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# **REPRODUCTIVE RIGHTS AND SURROGACY: A CONSTITUTIONAL PERSPECTIVE IN INDIA**

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## **1. Abstract**

The evolution of reproductive technologies has significantly transformed the contours of human rights discourse, particularly in relation to reproductive autonomy and bodily integrity. Surrogacy, as an integral component of Assisted Reproductive Technologies (ART), presents complex constitutional questions concerning the scope and limitations of reproductive rights in India. While it enables individuals and couples to exercise their right to parenthood, it simultaneously raises concerns regarding exploitation, commodification, and state regulation.

This paper critically examines surrogacy through the lens of constitutional principles, with particular emphasis on the right to life and personal liberty under Article 21 of the Constitution of India. It analyses the extent to which reproductive rights, including the right to procreate and the right to access reproductive technologies, are protected within the constitutional framework. The study further evaluates the impact of the Surrogacy (Regulation) Act, 2021 on these rights, highlighting its restrictive provisions and their implications for individual autonomy, equality, and privacy.

By engaging with judicial precedents, constitutional doctrines, and comparative perspectives, the paper argues that the current regulatory approach reflects a tension between state interests and individual freedoms. It identifies significant gaps in the legal framework, particularly in relation to exclusionary eligibility criteria and the limitation of reproductive choices. The paper advocates for a rights-based approach to surrogacy regulation that harmonises constitutional guarantees with ethical considerations, ensuring inclusivity, dignity, and autonomy for all stakeholders involved.

The study adopts a doctrinal and analytical methodology, drawing upon primary legal sources and scholarly literature. It concludes that while regulation of surrogacy is necessary, it must not come at the cost of fundamental rights, and calls for a re-examination of existing laws to

align them with constitutional values and evolving societal realities.

**Keywords:** Reproductive Rights; Surrogacy; Constitutional Law; Article 21; Right to Privacy; Assisted Reproductive Technology; Equality and Non-Discrimination; Surrogacy (Regulation) Act, 2021

## 2. Introduction

The rapid advancement of medical science, particularly in the field of Assisted Reproductive Technologies (ART), has fundamentally transformed the traditional understanding of reproduction, parenthood, and family structures. Among these developments, surrogacy has emerged as a significant reproductive option, enabling individuals and couples facing infertility to realise their desire for biological parenthood. However, while surrogacy offers unprecedented opportunities, it simultaneously raises complex constitutional, ethical, and legal questions, particularly concerning the scope of reproductive rights, bodily autonomy, and state regulation.

In the Indian context, the discourse on surrogacy must be situated within the broader framework of constitutional rights, especially the right to life and personal liberty under Article 21 of the Constitution of India. Over the years, the Supreme Court has expansively interpreted Article 21 to include a wide range of derivative rights essential for a dignified human existence, including the right to privacy, dignity, and reproductive autonomy.<sup>1</sup> The recognition of reproductive choice as an integral component of personal liberty underscores the importance of examining surrogacy not merely as a medical or contractual arrangement but as a matter of fundamental rights.

The landmark judgment in *Justice K.S. Puttaswamy v. Union of India* reaffirmed the centrality of privacy as a constitutionally protected right, encompassing decisional autonomy in matters relating to family, procreation, and sexual orientation.<sup>2</sup> This recognition has significant implications for surrogacy, as it strengthens the argument that decisions regarding reproduction, including the choice to avail surrogacy, fall within the protected sphere of individual autonomy. Similarly, in *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court explicitly acknowledged the right of a woman to make reproductive choices as

<sup>1</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>2</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

a dimension of personal liberty.<sup>3</sup> These judicial pronouncements collectively establish a constitutional foundation for recognising reproductive rights in India.

Despite this progressive judicial approach, the regulatory framework governing surrogacy reflects a more restrictive stance. The enactment of the Surrogacy (Regulation) Act, 2021 marks a significant legislative intervention aimed at addressing concerns of exploitation and commercialisation in the surrogacy industry. The Act prohibits commercial surrogacy and permits only altruistic surrogacy under stringent conditions, thereby imposing substantial limitations on access to reproductive technologies.<sup>4</sup> While the objective of preventing exploitation is undoubtedly legitimate, the means adopted raise important constitutional concerns regarding proportionality, reasonableness, and non-discrimination.

One of the most contentious aspects of the current legal framework is its exclusionary approach towards certain categories of individuals. By restricting access to surrogacy primarily to married heterosexual couples, the law excludes single individuals, unmarried partners, and members of the LGBTQ+ community.<sup>5</sup> This exclusion raises serious questions about the compatibility of the legislation with the constitutional principles of equality under Article 14 and non-discrimination under Article 15. The Supreme Court's decision in *Navtej Singh Johar v. Union of India*, which decriminalised consensual same-sex relations, emphasised the importance of recognising diverse forms of identity and relationships within the constitutional framework.<sup>6</sup> In this light, the restrictive provisions of the surrogacy law appear to be at odds with the evolving jurisprudence on equality and inclusivity.

