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Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

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Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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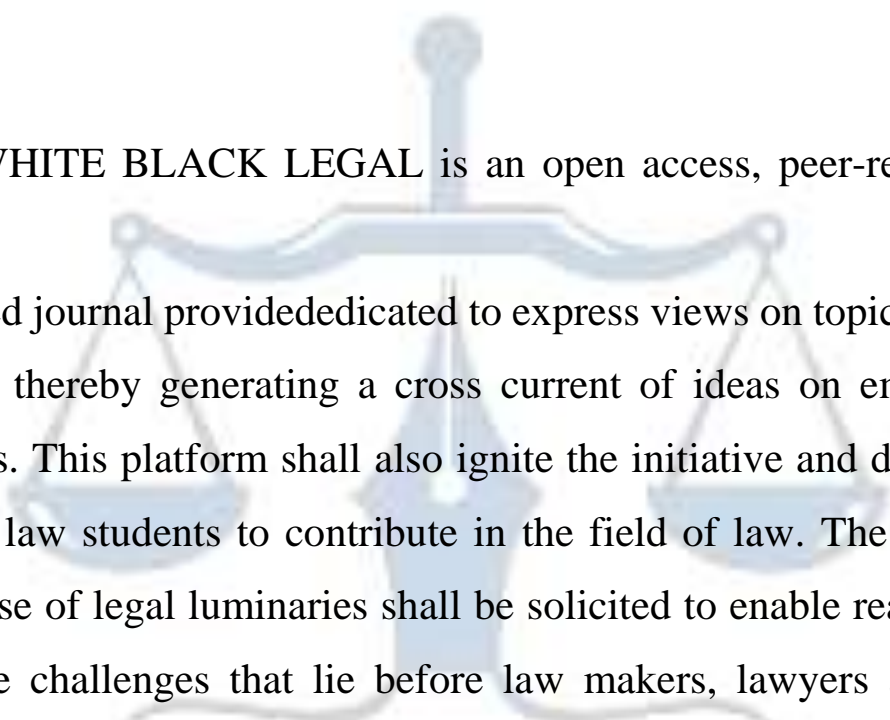


Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A BRIEF UNDERSTANDING OF SAME SEX RIGHTS THAT THE INDIAN CONSTITUTION GUARANTEES, BUT THE PARLIAMENT FORGETS

AUTHORED BY - SNEHA M,
Student, VIT School of Law, Chennai
Block 7, 4D, Asvini Amarisa, Kalasathamman Koil Street, Ramapuram, Chennai – 600089

Abstract

India's surrogacy laws, while aiming to regulate a complex practice, fall short of Dr. B.R. Ambedkar's vision of social justice and equity enshrined in the Indian Constitution. This paper argues that the exclusion of same-sex couples from accessing altruistic surrogacy violates their fundamental rights and perpetuates discrimination.

The current law restricts surrogacy to married heterosexual couples, neglecting the right to family formation for same-sex partners. This exclusion contradicts the 2018 decriminalization of homosexuality, leaving a gap between legal recognition and lived realities. Dr. Ambedkar envisioned a society free from prejudice, where all individuals have equal opportunities. Denying surrogacy to same-sex couples undermines this vision by reinforcing traditional family structures. Furthermore, the law disregards the potential of same-sex couples to provide loving and nurturing environments for children. Surrogacy offers a path to parenthood for these couples, mirroring the biological experience of heterosexual couples. Excluding them from this option not only restricts their reproductive autonomy but also reinforces societal stigmas against LGBTQ+ families.

This paper argues for an inclusive approach to surrogacy, aligning with Dr. Ambedkar's vision. By allowing same-sex couples access to altruistic surrogacy, India can move towards a more just and equitable society where all individuals, regardless of sexual orientation, have the right to build families and experience parenthood.

Keywords

Surrogacy, Queer, Reproductive Technologies, Eligibility, Violation, Birth.

Understanding Surrogacy

Surrogacy in its essence is an arrangement, whereby one bears a child for another person or people, who become the parent of the child therein after the birth. It often includes a legal agreement which may include details such as reasoning for choosing surrogacy, compensations if involved. Surrogacy is one the many assisted reproductive technologies.

