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Reproductive Autonomy Versus State Paternalism: The Surrogacy (Regulation) Act, 2021 — Constitutional Validity, Ethical Critique, and Reform Imperatives

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ABSTRACT

The newly enacted Surrogacy (Regulation) Act, 2021 (SRA) is a revolutionary, albeit debatable, legislation in the unregulated surrogacy market in India, which was estimated to be in excess of USD 2 billion a year. The prohibition on commercial surrogacy and the institutional oversight system outlined in the Act are legitimate regulatory measures in response to reports of exploitation of economically poor women, but the eligibility's scheme in the Act poses constitutional problems with India's constitutional Articles 14, 15 and 21. This paper provides a doctrinal and normative analysis of the provisions of the SRA in the light of the various developments in the reproductive-rights jurisprudence in India, including the landmark decision in Justice K.S. Puttaswamy (Retd.) v. Union of India, 20172, the empirical evidence of the social consequences of reproductive surrogacy, and the experiences of the United Kingdom, Canada and Israel. The analysis concludes that the ban on commercial surrogacy, while legally sound, raises serious equality and liberty concerns due to the limited eligibility criteria of the Act, which exclude LGBTQ+ persons, single men, and unmarried persons as well as allow for access only to heterosexual married couples and

certain categories of widows and divorcees. The paper also attacks the ‘altruistic surrogacy" approach that the Act upholds, arguing that the forced use of unpaid gestational labour in a kinship network is not a means of eradicating exploitation but rather covering it up. The paper ends with specific reform recommendations based on a rights-based, inclusive regulatory model.

Keywords: Surrogacy (Regulation) Act 2021, reproductive autonomy, altruistic surrogacy, constitutional validity, Article 21, LGBTQ+ rights, assisted reproductive technology, state paternalism.

I. INTRODUCTION

At the heart of the regulation of surrogacy is a struggle between two legitimate but sometimes incompatible interests: one, to keep vulnerable parties safe from being exploited in an inherently unequal arrangement; and the other, to maintain the autonomy of reproduction as part of human freedom and the right not to be restricted by the state. India adopted the Surrogacy (Regulation) Act, 2021 (SRA) which was enacted by the Parliament and became effective from 25 January 2022, which put the country at the interventionist end of this spectrum. The law that emerges is both the much-needed corrective for years of regulatory shortcomings and a document that contains the most stringent aspects in a constitutional manner.

From 2002 to 2015, India became the top destination for commercial surrogacy activities in the world. As of 2012, there were over 25,000 children born through surrogacy in India, about half of which were to international commissioning parents, or ‘fertility tourists,' as scholars have called the practice.

But this commercial boom came with well recorded harms. However, legislative action took a long time to come in the wake of landmark judicial decisions in Baby Manji Yamada v Union of India (2008) and Jan Balaz v Anand Municipality (2009), which highlighted the legal vacuum that left children, commissioning parents and surrogates in a state of acute legal uncertainty, especially in cross-border arrangements.8

Ultimately, the SRA 2021 provides a statutory regime, but one whose design features a vision of reproductive governance beyond what is strictly necessary for the prevention of exploitation. The choices are examined at three levels: First, in the light of the Constitution of India, the question is whether the eligibility restrictions in the Act would pass the test of Part III of the Constitution; second, in terms of regulatory philosophy, whether the 'altruistic surrogacy' model adequately protects surrogate welfare; and third, from a comparative perspective, whether India's approach is distinct from the foregoing in relation to surrogate welfare.

II. HISTORICAL AND LEGISLATIVE EVOLUTION

2.1 The Era of Unregulated Commercial Surrogacy (2002–2015)

From the legal perspective, commercial gestational surrogacy in India only began in 2002 when a court decision set the tone for a legal landscape that is largely tolerant of commercial gestational surrogacy with relatively little explicit prohibiting such surrogacy. In 2005, the Indian Council of Medical Research (ICMR) issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, which were non-binding and contained some basic procedural requirements, and were often ignored.