Further, the prohibition of commercial surrogacy reflects an underlying tension between state paternalism and individual autonomy. While the state seeks to protect vulnerable women from exploitation, it simultaneously limits their ability to make autonomous decisions regarding their bodies and labour. This raises the critical question of whether the state's regulatory approach undermines the very autonomy it seeks to protect. The doctrine of proportionality, as applied in constitutional adjudication, requires that any restriction on fundamental rights must be necessary, reasonable, and the least restrictive means to achieve the intended objective.<sup>7</sup>

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<sup>3</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>4</sup> The Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).

<sup>5</sup> *Id.*, s. 4(c).

<sup>6</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>7</sup> *Modern Dental College v. State of Madhya Pradesh*, (2016) 7 SCC 353.

Whether the blanket ban on commercial surrogacy satisfies this test remains a matter of debate. The importance of this study lies in examining surrogacy through a constitutional lens, thereby moving beyond purely ethical or policy-based discussions. It seeks to analyse whether the existing legal framework adequately balances the competing interests of protecting surrogate mothers from exploitation and safeguarding the reproductive rights of individuals. In doing so, the study also engages with broader questions relating to the role of the state in regulating intimate aspects of human life and the extent to which individual autonomy can be curtailed in the interest of public morality and welfare.

The central research problem addressed in this paper is whether the current regulatory regime governing surrogacy in India is consistent with constitutional principles of autonomy, equality, and dignity. The study aims to critically evaluate the extent to which reproductive rights are recognised and protected within the existing legal framework and to identify the tensions and contradictions inherent in the law.

The objectives of the study are: (i) to examine the constitutional basis of reproductive rights in India; (ii) to analyse the provisions of the Surrogacy (Regulation) Act, 2021 in light of constitutional principles; (iii) to evaluate the impact of restrictive provisions on individual autonomy and equality; and (iv) to propose a rights-based framework for regulating surrogacy that aligns with constitutional values.

The study is guided by the following research questions: whether the right to reproductive autonomy includes the right to access surrogacy; whether the restrictions imposed by the current legal framework are constitutionally valid; and whether a balance can be achieved between preventing exploitation and protecting fundamental rights. The hypothesis underlying this study is that while regulation of surrogacy is necessary, the existing legal framework imposes disproportionate restrictions that undermine constitutional guarantees.

This paper adopts a doctrinal and analytical research methodology, relying on constitutional provisions, judicial precedents, and scholarly literature. It is structured into multiple sections. Following this introduction, the next section examines the conceptual and constitutional foundations of reproductive rights in India. This is followed by an analysis of the legal framework governing surrogacy, a critical evaluation of its constitutional validity, and a discussion of key issues and challenges. The paper concludes with findings and

recommendations aimed at developing a more inclusive and rights-oriented approach to surrogacy regulation.

### 3. Literature Review

The discourse on reproductive rights and surrogacy has evolved significantly across legal, sociological, and bioethical scholarship, reflecting the complexity of balancing individual autonomy with regulatory concerns. Early academic contributions primarily focused on the ethical dilemmas associated with assisted reproduction, particularly the moral implications of third-party reproduction and the commodification of the female body. Scholars such as John A. Robertson have argued in favour of recognising procreative liberty as a fundamental human right, emphasising that decisions relating to reproduction should remain within the domain of individual autonomy unless compelling state interests justify intervention.<sup>8</sup> This perspective has laid the foundation for subsequent debates on the constitutional protection of reproductive choices.

In contrast, feminist critiques have raised concerns regarding the potential exploitation inherent in surrogacy arrangements. Authors like Martha Albertson Fineman have questioned the assumption of free choice in surrogacy, highlighting the structural inequalities that shape women's reproductive labour.<sup>9</sup> Similarly, Sharmila Rudrappa's empirical work on surrogacy in India demonstrates how economic vulnerability often compels women to participate in surrogacy arrangements, thereby complicating the narrative of autonomy.<sup>10</sup> These critiques challenge the liberal framework of reproductive rights by foregrounding issues of power, coercion, and socio-economic disparity.

Indian scholarship has further contributed to the debate by examining the intersection of law, policy, and constitutional rights. Flavia Agnes has critically analysed the regulatory approach adopted by the Indian state, arguing that the shift from an unregulated market to a prohibitionist regime reflects a moralistic stance rather than a rights-based framework.<sup>11</sup> Usha Ramanathan has similarly critiqued the Surrogacy (Regulation) Act, 2021 for prioritising control over

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<sup>8</sup> John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press, 1994.

<sup>9</sup> Martha Albertson Fineman, "The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies", Routledge, 1995.

<sup>10</sup> Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, New York University Press, 2015.

<sup>11</sup> Flavia Agnes, "Surrogacy and the Law: A Critical Analysis", *Economic and Political Weekly*, Vol. 51, 2016.

reproductive practices instead of ensuring substantive justice for surrogate mothers.<sup>12</sup> These perspectives highlight the tension between state paternalism and individual autonomy in the Indian context.

