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**WELFARE OR RESTRICTION: CONFLICT BETWEEN
FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE
POLICY IN SURROGACY JURISPRUDENCE OF INDIA**

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Abstract:

Surrogacy (Regulation) Act, 2021, totally prohibits commercial surrogacy and confines to altruistic surrogacy, narrowing the classes of intending parents, to protect the vulnerable women and children, as the State's constitutional duty. Tracing the relationship between the Part III and IV of the Constitution of India, it shows that welfare objectives can legitimise restrictions on rights only within a structure of harmony, not hierarchy. This article argues that the Act exposes an unresolved tension between the protective ambitions of Directive Principles of State Policy and the individual liberties guaranteed by Fundamental Rights of the Constitution of India. Further, endeavours to reconstruct the welfare case for the statute through Articles 15(3), 23, 38, 39 and 42 and then examines the rights case against it under Articles 14, 19(1)(g) and 21, including claims of reproductive autonomy, equality and livelihood advanced by intending parents, excluded persons and surrogates themselves. Analysing the proportionality framework developed by judicial interpretations, it contends that the blanket prohibition of compensated surrogacy, together with marital, age and parity-based eligibility filters, struggles to satisfy the necessity and balancing stages, because less restrictive, surrogatecentred regulatory alternatives exist. Judicial developments, revealing a pattern of narrow, case-specific relief that avoids confronting the Act's constitutional foundations. The article concludes by proposing a rights respecting welfare model that retains the protective purpose of State while reconfiguring the means by which the statute pursues it, so that protection of surrogates and children is secured without sacrificing dignity, equality and choice.

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I. Introduction

Indian Constitution being a law of land has played a prominent role in interpretation of legislations through judicial interventions from time and again. While enactment of legislation on surrogacy and surrogacy jurisprudence in India, involves a several considerations of the rights and welfare perspectives which Constitution of India reflects through its provisions, furthering the dilemma and tug of the different provisions of the Constitution of India.²

In July 2008 a baby girl named Manji was born in Anand, Gujarat, to a surrogate mother, later the Japanese couple who had commissioned her pregnancy separated before the birth.³ Within months, a German couple in *Jan Balaz* found that their twins, born to an Indian surrogate, were caught between two different legal systems and recognised by none.⁴ Both cases revealed the market had flourished only with mere guidelines of the Indian Council of Medical Research, where commercial surrogacy had operated for decades without a statute, was a favoured destination for cross-border reproductive services, while the women who were surrogate mother with a child to the intending parents, many of them were poor and housed in clinic-run hostels, enjoyed no entitlement beyond what an agreement and a clinic chose to provide them.⁵

Indian parliament passed a Surrogacy (Regulation) Act, 2021, which came into force on 25 January 2022 as answer to the decades chaotic arrangements of surrogacy.⁶ The Act prohibited commercial surrogacy and made it an offence, permitting only altruistic surrogacy and restricting access to legally married Indian couples, Indian widows and Indian divorcees within prescribed age bands, subject to medical certification and a series of further conditions.⁷ Supporters of the legislation held a perspective as the realisation of the State's constitutional duty to protect women from exploitation and children from commodification.

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³ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

⁴ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.

⁵ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press, 2014); Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (NYU Press, 2015).

⁶ The Surrogacy (Regulation) Act, 2021 (Act 47 of 2021) [hereinafter the Surrogacy Act].

⁷ *Id.*, ss. 2(1), 4 and 38.

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While critics described it as a paternalistic statute that denies reproductive choice of many, closed a livelihood to many and substituted the State's moral preferences against the autonomy of adults.⁸

The article endeavours to analyse the role of States on securing the vulnerable with consequential question as when the State invokes Directive Principles of State Policy to restrict a right that Fundamental Rights protects! The analysis proceeds through reconstructing the constitutional relationship between the Fundamental Rights and Directive Principles of State Policy tracing the legislative path towards the Surrogacy Act, 2021 and the dimension of welfare case against it proposing proportionality as the doctrinal bridge and judicial interpretation approaching a reconciliatory model. The methodology is doctrinal, drawing on statutes, subordinate legislation, parliamentary, Law Commission materials and the case law of the Supreme Court and High Courts, supplemented by socio-legal relationship, where the constitutional argument depends. The article does not claim free-standing fundamental right to surrogacy, nor that the State may not regulate it rather claim that the means chosen by the Act must be justified and that the language of welfare does not exempt them from scrutiny.

