



Reproductive Rights and Constitutional Morality: A Critical Analysis of India's Surrogacy Laws

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Abstract

The recent legislative interventions in India through the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 signify a pivotal transformation in the governance of reproductive healthcare. This paper critically examines the constitutional, ethical, and socio-legal dimensions of these enactments, particularly their impact on intended parents, surrogate mothers, and marginalized communities. While the framework ostensibly seeks to eliminate exploitative surrogacy practices and regulate clinical procedures, it paradoxically imposes rigid eligibility criteria that exclude unmarried individuals, same-sex couples, and fertile women raising substantive concerns under Articles 14, 19, and 21 of the Indian Constitution. The study also interrogates the underlying assumptions of gender, marriage, and reproductive labor embedded in the legislation, arguing that the present legal stance reinforces normative family structures at the expense of personal autonomy and equality. Drawing on judicial precedents, committee recommendations, and feminist scholarship, the analysis calls for a more inclusive and rights-based regulatory approach that acknowledges the evolving contours of parenthood and reproductive freedom in contemporary India.

Keywords: *Altruistic Surrogacy, Commercial Surrogacy, Committee Recommendation, Gender Equality*

A Study of the Surrogacy (Regulation) Act, 2021

In December 2021, the Indian Parliament took a landmark step in reforming reproductive healthcare by passing two crucial pieces of legislation: The Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021. These Acts represent a structured attempt to regulate assisted reproduction and safeguard the rights and health of all parties involved in surrogacy. Initially, the Surrogacy (Regulation) Bill was cleared by the Lok Sabha but did not pass in the Rajya Sabha. The Bill was then referred to a Parliamentary Standing Committee for further deliberation and revision. Eventually, the revised legislation was passed and received Presidential assent on December 25, 2021, thereby becoming law. The Surrogacy (Regulation) Act, 2021 establishes a regulatory framework that seeks to ban exploitative practices and ensure ethical surrogacy procedures in India. Some of its salient features include:

- **Prohibition on Commercial Surrogacy:** The Act completely bans commercial surrogacy, permitting only altruistic surrogacy undertaken without any form of monetary compensation, except for the medical expenses and insurance coverage of the surrogate mother.
- **Registration of Clinics:** All clinics offering surrogacy services are required to be registered within 60 days of the appointment of the appropriate authority. Registrations must be renewed every three years. Clinics not registered under the Act are barred from offering surrogacy-related services or employing unqualified personnel.
- **Eligibility of Intended Parents:** Only legally married Indian couples are eligible to opt for surrogacy. The female partner must be aged between 25 and 50 years, and the male between 26 and 55 years. The couple must be childless, whether by birth, adoption, or prior surrogacy. Therefore, many LGBTQ parents cannot have genetically-related children.
- **Eligibility of Surrogate Mother:** The surrogate must be an Indian woman aged between 35 and 45 years and must have been married. She is only allowed to act as a surrogate once in her lifetime.
- **Medical Certification and Consent:** Intended parents must obtain a Certificate of Essentiality or Infertility from the relevant National or State Surrogacy Board, which verifies the medical necessity of surrogacy. Additionally, the surrogate mother must be fully informed of the procedure's side effects and risks and must provide her written consent in a language she understands.
- **Regulatory Bodies:** The Act mandates the establishment of a National Assisted Reproductive Technology and Surrogacy Board as well as corresponding boards at the state and union territory levels. These bodies will monitor compliance and maintain a National Surrogacy Registry.
- **Penal Provisions:** Couples engaging in commercial surrogacy may be punished with imprisonment up to five years and a fine of up to ₹50,000. For repeat offenders, the penalty may extend to ten years of imprisonment and a fine of ₹10 lakhs.

Any individual, organization, or clinic involved in the exploitation of surrogate mothers or children born via surrogacy may face up to ten years of imprisonment and a fine reaching ₹10 lakhs.

A Study of The Assisted Reproductive Technology (Regulation) Act, 2021

The Assisted Reproductive Technology (Regulation) Act, 2021 (commonly known as the ART Act) was enacted to establish a robust legal and ethical structure for all assisted reproductive procedures in India. The Act received Presidential assent on December 18, 2021, and came into force on January 25, 2022.

