have the same fundamental human rights as other children. Therefore, regardless of whether surrogacy is legal or not, all nations have a duty to safeguard the children born through this method. Among the duties of the state is the creation and upkeep of effective regulatory frameworks to safeguard children from harm (UNICEF, 2022).<sup>49</sup>

According to Article 35 of the CRC, nations must "take all appropriate national, bilateral, and multilateral measures to prevent the abduction of the sale of or traffic in children for any purpose or in any form." Surrogacy falls under the broad description, and the statute also specifies the necessity of preventing "the abduction or the sale of or traffic in children" from creating families. The Committee on the Rights of the Child, which reviewed states impacted by surrogacy, supports this viewpoint by stating that, if left unregulated, surrogacy may amount to the illegal selling of children.<sup>50</sup>

In addition, the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption confirms that the CRC's rules can be applied to surrogacy and other family-formation methods.

As an inevitable consequence of surrogacy agreements, both conventions acknowledge and acknowledge permissible variations in national legislation pertaining to international adoption. Nonetheless, a state's stance on the legitimacy of international adoption and surrogacy does not exempt it from the need to put measures in place to prevent children from being trafficked, sold, or abducted and forced into families (UN General Assembly, 2018).<sup>51</sup>

***Legal Reactions to Surrogacy in other nations:*** Israel was the first to enact legislation specifically governing surrogacy. The Aloni Commission's recommendations served as the foundation for Israel's 1996 Surrogate Motherhood Agreements Law. Therefore, when it comes to regulating and enabling commercial surrogacy arrangements, Israel is a leader.<sup>52</sup>

In 2004, Canada passed the Assisted Human Reproduction Act, which forbids compensating surrogate mothers or individuals who arrange for surrogacy services. This is consistent with the idea that there are serious ethical and health issues with the commercialization of women's reproductive capacities. However, under some circumstances, surrogate mothers may also receive compensation for lost wages

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<sup>46</sup> ibid

<sup>47</sup> ibid

<sup>48</sup> ibid

<sup>49</sup> Source: <https://www.humanium.org/en/childrens-rights-and-surrogacy/> (Last accessed on 28.07.2025)

<sup>50</sup> ibid

<sup>51</sup> ibid

<sup>52</sup> Source: <https://www.researchgate.net/publication/340755343> (Last accessed on 24.07.2025)

throughout their pregnancy, as well as reimbursement for pregnancy-related expenses provided they can produce receipts. Additionally, it is against the law to help or encourage females under the age of 21 to become surrogates or to undergo medical procedures that would enable them to do so.

In the UK, the Human Fertilization and Embryology Act of 1990 and the Surrogacy Arrangements Act of 1985 regulate surrogacy. These regulations make surrogacy contracts illegal, forbid commercial surrogacy other than payments made to the surrogate mother directly, and establish guidelines for determining who is legally the child's parent. While the surrogate is automatically regarded as the child's mother, commissioning parents can obtain legal parentage through a court-issued parental decree provided specific requirements are satisfied (such as marriage or a genetic connection). In the event that these requirements are not met, the commissioning parents are required by the Adoption and Children Act of 2002 to adopt the kid.<sup>53</sup>

The first surrogacy law in New Zealand was the Human Assisted Reproductive Technology Act of 2004, which permitted only non-profit surrogacy agreements and made it plain that they were lawful but unenforceable. According to the law, surrogacy encompasses both natural and assisted conception, as well as traditional Maori Whangai customs in which a child is entrusted to a family member. Even though it is illegal to pay for surrogacy (apart from reasonable costs like legal or medical services), anyone who engages in surrogacy for financial gain, whether they are intended parents, middlemen, or surrogates, may be breaking the law.<sup>54</sup>

State laws pertaining to surrogacy in the United States differ greatly from one another; some states specifically allow and regulate surrogacy contracts, while others forbid or nullify them. Some states only permit altruistic (non-commercial) surrogacy, while others do not distinguish between gestational and traditional surrogacy. In the absence of particular laws, questions such as parentage may be addressed by case law. Both Article 8 of the Uniform Parentage Act, 2000, which deals with the verification of gestational agreements and the determination of parentage, and the American Bar Association's Model Act Governing Assisted Reproductive Technology, which lays out conditions for enforceability and permits compensation for surrogates, are attempts to standardize surrogacy laws.<sup>55</sup>

## VI. CASE ANALYSIS

- i. **Baby Manji Yamada v. Union of India and Ors.**<sup>56</sup>: In order to use a surrogate mother, a Japanese couple named Drs. Yuki and Ikufumi Yamada traveled to Anand, Gujarat, India in 2007. Dr. Ikufumi Yamada returned to Japan since his visa had expired, and the couple divorced during the process. Following the baby's birth on July 25, 2008, Dr. Ikufumi was listed as the child's genetic father on a birth certificate issued by the Anand Municipality.<sup>57</sup> Ms. Emiko Yamada, the baby's grandmother, attempted to secure travel authorization so that she could bring the kid to Japan. However, the scenario was complicated by Indian law, which prohibited unmarried men from adopting and required legal adoption before a kid could leave the country. The baby's travel documents were denied to Dr. Ikufumi, and Ms. Yamada's petition was denied. In response to a Supreme Court plea, India granted the baby permission to leave the country by issuing a Certificate of Identification rather than a passport.<sup>58</sup>