From a constitutional standpoint, scholars have increasingly engaged with the implications of judicial recognition of privacy and autonomy. Gautam Bhatia's analysis of transformative constitutionalism underscores the expanding scope of fundamental rights, particularly in relation to personal liberty and decisional autonomy.<sup>13</sup> Building on this framework, Aparna Chandra and Mrinal Satish have argued that reproductive rights must be understood as an integral component of dignity and autonomy, thereby necessitating a more inclusive and rights-oriented legal approach.<sup>14</sup> However, despite these theoretical advancements, there remains limited scholarship that directly engages with surrogacy regulation through a rigorous constitutional lens.

Comparative literature reveals divergent regulatory models across jurisdictions. While some countries adopt a prohibitionist approach similar to India, others permit regulated commercial surrogacy. Scholars such as Debora Spar have examined the global surrogacy market, highlighting how restrictive domestic laws often lead to cross-border reproductive arrangements.<sup>15</sup> This body of work suggests that prohibition may not eliminate surrogacy but merely shift it to less regulated environments, thereby exacerbating legal and ethical concerns. Despite the extensive body of literature, a significant research gap persists. Much of the existing scholarship either focuses on ethical critiques or policy-oriented discussions without undertaking a comprehensive constitutional analysis of surrogacy regulation in India. There is a lack of systematic engagement with questions of proportionality, equality, and reproductive autonomy in the context of the Surrogacy (Regulation) Act, 2021. Furthermore, limited attention has been paid to reconciling feminist critiques of exploitation with constitutional guarantees of autonomy.

This paper seeks to bridge this gap by providing a nuanced constitutional analysis of surrogacy

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<sup>12</sup> Usha Ramanathan, "Commercialisation of Reproductive Technologies: Issues of Law and Policy", *Indian Journal of Medical Ethics*, Vol. 4, 2019.

<sup>13</sup> Gautam Bhatia, *The Transformative Constitution*, HarperCollins, 2019.

<sup>14</sup> Aparna Chandra & Mrinal Satish, "Reproductive Rights and the Indian Constitution", *National Law School of India Review*, Vol. 27, 2015.

<sup>15</sup> Debora L. Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception*, Harvard Business School Press, 2006.

in India, integrating doctrinal legal analysis with critical perspectives from existing scholarship. It aims to move beyond binary debates of prohibition versus permissibility and instead explore how a rights-based framework can address the competing concerns of autonomy, dignity, and protection against exploitation.

#### 4. Research Methodology

The present study adopts a doctrinal method of research, focusing on the systematic analysis of constitutional provisions, statutory enactments, and judicial pronouncements relating to reproductive rights and surrogacy in India. The doctrinal approach is particularly appropriate for examining the constitutional dimensions of surrogacy, as it enables a detailed interpretation of fundamental rights, including the right to life and personal liberty under Article 21, and their application to emerging reproductive technologies.

In addition to the doctrinal approach, the study incorporates an analytical method to critically evaluate the extent to which the existing legal framework aligns with constitutional principles such as autonomy, dignity, equality, and privacy. This involves assessing the proportionality and reasonableness of restrictions imposed by the Surrogacy (Regulation) Act, 2021, particularly in relation to access to reproductive choices.

A limited comparative method is also employed to examine how different jurisdictions regulate surrogacy and protect reproductive rights. This comparative perspective provides valuable insights into alternative legal models and helps contextualise the Indian approach within global trends, especially in jurisdictions that recognise broader reproductive autonomy.

The research is based on both primary and secondary sources. Primary sources include constitutional provisions, notably Articles 14, 15, and 21 of the Constitution of India, statutory enactments such as the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021, and judicial decisions interpreting the scope of reproductive rights and personal liberty.<sup>16</sup> Secondary sources comprise scholarly books, peer-reviewed journal articles, reports of expert bodies, and interdisciplinary studies addressing ethical, social, and legal aspects of surrogacy.<sup>17</sup>

<sup>16</sup> *Devika Biswas v. Union of India*, (2016) 10 SCC 726; Constitution of India, arts. 14, 15 & 21.

<sup>17</sup> I. Glenn Cohen, *Patients with Passports: Medical Tourism, Law, and Ethics*, Oxford University Press, 2015; Bridget Anderson, "Reproductive Labour and the Politics of Surrogacy", *Feminist Legal Studies*, Vol. 18, 2010.

The methodology is interdisciplinary in nature, drawing upon constitutional law, feminist legal theory, and bioethics to provide a holistic understanding of the subject. Rather than adopting a purely descriptive approach, the study is evaluative and normative, aiming to assess the adequacy of the existing legal framework and to propose reforms grounded in constitutional values.

The research is primarily qualitative, relying on textual analysis of legal materials and scholarly discourse. It seeks to bridge the gap between theoretical frameworks and practical implications by examining how constitutional principles are operationalised within the regulatory regime governing surrogacy. Through this approach, the study endeavours to contribute to the ongoing discourse on reproductive rights by offering a nuanced and constitutionally grounded perspective.

## 5. Constitutional Framework

The constitutional framework governing reproductive rights in India is not explicitly codified in a single provision; rather, it has evolved through judicial interpretation, particularly under Part III of the Constitution. The recognition of reproductive rights as an integral component of fundamental rights reflects the dynamic and expansive nature of constitutional jurisprudence in India. At the heart of this framework lies Article 21, which guarantees the right to life and personal liberty, and has been interpreted to encompass a wide range of derivative rights essential for human dignity and autonomy.