Definition

Under Section 2(a), the ART Act defines “Assisted Reproductive Technology” as any procedure that handles sperm, ova, embryos, or gametes outside the body, including IVF, IUI, gamete donation, and gestational surrogacy. The Act also introduces key terms such as “ART clinic,” “ART bank,” “commissioning couple,” “donor,” and “embryo,” setting a clear framework for its application.

Comprehensive Registration and Oversight

Section 4 mandates that ART clinics and banks must register with the National ART and Surrogacy Registry, with their registration valid for five years and subject to renewal. These facilities are required to maintain standards for infrastructure, staff, and equipment, overseen by the National and State ART & Surrogacy Boards established under the Surrogacy Act.

Eligibility, Consent, and Medical Safeguards

The Act determines eligibility under Section 2(e): a “commissioning couple” must be an infertile married couple with the wife aged 21–50 and the husband 21–55, or a single woman (over 21) even if not infertile. It also strictly regulates gamete donation: sperm donors (21–55 years) and egg donors (23–35 years) with specific limits one lifetime donation for eggs and retrieval limits set in the 2023 Rules. All procedures require written informed consent, insurance coverage for egg donors, and a strict ban on sex selection. Clinics must conduct genetic screening before embryo implantation to ensure safety and ethical compliance.

Legal Rights and Parental Status

Children born through ART are granted full legal status as biological children of the commissioning parents, with no parental rights for donors under Section 2(o).

Offenses and Enforcement

The ART Act outlines offenses such as unauthorized practice, commercial dealings in gametes or embryos, and sex-selective practices. Penalties range from ₹500,000 to ₹1,000,000, with repeat violations attracting up to 12 years’ imprisonment and fines up to ₹1,000,000. Notably, prosecution can only proceed with prior approval from the National or State Board.

Constitutional Dimension of Surrogacy in India

The “golden triangle” of Indian constitutional rights is Articles 14, 19, and 21. Article 14 guarantees “equality before the law”. According to Article 19, individuals have the freedom to practice any profession or trade, while Article 21 safeguards their life and personal liberty. Originally, Article 14 was meant to be read with Article 21. The golden triangle principle states that any law denying a person’s right to life and liberty under Article 21 must also meet the criteria under Articles 14 and 19. To determine if a proposed law is a “reasonable restriction” on an individual’s basic right, consider the State’s interests, such as security, friendly relations, public order, and morality. The Supreme Court of India ruled that a reasonable restriction means limiting a person’s right without being arbitrary or disproportionate, beyond what is necessary for public good. The State’s encroachment on basic rights must be justified, not arbitrary or disproportionate. Article 21 of the Indian Constitution guarantees citizens the right to life and personal liberty. Relatedly, The Indian Supreme Court in *Olga Tellis v. Bombay Municipal Corporation* concluded that the right to life includes the right to livelihood, with just one answer: yes, women profit from surrogacy. The case established that Article 21 guarantees “wide and far reaching” rights. In expanding Article 21, the Indian Supreme Court recognized women’s reproductive decisions as part of their ‘personal liberty’. Women have the option to have children or abstain from having children, regardless of their fertility status. Additionally, women should have their right to privacy, dignity, and physical integrity maintained. The Supreme Court of India ruled in *Padmashali v. Union of India* that sexual orientation is an inherent part of an individual’s identity and that choosing to engage in consensual same-sex intimacy is a personal choice and expression of autonomy and self-determination. In *Devika Biswas v. Union of India*, the Supreme Court correctly noted that the ability to procreate is a necessary component of the “Right to Life,” which is protected by Article 21 of the Indian Constitution. The capacity to conceive, give birth, and raise children is included in the right to reproduce. Thus, there is a partial imbalance when surrogacy is limited to heterosexual couples within a specific age range. The complete denial of the freedom to make reproductive decisions to groups such as elderly couples, LGBTQ+ couples, and single people may violate both Article 21 and Article 14 of the Indian Constitution. Experts believe that the rights and interests of intended parents and surrogate mothers cannot be protected by the contradictory provisions of the Surrogacy (Regulation) Act, 2021. There has been concern that these weaknesses might promote the expansion of an unlicensed surrogacy services sector. Concerns have been raised regarding barriers like age limitations and the prohibition of homosexual couples, which have been said to hinder the growth of society, even though surrogacy should be recognized as a reproductive right accessible to everyone,

regardless of their social status. Because of the change the nation is going through, Indian culture is drastically changing from patriarchal standards to a more feministic attitude. Consequently, there is doubt about the potential of the current surrogacy laws to improve Indian society.

