



Conference Paper

From Reproductive Choice to Regulatory Control: Reassessing Constitutional Protections under India's Surrogacy Regime

Ruhi Dubey

PhD Scholar, Faculty of Legal Studies and Research, Sai Nath University, Ranchi, Jharkhand, India

Corresponding Author: * Ruhi Dubey

DOI: <https://doi.org/10.5281/zenodo.20769046>

Abstract

The enactment of the Surrogacy (Regulation) Act, 2021, marks a significant shift in India's approach towards assisted reproductive technologies and reproductive rights. While the legislation seeks to prevent the commercialisation of surrogacy and protect surrogate mothers from exploitation, it simultaneously imposes stringent restrictions on access to surrogacy services. The transition from a relatively liberal regime to a heavily regulated framework raises important constitutional and human rights concerns relating to reproductive autonomy, privacy, dignity, equality, and the right to form a family.

This paper critically examines the extent to which the Surrogacy (Regulation) Act, 2021, has transformed reproductive choice into a matter of regulatory control. The study analyses the constitutional validity of eligibility restrictions imposed by the Act, particularly with respect to single persons, live-in partners, LGBTQ+ individuals, and other excluded categories. Drawing upon judicial precedents recognising reproductive autonomy as an integral component of Article 21 of the Constitution of India, the paper evaluates whether the restrictions imposed by the Act satisfy the tests of reasonableness, proportionality, and non-arbitrariness under Articles 14, 19, and 21.

The paper further explores the tension between the State's obligation to prevent exploitation and an individual's right to make reproductive decisions free from excessive governmental interference. Through a doctrinal and comparative analysis, the study argues that while regulation of surrogacy is necessary, the current framework may unduly restrict constitutionally protected reproductive freedoms. The paper concludes by advocating a rights-based and inclusive regulatory model that balances protection against exploitation with respect for reproductive autonomy and constitutional values.

Manuscript Information

- ISSN No: 2583-7397
- Received: 10-10-2024
- Accepted: 25-01-2025
- Published: 20-03-2025
- IJCRM:4(SP1); 2025: 333-336
- ©2025, All Rights Reserved
- Plagiarism Checked: Yes
- Peer Review Process: Yes

How to Cite this Article

Dubey R. From Reproductive Choice to Regulatory Control: Reassessing Constitutional Protections under India's Surrogacy Regime. Int J Contemp Res Multidiscip. 2025;4(6):333-336.

Access this Article Online



www.multiarticlesjournal.com

KEYWORDS: Surrogacy, Reproductive Rights, Constitutional Law, Article 21, Reproductive Autonomy, Equality, Privacy, Human Dignity.

1. INTRODUCTION

Advancements in reproductive technologies have transformed traditional notions of parenthood and family. Surrogacy has emerged as a viable means for individuals and couples facing infertility to exercise their reproductive aspirations. India once served as a global hub for commercial surrogacy due to affordable medical facilities and comparatively relaxed regulations. However, concerns regarding exploitation of economically vulnerable women, commercialization of motherhood, and cross-border legal complications prompted legislative intervention.

The Surrogacy (Regulation) Act, 2021 represents the culmination of a long-standing effort by the Indian State to regulate surrogacy practices. The Act prohibits commercial surrogacy and permits only altruistic surrogacy subject to strict eligibility criteria. While the legislative objective of protecting surrogate mothers is commendable, the Act has generated significant debate regarding its impact on reproductive autonomy and constitutional rights.

This paper seeks to examine whether the Act strikes an appropriate balance between regulation and reproductive freedom.

2. RESEARCH OBJECTIVES

1. To examine the legal framework governing surrogacy under the Surrogacy (Regulation) Act, 2021.
2. To analyse the constitutional dimensions of reproductive autonomy under Articles 14, 19, and 21.
3. To evaluate the impact of the Act on the reproductive rights of intending parents.
4. To examine the constitutional validity of exclusionary provisions contained in the Act.
5. To propose reforms for creating a rights-oriented and inclusive surrogacy framework.

3. RESEARCH METHODOLOGY

The study adopts a doctrinal research methodology based upon an analysis of constitutional provisions, statutory enactments, judicial decisions, law commission reports, and scholarly literature. Comparative references to foreign jurisdictions have also been incorporated to identify best practices.