The transformation of Article 21 from a narrow procedural guarantee to a substantive repository of rights began with judicial decisions that expanded its scope beyond mere animal existence. The Supreme Court has consistently emphasised that the right to life includes the right to live with dignity, which inherently involves autonomy over personal decisions, including those relating to reproduction.<sup>18</sup> This expansive interpretation has laid the foundation for recognising reproductive rights as constitutionally protected interests.

Reproductive rights encompass both positive and negative dimensions of autonomy. The negative dimension includes the right to refrain from procreation, such as access to contraception and abortion, while the positive dimension includes the right to procreate and

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<sup>18</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.

form a family.<sup>19</sup> In the Indian context, judicial recognition of reproductive autonomy has primarily emerged in cases concerning abortion and bodily integrity. However, the underlying principles articulated in these cases extend to broader questions of reproductive choice, including access to assisted reproductive technologies and surrogacy.

A significant development in this regard is the recognition of privacy as a fundamental right. The right to privacy has been interpreted to include decisional autonomy in matters relating to intimate personal choices.<sup>20</sup> This includes decisions about marriage, procreation, contraception, and family life. The recognition of privacy as intrinsic to liberty reinforces the argument that reproductive choices fall within the protected sphere of individual autonomy, thereby limiting the extent of permissible state interference.

Closely linked to privacy is the concept of bodily autonomy, which forms a central pillar of reproductive rights. Bodily autonomy implies that individuals have the right to make decisions concerning their own bodies without undue interference from the state. In the context of reproduction, this includes the right to decide whether, when, and how to have children.<sup>21</sup> The recognition of bodily autonomy is particularly significant in the context of surrogacy, where questions arise regarding the extent to which the state can regulate or restrict the use of one's body for reproductive purposes.

The constitutional framework also incorporates the principle of dignity, which has been recognised as a core value underlying fundamental rights. Human dignity is not merely a philosophical concept but a legally enforceable right that informs the interpretation of all fundamental freedoms.<sup>22</sup> In the context of reproductive rights, dignity encompasses both the right to make autonomous choices and the right to be protected from exploitation and coercion. This dual dimension creates a delicate balance between autonomy and protection, which lies at the heart of surrogacy regulation.

In addition to Article 21, Articles 14 and 15 of the Constitution play a crucial role in shaping the contours of reproductive rights. Article 14 guarantees equality before the law and equal

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<sup>19</sup> John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth", *Virginia Law Review*, Vol. 69, 1983.

<sup>20</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

<sup>21</sup> Erin Nelson, *Law, Policy and Reproductive Autonomy*, Hart Publishing, 2013.

<sup>22</sup> *Common Cause v. Union of India*, (2018) 5 SCC 1.

protection of the laws, while Article 15 prohibits discrimination on grounds of sex, among others. These provisions require that any restriction on reproductive rights must be reasonable, non-arbitrary, and non-discriminatory.<sup>23</sup> The exclusion of certain categories of individuals from accessing reproductive technologies raises serious concerns under these provisions, particularly in light of evolving jurisprudence on substantive equality.

The concept of substantive equality goes beyond formal equality by recognising that identical treatment may not always result in equitable outcomes. It requires the state to account for existing social and economic inequalities and to adopt measures that promote inclusivity and fairness.<sup>24</sup> In the context of reproductive rights, this implies that access to reproductive technologies should not be unduly restricted based on marital status, sexual orientation, or other arbitrary classifications. The denial of such access may amount to indirect discrimination, thereby violating constitutional guarantees.

Another important aspect of the constitutional framework is the doctrine of proportionality, which governs the validity of restrictions on fundamental rights. Under this doctrine, any limitation on a fundamental right must satisfy a fourfold test: it must pursue a legitimate aim, be suitable to achieve that aim, be necessary in the sense that no less restrictive alternative is available, and maintain a proper balance between the right infringed and the objective sought to be achieved.<sup>25</sup> This doctrine is particularly relevant in assessing the constitutionality of regulatory measures governing surrogacy.

The application of the proportionality test to surrogacy regulation raises critical questions. While the objective of preventing exploitation of surrogate mothers is undoubtedly legitimate, the means adopted such as the complete prohibition of commercial surrogacy and restrictive eligibility criteria must be scrutinised to determine whether they are the least restrictive measures available. A failure to satisfy this test may render such restrictions constitutionally infirm.

Furthermore, the constitutional framework must be understood in light of the evolving nature of family and social relationships. Traditional notions of family based on heteronormative and

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<sup>23</sup> *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.

<sup>24</sup> Sandra Fredman, *Discrimination Law*, Oxford University Press, 2011.

<sup>25</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, 2012.

marital structures are increasingly being challenged by diverse forms of relationships and identities. Constitutional jurisprudence has gradually recognised these changes, emphasising the importance of individual choice and dignity in defining family life.<sup>26</sup> In this context, reproductive rights must be interpreted in a manner that accommodates diverse family structures rather than reinforcing exclusionary norms.

