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REPRODUCTIVE RIGHTS IN INDIA: A CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021

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INTRODUCTION

Through the use of assisted reproductive technologies (ART), people who are infertile can now conceive, revolutionizing the idea of motherhood[1]. Surrogacy has become a prominent reproductive option among these technologies, enabling an intending parent or couple to bear a genetically linked child via a surrogate mother[2]. Many infertile people's dreams have been realized thanks to surrogacy, but it has also raised difficult legal, moral, constitutional, and human rights issues[3]. Surrogacy has become one of the most contentious topics in modern legal discourse due to the conflicting interests of reproductive autonomy, bodily integrity, protection against exploitation, child welfare, and the commercialization of women's reproductive labor[4].

Early in the twenty-first century, India emerged as a global center for commercial surrogacy[5] because of its reasonably priced medical facilities, cutting-edge fertility procedures, and relatively lax regulations[6]. Due to the lack of a comprehensive legal framework, commercial surrogacy flourished[7] and attracted intended parents from both domestic and foreign countries. However, because to the industry's quick growth, surrogate mothers were subjected to abuse[8][9],

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1 Viral Dave & Bhavana Kadu, *Surrogacy (Regulation) Act 2021 and the Right to Procreation in India*, 13 J. Pharm. Negative Results (Special Issue 5) 1960, 1960–61 (2022).
2 Narayan et al., supra note 1.
3 Mohammed Zaheeruddin et al., *Legal Framework of Surrogacy in India*, 33 Perinatal J. 69, 69–71 (2025).
4 Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 Asian Bioethics Rev. 5, 5–8 (2023).
5 Kashyap & Tripathi, supra note 4.
6 Pritha Sen, *Surrogacy Laws in India Through the Years*, 2 Indian J. Integrated Rsch. L. (2022).

7 Narayan et al., supra note 1.
8 Narayan et al., supra note 1.
9 Zaheeruddin et al., supra note 3.

forced contracts, insufficient medical care, and informed consent violations. These worries, along with disagreements over citizenship, parentage, and child welfare, ultimately led Parliament to pass the Assisted Reproductive Technology (Regulation) Act, 2021[10] and the Surrogacy (Regulation) Act, 2021[11], which replaced an unregulated commercial model with a strictly regulated altruistic regime.[12]

In modern times, it is generally acknowledged that reproductive rights are a crucial part of globally recognized human rights[13]. They include access to reproductive healthcare and assisted reproductive technology, as well as an individual's ability to make independent decisions about reproduction free from coercion, discrimination, or violence. International human rights documents like the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social, and Cultural Rights, and the 1989 Convention on the Rights of the Child all acknowledge the value of family life, children's protection, and their dignity regardless of their birth circumstances[14].

The World Health Organization (WHO) and UNICEF, among other organizations, have emphasized that surrogacy needs to be controlled in a way that protects both surrogate mothers and children born via such arrangements[15][16]. These documents state that reproductive autonomy is an essential component of human dignity and personal liberty, even though they do not specifically recognize a right to surrogacy[17].

Article 21 of the Indian Constitution is the main source of constitutional protection for reproductive rights[18]. The scope of the right to life and personal liberty has gradually been

[10] Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021.
[11] Surrogacy (Regulation) Act, No. 47 of 2021.

[12] Viral Dave & Bhavana Kadu, *Surrogacy (Regulation) Act 2021 and the Right to Procreation in India*, 13 J. Pharm. Negative Results (Special Issue 5) 1960 (2022); Gaurang Narayan et al., *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?*, 15 Cureus e37864 (2023).

[13] Universal Declaration of Human Rights art. 16 (1948); International Covenant on Civil and Political Rights art. 23 (1966); International Covenant on Economic, Social and Cultural Rights art. 10 (1966).
[14] Convention on the Rights of the Child arts. 5–9, Nov. 20, 1989, 1577 U.N.T.S. 3.

[15] Mohammed Zaheeruddin et al., supra note 3.

[16] Mohammed Zaheeruddin et al., supra note 3, at 71–72.
[17] World Health Organization, Current Practices and Controversies in Assisted Reproduction (2002).
[18] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

broadened by judicial interpretation to encompass decisional autonomy in issues pertaining to marriage, procreation, privacy, and physical integrity[19]. The Supreme Court acknowledged that a woman's reproductive choice is an integral part of her personal liberty under Article 21 in Suchita Srivastava v. Chandigarh Administration[20]. In Justice K.S. Puttaswamy (Retd.) v. Union of India, the Court upheld this constitutional basis by recognizing reproductive choices as a crucial component of decisional autonomy and declaring privacy to be a basic right.[21]

Navtej Singh Johar v. Union of India and X v. Principal Secretary, Health & Family Welfare Department later confirmed that traditional ideas of marriage and family cannot limit constitutional guarantees pertaining to equality, dignity, and reproductive choice[22]. As a result, the Surrogacy (Regulation) Act, 2021 and other reproductive laws must be evaluated in light of the constitutional framework provided by Articles 14, 15, and 21.

