



## WOMBS AND WALLS: THE RIGHT TO PRIVACY IN SURROGACY AGREEMENTS

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### **ABSTRACT**

*Surrogacy is a remarkable medical and social development that has transformed the meaning of parenthood, enabling individuals and couples to fulfil their dreams of having children. However, it brings about a few intricate legal, ethical, and social challenges, among which are significant privacy concerns. The Right to privacy, enshrined as a fundamental right under Indian law, plays a pivotal role in surrogacy agreements. Surrogacy is more than just medical procedures; it is an intimate collaboration between the intended parents and the surrogate. Sharing sensitive personal information, ranging from health records to family relations, can expose the parties to potential privacy invasions. This raises several questions: How much information must be disclosed? Who has the right to access it? Where should one draw the line between transparency and protecting individual boundaries? In this article, the walls deal with the construct of surrogacy agreements while the wombs involve the balance between ensuring a fair and ethical process where the privacy of all participants is safeguarded. The aim is to determine how the legal frameworks and societal expectations respect the fundamental right to privacy while fostering trust and understanding.*

**Keywords:** Surrogacy, Privacy, Contract, Confidentiality, Autonomy.

### **THE RIGHT TO PRIVACY: A CORNERSTONE OF DIGNITY**

Surrogacy involves a woman known as a surrogate mother carrying and giving birth to a child for another person or a couple referred to as the intended parents. This process requires intimate, personal, medical, and financial information to be shared between the parties, making privacy a critical concern. The recognition of privacy as a fundamental right in the landmark

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case Justice K.S. Puttaswamy V. Union Of India <sup>1</sup>case reaffirmed its role as intrinsic to life, liberty and human dignity, furthermore in the Case of B.K. Parthasarathi V. Government of A.P. & Ors<sup>2</sup> It was held that the right to decide for family and marriage is an aspect of the right of privacy under Article 21, this extends to the decision regarding surrogacy agreements.

### **PRIVACY IN SURROGACY ENCOMPASSES**

1. Anonymity – the right of the surrogate mother and the intending parents to keep their identity confidential if desired
2. Confidentiality – protection of sensitive personal and medical information shared during the arrangement
3. Autonomy – the rights of all parties to make informed private choices without third-party interference.

### **PRIVACY CONCERNS FOR EACH PARTY**

#### For Surrogate Mothers

Surrogate mothers face unique challenges that make privacy and confidentiality paramount to their well-being and dignity. The surrogacy process involves stringent medical screenings and fertility treatments wherein the surrogate needs to disclose detailed medical and genetic information. This data, if not properly safeguarded, can lead to breaches that compromise dignity and autonomy. Protecting this confidential, sensitive information is essential to preserving their trust and ensuring they are treated with the utmost respect. Additionally, many surrogate mothers choose to stay anonymous, often due to societal stigma and fear of discrimination or unwanted public attention in conservative communities. Safeguarding their identity protects them from these risks and upholds their right to privacy. Beyond these aspects, a surrogate mother's emotional and physical boundaries are equally important. She must have the authority over the decision regarding the extent of contact between her and the intending parents, which helps maintain her autonomy. Together, all these measures are fundamental in creating a respectful, secure and equitable environment for all surrogate mothers.

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<sup>1</sup> K.S. Puttaswamy V. Union of India [2018] 1 SCC 809

<sup>2</sup> B.K. Parthasarathi V. Government of A.P. & Ors [1999] SCC AP 514

### For Intending Parents

Surrogacy often carries profound personal, medical and social implications, making privacy and sensitivity critical for intending parents. Many choose surrogacy due to medical or social reasons, yet societal judgment can compel them to maintain anonymity to avoid bias or discrimination. Preserving their privacy shields them from unwanted prejudice but also safeguards their dignity and choices. This journey is a deeply personal one that requires the sharing of sensitive financial and medical information to help complete the procedure, the breach of which can cause a lot of damage. Furthermore, the parents face a tough decision about how much of their decision to share with people – extended family, close relatives or even the child born through it. The right to keep these decisions private is a fundamental right of their autonomy and deserves utmost respect as it is intensely personal. To deal with these factors, compassion, understanding, and thoughtful support must be used to help everyone feel protected.