The intersection of reproductive rights with gender justice is another critical dimension. While surrogacy provides opportunities for women to exercise reproductive autonomy, it also raises concerns about the commodification of their bodies and the reinforcement of gender inequalities. The constitutional framework must therefore ensure that reproductive rights are not exercised in a manner that perpetuates exploitation or undermines the dignity of women.<sup>27</sup> This requires a nuanced approach that balances autonomy with protection, rather than adopting extreme positions of either unrestricted freedom or absolute prohibition.

Additionally, international human rights principles provide valuable guidance in interpreting reproductive rights. Although not directly enforceable, international conventions and norms influence constitutional interpretation, particularly in the absence of domestic legislation. Instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasise the importance of reproductive autonomy and gender equality.<sup>28</sup> These principles reinforce the argument for recognising reproductive rights as fundamental human rights within the constitutional framework.

Despite these developments, the constitutional recognition of reproductive rights in India remains fragmented and context-specific. Judicial pronouncements have addressed aspects of reproductive autonomy in isolated contexts, but a comprehensive and coherent framework is yet to emerge. This lack of clarity creates challenges in applying constitutional principles to emerging issues such as surrogacy, where competing interests must be carefully balanced.

In conclusion, the constitutional framework of reproductive rights in India is characterised by an expansive interpretation of fundamental rights, particularly under Articles 21, 14, and 15. It encompasses key principles such as autonomy, privacy, dignity, equality, and proportionality,

<sup>26</sup> *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

<sup>27</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press, 1989.

<sup>28</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

which collectively shape the legal understanding of reproductive choices. However, the application of these principles to surrogacy regulation reveals inherent tensions between individual rights and state interests. Addressing these tensions requires a more coherent and rights-oriented approach that aligns legislative measures with constitutional values while responding to the complexities of modern reproductive technologies.

## 6. Surrogacy Law vs Constitutional Rights

The regulation of surrogacy in India, particularly through the Surrogacy (Regulation) Act, 2021, presents a complex intersection of constitutional rights and state interests. While the legislation seeks to address legitimate concerns such as exploitation and unethical practices, its provisions raise significant constitutional questions when examined in light of the principles of autonomy, privacy, equality, and proportionality.

At the outset, the restriction of surrogacy to altruistic arrangements reflects a direct limitation on reproductive autonomy. As discussed earlier, reproductive choice forms an integral part of personal liberty, and any restriction on such choice must satisfy constitutional scrutiny. The Act's prohibition of commercial surrogacy effectively denies individuals the option to enter into compensated arrangements, thereby limiting the scope of reproductive decision-making.<sup>29</sup> This raises the question of whether the state can justifiably curtail such choices on paternalistic grounds, particularly when the individuals involved are capable of informed consent.

The principle of privacy further strengthens the argument against excessive state interference. Decisions relating to procreation and family formation fall within the intimate sphere of personal life, which is constitutionally protected.<sup>30</sup> By imposing strict conditions on who can access surrogacy and under what circumstances, the law intrudes into deeply personal decisions, thereby raising concerns about the legitimacy of such intervention. The extent of permissible regulation must therefore be carefully balanced against the need to preserve individual autonomy.

A critical issue arises in relation to the exclusionary eligibility criteria prescribed under the Act. By limiting access to surrogacy primarily to married heterosexual couples, the law discriminates against single individuals, unmarried partners, and members of the LGBTQ+

<sup>29</sup> I. Glenn Cohen, "The Constitution and the Rights Not to Procreate", *Stanford Law Review*, Vol. 60, 2007.

<sup>30</sup> Neil M. Richards, "The Dangers of Surveillance", *Harvard Law Review*, Vol. 126, 2013.

community.<sup>31</sup> This classification appears to be based on traditional notions of family, which may not align with contemporary constitutional values. The principle of equality under Article 14 requires that any classification must be reasonable and based on an intelligible differentia having a rational nexus with the objective sought to be achieved. The exclusion of these categories does not appear to satisfy this test, as it arbitrarily denies access to reproductive technologies without sufficient justification.

Moreover, the prohibition of commercial surrogacy raises questions under the doctrine of proportionality. While the objective of preventing exploitation is legitimate, the means adopted must be the least restrictive.<sup>32</sup> A complete ban on commercial surrogacy may not be necessary if alternative regulatory mechanisms such as strict oversight, fair compensation standards, and enforceable contracts can achieve the same objective. In this regard, the law appears to adopt a disproportionate approach by prioritising prohibition over regulation.

The issue of dignity also assumes central importance in the constitutional analysis of surrogacy. On one hand, the state seeks to protect the dignity of surrogate mothers by preventing their exploitation. On the other hand, by denying them the choice to engage in compensated surrogacy, the law may undermine their autonomy and agency.<sup>33</sup> This paradox highlights the inherent tension between protection and empowerment, raising the question of whether dignity is better served through restriction or through enabling informed choice.