It was all too well known that India's status as a global leader in surrogacy was supported by its relatively low medical expenses, cutting-edge fertility technology and a high percentage of economically disadvantaged women willing to provide their wombs for rent, along with the complete lack of any regulatory jurisdiction. In India, the surrogate would be paid a compensation, which was about one-third of what he/she would be paid in a developed country. For those women who had no other means of livelihood, however, even a reduced wage was a significant economic occurrence. Ethical lapses were reported in the clinical literature, with surrogates often staying in 'surrogate homes' run by the clinic, and having their movements curtailed; they had their embryos transferred repeatedly, with each transfer also being accompanied by an increasing risk on their part; and they received inconsistent post-delivery treatment.

2.2 Landmark Judicial Interventions

The Supreme Court's formal engagement with surrogacy started in Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.6, where a Japanese couple undertook a surrogacy programme in Gujarat. The legal void where the couple divorced prior to the child's birth, thus leaving the child with no nationality which failed to provide travel documents for the child, and the resulting emergency application before the Supreme Court. The Court ordered the government to provide adequate travel documentation, and importantly recognized in passing that an intending parent might be either a single man or a homosexual couple, a judicial recognition that was in stark contrast to the eventual eligibility framework set out by the SRA.

The Gujarat High Court faced the citizenship of twin children born by an Indian surrogate to a German commissioning father in Jan Balaz vs. Anand Municipality (2009). The children lost their citizenship rights by both countries: the Indian passport office and the German immigration office. The children lost their citizenship rights both from the Indian passport office and the German immigration office. The High Court gave a blanket citizenship to humanitarians in order to fill the citizenship and parentage gap in the law, creating political pressure for a more inclusive law.

The government had drafted a number of bills on ART and surrogacy between 2010 and 2021, each of which failed to pass into law. In 2015, the government made commercial surrogacy illegal, through notification. On 21st November, 2016, the Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha and presented to the Standing Committee on Health and Family Welfare in August, 2017, which recommended substantial changes to the Bill, including a more complex compensation framework. However, the Act has been presented several times and was finally assented to by the President on 25 December 2021.

2.3 The Road to the SRA, 2021

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complex compensation framework. However, the Act has been presented several times and was finally assented to by the President on 25 December 2021.

III. STRUCTURAL ARCHITECTURE OF THE SRA, 2021

3.1 The Prohibition on Commercial Surrogacy

The defining element of the SRA is the difference between 'altruistic surrogacy' and 'commercial surrogacy'. Altruistic surrogacy, as defined under Section 2(1)(b) would be a pregnancy agreement where the surrogate mother is given nothing in return beyond medical costs and insurance coverage regarding her pregnancy. According to Section 2(1)(g), commercial surrogacy is defined as any agreement made for the payment of amounts that are more than the basic medical and insurance costs. Section 4(ii) (b) explicitly bars commercial surrogacy. Violations can lead to up to ten years of imprisonment and fines of up to INR 10 lakh under Section 38(1) of the Act — which is one of the very severe penalties in the Act — and the intent of the legislature was that commercial surrogacy is a form of exploitation itself cannot be regulated effectively.

3.2 Eligibility Framework

The SRA's eligibility requirements are double-layered, relating to both intending parents and surrogate mothers, in 3.2. Section 2(1)(h) explains the concept of eligible ‘intending couple’ as a ‘legally married Indian man and woman’, providing an exclusive access to heterosexual married couples, and stresses the age limit as 23-50 years for women and 26-55 years for men. The ‘intending woman' is defined by section 2(1)(s) as a single woman (but only a widow or divorcee aged between 35 and 45). The Act does not apply to single people who are not married, live-in partners, single men or same sex couples in a de facto relationship.

Section 4(iii)(b) sets out the requirements for surrogate mothers, requiring them to be a 'close relative' of the intending couple, an 'ever-married' woman (at least one living child), aged between 25 and 35 years, not to have been a surrogate mother before, and to possess a medical and psychological fitness certificate. A 'close relative' requirement largely disables the commercial

surrogacy market's main supply chain and tightens the pool of surrogates eligible for commercial surrogacy arrangements.