New Laws Inconsistent With The Constitution of India

The Surrogacy (Regulation) Act breaches various Indian Constitutional requirements and must be amended. The Act only legalizes altruistic surrogacy. To be eligible, the couple must be married for at least five years, however this may limit their ability to conceive a family sooner. Women seeking surrogacy must be divorced or widowed. Moreover, the marriage must be heterosexual, with a male aged 26-55 and a woman aged 23-50, and no additional children, biological, adoptive, or surrogate. The Act exempts spouses with children with physical/mental impairments or life-threatening diseases from this condition. The legislation offers a solution for individuals with biological children with physical or special needs or a life-threatening condition or disorder. The Act's requirements also contravene various Indian Constitutional prohibitions. The Act breaches Articles 14, 19, and 21 of the Indian Constitution. The Act restricts access to surrogate services, violating Article 14's promise of equality and legal protection. Providing altruistic surrogacy only to heterosexual, married, infertile Indian couples and widowed or divorced women discriminates against others based on marital status, sexual orientation, and country origin. The constitutionality test involves determining whether the restriction is (1) reasonable and (2) formal. The Act aims to prevent surrogate mother exploitation, but there is no clear connection between this goal and the classification of altruistic surrogacy for heterosexual, married Indian couples and widowed/divorced women. Thus, the Act breaches the modest constitutional bar. The surrogacy process is not available to same-sex couples, single individuals, or foreigners, infringing their right to equal protection under the law. The Act directly violates a surrogate mother's freedom to practice any profession, vocation, trade, or business, as outlined in Article 19 of the Indian Constitution. Therefore, Article 19 affords protection to surrogates who wish to earn money through surrogacy. India may have a genuine interest in protecting surrogates from financial and other risks. A total prohibition on commercial surrogacy is deemed "excessive" beyond public interest criteria. Instead, the Act should adopt the 2017 PSC Report's recommendations, which defined a compensating model for surrogacy and limited the number of times a woman may conduct services, balancing exploitation and women's autonomy. The PSC Report introduced a compensation model for surrogate mothers, covering expenses such as lost wages, medical and insurance costs, child care support, maternity clothing, and post-delivery care. Feminist scholars endorse this model for its pragmatic and rights-based approach to compensate women for their time, effort, and reproductive labour. In addition to reducing unfair or arbitrary bargaining practices present in many private contractual agreements of surrogate-intending parents, this somewhat itemized approach to compensation can also reduce the excessive variations in surrogate pricing by designating a "fixed" cost for surrogate services. The PSC Report and the Surrogacy (Regulation) Act came to the conclusion that a woman could only serve as a surrogate once throughout her lifetime, hence restricting the number of times she could become a surrogate. The number of surrogate pregnancies per woman should be limited due to the severe poverty in India and the high financial incentive to become a surrogate; however, this balancing test must take into account that Article 19 protects a citizen's right to engage in "any occupation," which may include surrogacy. Therefore, India should acknowledge the State's interest in protecting surrogates from exploitation while also logically increasing the number of surrogate pregnancies that are allowed, as some situations may call for more than one surrogate pregnancy per woman to provide for economic opportunities. The right to life and personal liberty is protected by Article 21 of the Indian Constitution, but the Surrogacy (Regulation) Act restricts this essential freedom. The Supreme Court of India determined that a woman's freedom to choose her own reproductive path is also a component of "personal liberty" as defined by Article 21. However, because intended couples must demonstrate their infertility in order to get surrogacy, the Act takes away a woman's ability to make reproductive decisions. Therefore, a fertile mother could not use a surrogate to conceive a biological child. Consequently, the Act's need for infertility violates a "woman's right to make reproductive choices," which the Indian Supreme Court has determined to be a component of personal liberty under Article 21. In a similar vein, reproductive options encompass both having and not having children. As an expression of the personal liberty protected by Article 21 of the Indian Constitution, women should be able to use surrogate services regardless of their reproductive status. According to some, the Surrogacy (Regulation) Act "reinforces patriarchal values of society by assuming the institution of heterosexual marriage as a basis for parenthood, which goes against the fundamental rights of the LGBTQ+ population, single men and women," even though it may have been created with the best interests of surrogate mothers in mind. Additionally, many have gone so far as to claim that the Act's provision for heterosexual couples "is a clear slap on the face of the LGBTQ community." Fifteen percent of Indian respondents to the 2021 Pride Global Survey said they identified as "LGBT+." With a population of more than 1.4 billion, this represents a sizable portion of the nation. Additionally, India is on the verge of acknowledging the rights of LGBTQ people. 2018 saw the Supreme Court decriminalized homosexual sex in India. The Court determined that "the LGBTQ community possess[ed] the same human, fundamental, and constitutional rights as other citizens" in that historic decision. The Court also said that a person's sexual orientation was a fundamental aspect of who they were and that choosing to engage in consensual same-sex relationships was "an exercise of their personal choice, and an expression of their autonomy and self-determination." Therefore, the Act is morally flawed because it shows how moral beliefs may evolve and change laws, as seen by the decriminalization of gay sex after nearly 158 years represents how moral sentiments can change and in turn alter legislation. Likewise, using a same-sex partner to become a parent through surrogacy may be acceptable under the same justification, and the Act may be arbitrary and overly harsh since the State does not establish a connection between prohibiting LGBTQ couples from using surrogacy and stopping the exploitation of surrogate mothers. The majority of Indian family-related regulations, including those pertaining to surrogacy, are dependent on a person's marital status. The Supreme Court of India acknowledged that same-sex couples had the right to select a life partner, although rejecting the legalization of same-sex marriage in October 2023. Even if progress is "slow" and "uphill," advocates are optimistic that the Indian Parliament will provide same-sex spouses further rights, like pensions. Even though the results have been unsatisfactory, this issue has continued to advance.