### For the Child

A surrogate-borne child has a natural curiosity and, in certain cases, a legal right to know their biological roots: biological parents and surrogates' identity. This, however, can clash with the privacy rights of the surrogate, who may not want to be identified with or with the intending parent who wanted the agreement to be kept confidential. Access to the medical histories of the surrogate, when it is regarding the child's health, can affect the anonymity clause. This can compromise the ability to make informed health decisions in the future.

## **PRIVACY CHALLENGES IN SURROGACY**

Privacy concerns in surrogacy are multifaceted, involving every stage of the process and impacting all the parties involved. One of the most significant challenges lies in differentiating between anonymity and transparency. Many surrogate mothers prefer to remain anonymous due to the stigma and unwanted attention, while intending parents often need detailed medical histories and personal information to ensure the health and safety of the future child. Striking a balance between protecting the identity of the surrogate and providing parents with essential health transparency requires a detailed framework that respects the rights and needs of both parties. Alongside this, the process requires highly sensitive data, including medical records, financial transactions, and legal agreements. Without proper data protection measures, this information becomes vulnerable to breach, exposing the surrogates and the parents to risks like

identity theft, unauthorized disclosure, or use of personal details. The use of effective data security systems is critical to maintaining trust and safeguarding the degree of everyone involved. Additionally, societal stigma causes a significant challenge, particularly in conservative communities where the process is misunderstood. Societal stigma is a significant challenge, as surrogacy is often misunderstood. Even the children born through surrogacy face privacy issues. While these children have a right to access information about genetic and biological lineage, including medical history and privacy laws, carefully balancing is right with the need to protect their identity. These challenges revolve around the importance of thoughtful legal frameworks, ethical practices and respect for the decisions of all parties involved.

### **ETHICAL DIMENSIONS OF PRIVACY**

The ethical dimensions of privacy in surrogacy are deeply intertwined with issues of exploitation, inclusivity, autonomy and ensuring fairness to all parties involved. Altruistic surrogacy is often seen to prevent the commercialization of childbearing, causing an inherent risk of exploitation. Indian laws permit only close relatives to act as the surrogate; this relies heavily on familial and emotional bonds, which can pressure women into surrogacy out of obligation rather than genuine choice<sup>3</sup>. This raises significant ethical concerns as true voluntariness and informed consent is essential to respect autonomy and dignity. Furthermore, the exclusion of single parents, LGBTQ people and unmarried couples from surrogacy agreements causes the trouble of lack of inclusivity. This exclusion infringes on their reproductive autonomy, denying them the right to pursue parenthood. These restrictions affect the people on a larger scale by infringing their principles of equality and non-discrimination, underscoring the need for a more inclusive framework that respects diverse family structures and individual rights. The landmark case of *Suchita Srivastava v. Chandigarh Administration* (2009<sup>4</sup>) recognized women's rights to make reproductive choices as a dimension of personal liberty under Article 21 of the Indian constitution, further highlighting the importance of autonomy. This right should extend not only to the surrogate mother but also to all individuals seeking to form families, ensuring that privacy and ethical principles are upheld in every surrogacy agreement.

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<sup>3</sup> PRS Legislative Research, "Legislative Brief The Surrogacy (Regulation) Bill, 2016" (*PRS.org*, June 9, 2017) <<https://prsindia.org/billtrack/prs-products/prs-legislative-brief-2709>> accessed December 17, 2024

<sup>4</sup> *Suchita Srivastava V. Chandigarh Administration* [2009] 9 SCC 1

## **RECOMMENDATION FOR STRENGTHENING PRIVACY**

1. Detailed contracts – They are essential to safeguard privacy through enforceable confidentiality clauses. These clauses must obligate all parties to protect personal and medical information. The scope of confidentiality should be clearly stated, with penalties for breaches. Contracts must also address the role of third-party entities like fertility clinics or legal advisors to maintain the integrity of the process.
2. Strengthening Data Security – This is crucial to protect sensitive medical and financial information. The data should be shared using encrypted platforms like a secure email address, advanced cloud storage system and protected databases. Access should be granted using a protected system with regular audits of access. Furthermore, they should comply with the relevant privacy regulations like GDPR and HIPAA to ensure lawful and secure information management.
3. Legal awareness – This is essential to ensure all parties understand their rights and responsibilities. The surrogate mothers and intending parents must be informed about disclosure regulations. An informed consent process with a well-framed contract ensures a secure and transparent agreement.
4. Support system – These play an important role pre and post the process. Counselling can address the emotional challenges the parties face from unintentional exposure to information and societal pressure and judgement. Furthermore, surrogacy agencies should mediate communication between parties regarding their health as well as ensure the security of sensitive information. This fosters long-term confidentiality and trust.

