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A CRITICAL APPRAISAL OF THE JUDICIAL RESPONSE TO THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021 AND SURROGACY LAWS IN INDIA

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ABSTRACT

The trajectory of assisted reproduction law in India runs from an interpretive vacuum, filled ad hoc by constitutional courts confronting question of citizenship, custody and contractual enforceability, to a dense statutory regime under the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 that has itself become the object of sustained litigation. This paper traces that trajectory, examines the eligibility, consent and gamete-use architecture of the twin statute, and undertakes a critical appraisal of the judicial response since the Acts came into force. It argues that constitutional courts, drawing on the post-Puttaswamy privacy jurisprudence, have progressively read down the more paternalistic feature of the surrogacy regime, including the restriction on donor gamete and the retrospective application of rigid age bar, while a substantial constitutional challenge to the prohibition of commercial surrogacy, the exclusion of unmarried and same-sex intending parent, and the single-child bar remains pending before the Supreme Court. The paper contends that this incremental, case-by-case judicial correction, though doctrinally coherent, has produced an uneven and unpredictable regulatory landscape, and it proposes legislative and interpretive reform to reconcile the state's legitimate interest in preventing the exploitation of women's reproductive labour with the constitutionally guaranteed right to reproductive autonomy.

KEYWORDS*: Surrogacy (Regulation) Act 2021; Assisted Reproductive Technology; Reproductive Autonomy; Article 21; Judicial Review.*

1. INTRODUCTION

India occupied, for nearly two decades, a singular position in the global market for assisted reproduction. The availability of skilled clinician, low treatment cost and the near-total absence of binding regulation made the country a preferred destination for commissioning parent from across the world, giving rise to a large, loosely supervised industry built around gestational surrogacy and gamete donation. That very permissiveness generated the condition for exploitation that the Law Commission of India, constitutional courts, and eventually Parliament were each called upon to address. The right to reproductive autonomy, now settled as an incident of the right to life and personal liberty under Article 21 of the Constitution,[1] sits uneasily beside the state's equally legitimate interest in preventing the commodification of women's bodies and the trafficking of children born through commercial arrangement. The Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 were Parliament's belated attempt to

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[1] India Const. art. 21.

resolve that tension by statute. Both Acts came into force on 25 January 2022, and both have, since then, generated a steady stream of constitutional litigation.

The stake of this inquiry extend well beyond the several hundred families directly affected by any given ruling. Assisted reproduction sits at the intersection of at least three distinct body of doctrine: the right to privacy and personal autonomy under Article 21, the equal protection guarantee under Article 14, which bears directly on the eligibility criteria examined below, and the state's police power to regulate medical practice and prevent the exploitation of vulnerable person under Article 47 read with the directive principles. The 2021 Acts resolve the tension among these doctrine in favour of a highly restrictive model, and it has fallen to the judiciary, rather than to any subsequent legislative revision, to test whether that resolution survives constitutional scrutiny. The resulting case law is accordingly of interest not only to family law and health law specialist but to constitutional lawyer more generally, since it illustrates how courts respond when a detailed, prescriptive statute is enacted in an area previously governed by judge-made law.

The analysis that follows is doctrinal. It proceeds from the text of the two 2021 Acts and the Rules framed under them, and traces the manner in which constitutional courts have applied Article 21 and Article 14 to that text since January 2022. Primary source, statute, rule, and reported and unreported judgment, are preferred throughout, and secondary commentary is used only to identify litigation trend that have not yet produced a reported judgment. The paper does not purport to offer an empirical account of how the 2021 Acts have affected the supply of surrogates or the incidence of exploitation, a task better suited to sociological and public-health research; its object is narrower, to assess whether the judicial correction of the statutory regime has been principled, adequate, and evenly distributed among those who need it.

This paper undertakes a critical appraisal of the judicial response to that statutory regime. It does not merely catalogue the case law; it asks whether the courts, in correcting the more evidently arbitrary feature of the 2021 Acts, have supplied a coherent constitutional theory of reproductive autonomy in the context of third-party assisted reproduction, or whether they have instead produced a fragmented body of relief available chiefly to litigant with the resource and information to approach a constitutional court. The paper proceeds in eight part. Part 2 reconstructs the pre-legislative period, in which courts filled the regulatory vacuum through habeas corpus and citizenship litigation. Part 3 sets out the architecture of the two 2021 Acts. Part 4 examines the post-2021 jurisprudence in which courts have invoked Article 21 to correct restriction on gamete use and the retrospective application of age bar. Part 5 turns to the still-pending challenge to the exclusionary eligibility criteria of the Surrogacy Act. Part 6 offers a critical assessment of the judicial method, arguing that the courts

have been assertive at the administrative margin of the regime but restrained at its substantive, exclusionary core. Part 7 proposes reform, and Part 8 concludes.