3.3 Regulatory Institutions and Parentage Framework

The Act creates a multi-level institutional structure. The National Assisted Reproductive Technology and Surrogacy Board (NARTSB) is established by Section 17 under the chairmanship of Union Minister of Health and Family Welfare. The State Boards are required by Section 26 in each state and union territory. Section 15 provides for the establishment of the National ART and Surrogacy Registry, to which all the surrogacy clinics have to be registered. A child born via surrogacy is deemed under Section 8 to be the biological child of the intending couple with full entitlement to all rights applicable to naturally born children. Abandoning a surrogate child is out of the question—even if the child is born with a genetic defect or the parents prefer a different sex.

IV. CONSTITUTIONAL ANALYSIS: EQUALITY, LIBERTY, AND REPRODUCTIVE AUTONOMY

4.1 Reproductive Autonomy as a Fundamental Right

The argument challenging the SRA's eligibility framework is based primarily on the jurisprudence of Article 21. In this context, the decision of the Nine Judge Constitution Bench of the Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1*, provides the compass. The Court unanimously ruled that the right to privacy is a fundamental right which is embedded in Article 21 and expressly stated that the right to reproductive autonomy, that is individual rights to decide on conception and procreation, is a protected aspect of the right to privacy. Justice D.Y. Chandrachud defined ‘decisional autonomy' as including ‘intimate personal choices, including those about reproduction', thus excluding such choices from the realm of 'legitimate' state interference without any justification.

In Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1, the Court also extended the definition of personal liberty to include women's reproductive decisions, which the state could not compel or prohibit without justifying same with a very high bar. The precedents have set

precedence that access to ART is a sphere of constitutional protection, not a right per se, but as one that can be regulated by the legislature only with respect to the constraints of Articles 14 and 21.

4.2 Article 14 and the Equality Challenge

Article 14 of the Constitution guarantees equality before the law and bans arbitrary action by the State. It bans legislation making distinctions between groups of people based on an intelligible differentia with a rational nexus to the legislative purpose. Several classification problems arise in the context of this standard in the context of the SRA's eligibility framework.

The most analytically problematic difference is between never married single women and widows or divorcees. While the Act allows the latter, not the former, to have access to surrogacy as intending mothers. The two are alike in that they are both single and may have the same reproductive needs from medical infertility. Under Indian laws such as Hindu Adoption and Maintenance Act, 1956, and Juvenile Justice (Care and Protection of Children) Act, 2015, single unmarried women are allowed to adopt. The denial of surrogacy to the never-married single women, but the allowance of surrogacy to married women, has no intelligible differentia and it has no rational connection to the objective of the Act as to an approach to preventing exploitation.15

The other issue of a more complicated constitutional nature is the exclusion of LGBTQ+ people. In India, the LGBTQ+ population has been estimated to be around 104 million, which is around 9% of the total population. The SRA's categorical denial, which was based on a definition of 'intending couple', expressly including the need for a man and a woman, directly challenges these protections. There is no legally adequate basis for differential treatment under Article 14 that the Lok Sabha has noted in its record that the Act does not recognise same sex family formation.

4.3 Pending Constitutional Adjudication

Right now, these constitutional issues are being heard by the Supreme Court in Arun Muthuvel v. Union of India (W.P. (C) /2022). The petitioner has challenged several provisions of both SRA and the Assisted Reproductive Technology (Regulation) Act, 2021 on the ground that it is discriminatory and infringes upon the constitutional rights of privacy and reproductive

autonomy. A Division Bench of Justices B.V. Nagarathna and Augustine George Masih has raised eleven questions for written submissions, among them whether the ban on commercial surrogacy, limitation of married couples to specific age groups and access for single-women to married couples only on condition that they are widows and divorcees are constitutionally valid. In April 2024, the Ministry of Health and Family Welfare also set up a Special Review Committee for review of contentious provisions and suggestions for improvement.