Conclusion

The legal evolution of surrogacy in India, marked by the enactment of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021, reflects the State's effort to establish a framework rooted in ethical and medical safeguards. These statutes aim to curb

exploitative practices and ensure accountability among stakeholders involved in assisted reproduction. However, despite their intent to protect surrogate mothers and uphold procedural integrity, the present legislative framework remains mired in constitutional contradictions and social exclusions. By confining access to altruistic surrogacy within the bounds of heterosexual, infertile, married couples, the law implicitly marginalizes a range of identities single parents, LGBTQ+ individuals, and those who do not conform to normative familial structures. This legal architecture, therefore, not only restricts reproductive autonomy but also risks reinforcing heteronormative and patriarchal norms under the guise of ethical regulation. Furthermore, the rigid conditions imposed—such as limiting a surrogate's reproductive labour to a single instance and enforcing prolonged marital prerequisites—fail to account for socio-economic realities and the autonomy of women as decision-makers over their bodies and professions. While the State's interest in preventing exploitation is legitimate, the complete prohibition of compensated surrogacy, without nuanced safeguards, veers toward paternalism and undermines the agency of surrogate mothers. The intersection of constitutional guarantees particularly Articles 14, 19, and 21 demands a more inclusive approach, one that respects the right to equality, occupational freedom, and personal liberty in reproductive choices. The jurisprudence of the Indian Supreme Court has time and again affirmed these rights in varying contexts, suggesting that the law must evolve in tandem with changing societal values and lived realities. In conclusion, for surrogacy laws to serve their true purpose, they must be revisited through a progressive, rights-based lens one that harmonizes ethical governance with personal dignity, autonomy, and inclusivity. A recalibrated model that balances regulation with reproductive justice is not only constitutionally imperative but morally indispensable in a diverse, democratic society.

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