In India, the legal structure governing surrogacy has developed from a nearly total regulatory void to a thorough legislative framework. In 2002, the Indian Council of Medical Research (ICMR) Guidelines governing Assisted Reproductive Technology facilities effectively gave commercial surrogacy legality[23]. Although these regulations helped India's fertility sector expand, their non-statutory nature led to a great deal of legal ambiguity and little protection for surrogate mothers. The critical need for legislative action was brought to light by reports of exploitation[24][25], inadequate postpartum care, and unequal bargaining power between surrogate mothers, clinics, and middlemen[26].

Legal complications pertaining to paternity, nationality, and citizenship of children born through overseas surrogacy arrangements were further revealed by court rulings like Baby

[19] K.S. Puttaswamy, (2017) 10 S.C.C. 1, ¶¶ 297–298.

[20] Suchita Srivastava v. Chandigarh Administration, (2009) 9 S.C.C. 1.

[21] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.

[22] Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1; X v. Principal Sec'y, Health & Fam. Welfare Dep't, Gov't of NCT of Delhi, (2023) 9 S.C.C. 433.

[23] Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005).

[24] Sen, supra note 6.

[25] Zaheeruddin et al., supra note 3.

[26] Sen, supra note 6.

Manji Yamada v. Union of India[27] and Jan Balaz v. Anand Municipality[28]. These events increased calls for comprehensive legislation and highlighted the shortcomings of the current regulatory structure. In response to these worries, the Law Commission of India suggested in its 228th Report (2009) that commercial surrogacy be outlawed but strictly regulated altruistic surrogacy be allowed with sufficient protections for surrogate mothers and their offspring[29]. The Surrogacy (Regulation) Act, 2021 was largely influenced by these suggestions.

In light of this, the present article critically evaluates whether the Surrogacy (Regulation) Act, 2021 effectively strikes a balance between the constitutional guarantees of equality, dignity, privacy, and reproductive autonomy and the justifiable goal of preventing exploitation. It contends that while the Act is a major step in the direction of regulating assisted reproduction, its stringent eligibility requirements create serious constitutional issues with regard to access to reproductive rights in modern India.

THE LEGISLATIVE FRAMEWORK: THE SURROGACY (REGULATION) ACT, 2021

India's stance on assisted reproduction underwent a dramatic change on January 25, 2022, when the Surrogacy (Regulation) Act, 2021 went into effect[30]. It forbade commercial surrogacy and only allowed altruistic surrogacy under strict regulations[31]. It works in tandem with the Assisted Reproductive Technology (Regulation) Act, 2021[32], which regulates gamete banks, ART facilities, and assisted reproductive treatments. When taken as a whole, these laws create India's first thorough legislative framework governing assisted reproduction and surrogacy[33][34]. According to the Statement of Objects and Reasons, the main goals of the Act are to protect

[27] Baby Manji Yamada v. Union of India, (2008) 13 S.C.C. 518.
[28] Jan Balaz v. Anand Municipality, Special Civil Application No. 3020 of 2008 (Guj. H.C.).

[29] Law Comm'n of India, Report No. 228: Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (2009).

[30] The Surrogacy (Regulation) Act, No. 47 of 2021 (India); Notification S.O. 472(E), Gazette of India (Jan. 25, 2022).

[31] The Surrogacy (Regulation) Act, 2021, §§ 2(b), 2(g), 4.
[32] Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021.
[33] Zaheeruddin et al., supra note 3, 70–72 (2025).
[34] Kashyap & Tripathi, supra note 4, 6–8 (2023).

intended parents and surrogate children, prevent surrogate women from being exploited, and commercialize reproduction[35].

The Act makes commercial surrogacy illegal[36] while allowing only altruistic surrogacy[37], in contrast to the previous system based on non-binding administrative guidelines. Altruistic surrogacy is only permitted to be reimbursed for medical costs and prescribed insurance coverage under Section 2(1)(b); any additional financial consideration is forbidden under Section 2(1)(g). In order to guarantee ethical compliance and responsibility, the Act also creates National and State Surrogacy Boards, Appropriate Authorities, mandatory surrogacy clinic registration[38], and regulatory supervision systems[39].