2. THE PRE-LEGISLATIVE VACUUM AND THE GENESIS OF JUDICIAL INTERVENTION

Until 2021, assisted reproduction in India was governed, if at all, by non-binding guideline issued by the Indian Council of Medical Research. In the absence of legislation, courts became the default forum for dispute over custody, citizenship and the enforceability of surrogacy arrangement, and did so without any statutory vocabulary to draw upon. The first such dispute to reach the Supreme Court was *Baby Manji Yamada v. Union of India*[2], arising from the birth of a child to an Indian gestational surrogate on behalf of a Japanese commissioning couple who divorced before the child's birth. A non-governmental organisation filed what was styled as a habeas corpus petition before the Rajasthan High Court, questioning the legality of the surrogacy arrangement itself and the custody of the child. The Supreme Court confined itself to the custody question and declined to pronounce on the legality of commercial surrogacy as such, but its judgment is significant for what it did not do: it left wholly open the status of the intending parent, the surrogate, and the child, and it recorded, in effect, that Indian law possessed no framework capable of answering these questions. The case is widely read as the proximate trigger for the Law Commission of India's 228th Report, which recommended a statute permitting altruistic surrogacy arrangement under medical supervision while addressing the citizenship and parentage of children so born.[3]

The following year, the Gujarat High Court confronted an even more intractable problem in *Jan Balaz v. Anand Municipality*[4], where twins were born to an Indian gestational surrogate through a donor egg and the sperm of a German national, and Germany refused to recognise the children as its citizens because German law does not recognise surrogacy, while India, in turn, refused to grant the children Indian citizenship because their genetic father was foreign. Confronted with children who were, on a strict application of nationality law, citizens of no state, the High Court held that the surrogate mother, being an Indian citizen who had given birth to the children on Indian soil, was to be treated as their natural mother for the purposes of citizenship, a holding the court reached expressly because no legislation existed to govern the point. The case exposed the practical cost of legislative silence: children rendered stateless, intending parent unable to leave India with their own genetic offspring, and a

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2 Baby Manji Yamada v. Union of India, (2008) 13 S.C.C. 518 (India).

3 Law Commission of India, Report No. 228, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (Aug. 2009).

4 Jan Balaz v. Anand Municipality, 2010 S.C.C. OnLine Guj. 1097 (India).

surrogate mother thrust into an unintended and unwanted legal relationship with the children she had carried.

A third strand of pre-2021 jurisprudence, less directly concerned with surrogacy but doctrinally indispensable to it, established that reproductive choice is an incident of personal liberty under Article 21. In *Suchita Srivastava v. Chandigarh Administration*[5], the Supreme Court held that a woman's right to make reproductive choice is itself a facet of personal liberty, encompassing the right to refuse participation in sexual activity as well as the right to procreate. In *Devika Biswas v. Union of India*[6], decided against the backdrop of coercive sterilisation camp, the Court reiterated that the right to reproductive autonomy, including the right to take decision concerning family planning and to access reproductive health service with dignity and free from coercion, is protected under Article 21. These holding acquired still greater constitutional weight after the nine-judge bench decision in *K.S. Puttaswamy v. Union of India*[7], which recognised privacy, including decisional autonomy over intimate matter such as procreation and family life, as a fundamental right flowing from Articles 14, 19 and 21 read together. It is this doctrinal inheritance, and not any express textual guarantee of a right to assisted reproduction, that the post-2021 judiciary has drawn upon in reviewing the surrogacy regime, and its origin in cases far removed from surrogacy explain both the strength and the limit of the resulting jurisprudence, a point developed in Part 6.

3. THE STATUTORY ARCHITECTURE: THE 2021 ACTS

Parliament ultimately enacted two related but formally distinct statute. The Assisted Reproductive Technology (Regulation) Act, 2021 regulates the clinic and gamete bank that provide ART service generally, requiring registration under a National Registry, mandating written informed consent, prohibiting sex-selective procedure, and restricting the sale and import of human gamete and embryo.[8] It defines a commissioning couple as an infertile married couple who approach a registered clinic or bank for ART service,[9] a definition that, on its face, excludes unmarried person and same-sex couple from the Act's protective and facilitative architecture, even for procedure such as in-vitro fertilisation that do not involve a surrogate at all.

The Surrogacy (Regulation) Act, 2021 is the more restrictive of the two statute. It permits only altruistic surrogacy, defined as an arrangement in which no charge, expense, fee, remuneration or monetary incentive of any kind, other

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5 Suchita Srivastava v. Chandigarh Admin., (2009) 9 S.C.C. 1 (India).
6 Devika Biswas v. Union of India, (2016) 10 S.C.C. 726 (India).
7 K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).
8 Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, §§ 3, 8, 21, 33 (India).
9 Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, § 2(1)(e) (India).