When the surrogate mother receives monetary compensation for the bearing the child it is called as a commercial surrogacy. This is not permitted in few places. Another basis under surrogacy which has restrictions usually is the reasoning for opting for surrogacy. Many jurisdictions may permit surrogacy only if it is done due to the infertility or incompetence of one or both of the couple looking for a child. The places where commercial surrogacy is legal may include agencies which tend to connect a mass list of couples with that of potential surrogates. These agencies often screen surrogates' psychological and other medical tests to ensure the best chance of healthy gestation and delivery. They also usually facilitate all legal matters concerning the intended parents and the surrogate.

The Indian Take

Surrogacy in India has become increasingly popular amongst intended parents because of the relatively low costs and easy access offered by Indian surrogacy agencies. In 2005, the government approved the 2002 draft of the *National Guidelines for the Accreditation, Supervision and Regulation of ART Clinics in India*. Before commercial surrogacy was banned in 2015, India was a popular destination for surrogacy. The economic scale of surrogacy in India is unknown, but studies backed by the United Nations in July 2012 estimated the business at more than \$400 million a year, with over 3,000 fertility clinics across India.

Right after this 2012 push is where we see everything wrong with how our country views surrogacy.

In 2013, surrogacy by foreign homosexual couples and single parents was banned. In 2015, the government banned commercial surrogacy in India and permitted entry of embryos only for research purposes. Shortly thereafter in 2016, a *Surrogacy (Regulation) Bill* was introduced and passed by Lok Sabha, the lower house of the Indian parliament, proposing to permit only heterosexual couples with Indian citizenship who are married for at least five years with

infertility problems to access altruistic or unpaid surrogacy and thereby further banning commercial surrogacy. The 2016 bill lapsed owing to the adjournment sine die of the parliament session. The bill was reintroduced and passed by the Lok Sabha in 2019. And this bill is the main subject of the paper in hand.¹

As a country raised on strong conservative values, the idea of something like adoption let alone surrogacy, is but a hard pill to swallow. People tend to have a view that this child should not really be considered legitimate as they would not be related to both parents by blood. The involvement of another woman here seems inane to such a society in all cases but one, that being infertility. The idea is unless there is no other possible way to have only the two members of the marital relation be the producers of the child, the usage of a third party is not permitted. This actually aligns with why the bill being discussed has restrictions of fertility of the heterosexual parents as the integral criteria.

The Bills

The first bill was originally passed in 2016. Titled *Surrogacy (Regulation) Bill*, it was passed in the Lok Sabha 6 years ago while reinforcing archaic and unrealistic ideas of family. One such big criticism has been its prohibition of homosexual couples from commissioning surrogates. This was amended and passed in the Rajya Sabha in December of 2021 as the *Surrogacy (Regulation) Bill, 2020*² along with the *Assisted Reproductive Technology (Regulation) Bill, 2021*³. A select committee had been referred for the bills prior in order to suggest recommendations, which have been incorporated to the 2 bills passed in 2021. The guise both bills rally on is seeking to curb unethical practices pertaining to issues ranging from sex selection to exploitation of surrogate mothers at the hand of prospective parents and agencies.

The Surrogacy (Regulation) Bill, 2020, proposes to regulate surrogacy in India by establishing a National Surrogacy Board. The Assisted Reproductive Technology (Regulation) Bill, 2021, aims to regulate and supervise assisted reproductive technology clinics and assisted reproductive technology banks, and prevent misuse.

¹ Promise Institute. (2021, October 9). India's New Surrogacy Bill: A Hurdle to Women's Reproductive Autonomy and LGBT+ Rights. Voices of Promise.

² Surrogacy (Regulation) Bill, 2020. (hereafter 'Surrogacy Bill').

³ Assisted Reproductive Technology (Regulation) Bill, 2021. (hereafter 'ART Bill').

Though similar legislations, the Surrogacy Bill has been passed as a separate legislation primarily for protection of the rights of the surrogate mother in the process. Since practices part of the Assisted Reproductive Technology (ART) Bill do not specifically require the participation of a third party (a surrogate), several other methods of obtaining a pregnancy like gamete (sperm or oocyte) donation, in-vitro fertilization and gestational surrogacy are included in the ART Bill.

Both bills prohibit commercial surrogacy, but allow altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy.⁴ Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage. This builds a narrative wherein the surrogate has no actual benefit from the agonizing process that is giving birth.