## **ROLE OF TECHNOLOGY**

Technology has its pros and cons. However, it plays a vital role in protecting privacy in surrogacy. Encrypted messaging and secure file-sharing platforms make sensitive conversations safer, while robust security measures help clinics and agencies protect personal data. Additionally, social media can be a powerful tool for spreading awareness about privacy rights. However, one must ensure no personal information is exposed.<sup>5</sup>

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<sup>5</sup> University of Delaware, “Managing Data Confidentiality” (2020)  
<<https://www1.udel.edu/security/data/confidentiality.html>> accessed December 21, 2024

## **OTHER FUNDAMENTAL RIGHTS VIOLATIONS**

### **1. Right to Equality**

The surrogacy act only allows married heterosexual couples to access surrogacy while excluding homosexuals, single parents and live-in couples. This classification is discriminatory and fails the test of reasonable classification under Article 14. The denying of individuals the ability to choose surrogacy infringes on their autonomy to make decisions about childbirth and parenthood, thus affecting the Right to Life and Personal Liberty (Article 21)

### **2. Freedom of Trade and Profession**

The ban on commercial surrogacy has affected the livelihood of women who may willingly choose surrogacy as a legitimate profession. Furthermore, the ban had a huge impact on fertility clinics service providers who specialised in it although this was done to prevent exploitation, it restricts the right to practice their trade and profession. This prohibition lacks a clear, rational nexus, a framework to ensure ethical practice should have been implemented rather than a complete ban.<sup>6</sup>

The state cannot impose unreasonable restrictions on a woman's right to decide whether to be a surrogate mother, as it infringes on her fundamental right to privacy, bodily autonomy and professional freedom. A woman's body is her own, and it is her right to make independent decisions regarding reproductive choices without arbitrary government interference. In a democratic society, individual rights are the cornerstone of freedom; it is the role of the state to not take away the personal choice of citizens.<sup>7</sup>

## **THE WAY FORWARD**

There must be a balance between protecting individual rights and preventing exploitation while upholding the principles of privacy, equality, and freedom to trade and profession enshrined in the Constitution of India. The state should acknowledge that individuals, whether married, single or hetero/homosexual, have the right to make informed reproductive decisions without undue interference. The law must be more inclusive to ensure equal access to all for a just and

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<sup>6</sup> Shetty P, "India's Unregulated Surrogacy Industry" (2012) 380 The Lancet 1633

<sup>7</sup> Yeseswini H and Rohith S, "Fundamental Rights and The Surrogacy (Regulation) Act, 2021: A Constitutional Scrutiny" (The Law Reporter, February 12, 2023) <<https://thelawreporter.in/2023/02/12/fundamental-rights-and-the-surrogacy-regulation-act-2021-a-const>

equitable society; it should also protect the child born through surrogacy, ensuring they can learn about their origins. Furthermore, the Indian government must keep laws updated, especially with the constantly evolving digital world. Collaboration at a global level is also important to ensure consistency of privacy standards in cross-border surrogacy agreements. Conducting awareness campaigns can help reduce the stigma around surrogacy, helping society embrace it while respecting individual choices.

## **CONCLUSION**

Privacy in surrogacy is a cornerstone of digital and autonomy; it requires a delicate balance between transparency, ethical considerations and the safeguarding of individual rights. Surrogacy is a viable solution for parenthood. However, it presents unique challenges for the surrogate mother, intending parent and child born. The integration of a robust legal framework, including enforceable confidentiality clauses and secure data management, is essential to protect sensitive – personal, medical and financial information. Addressing the societal stigma around surrogacy and the presence of a support system and informed consent process can strengthen trust among all parties and is crucial to ensure equality and respect for the diverse family structures. To conclude, a comprehensive and inclusive legal approach coupled with global collaboration can uphold the principles of trust, dignity and mutual understanding in surrogacy agreements.

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