than the medical expense and insurance coverage of the surrogate, are given to the surrogate mother or her dependent, and it expressly prohibits commercial surrogacy.[10] Eligibility to commission a surrogacy is confined to a narrow class of intending couple, meaning a legally married Indian man and woman within the reproductive age group who have been certified as infertile, and to a still narrower class of intending women, meaning Indian women aged between thirty-five and forty-five who are widow or divorcee.[11] Never-married single women, single men, live-in partner regardless of the duration or stability of their relationship, and same-sex couple are excluded altogether from the definition of persons who may commission a surrogacy. The Act further bars couple who already have a child, whether biological, adopted or born through a prior surrogacy, from commissioning a further surrogacy, unless the existing child suffers from a life-threatening disorder or fatal illness.[12] The intending couple must additionally be within a prescribed age bracket, and the surrogate herself must be a close relative of the intending couple, ever-married, with a child of her own, aged between twenty-five and thirty-five, and may act as a surrogate only once in her lifetime.[13]

The subordinate legislation compounded these restriction in ways that produced internal contradiction. Rule 14 of the Surrogacy (Regulation) Rules, 2022 permitted the use of a donor gamete where the intending couple possessed a certificate from a District Medical Board confirming a medical condition necessitating such use, for instance the absence of a uterus. In March 2023, however, the Union Government amended the prescribed consent form, Form 2 under Rule 7, to require that both gamete used in the surrogacy procedure be those of the intending couple, effectively withdrawing by administrative form the option Rule 14 continued to confer.[14] It is this contradiction, and its consequence for women with congenital reproductive condition, that produced the first significant round of post-2021 litigation, examined in Part 4.

Both statute also establish a supervisory apparatus of appropriate authority at the state and district level, empowered to grant, suspend and cancel the registration of clinic and bank, and National and State Board charged with advising government on policy. Offence under both Acts are cognisable and non-bailable, and penalty escalate sharply on a second conviction, reaching imprisonment of up to ten year and fine of up to twenty-five lakh rupees under the ART Act and comparably severe term under the Surrogacy Act.[15] This penal architecture, transplanted almost wholesale from the criminal law rather than

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10 Surrogacy (Regulation) Act, No. 47 of 2021, §§ 2(1)(b), 4(ii)(b)-(c) (India).
11 Surrogacy (Regulation) Act, No. 47 of 2021, § 2(1)(s) (India).
12 Surrogacy (Regulation) Act, No. 47 of 2021, § 4(iii)(c)(II) (India).
13 Surrogacy (Regulation) Act, No. 47 of 2021, § 4(iii)(c)(I), (v) (India).
14 Surrogacy (Regulation) Rules, 2022, R. 7, R. 14 & Form 2 (India), as amended Mar. 2023.
15 Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, § 34 (India); Surrogacy (Regulation) Act, No. 47 of 2021, §§ 35-38 (India).

from ordinary medical regulation, reflects Parliament's evident view that the pre-2021 industry was not merely under-regulated but criminal in character, a characterisation that colours the interpretive posture the appropriate authorities have brought to the Act's implementation and that the courts have, in the cases discussed in Part 4, found themselves obliged to soften.

The Surrogacy Act also makes the intending couple responsible for a medical insurance policy covering the surrogate for a period of thirty-six month, and requires that a certificate of essentiality, comprising a certificate of infertility, an order of parentage and custody from a competent court, and insurance coverage, be obtained before an appropriate authority will permit the parties to proceed, in addition to a certificate of eligibility for the surrogate herself confirming she is medically fit and has not previously acted as a surrogate.[16] The ART Act, for its part, requires clinic to counsel commissioning party on the probability of success and the attendant medical risk, but imposes no equivalent obligation to counsel the gamete donor, who typically has the least bargaining power of any party to the transaction and the least independent access to legal advice.[17] This asymmetry, coupled with the absence of any provision entitling a donor to withdraw consent after her gamete have been collected but before they are used, a right expressly available to the commissioning party, has attracted sustained academic criticism as a structural gap in the ART Act's consent architecture, a gap distinct from, but related to, the exploitation concern that motivated the Surrogacy Act's altruistic model discussed in Part 6.

4. CONSTITUTIONALISING REPRODUCTIVE AUTONOMY: THE POST-2021 JURISPRUDENCE

The lead petition testing the 2021 regime was filed by Dr Arun Muthuvel, a Chennai-based infertility specialist, joined by several affected couples, challenging the constitutionality of multiple provision of the Surrogacy Act and the ART Act as discriminatory, exclusionary and arbitrary, and as an interference with reproductive autonomy and privacy protected under Article 21.[18] A discrete and more tractable question within that litigation, concerning the March 2023 amendment to Form 2, was resolved first. The petitioners argued that a woman lacking a uterus, or otherwise medically unable to produce a viable gamete, could never satisfy a requirement that both gamete be her own and her spouse's, so that the form amendment nullified Rule 14 for the very class of women that Rule was designed to protect, and did so through a change to a form, an instrument of delegated legislation subordinate to the Rules themselves. The Supreme Court accepted this reasoning, held that a form

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16 Surrogacy (Regulation) Act, No. 47 of 2021, §§ 4(iii)(a)-(b), 31 (India).