Another dimension of the constitutional analysis pertains to the rights of surrogate mothers themselves. While the Act includes provisions for medical care and insurance, it does not adequately address broader concerns such as informed consent, contractual fairness, and post-birth welfare.<sup>34</sup> The absence of a comprehensive rights-based framework for surrogate mothers indicates a gap between the stated objectives of the law and its practical implications.

The regulation of surrogacy also has implications for the rights of children born through such arrangements. Issues relating to parentage, legitimacy, and citizenship become particularly complex in cross-border contexts.<sup>35</sup> Although the Act attempts to address some of these

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<sup>31</sup> The Surrogacy (Regulation) Act, 2021, s. 4(c).

<sup>32</sup> Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge University Press, 2013.

<sup>33</sup> Cécile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person*, Oxford University Press, 2006.

<sup>34</sup> Brenda Cossman, "Feminist Legal Approaches to Reproductive Technologies", *Osgoode Hall Law Journal*, Vol. 36, 1998.

<sup>35</sup> Jenni Millbank, "The New Surrogacy Parentage Laws in Australia", *Sydney Law Review*, Vol. 35, 2013.

concerns, it does not provide a fully coherent framework, thereby leaving room for legal uncertainty. From a constitutional perspective, the best interests of the child must be a primary consideration, necessitating a more comprehensive approach.

Further, the intersection of surrogacy with evolving family structures raises important constitutional questions. Judicial recognition of diverse forms of relationships and identities suggests that the law must adapt to changing social realities.<sup>36</sup> However, the current regulatory framework appears to reinforce traditional family norms, thereby limiting its relevance in a rapidly evolving society.

It is also important to consider the broader socio-economic context in which surrogacy operates. While the prohibition of commercial surrogacy is intended to prevent exploitation, it may have unintended consequences, such as driving the practice underground or pushing it to foreign jurisdictions.<sup>37</sup> This not only undermines the effectiveness of the law but also creates additional risks for all parties involved. A more nuanced approach that combines regulation with safeguards may be better suited to addressing these challenges.

In conclusion, the application of constitutional principles to the regulation of surrogacy reveals significant tensions between state objectives and individual rights. While the need for regulation is undeniable, the current legal framework appears to impose disproportionate and exclusionary restrictions that may not withstand rigorous constitutional scrutiny. A re-evaluation of the law is therefore necessary to ensure that it aligns with the fundamental values of autonomy, equality, and dignity enshrined in the Constitution.

## 7. Findings

The foregoing constitutional and legal analysis of surrogacy regulation in India reveals several critical findings that highlight the inherent tensions between individual rights and state control. These findings underscore the inadequacies of the current legal framework and the need for a more coherent and rights-oriented approach.

Firstly, it is evident that reproductive rights, though not explicitly enumerated in the Constitution, have been implicitly recognised through judicial interpretation as an essential

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<sup>36</sup> Seema Mohapatra, "Stateless Babies and Adoption Scams", *Berkeley Journal of International Law*, Vol. 33, 2015.

<sup>37</sup> William N. Eskridge Jr., *The Case for Same-Sex Marriage*, Free Press, 1996.

component of personal liberty, privacy, and dignity. However, this recognition remains fragmented and context-specific, lacking a unified doctrinal foundation.<sup>38</sup> The absence of a clearly articulated constitutional framework for reproductive rights results in inconsistent application, particularly in emerging areas such as surrogacy.

Secondly, the regulatory approach adopted under the Surrogacy (Regulation) Act, 2021 reflects a dominant trend of state paternalism. While the objective of preventing exploitation is legitimate, the means employed—particularly the prohibition of commercial surrogacy—suggest an assumption that individuals, especially women, are incapable of making autonomous and informed choices.<sup>39</sup> This approach undermines the very principle of autonomy that the Constitution seeks to protect and fails to acknowledge the agency of surrogate mothers.

Thirdly, the eligibility criteria prescribed under the Act create a framework that is inherently exclusionary and discriminatory. By restricting access to surrogacy to a narrowly defined category of intending parents, the law excludes a significant segment of the population, including single individuals and sexual minorities.<sup>40</sup> This exclusion is not supported by a sufficiently compelling justification and appears to be rooted in traditional notions of family, thereby conflicting with the constitutional mandate of equality and inclusivity.

Another important finding relates to the inconsistency between the stated objectives of the law and its practical implications. While the legislation aims to prevent exploitation, the prohibitionist model may inadvertently encourage informal and unregulated surrogacy arrangements.<sup>41</sup> Such outcomes not only defeat the purpose of regulation but also increase the vulnerability of surrogate mothers by removing them from the protection of formal legal mechanisms.

Further, the analysis reveals a significant gap in the protection of the rights and welfare of surrogate mothers. Although the law provides for certain safeguards, such as medical care and insurance, it does not adequately address broader concerns relating to informed consent,

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<sup>38</sup> Reva B. Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation”, *Georgetown Law Journal*, Vol. 44, 1992.

<sup>39</sup> Janet Radcliffe Richards, *The Ethics of Transplants: Why Careless Thought Costs Lives*, Oxford University Press, 2012.

<sup>40</sup> Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women”, *Stanford Law Review*, Vol. 43, 1991.