<sup>53</sup> ibid

<sup>54</sup> ibid

<sup>55</sup> ibid

<sup>56</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518

<sup>57</sup> Source: <https://www.researchgate.net/publication/346714993> (Last accessed on 29.07.2025)

<sup>58</sup> ibid



- ii. **Jan Balaz Case<sup>59</sup>:** The German couple, Jan Balaz and Susanne Anna Lohle, had twins in India via surrogacy. An Indian surrogate, Marthaben Immanuel Khristi, carried a donated egg that was fertilized by Jan Balaz's sperm to produce the twins, Balaz Nikolas and Balaz Leonard. The name of Susanne Anna Lohle was left off of the birth certificates, which named Jan Balaz as the father and Marthaben as the mother.<sup>60</sup>
- iii. After applying for and receiving the twins' passports, the couple received a notice from Indian authorities asking for the passports to be turned in. Jan Balaz filed a petition before the Gujarat High Court as a result, focusing on the nationality status of children born to Indian surrogate mothers for foreign parents.<sup>61</sup>

## VII. OBSTACLES FACED BY THE CONCEPT

At first glance, surrogacy appears to be a desirable option because it provides a poor surrogate mother with much-needed money, enables an infertile couple to have their long-desired biological child, and generates foreign exchange for the nation.<sup>62</sup> However, the reality is far grimmer. Surrogate mothers and intended parents are both exploited in some way due to inadequate legislation, and middlemen and commercial agencies profit from this. The entire process lacks transparency, and the erratic laws regarding surrogacy in India increase the likelihood of running afoul of the law.<sup>63</sup>

Despite the ICMR's 2005 standards for the accreditation, oversight, and control of ART clinics in India, these rules are often broken. It's easy to understand why cross-border childless couples who must deal with a language barrier and occasionally a protracted legal battle to obtain their child are frustrated. Even if all goes according to plan, they must remain in India for two to three months to finish the necessary paperwork following the baby's birth. Parenting, citizenship, nationality, motherhood, and child rights issues are caused by cross-border surrogacy.<sup>64</sup> Sometimes children are denied the nationality of the country of their intended parents, which leads to either a protracted legal battle (as was the case with the German couple who had twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage) or a dismal future for the child in an orphanage. In many cases, the intended parent disowns the kid born to a couple using surrogacy because he is not genetically related to them, forcing him to live in an orphanage for the rest of his life.<sup>65</sup>

The Surrogacy Regulation Act of 2021 raises issues and obstacles that must be resolved, even though it is a major start in the right direction towards regulating surrogacy in India and resolving ethical concerns. Equal access to surrogacy services is called into question by the exclusion of LGBTQIA+ couples and live-in partners. Furthermore, the surrogacy business may have unforeseen repercussions from the prohibition on commercial surrogacy and the export of embryos.<sup>66</sup> The main problems are:

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<sup>59</sup> *Jan Balaz Vs Anand Municipality and Ors.*, AIR 2010 Gul 21

<sup>60</sup> Source: <https://www.researchgate.net/publication/346714993> (Last accessed on 29.07.2025)

<sup>61</sup> *ibid*

<sup>62</sup> Source: <https://pmc.ncbi.nlm.nih.gov/articles/PMC3531011/> (Last accessed on 30.07.2025)

<sup>63</sup> *ibid*

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

<sup>66</sup> Source: <https://www.defactolaw.in/post/surrogacy-in-india-law-and-issues> (Last accessed on 28.07.2025)

- i. **LGBTQIA+ Community Exclusion:** Concerns about the Surrogacy Regulation Act of 2021's discriminatory treatment of the LGBTQIA+ population have been raised. The Act makes it illegal for gay couples to use charitable surrogacy services. Discrimination and contradiction with equality and human rights principles have been discussed in relation to this exclusion.<sup>67</sup>

**Navtej Singh Johar v. The Union of India**<sup>68</sup>: Section 377 of the Indian Penal Code was ruled illegal by the Supreme Court of India in the historic case of Navtej Singh Johar v. The Union of India. This decision acknowledged LGBTQIA+ people's rights and decriminalized homosexuality. The Act denies homosexual couples' equitable access to surrogacy as a method of achieving biological parenting, which runs counter to the principles established in this case.<sup>69</sup>

- ii. **Ostracism of Live-In Relationships:** The fact that live-in spouses are not included by the Act's regulatory purview is another urgent issue. Couples in live-in relationships frequently raise families together because Indian courts have acknowledged and protected them as legitimate partnerships. The Act's prohibition on live-in partners in surrogacy agreements raises concerns regarding different societal groups' equitable access to surrogacy.<sup>70</sup>

**S. Khushboo v. Kanniammal**<sup>71</sup>: In the S. Khushboo v. Kanniammal case, the Indian Supreme Court decided that Article 21 (right to life) protects and covers cohabitation. The legitimacy of live-in relationships was upheld by this ruling. The Act may be discriminatory because it excludes live-in partners from its purview, which seems at odds with the legal acceptance of these partnerships.<sup>72</sup>

