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A STUDY ON THE HUMAN RIGHTS IMPLICATIONS OF INDIA'S SURROGACY (REGULATION) ACT, 2021

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Abstract

The Surrogacy (Regulation) Act, 2021 represents a major shift in India's legal framework governing assisted reproductive technologies. Enacted to curb unethical practices and protect surrogate mothers from exploitation, the Act bans commercial surrogacy and permits only altruistic surrogacy under strict eligibility conditions. While the law aims to safeguard dignity, equality, and bodily autonomy, it has also raised substantial human rights concerns—especially with respect to reproductive autonomy, right to parenthood, equality for LGBTQ+ individuals, single persons, and foreign nationals. This paper critically examines the human rights implications of the 2021 Act as relevant up to the year 2022, analysing its strengths, limitations, and impact on vulnerable groups. It concludes with recommendations for balancing ethical safeguards with reproductive choice and non-discrimination.

Keywords: Surrogacy, Human Rights, Bodily Autonomy, Reproductive Rights, Commercial Surrogacy, Surrogacy (Regulation) Act 2021, Equality, Parenthood Rights.

Introduction

Surrogacy in India evolved rapidly between 2002 and 2015, placing the country among the world's leading hubs for commercial surrogacy. Concerns over exploitation, lack of regulation, and commodification of women's bodies prompted legal intervention. After several drafts and debates, the Surrogacy (Regulation) Act, 2021 came into force aiming to establish ethical,

medical, and legal boundaries around surrogacy practices. The Act was projected as a protective, human-rights-oriented reform. However, academic and social critique up to 2022 indicates that while the Act protects certain rights, it simultaneously restricts others.

This paper analyses whether the 2021 Act achieves a balance between protecting surrogate mothers and ensuring the

reproductive rights of intending parents and children.

Background: Surrogacy and Human Rights Concerns in India

Between 2002 and 2015, commercial surrogacy flourished in India, creating both opportunities and exploitation. Cases such as Baby Manji Yamada v. Union of India (2008) highlighted the absence of clear legal parentage provisions. The 228th Law Commission Report (2009) recommended banning commercial surrogacy to prevent exploitation.

By 2021, India enacted a restrictive framework permitting only altruistic surrogacy.

Human rights debates before and immediately after 2021 (till 2022) revolved around:

Economic exploitation of poor surrogate mothers

Autonomy over reproductive labour

Right to privacy and informed consent

Citizenship and parentage of children

Exclusion of LGBTQ+ persons and single men

Absence of enforceable rights for surrogates

Objectives of the Study

1. To analyse the major provisions of the Surrogacy (Regulation) Act, 2021.
2. To evaluate whether the Act protects or restricts human rights.
3. To study the implications of the Act for surrogate mothers, intending parents, and children.
4. To highlight challenges arising from the Act as noted in 2022.
5. To provide suggestions for strengthening rights-based regulation.

Methodology

This paper uses a doctrinal research approach, analysing:

The text of the Surrogacy (Regulation) Act, 2021

Parliamentary debates up to 2021

Case law relevant up to 2022

Reports of the Law Commission of India

Human rights conventions such as CEDAW and UNCRC

Academic commentary available till 2022

Key Provisions of the Surrogacy (Regulation) Act, 2021

Major features include:

Ban on commercial surrogacy; only altruistic surrogacy permitted.

Eligibility restrictions: Only Indian married couples (5 years of marriage) and proven infertility.

Surrogate requirements: A married woman with a child of her own, age 25–35, acting as surrogate only once.

Restrictions on foreigners, OCI, PIO card holders, LGBTQ+ persons, and single individuals.

State and National Surrogacy Boards for monitoring.

Mandatory insurance for surrogate mothers.

No monetary compensation, except medical expenses.

6. Human Rights Implications of the Act

Protection of Surrogate Mothers' Rights

Positive aspects

Prevention of commercial exploitation.

Mandatory counseling and insurance improves welfare.

Prohibition of middlemen reduces coercive recruitment.

Limitations

Lack of compensation for reproductive labour violates the principle of fair remuneration.

Restricting a woman to be a surrogate only once may infringe bodily autonomy.

Altruistic model may create emotional and familial pressure, leading to hidden coercion.

Right to Reproductive Autonomy

The restriction that only married couples with infertility can commission surrogacy limits reproductive choice.

Human rights principles (CEDAW, Article 16) emphasise reproductive autonomy as a personal liberty.

The Act restricts:

Married couples without infertility

Couples unwilling to undergo medical infertility tests

Women who cannot carry pregnancy for health reasons but are not infertile

This overly medicalised definition undermines autonomy.

Equality and Non-Discrimination

The Act excludes:

Single men

LGBTQ+ couples

Live-in partners

Foreign nationals

Overseas Indians and PIO/OCI holders (under the 2021 version)

This raises equality concerns under Articles 14 and 15 of the Indian Constitution.

In 2022, critiques argued that the law reflects a heteronormative and marital bias, inconsistent with evolving family structures recognised in Navtej Johar (2018) and KS Puttaswamy (2017).

Rights of the Child Born Through Surrogacy

Positive aspects:

Legal parentage is clearly defined.

Protection from abandonment.

Concerns:

No provision recognising the child's right to know genetic origins.

Citizenship rules for children born to foreigners were unclear in earlier legislation, leaving risk of statelessness.

Right to Privacy and Informed Consent

The Act mandates consent but offers limited mechanisms to verify:

Comprehension

Voluntariness

Confidentiality

Surrogate mothers' privacy during medical screening and pregnancy management also remains insufficiently protected.

Criticisms Noted in 2021–2022

1. Over-regulation may push surrogacy underground, increasing exploitation.
2. Altruistic surrogacy may encourage emotional exploitation within families.
3. Exclusion of LGBTQ+ and single persons contradicts progressive judgments on equality.
4. No clear grievance redressal mechanism for surrogate mothers.
5. Lack of financial compensation disregards the economic reality of reproductive labour.

Suggestions for Reform

1. Allow compensated surrogacy with strict regulation, instead of a blanket ban.
2. Expand eligibility to include single individuals, LGBTQ+ persons, and foreign nationals under regulated conditions.
3. Ensure fair remuneration respecting surrogate mothers' labour and autonomy.
4. Provide independent legal counseling for surrogates before contract signing.
5. Insert clear provisions on data privacy and confidentiality.
6. Recognise the child's right to identity, subject to privacy protections.
7. Strengthen monitoring of clinics and agencies through transparent audits.

Conclusion

The Surrogacy (Regulation) Act, 2021 is a well-intentioned step aimed at protecting women from exploitation and ensuring ethical reproductive practices. However, a human rights-based analysis as applicable in 2022 shows that the law suffers from structural limitations that restrict reproductive autonomy and equality. By excluding several categories of intending parents and prohibiting compensation, the Act prioritises control over choice. A balanced framework—recognising both ethical safeguards and modern human rights standards—is needed to ensure that surrogacy in India becomes both inclusive and protective.

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