The Act's stringent eligibility requirements are a key component. The majority of Indian heterosexual married couples[40] with confirmed infertility are eligible for surrogacy. Both must receive statutory Certificates of Essentiality and Eligibility[41], and the wife must be between the ages of 23 and 50[42] and the husband must be between the ages of 26 and 55. Furthermore, a "intending woman" is only qualified if she is a widow or divorced woman between the ages of 35 and 45[4344]. The law does not apply to same-sex couples, live-in partners, single men, or unmarried women who have never been married[4546].

Additionally, the Act establishes stringent requirements for surrogate mothers. A surrogate can only serve as a surrogate once in her lifetime[47] and must be an Indian citizen, a married woman[48] with at least one biological kid, between the ages of 25 and 35, and in good physical

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[35] The Surrogacy (Regulation) Act, No. 47 of 2021, Statement of Objects and Reasons.

[36] The Surrogacy (Regulation) Act, 2021, §§ 2(b), 2(g).
[37] Surrogacy Act § 2(b).
[38] Assisted Reproductive Technology (Regulation) Act, 2021, §§ 15–26.
[39] The Surrogacy (Regulation) Act, 2021, §§ 14–24.
[40] The Surrogacy (Regulation) Act, 2021, §§ 2(r), 2(s), 4.
[41] § 4(ii).
[42] § 4(c).
[43] Surrogacy Act § 2(s).
[44] Kashyap & Tripathi, supra note 4, at 10–11.

[45] Id. §§ 2(r), 2(s), 4.

[46] Kashyap & Tripathi, supra note 4, at 12–15.
[47] § 4(iii)(b).
[48] Surrogacy Act § 4.

and mental health. She is entitled to insurance coverage for pregnancy-related issues[49] and is not allowed to contribute her own gametes to the pregnancy[50]. These protections aim to stop recurring exploitation and guarantee that surrogacy stays a medical practice rather than a business one.[51]

Furthermore, the law aims to balance the rights of all parties involved. Throughout her pregnancy, a surrogate mother maintains her bodily autonomy[52], and no pregnancy can be terminated without her informed written agreement and in accordance with the Medical Termination of Pregnancy Act of 1971. She is entitled to insurance coverage and reimbursement for medical costs. Concurrently, the child is considered the intended couple's biological child for all legal purposes, including inheritance, and they become legal parents as soon as the child is born. Concerns expressed in previous surrogacy conflicts are also addressed by the Act, which forbids abandoning a child born through surrogacy on the basis of a handicap or congenital deformity[53]. Commercial surrogacy, the sale of gametes or embryos, the exploitation of surrogate mothers, the promotion of commercial surrogacy services, and the operation of unregistered clinics are all crimes that carry jail time and penalties.[54]

The Assisted Reproductive Technology (Regulation) Act, 2021[55], which governs gamete donation, ART banks, fertility clinics, and ethical requirements for assisted reproductive operations, must be studied in conjunction with the Surrogacy Act. The ART Act complements the Surrogacy Act in establishing a thorough regulatory framework by requiring clinic registration, donor record preservation[56], secrecy, and professional accountability[57]. However,

[49] § 4(iii)(a).
[50] § 4(iii)(b).
[51] Narayan et al., supra note 1.
[52] Suchita Srivastava v. Chandigarh Administration, (2009) 9 S.C.C. 1.

[53] The Surrogacy (Regulation) Act, 2021, §§ 7–8; The Medical Termination of Pregnancy Act, No. 34 of 1971 (as amended in 2021).

[54] The Surrogacy (Regulation) Act, 2021, §§ 38–47.

[55] Assisted Reproductive Technology (Regulation) Act, 2021.
[56] ART Act §§ 20–29.
[57] ART Act §§ 33–35.

observers have noted that overlapping clauses under both legislative could lead to implementation issues and procedural complications[58].[59]

The Act's stringent eligibility requirements have drawn criticism from a constitutional standpoint. Legislative classifications[60] must have an understandable distinction and a logical connection to the goal being pursued, according to Article 14 of the Constitution[61]. The exclusion of unmarried people, single men, live-in partners, LGBTQIA+ individuals, and same-sex couples raises questions[6263] about substantive equality, even though preventing exploitation is a valid goal. Critics contend that such bans are arbitrary and excessive because infertility is a medical problem unrelated to marital status or sexual orientation[64].