- iii. **Possible Effect on the Surrogacy Sector:** Both the export of embryos and commercial surrogacy are prohibited by the Act. Concerns are raised regarding the effects on the sustainability and accessibility of the surrogacy industry, even though these regulations are intended to protect moral surrogacy practices and stop the exploitation of surrogate mothers.<sup>73</sup>

**Commercial embryo surrogacy and export:** The prohibition on commercial surrogacy can restrict intended parents' choices and make surrogacy services less accessible. Additionally, it could result in an uncontrolled or underground surrogacy business, which could raise dangers for intended parents as well as surrogate moms. The Act forbids the export of embryos to other nations, which may have an impact on the demand for surrogacy services in India worldwide. The sustainability of the surrogacy sector may be impacted by this restriction's unforeseen repercussions, which could include India's fall as a surrogacy destination.<sup>74</sup>

In India, surrogacy raises difficult moral, legal, and constitutional questions. Addressing the possibility of exploitation and unethical behaviours in the surrogacy sector is vital, even though people have the constitutional freedom to make reproductive decisions and make a living. To achieve a balance between safeguarding constitutional rights and guaranteeing the moral and secure practice of surrogacy in India, a thorough legal framework must be established, as delineated in the Surrogacy Regulation Act of 2021. In order to maintain the values of justice, equality, and dignity stated in the Indian Constitution, this framework must adapt to changing society trends.<sup>75</sup>

## VIII. CONCLUSION AND SUGGESTIONS

Children born through surrogacy may, as adults or as children, want to know where they came from. Current reform plans for surrogate-born children in the UK and Ireland need to be re-examined because they reflect current laws pertaining to donor-conceived individuals' access to information. From the standpoint of children's rights, it is crucial to examine new legislative ideas that would affect the identity rights of

<sup>67</sup> ibid

<sup>68</sup> Navtej Singh Johar & Ors. v. Union of India, (2018) 10 SCC 1

<sup>69</sup> Source: <https://www.defactolaw.in/post/surrogacy-in-india-law-and-issues> (Last accessed on 28.07.2025)

<sup>70</sup> ibid

<sup>71</sup> S. Khushboo vs Kanniammal & Anr, (2010) 5 SCC 600

<sup>72</sup> Source: <https://www.defactolaw.in/post/surrogacy-in-india-law-and-issues> (Last accessed on 28.07.2025)

<sup>73</sup> ibid

<sup>74</sup> ibid

<sup>75</sup> ibid

surrogate-born children. This article makes the case that lawmakers ought to take into account ways to provide surrogate-born and donor-conceived children with access to this information while they are still young. In fact, delaying children's ability to independently obtain information about their origins until they turn 18 violates both international children's rights law obligations and the approach taken in many other jurisdictions. It also goes against what research indicates about the significance of educating children about their origins at an early age. States may decide to establish a minimum age—less than 18—at which minors can obtain identifying information, as well as a mechanism that enables them to request information from a court, ethics committee, or other entity in accordance with their developing capacity and maturity. This could also include optional counselling. From the perspective of children's rights, more thought is required.

In India, there are currently no regulations governing surrogacy or ART. Although technology brought these kids into the world, they are frequently rejected and left behind by everyone. States are required to defend the rights that have been granted to them. Although state laws and international treaties grant children a variety of human rights, many children are denied their most fundamental rights. The 2020 Surrogacy Regulation Bill and the ART Regulation Bill both contain promising provisions that, if followed, could significantly reduce the violation of the rights of children born using these methods. Since children are being purchased for cash, traditional elements become less valuable.

#### *SUGGESTIONS TO BE MADE:*

- i. Both the Surrogacy (Regulation) Bill 2020 and the Assisted Reproductive Technology (Regulation) Bill 2020 need to be passed as soon as possible and put into effect.
- ii. India is home to thousands of orphans. Therefore, instead of using surrogacy, families should think about adopting and providing them with a nice life.
- iii. Since it raises additional legal concerns regarding the child's status, international surrogacy needs to be outlawed entirely.
- iv. Inter-country surrogacy is forbidden under the Surrogacy Bill; however it should be tightly controlled until then. The intended couple must be permitted to engage into an arrangement in India only if their nation permits surrogacy.
- v. There are numerous risks associated with these unregulated procedures. There is an inherent risk of abusing the surrogate child and utilizing them for prostitution, trafficking, etc.
- vi. The definition of an abandoned kid is included in the Surrogacy Bill. A child born using these methods must never be left behind. The child must be cared for by the intended parents at all costs.
- vii. By using these methods, it is possible to have two or more children. Low-weight newborns may be born as a result, and these therapies may have negative health implications on the infant.
- viii. The surrogate child may have a permanent psychological scar when they grow up and learn about its birth and the number of persons involved.
- ix. Numerous revisions were made even before both bills were put into effect; thus, it is evident that new problems are always coming up. Therefore, when it is implemented, it must contain comprehensive rules to control ART and surrogacy.



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