They also put forth a regulation on surrogacy which restricts the purposes for which surrogacy is permitted. As per the Bill, surrogacy is permitted when it is:

- (i) for intending couples who suffer from proven infertility
- (ii) altruistic
- (iii) not for commercial purposes
- (iv) not for producing children for sale, prostitution or other forms of exploitation
- (v) for any condition or disease specified through regulations

Further, the first point of “intending couples”⁵ has another layer of scrutiny. The intending couple should have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority. This is the basis which explains why these bills are not inclusive of same-sex couples.

Violations upon Violations

As per the Surrogacy bills, there are strict restrictions imposed on the parties who are involved in the surrogacy. This is where it gets complicated for the queer community.

For the couple looking for a surrogate, the intending couple that is, a certificate of essentiality

⁴ Shastri, J. S. (2022, January 18). The Surrogacy (Regulation) Bill, 2019. PRS Legislative Research

⁵ Promise Institute. (2021, October 9). India’s New Surrogacy Bill: A Hurdle to Women’s Reproductive Autonomy and LGBT+ Rights. Voices of Promise.

is to be issued along with one of eligibility. The certificate of essentiality will be issued upon fulfilment of the following conditions:

- (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board
- (ii) an order of parentage and custody of the surrogate child passed by a Magistrate's court
- (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate

The certificate of eligibility to the intending couple is issued upon fulfilment of the following conditions:

- (i) the couple being Indian citizens and married for at least five years
- (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband)
- (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness
- (iv) other conditions that may be specified by regulations

Let's start with the essentiality. Same sex couples are not capable of having a child on their own, that is the basis due to which they seek to adopt a child or use surrogates/donors who help them.⁶ These bills put a major restriction on their right to have a child as the only acceptable reasoning according to them is one or both parties being infertile. It can be inferred from this that only opposite-sex couples are even in the scope of seeking surrogacy. But this is an indirect inference, and if that is not obvious enough then take a look at the points for the certificate of eligibility. Point (ii) is blatantly exclusionist to same-sex couples.⁷ It gives very clear-cut requirements of the parents to be, one must be a man and the other his wife. For a country like India which is yet to legalise same-sex marriage, this feels like an unnecessarily specific and targeted neglect of the rights of the LGBTQIA+ community.

The idea is this bill allows surrogacy or other forms of assisted reproductive technologies only

⁶ Parthak, S. (2021, December 12). The Discrimination against LGBTQ+ Community Continues. Law Journal India

⁷ Sharma, N. (2021, December 9). How the Surrogacy Bills shall regulate the Surrogacy Market in India. India Today

to cisgendered-heterosexual couples. This blindly discriminates against not only the community but also against single parents. An estimate suggests that about 20% of all surrogacy cases in India comprise single men and women. Dr. Anant Bhan is a researcher in Global Health and Bioethics, he notes that *"This is a non-progressive step and needs to be examined and addressed. Rights to access this technology should be available to them too."*⁸ The surrogacy law throws up a discriminatory hurdle for same-sex couples seeking parenthood through surrogacy. The requirement for a "close relative" as the surrogate clashes with the reality of LGBTQ+ family structures. Societal acceptance of same-sex relationships, while gradually improving, still lags behind. The prevalent attitude, *"I don't mind them being gay, but I wouldn't want my child to be gay,"* exemplifies these lingering prejudices. For same-sex couples, this translates to a vanishingly small pool of potential surrogates within their immediate family network.

This law's insistence on a close relative disproportionately restricts a group already facing societal disapproval. It blatantly discriminates based solely on sexual orientation. The law fails to acknowledge the diversity of LGBTQ+ families and reinforces negative social attitudes towards them. Imagine a loving, committed same-sex couple denied the opportunity to form a family through surrogacy simply because they lack a willing family member as a surrogate. This scenario highlights the law's fundamental flaw: it denies same-sex couples the chance to be parents based on factors *unrelated* to their capability to provide a nurturing environment for a child.

By creating this hurdle, the law contradicts the very spirit of social justice and equality enshrined in the Indian Constitution. These bills raise serious concerns about violations of fundamental rights guaranteed by the Indian Constitution for LGBTQ+ individuals. *Article 21(1)*⁹, which enshrines the right to personal liberty, is arguably infringed upon. The right to personal liberty encompasses the right to make crucial life decisions, including forming a family and having children. By excluding same-sex couples from surrogacy, the law restricts their ability to exercise this fundamental right.