17 Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, § 21(g) (India).

18 Arun Muthuvel v. Union of India, W.P.(C) No. 756 of 2022 (Sup. Ct. India) (petition).

cannot override the substantive entitlement conferred by a Rule, and observed that requiring both gamete from the couple in every case would defeat the very object for which the Surrogacy Act permits gestational surrogacy at all.[19] The Union Government subsequently amended the Surrogacy (Regulation) Rules in February 2024 to formally permit the use of a donor gamete where a District Medical Board certifies that either member of the intending couple suffers from a medical condition necessitating it.[20]

A second and doctrinally more significant question concerned the age bar in Section 4(iii)(c)(I) of the Surrogacy Act, which fixes upper and lower age limit for intending couple. Several couple had begun fertility treatment, extracted gamete and frozen embryo before the Act commenced on 25 January 2022, but had not yet located a surrogate or completed the transfer by the time the age bar came to be enforced against them, by which point they had crossed the prescribed age ceiling. The Supreme Court, in the clubbed matters of *Arun Muthuvel* and *Vijaya Kumari S. v. Union of India*[21], held on 9 October 2025 that Section 4(iii)(c)(I) does not operate retrospectively and cannot disqualify couple who had already commenced the surrogacy process, understood as the point at which gamete are extracted, fertilised and the resulting embryo frozen with the clear intention of transferring it to a surrogate, before the Act came into force. The Court reasoned that such couple possessed a legitimate expectation, crystallised in the frozen embryo itself, that the law prevailing at the time they began treatment would govern their access to surrogacy, and that a rigid, retrospective application of the age bar would defeat that expectation and infringe reproductive autonomy under Article 21 without any countervailing justification specific to their circumstance. The Court went further and directed that other similarly situated couple, who had commenced treatment before the Act but had not themselves approached the Supreme Court, could seek equivalent relief from their jurisdictional High Courts.

That direction has generated a fast-growing body of High Court decision applying the same reasoning. The Allahabad High Court, in *Anshu Shukla v. Union of India*[22], held that the rigid application of the age restriction infringes the fundamental right to reproductive autonomy recognised as part of personal liberty under Article 21, and directed the appropriate authority to process the petitioner's application in light of the Supreme Court's ruling. Similar relief has been granted by the Delhi High Court in *Tapas Kumar Mallick v. Union of India* and by the Punjab and Haryana High Court in *Shobhini Mala v. Union of*

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19 Arun Muthuvel v. Union of India, W.P.(C) No. 756 of 2022, order dated Oct. 9, 2023 (Sup. Ct. India).

20 Surrogacy (Regulation) Amendment Rules, 2024 (Feb. 21, 2024) (India).

21 Vijaya Kumari S. v. Union of India, 2025 INSC 1209 (Sup. Ct. India, decided Oct. 9, 2025) (Nagarathna, J.).

22 Anshu Shukla v. Union of India, 2026:AHC-LKO:43965-DB (Allahabad H.C.) (India).

India[23], both decided in 2026 and both expressly following the Supreme Court's ratio. Taken together, this line of authority now stands as a settled, if judge-made, gloss on Section 4(iii)(c)(I): the age bar applies only prospectively to couple who had not, before 25 January 2022, taken concrete and irreversible medical step toward surrogacy. It is a considerable achievement of constitutional interpretation, but as Part 6 argues, it is also a template that places the burden of vindicating a right on the individual litigant, one High Court petition at a time.

5. THE EXCLUSIONARY ARCHITECTURE UNDER JUDICIAL SCRUTINY

A second and still-unresolved front of litigation concerns not the administration of the Surrogacy Act but its substantive eligibility criteria. The Delhi High Court has questioned, in proceeding challenging Section 2(1)(s), why eligibility to commission a surrogacy as a single woman should turn on marital history at all, given that the provision permits widow and divorcee between thirty-five and forty-five to commission a surrogacy while excluding a never-married single woman of identical age and identical medical need.[24] The classification is difficult to justify on any ground other than a legislative preference for a particular model of family formation, since the medical fact of infertility or the social fact of wishing to parent alone is unaffected by whether a woman's single status arose from widowhood, divorce, or a decision never to marry.

The lead petition of Dr Arun Muthuvel, beyond the donor-gamete and age-bar question already decided, squarely challenges the constitutionality of the ban on commercial surrogacy under Sections 4(ii)(b) and 4(ii)(c) of the Surrogacy Act, and the exclusion of unmarried women from the definition of intending woman. In May 2024, a bench of Justices B.V. Nagarathna and A.G. Masih called for written submission on a set of issue framed at the Union's suggestion, including squarely whether the prohibition of commercial surrogacy is constitutional.[25] These question remain sub judice. A related challenge concerns Section 4(iii)(c)(II), the bar on surrogacy for couple who already have a child, now being tested by couple suffering from secondary infertility, who argue the provision draws no distinction between family that can conceive a second child naturally and those that cannot, and that it therefore imposes a disproportionate burden on reproductive autonomy without a rational medical basis. The Union's position, that surrogacy is a statutorily conferred facility

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[23] Tapas Kumar Mallick v. Union of India (Delhi H.C. 2026); Shobhini Mala v. Union of India (Punjab & Haryana H.C. 2026).