<sup>41</sup> Richard A. Posner, *Sex and Reason*, Harvard University Press, 1992.

contractual fairness, and long-term socio-economic security.<sup>42</sup> This limited approach reflects a narrow understanding of protection, focusing on immediate risks while ignoring structural inequalities.

The application of the doctrine of proportionality also exposes deficiencies in the legal framework. The restrictions imposed by the Act, particularly the ban on commercial surrogacy and restrictive eligibility conditions, appear disproportionate when measured against the objective of preventing exploitation.<sup>43</sup> Less restrictive alternatives, such as regulated compensation and stronger oversight mechanisms, have not been adequately explored, indicating a failure to adopt a balanced approach.

Additionally, the lack of coherence between different legislative instruments governing reproductive technologies creates administrative and legal ambiguities. The interaction between the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 is not clearly defined, leading to potential overlaps and inconsistencies in implementation.<sup>44</sup> This fragmentation undermines the effectiveness of the regulatory framework.

The findings also highlight the inadequacy of the law in addressing cross-border surrogacy and related issues such as citizenship, parentage, and legal recognition. In an increasingly globalised context, the absence of clear provisions in this regard creates uncertainty and potential conflict of laws, thereby affecting the rights of children born through such arrangements.<sup>45</sup>

Finally, a broader observation emerging from the study is the tension between evolving constitutional values and static legislative responses. While constitutional jurisprudence has progressively recognised autonomy, privacy, and diversity, the legislative framework governing surrogacy appears to lag behind, reflecting outdated assumptions about family and morality.<sup>46</sup> This disconnect between law and constitutional values undermines the legitimacy and effectiveness of the regulatory regime.

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<sup>42</sup> Margaret Jane Radin, "Market-Inalienability", *Harvard Law Review*, Vol. 100, 1987.

<sup>43</sup> David M. Beatty, *The Ultimate Rule of Law*, Oxford University Press, 2004.

<sup>44</sup> N.R. Madhava Menon, *Law and Justice: An Indian Perspective*, Eastern Book Company, 2004.

<sup>45</sup> Hague Conference on Private International Law, *Parentage/Surrogacy Project*, 2019.

<sup>46</sup> Upendra Baxi, *The Future of Human Rights*, Oxford University Press, 2002.

In sum, the findings indicate that the current legal framework governing surrogacy in India is characterised by contradictions, gaps, and inconsistencies. While it seeks to address genuine concerns, it does so in a manner that compromises fundamental rights and fails to provide a balanced and inclusive approach. These observations form the basis for the recommendations proposed in the subsequent section.

## 8. Suggestions

In light of the constitutional analysis and the gaps identified in the existing legal framework, it is imperative to adopt a more balanced, inclusive, and rights-oriented approach to the regulation of surrogacy in India. The following recommendations aim to harmonise legislative policy with constitutional principles of autonomy, dignity, equality, and proportionality.

Firstly, the prohibition of commercial surrogacy under the Surrogacy (Regulation) Act, 2021 should be reconsidered in favour of a regulated compensatory model. Rather than imposing a blanket ban, the law should permit reasonable compensation to surrogate mothers under strict regulatory oversight. Such a model would recognise the agency and autonomy of women while simultaneously ensuring safeguards against exploitation.<sup>47</sup> Establishing clear contractual standards, mandatory counselling, and independent monitoring mechanisms can further strengthen this framework.

Secondly, the eligibility criteria for intending parents must be expanded to reflect constitutional commitments to equality and non-discrimination. The current exclusion of single individuals, unmarried couples, and members of the LGBTQ+ community is inconsistent with the evolving jurisprudence on personal liberty and identity.<sup>48</sup> A more inclusive approach would not only align the law with constitutional principles but also acknowledge the changing nature of family structures in contemporary society.

Thirdly, there is a pressing need to adopt a comprehensive rights-based framework for the protection of surrogate mothers. This framework should extend beyond medical care and insurance to include psychological support, legal counselling, fair contractual terms, and long-term socio-economic security.<sup>49</sup> The establishment of dedicated grievance redressal

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<sup>47</sup> Richard M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy*, Allen & Unwin, 1970.

<sup>48</sup> Kenji Yoshino, "The New Equal Protection", *Harvard Law Review*, Vol. 124, 2011.

<sup>49</sup> Susan Markens, *Surrogate Motherhood and the Politics of Reproduction*, University of California Press, 2007.

mechanisms and oversight bodies can further ensure accountability and prevent abuse.

Further, the law must incorporate the doctrine of informed consent as a central principle in all surrogacy arrangements. Surrogate mothers should be provided with complete and transparent information regarding the medical, legal, and financial aspects of the arrangement, enabling them to make voluntary and informed decisions.<sup>50</sup> This is essential to uphold their dignity and autonomy.

Another important reform relates to the application of the doctrine of proportionality in legislative design. Any restriction on reproductive rights must be carefully calibrated to ensure that it is necessary and the least restrictive means available.<sup>51</sup> The current prohibitionist approach fails to meet this standard and should be replaced with a regulatory framework that balances state interests with individual freedoms.