V. CRITIQUING THE ALTRUISTIC SURROGACY MODEL

5.1 The Altruism Construct and Its Regulatory Logic

The legislative rationale for altruistic surrogacy is rooted in a simple intuition: If there are no financial rewards, apart from the normal costs of the pregnancy, labor a woman would not otherwise be willing to do — if financial considerations are removed, the most common form of exploitation is removed, too — the use of an economically vulnerable woman to force her into reproductive work. This logic is sound to this point. Yet, the exploitation that was reported in Indian surrogacy industry before 2015 was largely due to the lack of proper regulation, including lack of transparency in the contracts, independent legal representation, proper insurance, post-delivery care, and restrictions on repeat surrogacy, rather than being an intrinsic part of the commercialization of surrogacy. Protective strategies have been successful in the United Kingdom and in Canada over surrogate protections in a compensatory (but not-for-profit) structure, and therefore, exploitation does not have to be a structural inevitability of commercial surrogacy.

5.2 Displaced Exploitation and the Close-Relative Problem

The Act's definition of a 'close relative' of the intending couple has significant implications for the nature of the surrogate's relationship, changing it from a commercial one, though imperfectly protected, to a family one. Kinship duty, social pressure and relational hierarchy come into the picture when considering whether or not to be a surrogate. In other words, the close-relative requirement, which is a condition of the altruistic model, may lead to power imbalance within the family, as the woman may feel compelled to give birth to a child she wouldn't willingly have.13

The power imbalance is less visible and less legally enforceable than in the marketplace, but is just as present.

The altruistic model is complicated by the economic dimension. If compensation for surrogates is completely eliminated (even after considering the possibility of alternative income-generating measures), it implies that poor women from the communities who were accessing surrogacy income have simply lost that income, whereas middle-class women who can afford to be surrogates and are not willing to accept payment of any kind are the main beneficiaries of the Act. The Standing Committee of the Rajya Sabha had urged for regulated compensation, which includes lost wages, medical screening cost, psychological counseling, dietary supplementation, and post-delivery care, but which the government had not done so.

5.3 Underground Market Risk

A ban on the commercial surrogacy without being a ban on the demand does not necessarily mean that the market has been eradicated; it means that it has been driven under the ground. The Act's prohibition could have minimised the total harm in India between 2013 and 2015, while causing harm elsewhere – the jurisdictions that have become surrogacy centres are countries with much looser regulatory frameworks, and in which surrogate women are offered much less protection. Learning from past experience with the criminalisation of sex work and the unregulated abortion, similar patterns of increased harms emerge with prohibitory interventions as they have been used in the past, resulting in a greater increase in harms as they are removed.

VI. COMPARATIVE REGULATORY PERSPECTIVES

6.1 The United Kingdom: Regulated Altruism

The closest comparison to the Indian model is the United Kingdom which has banned commercial surrogacy but allowed altruistic surrogacy. The Surrogacy Arrangements Act of 1985 does not make commercial surrogacy agreements illegal, but they violate the law.Commercial surrogacy agreements are not illegal under the Surrogacy Arrangements Act of 1985 but they do break the law. A degree of informally tolerated compensation for lost earnings is accepted; and reasonable

expenses may be paid to surrogates. Under the Human Fertilisation and Embryology Act 2008, all parental arrangements must be approved by the court and there must be a parental order passed in each case. Importantly, the UK system does not place any limits on sexual orientation or marital status; that is, same-sex couples and single people can commission surrogacy on equal terms.

6.2 Canada and Israel: Toward Inclusive Models

The Assisted Human Reproduction Act, 2004 (the act) banned commercial surrogacy for profit in Canada; however, Health Canada regulations have been slowly increasing to allow reimbursement of surrogate expenses, including lost employment income. This 'compensatory altruism' approach has created a documented, stable and burgeoning market for surrogacy without restricting commissioning parents based on marital status or sexual orientation.23

Israel's Embryo Carrying Agreements Law, 1996 is a unique model in which surrogacy is subject to the approval of a state appointments committee that reviews consent, medical fitness and ethical issues, and compensation is allowed, but it is controlled. The trajectory of Israel, from a narrow definition of eligibility, to gradually widening its definition through amendment of law and judicial action, provides an edifying model for the going reformers in India.