[24] Surrogacy (Regulation) Act, No. 47 of 2021, § 2(1)(s) (India); see also Delhi High Court proceedings questioning the marital-status classification under § 2(1)(s).

[25] Order dated May 3, 2024, Arun Muthuvel v. Union of India, W.P.(C) No. 756 of 2022 (Sup. Ct. India); see also Order dated Jan. 2025 framing eleven issues for consideration.

rather than a free-standing fundamental right, and that the existing-child bar conserves a scarce and ethically sensitive resource, that is, altruistic surrogates, for family with no other route to parenthood, has been placed before the Court and awaits adjudication.

Two categories of persons remain almost entirely outside the frame of this litigation. The first is same-sex couple and transgender persons, who are excluded from both the ART Act's definition of commissioning couple and the Surrogacy Act's definitions of intending couple and intending woman because both turn on a marriage recognised under Indian law, and Indian law does not, at present, recognise marriage between persons of the same sex. The Supreme Court's marriage equality judgment in *Supriyo v. Union of India*[26] declined to read civil marriage or, more broadly, an entitlement to state-recognised family formation for queer couple into the Constitution, and left the matter to Parliament, a holding whose consequence are felt with particular force in the surrogacy context, where marital status is the statutory gateway to eligibility itself. The second category is single men and unmarried person generally, who are wholly outside both statute irrespective of medical need. Neither exclusion has yet been the direct subject of a final judicial pronouncement, and both illustrate the limit of a rights framework that has, so far, developed principally around the procedural and administrative feature of the surrogacy regime rather than its categorical exclusion.

The unresolved status of these two categories is not merely an omission; it is, on a proportionality analysis of the kind *Puttaswamy* requires and Part 6 applies more fully to Section 2(1)(s), difficult to reconcile with Article 14. A same-sex couple or a single man who can demonstrate medical need, whether through a diagnosed condition necessitating gestational surrogacy or through the simple biological fact that a male intending parent cannot gestate a child, and who possesses the financial stability to provide for a child, present a claim structurally identical to that of the heterosexual married couple the Act already protects. If the legislative object of the marriage requirement is child welfare, the classification is significantly overinclusive and underinclusive at once: it excludes financially stable, medically motivated same-sex couple and single parent while including heterosexual married couple without any inquiry into their fitness to parent beyond the fact of marriage itself, and it is well established that the mere fact of a heterosexual marriage certificate is no more a guarantee of child welfare than its absence is a threat to it. If the object is instead the prevention of exploitation of the surrogate, the marital status of the intending parents bears no logical connection to that object at all, since the risk of coercion arises from the surrogate's own circumstance and her relationship to the intending parents, not from whether those parents are married to each other. On either formulation, the nexus between the classification, marital and gender

[26] Supriyo @ Supriya Chakraborty v. Union of India, (2023) 10 S.C.C. 1 (India).

status, and the legislative object is illusory, and the classification should accordingly be held to fail the rational-nexus limb of Article 14 quite apart from any question of proportionality under Article 21. That, at least, is the argument available to a future litigant; no court has yet been asked to test it directly, because, as noted above, the statutory text forecloses standing before the argument can be reached.

6. INTERPRETIVE CORRECTION OR STRUCTURAL REFORM? A CRITICAL ASSESSMENT

The jurisprudence surveyed in Parts 4 and 5 displays a consistent pattern. Wherever a litigant has been able to show a concrete, individualised deprivation, typically the frustration of a medical process already underway, the courts have moved decisively, and have done so using the vocabulary of Article 21 autonomy inherited from *Puttaswamy* and *Suchita Srivastava*. The donor-gamete ruling and the age-bar ruling share a structural feature: in each, the Court characterised the impugned restriction not as an illegitimate policy choice but as a departure, through subordinate legislation or through an unreasoned retrospective application, from the very policy that Parliament itself had enacted. The Court could therefore correct the regime while professing fidelity to it, a mode of reasoning that is doctrinally economical but also self-limiting, because it supplies no basis for disturbing a restriction that the statute itself, on a plain reading, actually intends.