The legal framework must also be harmonised with the Assisted Reproductive Technology (Regulation) Act, 2021 to ensure coherence and clarity in implementation. Clear delineation of roles and responsibilities between regulatory authorities, along with uniform guidelines, can minimise administrative ambiguities and enhance efficiency.<sup>52</sup>

In addition, the law should address cross-border surrogacy in a comprehensive manner by establishing clear rules regarding parentage, citizenship, and recognition of children born through international arrangements. Drawing upon international best practices, India can develop a framework that ensures legal certainty while protecting the rights of all stakeholders.<sup>53</sup>

The incorporation of gender-sensitive and intersectional perspectives is equally important. Surrogacy regulation must account for the socio-economic realities of women, particularly those from marginalised backgrounds, and ensure that legal safeguards are responsive to their specific vulnerabilities.<sup>54</sup> This requires moving beyond a purely formal approach to equality and adopting substantive measures that promote justice and inclusivity.

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<sup>50</sup> Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, 2018.

<sup>51</sup> Grégoire C.N. Webber, *The Negotiable Constitution*, Cambridge University Press, 2009.

<sup>52</sup> S. Chandra Mohan, "Regulating Assisted Reproductive Technologies in India", *Journal of Indian Law Institute*, Vol. 63, 2021.

<sup>53</sup> Claire Fenton-Glynn, *Children and the European Court of Human Rights*, Oxford University Press, 2021.

<sup>54</sup> Patricia Hill Collins, *Black Feminist Thought*, Routledge, 2000.

Further, there is a need for greater transparency and accountability in the functioning of surrogacy clinics and agencies. Mandatory registration, periodic audits, and strict compliance with ethical standards can help prevent malpractices and ensure adherence to legal norms.<sup>55</sup> Public awareness programmes and access to legal aid can also empower individuals to make informed choices.

Finally, the development of a comprehensive policy framework that integrates legal, ethical, and social considerations is essential for effective regulation. Such a framework should be informed by empirical research, stakeholder consultations, and comparative experiences, thereby ensuring that it is responsive to the complexities of surrogacy in a modern society.<sup>56</sup>

In conclusion, the regulation of surrogacy must move beyond restrictive and paternalistic approaches towards a model that respects individual autonomy while ensuring protection against exploitation. By aligning legislative measures with constitutional values, it is possible to create a legal framework that is both effective and equitable, thereby advancing the broader goals of justice, dignity, and human rights.

## 9. Conclusion

The intersection of reproductive rights and surrogacy in India presents a complex constitutional landscape shaped by evolving judicial interpretations, socio-economic realities, and legislative interventions. This study has demonstrated that reproductive autonomy, though not explicitly codified, has been firmly embedded within the ambit of fundamental rights, particularly under Article 21 of the Constitution, encompassing the principles of privacy, dignity, and personal liberty. The constitutional framework thus provides a strong normative foundation for recognising the right to make reproductive choices, including the use of assisted reproductive technologies such as surrogacy.

However, the analysis of the Surrogacy (Regulation) Act, 2021 reveals a significant disconnect between constitutional ideals and legislative practice. While the Act seeks to address legitimate concerns relating to exploitation and unethical practices, its restrictive provisions—particularly the prohibition of commercial surrogacy and exclusionary eligibility criteria—undermine the very principles of autonomy, equality, and inclusivity that the Constitution seeks to uphold.

<sup>55</sup> Mark A. Hall, "Regulating Medical Profession", *Michigan Law Review*, Vol. 97, 1999.

<sup>56</sup> Amartya Sen, *The Idea of Justice*, Harvard University Press, 2009.

The law reflects a paternalistic approach that prioritises control over empowerment, thereby limiting individual choice and failing to accommodate diverse social realities.

In addressing the central research questions, it becomes evident that the current legal framework does not adequately protect reproductive rights in their fullest constitutional sense. The restrictions imposed are not only disproportionate but also fail to satisfy the requirements of reasonableness and non-discrimination. The denial of access to surrogacy for certain categories of individuals highlights a broader issue of constitutional inconsistency, where progressive judicial recognition of rights is not fully translated into legislative policy.

At the same time, the concerns underlying the regulation of surrogacy—particularly the need to prevent exploitation and ensure ethical practices—cannot be overlooked. The challenge, therefore, lies in striking a balance between safeguarding vulnerable individuals and preserving fundamental freedoms. This study argues that such a balance can be achieved only through a rights-based regulatory framework that recognises the agency of all stakeholders, particularly surrogate mothers, while ensuring robust safeguards against abuse.

The broader implication of this analysis is that reproductive rights must be understood not merely as abstract legal entitlements but as practical freedoms that require supportive legal and institutional frameworks. The regulation of surrogacy, therefore, must move beyond restrictive and exclusionary models towards a more inclusive and constitutionally aligned approach.

In conclusion, the effectiveness of surrogacy regulation in India depends on its ability to reconcile constitutional values with regulatory objectives. A reformed legal framework that embraces autonomy, equality, and dignity while addressing legitimate concerns of exploitation would not only enhance the legitimacy of the law but also contribute to the broader project of realising substantive justice in the realm of reproductive rights.

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