VII. THE 2023 AND 2024 AMENDMENTS: PARTIAL COURSE CORRECTIONS

Since the Act was enacted, several amendments have been made to rules, some of which have provided some relief for issues identified but did not significantly change the overall design of the Act. In March 2023, the Surrogacy (Regulation) Rules were updated to allow for surrogacy with donor gametes when either party to the intended parents is medically fit for parenthood as per a medical certificate of infertility, thereby easing the original requirement that the intended parents would have to provide genetic material for the child. The amendment was particularly important because the original rule had resulted in a bizarre situation whereby a couple where both were medically infertile would not be able to access surrogacy under the Act, which is precisely the population for which surrogacy is most needed.

While the Surrogacy (Regulation) Rules, 2024 addressed some of the implementation issues of the Act, it did not take any steps to overcome structural issues such as exclusion of never-married individuals, exclusion of LGBTQ+ from the Act, close-relative restrictions, or the absolute ban on remuneration or any payment..

VIII. REFORM RECOMMENDATIONS

The preceding analysis indicates that there is a reform agenda of five key axes. The first is to revise the eligibility criteria to ensure that the Act must be made compatible with the constitutional values enshrined in Puttaswamy and Navtej Singh Johar, and thus be accessible to all people irrespective of marital status, sexual orientation and gender identity. The term 'intending couple' and 'intending woman' are to be replaced by a gender-neutral term for 'intending person(s)' and applied equally with age and medical-necessity criteria.

Secondly, the surrogate mother requirement, which is based on close family ties, should be removed or significantly loosened. The proper structure would allow any woman who is able to to act as a surrogate, but that the psychological fitness of that woman should be assessed independently by a psychologist, and that she has her own legal counsel, and that she does not have any prior commercial surrogacy experience.

Third, the altruistic model should be abolished and a regulated compensatory model adopted. Instead of a binary system of medical expenses, there should be state-determined compensation ranges that are indexed to the foregone earnings, medical risk burden and psychological costs of the surrogate. These reimbursements should be handled with state-supervised escrow accounts to stop parents from exploiting it or intermediaries from taking it. This method maintains the primary goal of the policy, i.e. to make sure that reproductive work will not be commercialised, and still recognises the economic value of the surrogate's contribution.

Fourth, the institutional setting should be strengthened, with an introduction of an independent legal counsel (trained and paid by the state) to assist surrogate mothers; and with introduction of a pre-arrangement psychological evaluation by independent legal practitioner, a model surrogacy

agreement published by the competent authority and systematic follow-up care after the delivery as a condition for the permit to run a clinic.

Fifth, there should be a fast, more accessible and more fertility-specific procedure for the resolution of conflicts between parents and children in relation to surrogacy arrangements, through a dedicated adjudicatory mechanism (a specialised division of Family Court or a tribunal established under the Act).

IX. CONCLUSION

Surrogacy (Regulation) Act, 2021 is an important and timely piece of legislation in an area that has been marred by a lack of regulation and the exploitation of economically marginalized women for over a decade. The ban on commercial surrogacy, and the adoption of a system of institutional registration and oversight, are sensible and reasonable parts of a responsible regulatory response. The protection of surrogate welfare -- with requirements for insurance coverage, informed consent, and against forced abortion -- is an actual improvement over the pre-legislative situation.

Concurrently, the Act's eligibility framework brings in a normatively limited, constitutionally questionable, and factually confused definition of family life that fails to correspond to the Act's protective goals. The denial of the right to access for married heterosexual couples and certain categories of widows and divorcees, the wholesale exclusion of LGBTQ+ people, single men and unmarried women, and the requirement that surrogate mothers be 'close relatives' of the intending couple has no obvious welfare-protecting effect and carries significant reproductive-liberty costs for a substantial proportion of the population.

As the Supreme Court considers matters in Arun Muthuvel v. Union of India, it will have a chance to better balance the constitutional constraints on the state in reproductive decision making. Regardless of the outcome of the Court's judgment, the legislative challenge that lies ahead is to create a regulatory system that is not paternalistic, but one that treats surrogate women as economic and moral actors, and recognizes the reproductive ambitions of all Indian families. This balance can be achieved through principled regulatory design, as illustrated by comparative evidence from

the United Kingdom, Canada and Israel, and not through the blunt instrument of categorical exclusion

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