That self-limitation is precisely what distinguishes the resolved disputes from the pending ones. The marital-status classification in Section 2(1)(s), the ban on commercial surrogacy, and the single-child bar are not administrative accretions upon the statute; they are the statute. A court that wishes to disturb them cannot rely on the argument, available in the donor-gamete and age-bar cases, that the restriction frustrates Parliament's own object. It must instead hold that Parliament's object, as expressed in the text, is itself constitutionally infirm, a considerably more exacting undertaking that requires the Court to weigh reproductive autonomy against the state's asserted interest in preventing the commodification of women's reproductive labour and in preserving a particular conception of the family unit through which children are brought into the world. This is not a criticism of the outcomes reached so far, both of which were correctly decided, but an observation about the ceiling of the interpretive method the Court has used, a ceiling that explains why the harder questions, concerning who may commission a surrogacy at all, remain pending years after the Act's commencement.

The distinction tracks a familiar fault line in Indian constitutional adjudication between interpretation that vindicates a right by aligning administrative practice with legislative intent, and interpretation that vindicates a right by displacing legislative intent altogether. The Court's own privacy

jurisprudence supplies the doctrinal tools for the latter task: *Puttaswamy* holds that any restriction on a facet of privacy, including decisional autonomy over family and procreation, must satisfy a standard of proportionality comprising four distinct limb, a legitimate state aim, a rational connection between the restriction and that aim, necessity in the sense that no less restrictive alternative would serve the aim equally well, and a balance between the extent of the restriction and the importance of the aim.[27] Applying that four-part structure separately to Section 2(1)(s) and to the ban on commercial surrogacy exposes precisely why the first has proved amenable to swift correction and the second has not.

Section 2(1)(s), the marital-status classification, fails the test at its second limb. A legitimate aim can be assumed in the state's general interest in child welfare, but there is no rational connection between that aim and a rule confining single-woman eligibility to widow and divorcee: nothing about the fact of having once been married, as against never having married, bears on a woman's fitness to parent, her financial stability, or her vulnerability to coercion by an intending spouse who does not exist. The classification supplies no answer to the question of necessity or balance because it never clears the threshold rational-nexus inquiry at all, which is why the Delhi High Court has been able to question it directly and why it is likely to fall on a comparatively narrow and uncontroversial constitutional footing.

The ban on commercial surrogacy present a materially harder case at every limb of the same test. Its aim, preventing the exploitation of poor women's reproductive capacity and the commodification of children, is unambiguously legitimate. Its connection to that aim is rational, since remuneration is precisely the incentive structure that produced the pre-2021 abuse the Act was designed to end. The genuinely contested limb is necessity: whether outright prohibition is required to prevent exploitation, or whether the regulated-compensation alternative examined in Part 7, independent legal counsel, escrow-administered payment, and mandatory psychological screening, would serve the same protective aim with a materially smaller restriction on the autonomy of both surrogate and intending parent. Because that is an empirical and comparative question rather than a purely logical one, it cannot be resolved by pointing to an internal inconsistency in the statute's own text, the technique that succeeded in the donor-gamete and age-bar litigation.

A second and related concern is distributive. The age-bar relief secured in *Arun Muthuvel* and *Vijaya Kumari* was extended, by the Supreme Court's own direction, to similarly situated couple through subsequent High Court litigation rather than through a rule amendment of general application. The result, as the

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[27] K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1, ¶¶ 310, 325-27 (India) (Chandrachud, J.).

string of 2026 High Court decisions in *Anshu Shukla*, *Tapas Kumar Mallick* and *Shobhini Mala* illustrates, is that a couple's entitlement to the benefit of a settled Supreme Court ruling still depends on that couple's capacity to identify counsel, draft a writ petition, and secure a hearing in a jurisdictional High Court, a capacity that correlates closely with income and education. A right recognised in principle by the apex court in October 2025 was, as late as mid-2026, still being litigated afresh, state by state, rather than implemented administratively by the appropriate authorities constituted under the Surrogacy Act itself. Judicial correction of this kind, however doctrinally sound, is a poor substitute for a rule of general application, and its burden falls disproportionately on those least able to bear it.

A final and more fundamental critique concerns the altruistic-only model the Surrogacy Act enacts and that no petition, so far, has directly challenged on this ground. By prohibiting all remuneration to a surrogate beyond medical expense and insurance, the Act treats a woman's reproductive labour as a service that can properly be requested but not properly compensated, a position the petitioners in the pending Supreme Court batch characterise as itself paternalistic and as denying women agency over their own reproductive capacity. The concern that animated the altruistic model, the exploitation of poor women documented before 2021, remains legitimate, but the altruistic model addresses it by removing the woman's economic agency altogether rather than by regulating the terms on which that agency is exercised, and by confining eligible surrogates to close relatives of the intending couple, a restriction that risks reproducing exactly the intra-family coercion the Act's architects sought to avoid, since a woman asked by her own family to act as a surrogate may find it considerably harder to decline than a stranger approached on commercial terms with independent legal advice and a negotiated contract. The judicial response to date has not engaged this structural critique, because no case before the courts has yet required it to.