Article 14 forbids arbitrary State action, as the Supreme Court has repeatedly ruled. While Navtej Singh Johar v. Union[65] of India upheld that constitutional rights cannot be denied simply because a person's identity deviates from conventional social norms, Shayara Bano v. Union of India[66] recognized obvious arbitrariness as a basis for dismissing laws. In light of this constitutional context, the Surrogacy (Regulation) Act, 2021 clearly advances the justifiable goal of preventing exploitation; however, its stringent eligibility requirements are still subject to constitutional scrutiny because they may restrict reproductive autonomy in a way that is incompatible with modern ideals of equality and dignity.

REPRODUCTIVE AUTONOMY UNDER ARTICLE 21: THE CONSTITUTIONAL DEBATE

[58] Zaheeruddin et al., supra note 3.

[59] Kashyap & Tripathi, supra note 4.
[60] Budhan Choudhry v. State of Bihar, A.I.R. 1955 S.C. 191.
[61] E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3.
[62] Kashyap & Tripathi, supra note 4.
[63] Narayan et al., supra note 1.

[64] Kashyap & Tripathi, supra note 4.

[65] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[66] Shayara Bano v. Union of India, (2017) 9 S.C.C. 1.

As it governs one of the most intimate moments of human life—the choice to become a parent—the Surrogacy (Regulation) Act, 2021 has sparked intense constitutional discussion[67]. In order to protect public health and prevent exploitation, the State certainly has the right to regulate assisted reproductive technologies; nevertheless, any regulations must be in line with the fundamental guarantees of equality, liberty, dignity, and privacy.[68]

Article 21, which protects the right to life and personal liberty, is the main source of the constitutional foundation for reproductive autonomy.[69] The Supreme Court has acknowledged that decisional autonomy with regard to marriage, family, and reproduction constitutes a crucial component of individual liberty through broad judicial interpretation.[70] The Court recognized reproductive autonomy as a fundamental constitutional right in Suchita Srivastava v. Chandigarh Administration by ruling that reproductive choice encompasses both the freedom to reproduce and the right to refrain from reproduction[71]. In Justice K.S. Puttaswamy (Retd.) v. Union of India, the nine-judge bench recognized reproductive choices as an essential part of decisional privacy and proclaimed privacy to be a basic right, greatly strengthening this notion[72]. Furthermore, the Supreme Court ruled in X v. Principal Secretary, Health & Family Welfare Department that unmarried women have equal reproductive autonomy under Article 21, reaffirming that constitutional protection cannot be limited based only on marital status[73]. When taken as a whole, these rulings imply that although the State may control surrogacy, any limitations must meet the constitutional requirements of necessity, proportionality, and legality[74].

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[67] Kashyap & Tripathi, supra note 4, 8–11 (2023).

[68] Zaheeruddin et al., supra note 3, 70–73 (2025).

[69] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

[70] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1, ¶¶ 297–298.

[71] Suchita Srivastava v. Chandigarh Administration, (2009) 9 S.C.C. 1.

[72] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.

[73] X v. Principal Sec'y, Health & Fam. Welfare Dep't, Gov't of NCT of Delhi, (2023) 9 S.C.C. 433.

[74] Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 S.C.C. 353.

The Act has been criticized for adopting an exclusive concept of parenthood[75], despite its welfare-oriented goals. It limits access to surrogacy by prohibiting same-sex couples, single men, live-in partners, LGBTQIA+ people, and unmarried people (except from widows and divorcees)[7677]. These exclusions, according to critics, uphold a heteronormative conception of family that is at odds with modern constitutional law[78]. The Supreme Court rejected social morality as a legitimate basis for denying constitutional rights in Navtej Singh Johar v. Union of India, affirming that constitutional morality demands equal respect for the autonomy and dignity of LGBTQIA+ people[79].[80] Similarly, the Court acknowledged in Deepika Singh v. Central Administrative Tribunal that the notion of family embraces a variety of familial connections that are worthy of constitutional protection and goes beyond conventional heterosexual marriage[81]. The claim that reproductive rights shouldn't be restricted based just on sexual orientation or marital status is strengthened by these rulings.

The Act's proponents argue that the stringent eligibility requirements are required to protect children's wellbeing and stop commercial exploitation. However, detractors contend that excluding otherwise competent people could amount to indirect discrimination in violation of Articles 14[82], 15[83], and 21[84] of the Constitution as infertility is a medical problem unrelated to marital status or gender identity[85]. As a result, the Act's eligibility framework is still open to constitutional challenge.