To add kerosene to the fire, the current legislation arguably contradicts *Article 14(1)* – Equality

⁸ Parthak, S. (2021, December 12). The Discrimination against LGBTQ+ Community Continues. Law Journal India

⁹Article 21, Constitution of India.

before law and *Article 14(2)* – Prohibition of discrimination¹⁰. These articles guarantee equal protection under the law and prohibit discrimination based on factors like sex, religion, or caste. Denying access to surrogacy solely on the basis of sexual orientation creates an unequal playing field compared to heterosexual couples. This disparate treatment raises questions about the law's adherence to these foundational principles of equality. Similarly, *Article 15(1)*¹¹ prohibits discrimination on grounds such as sex, race, place of birth, or caste. While sexual orientation is not explicitly mentioned, a strong argument can be made that excluding same-sex couples from surrogacy falls under the ambit of discriminatory practices.

The passage of these bills by both houses of Parliament highlights a concerning disconnect between the promises enshrined in the Constitution and the lived realities of LGBTQ+ citizens. It signifies a continuation of societal norms that perpetuate discrimination rather than embracing the vision of an inclusive and equitable society as envisioned by Dr. B.R. Ambedkar. By passing this bill by not just one Sabha but both, we now see how those in power have completely forgotten the fundamental rights that the Constitution of India guarantees to these citizens and have chosen to continue to perpetuate societal norms that might cause them harm.

Conclusion; Society Follows

In a society, the influence of law and its ability to change the overall public opinion is immense. Within a snap of one judgement, drastic changes to societal viewpoints have been made. Take the *Triple Talaq case*¹², where the legal change brought in a domino effect which resulted in people's mindset about the practice changing. That is the power of law. So, where the law goes, society follows.

With this bill, we take the law in the direction of saying that only heterosexual couples can become “parents.” In the fight for Same-Sex marriage rights, well known advocate Menaka Guruswamy has explained how in our country, the only way to get social sanction for one's relationship is through marriage and then having kids. Therefore, by legally depriving queer people from having kids through the very few options they have, we increase the stigma for LGBTQIA+ persons in our society.

¹⁰ Article 14, Constitution of India.

¹¹ Article 15, Constitution of India.

¹² *Shayara Bano v. Union of India and Ors.*, AIR 2017 SC 4609

Professor Satendra Singh from University College of Medical Sciences, Delhi, contended¹³ that this law contradicts the spirit of the Supreme Court's 2018 landmark verdict in the *Navtej Johar v. Union of India*¹⁴ case, the judgement which decriminalised all consensual sex among adults, including homosexual sex. And this is true. The issue here is not just that it is exclusionary to queer couples, but that this exclusion is completely and utterly unnecessary to the premise of the bill.

Harish Iyer, a queer rights activist from Queer India, said that this was nothing but prejudice in the form of a bill. *"If the sole intention had been protecting the rights of surrogate mothers and to steer against making wombs-on-rent a norm, there would have been a plan to rehabilitate and integrate surrogate moms into our societal framework. There is no plan whatsoever in this direction. Instead, we get a bill that almost brings surrogacy to a standstill,"*¹⁵ he noted. While the Bill is a definite improvement upon its predecessors, it still fails to uphold women's rights to livelihood and to reproductive autonomy and violates the right of LGBTQ+ couples to both equality and parenthood.

The main purpose of the bill is not what is being addressed. Instead, we have a group of criteria for the parties which limits the scope of the procedure to a very privileged group¹⁶ that is not always dependant on these procedures. This exclusion is thus unnecessary. It feels as though the additions that dismiss queer couples are needless and baseless points added with no aim other than to rob same-sex couples from having kids. It is as though our parliament wants to make it harder for the community than it already is to live a peaceful, happy life with a family of their own. It is as though they want to take a step back from all the progress that was made over the past few years to ensure that our society jumps back into its deep-rooted bigotry with the community instead of evolving and developing into a more inclusive, supporting and harmonious society. The passing of this Bill into an act under the Surrogacy (Regulation) Act of 2021¹⁷ is thus one of the biggest missteps in the implementation of the equality principle in India. And it must be amended, and evolved.

¹³ Parthak, S. (2021, December 12). The Discrimination against LGBTQ+ Community Continues. Law Journal India

¹⁴ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321

¹⁵ Sharma, N. (2021, December 9). How the Surrogacy Bills shall regulate the Surrogacy Market in India. India Today

¹⁶ Promise Institute. (2021, October 9). India's New Surrogacy Bill: A Hurdle to Women's Reproductive Autonomy and LGBT+ Rights. Voices of Promise.

¹⁷ Act No. 47 of 2021.

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