7. TOWARDS A COHERENT FRAMEWORK: PROPOSALS FOR REFORM

Four reforms would translate the doctrinal gains of the post-2021 jurisprudence into a coherent and administrable regime. First, the contradiction between Rule 14 and the consent form that produced the *Arun Muthuvel* litigation illustrates the danger of regulating substantive entitlement through form rather than rule, and through rule rather than the statute. The appropriate authorities constituted at the state level under the Surrogacy Act should be required to apply the Supreme Court's age-bar ruling as a matter of course, without requiring each affected couple to obtain a High Court order to the same effect. A circular from the Ministry of Health and Family Welfare directing appropriate authorities to treat a frozen embryo predating 25 January 2022 as conclusive evidence that the

surrogacy process commenced before the Act, in line with the ratio in *Arun Muthuvel*, would convert an individually litigated entitlement into a generally available one.

A circular alone, however, still depends on consistent application by dozens of state and district-level appropriate authorities, and offers no mechanism by which a couple can verify their own eligibility without approaching an authority in person. A more durable solution would embed the *Arun Muthuvel* principle directly within the infrastructure the Surrogacy Act and the ART Act already establish, the National Assisted Reproductive Technology and Surrogacy Registry. A standardised digital window within that Registry, allowing an intending couple to upload embryo-freezing or gamete-extraction record predating 25 January 2022 and receive an automated determination of legacy eligibility, cross-verified against the treating clinic's own registration data, would convert the Supreme Court's ratio into a self-executing administrative rule rather than a precedent that must be pleaded afresh in every jurisdiction, addressing directly the distributive concern identified in Part 6, that access to a settled right should not depend on a litigant's capacity to engage counsel and navigate a High Court.

Second, the marital-status classification in Section 2(1)(s) merits legislative reconsideration independent of the outcome of the pending constitutional challenge. There is no medical or child-welfare rationale that distinguishes a widow or divorcee from a never-married single woman of the same age and the same infertility, and Parliament could remove the anomaly by amending the definition of intending woman to turn on age and medical certification alone. Whether the exclusion of unmarried couple in stable relationships, and of same-sex couple, should likewise be reconsidered raises a harder question the Supreme Court left open in *Supriyo*, but the surrogacy context supplies an independent and narrower ground for revisiting it, that the exclusion operates not merely to withhold civil marriage but to withhold access to parenthood itself for persons who are, on any other measure, capable of providing a stable family environment.

Third, the single-child bar in Section 4(iii)(c)(II) should be replaced with an individualised medical assessment of secondary infertility, certified by the same District Medical Boards that already certify primary infertility and the need for donor gamete, rather than a categorical prohibition that treats all families with one child alike regardless of their capacity to conceive again. Fourth, and most contested, Parliament should revisit the altruistic-only model in favour of a regulated, reasonable-compensation framework that recognises a surrogate's medical risk, time and physical burden as compensable without recreating the unregulated commercial market the 2021 Act was designed to end, combining a fixed, state-supervised compensation scale, independent legal counselling for the surrogate before she consents, and a requirement, already partially present

in the Act's insurance provisions, that compensation continue irrespective of the outcome of the pregnancy.

Comparative practice suggests that a middle path between wholly unregulated commercial surrogacy and the pure altruism the 2021 Act enacts is administrable, and can address the socioeconomic vulnerability of surrogates more directly than either extreme. The United Kingdom permits only altruistic surrogacy, but confines the prohibition to payment beyond reasonable expenses, a standard, developed under the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008, that courts there have interpreted flexibly enough to cover loss of earnings and a range of pregnancy-related cost, without opening the door to a commercial market.[28] California, at the other end of the spectrum, permits compensated gestational surrogacy under a statutory scheme, the California Family Code, that mandates independent legal counsel for the surrogate, separate from and unconnected to counsel retained by the intended parents, a fully executed written agreement before any medical procedure begins, and an independent escrow arrangement through which compensation is administered in staged instalments rather than as a lump sum contingent on delivering a healthy child.[29] Both jurisdictions, despite their opposite positions on the permissibility of payment, converge on a structural safeguard the Surrogacy Act omits altogether: they treat the surrogate as a party requiring independent representation, distinct from the intending couple and from any clinic facilitating the arrangement, and in the American context that representation is frequently paired with independent psychological screening and counselling commissioned specifically to assess the surrogate's own capacity to consent, free of familial or financial pressure.

India's altruistic model, by contrast, addresses the risk of exploitation not by insulating the surrogate through independent counsel or screening but by confining eligible surrogates to close relatives of the intending couple, on the assumption that a family member is inherently less susceptible to coercion than a stranger engaged for payment.[30] The assumption runs in precisely the wrong direction. A woman approached by her own family, in a culture where filial and marital obligation carries considerable normative weight, may find it markedly harder to decline than a stranger who negotiates at arm's length, retains her own lawyer, and can walk away from the transaction without disrupting a lifelong relationship. A reformed Indian regime, whether or not it retains an altruistic or a regulated-compensation model, should adopt the safeguard on which both comparators agree: independent legal counsel and independent psychological screening for the surrogate, procured and paid for by the appropriate authority

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28 Human Fertilisation and Embryology Act 2008, c. 22 (UK); Surrogacy Arrangements Act 1985, c. 49 (UK).