[75] Kashyap & Tripathi, supra note 4, at 10–15.

[76] Surrogacy (Regulation) Act, 2021, §4.

[77] Kashyap & Tripathi, supra note 4.

[78] Kashyap & Tripathi, supra note 4.

[79] Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1.

[80] Indian Young Lawyers Association v. State of Kerala, (2019) 11 S.C.C. 1.

[81] Deepika Singh v. Cent. Admin. Tribunal, (2023) 13 S.C.C. 681.

[82] Budhan Choudhry v. State of Bihar, A.I.R. 1955 S.C. 191.

[83] Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1.

[84] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.

[85] Narayan et al., supra note 1.

Nonetheless, the law adds significant protections for children and surrogate mothers. It forbids recurrent surrogacy and commercial exploitation and requires insurance coverage, medical and psychological fitness evaluations, informed consent, and payment of pregnancy-related medical costs. The previous uncontrolled system, in which surrogate moms frequently lacked legal contractual rights and proper postpartum care, is greatly improved by these regulations[86]. Simultaneously, the Act strengthens child protection in accordance with international human rights standards by recognizing surrogate children as the intended parents' legitimate children and forbidding their abandonment due to disabilities or congenital abnormalities[87].

India's regulatory paradigm is far more stringent than that of several other jurisdictions, according to a comparative research. Only altruistic surrogacy is permitted in the United Kingdom under the Surrogacy Arrangements Act of 1985 and Canada under the Assisted Human Reproduction Act of 2004, however their qualifying requirements are comparatively more expansive. On the other hand, a number of US jurisdictions, including California, recognize paid gestational surrogacy through legally binding contracts and court supervision. On the other hand, nations like Germany, France, and Italy forbid surrogacy completely, while places like Ukraine have historically allowed commercial surrogacy under some restrictions. As a result, India takes a middle ground by outlawing commercial surrogacy and enforcing one of the strictest eligibility requirements in the world.

These contrasting experiences show that banning entire categories of intending parents is not always necessary to prevent exploitation. Strict regulation of fertility clinics, required counseling, informed consent, clear contractual protections, and efficient governmental oversight while honoring reproductive autonomy might all be included in a more equitable rights-based framework. Therefore, although if the Surrogacy (Regulation) Act, 2021[88] is an important piece of legislation, its long-term constitutional legality will ultimately rely on whether or not its limitations uphold the expanding fundamental concepts of equality, dignity, privacy, and freedom of reproduction.

CONCLUSION

[86] Sen, supra note 6.

[87] Zaheeruddin et al., supra note 3.

[88] The Surrogacy (Regulation) Act, No. 47 of 2021.

By replacing an unregulated commercial surrogacy regime with a structured framework intended to prevent exploitation and protect surrogate mothers, intending parents, and children, the Surrogacy (Regulation) Act, 2021 represents a significant change in India's reproductive law. The Act's stringent eligibility requirements pose significant constitutional issues with regard to equality, privacy, dignity, and reproductive autonomy, even while it reflects Parliament's justifiable goal of stopping unethical business practices[89].

Several sets of court rulings, including Suchita Srivastava v. Chandigarh Administration, Justice K.S. Puttaswamy (Retd.) v. Union of India, Navtej Singh Johar v. Union of India, Deepika Singh v. Central Administrative Tribunal, and X v. Principal Secretary, Health & Family Welfare Department, have gradually broadened the scope of reproductive choice and decisional autonomy under Articles 14 and 21[90]. This According to these developments, any limitations on the use of assisted reproductive technology must adhere to the proportionality, nondiscrimination, and substantive equality requirements of the constitution.

While the Act is a good attempt to regulate surrogacy in an ethical manner, future revisions should take a more inclusive, rights-based approach that strikes a balance between reproductive autonomy and protection against exploitation. In addition to addressing the changing realities of family and reproductive rights, this strategy would better link India's surrogacy framework with constitutional ideals of liberty, dignity, equality, and social justice.

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[89] The Surrogacy (Regulation) Act, No. 47 of 2021; Law Comm'n of India, Report No. 228: Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (2009).

[90] Suchita Srivastava v. Chandigarh Administration, (2009) 9 S.C.C. 1; Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1; Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1; Deepika Singh v. Cent. Admin. Tribunal, (2023) 13 S.C.C. 681; X v. Principal Sec'y, Health & Fam. Welfare Dep't, Gov't of NCT of Delhi, (2023) 9 S.C.C. 433.