Constitutional Foundations of Reproductive Rights

The Indian Constitution does not expressly recognize reproductive rights. Nevertheless, judicial interpretation has expanded the scope of Article 21 to include privacy, dignity, bodily autonomy, and reproductive choice.

The Supreme Court has repeatedly emphasized that personal liberty encompasses decisions concerning marriage, procreation, and family life. Reproductive autonomy forms an essential aspect of individual dignity and self-determination.

The constitutional framework supporting reproductive rights may be understood through:

Article 21

Protection of life and personal liberty includes:

- Right to privacy.
- Right to bodily autonomy.
- Right to reproductive choice.
- Right to family life.

Article 14

Ensures equality before law and prohibits arbitrary classifications.

Article 19

Protects personal freedoms which may indirectly influence reproductive decision-making.

Key Features of the Surrogacy (Regulation) Act, 2021

The Act introduces several significant changes:

- Prohibition of commercial surrogacy.
- Permission only for altruistic surrogacy.
- Establishment of National and State Surrogacy Boards.
- Strict eligibility conditions for intending couples.
- Regulation of surrogacy clinics.
- Criminal penalties for violations.

The legislative intent is to eliminate exploitation and ensure ethical surrogacy practices.

Reproductive Choice versus Regulatory Control

The central question is whether the Act appropriately regulates surrogacy or excessively restricts reproductive freedom.

Restrictions on Eligibility

The Act limits access to surrogacy through stringent conditions. Such restrictions may exclude:

- Single individuals.
- Unmarried couples.
- Live-in partners.
- LGBTQ+ persons.
- Certain categories of foreign nationals.

These exclusions raise concerns regarding constitutional equality and non-discrimination.

Impact on Reproductive Autonomy

The right to become a parent constitutes an important component of personal liberty. Excessive restrictions may interfere with:

- Freedom to form a family.
- Reproductive decision-making.
- Bodily autonomy.
- Human dignity.

The Act arguably substitutes individual choice with State approval.

Constitutional Challenges to the Act

Violation of Article 14

The classification between eligible and ineligible persons must satisfy the test of reasonable classification.

Questions arise as to:

- Whether exclusion of unmarried persons is justified.
- Whether exclusion of LGBTQ+ individuals violates equality principles.
- Whether the classifications bear a rational nexus with the legislative objective.

Violation of Article 21

The Supreme Court's privacy jurisprudence recognizes decisional autonomy in matters concerning reproduction.

Restrictions imposed by the Act may be tested against:

- Necessity.
- Legitimate State objective.
- Proportionality.
- Least restrictive means.

Doctrine of Proportionality

Even if the objective of preventing exploitation is legitimate, restrictions should not disproportionately burden constitutional freedoms.

Comparative Perspective

United Kingdom

The UK permits altruistic surrogacy under a regulated framework while recognizing broader access.

United States

Several states permit compensated surrogacy subject to safeguards.

Canada

Canada follows an altruistic model but adopts a more inclusive approach.

The comparative analysis demonstrates that protection against exploitation can coexist with broader reproductive freedoms.

4. FINDINGS

1. The Act successfully addresses concerns relating to commercialization and exploitation.
2. The legislation adopts a highly restrictive approach towards reproductive choice.
3. Several eligibility criteria may face constitutional scrutiny under Articles 14 and 21.
4. The exclusion of certain categories of persons raises concerns regarding equality and inclusiveness.
5. A balance between protection and autonomy remains inadequately achieved.

Suggestions

1. Broaden eligibility criteria to include diverse family structures.
2. Reconsider exclusions affecting LGBTQ+ individuals and single persons.
3. Adopt a rights-based regulatory framework.
4. Strengthen informed consent and welfare protections for surrogate mothers.
5. Ensure periodic review of the legislation in light of constitutional developments.

5. CONCLUSION

The Surrogacy (Regulation) Act, 2021 reflects the State's attempt to regulate a sensitive area involving ethics, technology, and human rights. While preventing exploitation is a legitimate and necessary objective, regulation must not extinguish reproductive autonomy. Constitutional values require a careful balance between individual liberty and State interests. A reproductive rights framework grounded in dignity, equality, privacy, and autonomy offers a more sustainable approach to surrogacy regulation. The future of surrogacy law in India should therefore move towards an inclusive and rights-oriented model that protects vulnerable women without unnecessarily restricting the reproductive choices of intending parents.

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