29 Cal. Fam. Code §§ 7960-7962 (West).

30 Surrogacy (Regulation) Act, No. 47 of 2021, § 4(iii)(v) (India).

rather than the intending couple, so that the protective purpose of the close-relative requirement is achieved through institutional safeguard rather than assumed from kinship alone. Neither the United Kingdom's nor California's model can be transplanted into India without adaptation to a very different socio-economic context, in which the bargaining inequality between a commissioning couple and a surrogate is likely to be more pronounced, and in which state capacity to administer an escrow-based compensation system at scale remains unproven, but both models demonstrate that regulation of the surrogate's autonomy through independent representation, rather than restriction of her eligible pool to relatives presumed trustworthy by kinship alone, is a workable alternative the Surrogacy Act's drafters did not seriously canvass.

8. CONCLUSION

The judicial response to the ART Act and the Surrogacy Act displays both the strength and the limit of Article 21 as a tool of statutory correction. Courts have shown themselves willing, and increasingly well-equipped, to strike down features of the regime that frustrate the legislative object the 2021 Acts themselves proclaim, restoring access to donor gametes for women with congenital conditions and protecting couple whose reproductive process had crystallised before the law changed around them. That jurisprudence, running from *Baby Manji Yamada* through *Devika Biswas* and *Puttaswamy* to *Arun Muthuvel*, represents a coherent and increasingly confident line of authority holding reproductive autonomy to be a constitutional value that subordinate legislation and rigid administrative practice cannot casually override. But the harder question, whether marital status may condition access to parenthood, whether commercial surrogacy may be prohibited outright, and whether a family with one child may be denied a second through surrogacy, remain before the Supreme Court years after the statute came into force, precisely because they require the Court to hold not that the executive has misapplied Parliament's policy but that Parliament's policy is itself constitutionally deficient.

Three broader observation follow from the appraisal undertaken in this paper. The first concerns the shape of judicial review itself. The cases examined in Part 4 succeeded because the petitioners could point to a gap between what Parliament had enacted and what the executive had implemented, a gap the courts could close without disturbing the statute's underlying policy choice. The cases still pending in Part 5 present no such gap; they ask the Court to hold that the policy choices are themselves unconstitutional, a task that engages the separation of powers far more directly and that, as Part 6 argued, the courts have so far approached with considerably greater caution. That asymmetry is not a criticism of any individual judgment, each of which was reasoned within the confines of the dispute actually before the court, but it does mean the jurisprudence to date has been more effective at correcting the regime's

administration than at testing its architecture, and that the true constitutional verdict on the Surrogacy Act and the ART Act still lies ahead.

The second observation concerns the persons the litigation has not yet reached. Every reported decision discussed in this paper was brought by a married, heterosexual, financially capable couple, or by a physician acting on behalf of such couple, seeking to enforce right within the statutory categories Parliament has already recognised. No reported judgment has yet vindicated the claim of an unmarried woman outside the widow-or-divorcee class, a single man, a live-in partner, or a same-sex couple, because the statutory text excludes each of them from the threshold definitions of intending couple, intending woman and commissioning couple before any question of administrative implementation can even arise. Their claims, unlike the claims resolved in *Arun Muthuvel* and *Vijaya Kumari*, cannot be framed as a request that the executive be held to Parliament's own word; they can only be framed as a request that Parliament's word itself be set aside, precisely the harder and still-undecided category of claim identified in Part 6. A critical appraisal of the judicial response to the ART Act and the Surrogacy Act must therefore record not only what the courts have done but whom they have not yet been asked, or been able, to reach.

The third observation is prescriptive rather than descriptive, and returns to the argument developed in Part 7. Even within the domain the courts have already settled, relief has travelled by litigation rather than by rule, so that the practical benefit of a Supreme Court judgment has depended, well over a year after it was delivered, on a litigant's capacity to locate counsel and draft a fresh writ petition in a jurisdictional High Court. A statute enacted to protect vulnerable parties from an unregulated private market ought not, in its implementation, recreate a comparable inequality of access to the public remedies it makes available. Codifying the *Arun Muthuvel* principle by circular, widening the statutory categories of eligible intending parent, replacing the categorical single-child bar with individualised medical assessment, and reconsidering the altruistic-only model along the regulated-compensation line examined in Part 7, would together do more to vindicate reproductive autonomy than any number of further writ petition. Until Parliament undertakes that revision, or the Supreme Court resolves the batch of petition still pending before it, the law governing assisted reproduction and surrogacy in India will remain what it has been since 2022: a statute whose text sets the outer boundary of permissible family formation, and an unfinished body of case law testing, provision by provision, whether that boundary can withstand the Constitution it must answer to.