II. The Constitutional Architecture: Fundamental Rights and Directive Principles of State Policy

From Hierarchy to Harmony

The early judicial position was one of clear hierarchy. In *State of Madras v. Champakam Dorairajan*, the Supreme Court held that the Directive Principles, being expressly non-justiciable under Article 37, must confirm to and run as subsidiary to the Fundamental Rights.⁹ On that view, a welfare objective, however worthy, could not save a law that infringed a guaranteed right. The constitutional text itself seemed to support that Fundamental Rights is enforceable through Articles 32 and 226, while Directive Principles declares that its principles "shall not be enforceable by any court" even though they are "fundamental in the governance of the country." Over the following decades the hierarchy

⁸Rajya Sabha Secretariat, *Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019* (February 2020).

⁹*State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; The Constitution of India, art. 37.

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softened. The framers had conceived the two Parts as expressions of a single commitment, a point stressed in the historical account of the Constituent Assembly's deliberations.¹⁰

In *Kesavananda Bharati*, several judges treated the Directive Principles as integral to the basic structure as it guides to the meaning of rights,¹¹ and in *State of Kerala v. N.M. Thomas* the Court described the Directive Principles as aids to the interpretation of the Fundamental Rights.¹² The decisive articulation came in *Minerva Mills*, where the Court held that the Constitution is founded on the bedrock of a balance between the two Parts, and that to give absolute primacy to either would disturb the harmony that is part of the basic structure.¹³ The doctrine of harmony is therefore not a rule of priority but a rule of reconciliation.

Welfare as Aim and Right

Directive Principles of State Policy, provides legitimate State purposes, a legislative objective grounded in Articles 38, 39, 41, 42 or 47, almost by definition, a public purpose capable of supporting reasonable restrictions under Articles 19(2) to 19(6) and justifying special provisions for women and children under Article 15(3). Secondly, extends rights beginning with *Francis Coralie Mullin*, the Court read Articles 39(e), 39(f), 41 and 42 into Article 21 to hold that the right to life means a life of dignity and the same method yielded the right to livelihood in *Olga Tellis*, enforceable protections against bonded labour in *Bandhua Mukti Morcha*, a broad reading of Article 23 in *People's Union for Democratic Rights*.¹⁴ Maternity rights received similar treatment in *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, where Article 42 informed the interpretation of maternity benefits legislation.¹⁵

This duality is not unique to surrogacy, but it is sharper here than in most fields. For instance, in labour law, the beneficiary of a protective statute is usually distinct from the person whose liberty is restricted but in surrogacy the same woman may be both. The State invokes Part IV to restrict rights of intending parents, while the surrogate herself may invoke the same Part, through Articles 21, 23, 39 and 42, to claim protection against exploitation and arguably,

¹⁰Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966) ch. 3.

¹¹*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹²*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

¹³*Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

¹⁴*Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608; *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235.

¹⁵*Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, (2000) 3 SCC 224.

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recognition of her labour. A court cannot therefore treat the case as one of welfare against liberty. It is a case in which the content of welfare and the identity of those whose welfare counts, is itself in dispute.

The Limits of Article 31C

A further doctrinal point often overlooked. Article 31C, as it survives after *Kesavananda* and *Minerva Mills*, protects from challenge under Articles 14 and 19 only those laws that give effect to the principles in Articles 39(b) and 39(c), concerning the distribution of material resources and the prevention of concentration of wealth.¹⁶ The Surrogacy Act is not a law of that kind. Its welfare justifications are most naturally rooted in Articles 39(e) and 39(f) and in Articles 15(3), 23 and 42, none carries the insulating effect of Article 31C. The Act therefore receives no constitutional immunity and must satisfy ordinary scrutiny under Articles 14, 19 and 21. Welfare may furnish the purpose of the law, but it cannot furnish its defence.

III. The Legislative Trajectory: Market to Mandate

Surrogacy in India until 2021, was governed by guidelines rather than law. The Indian Council of Medical Research issued a National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005, which recognised surrogacy arrangements but lacked statutory force.¹⁷ The Supreme Court in *Baby Manji* noted the prevalence of commercial surrogacy and the absence of legislation, observations that prompted the Law Commission of India to examine the subject. In 228th Report, submitted in August 2009, escalated legislation to regulate assisted reproductive technology clinics, the rights and obligations of parties to surrogacy and recommended prohibiting commercial surrogacy while only permitting altruistic arrangements.¹⁸ Previously drafted, Assisted Reproductive Technology Bills of 2008 and 2014 less restrictive or inefficient as per the need of the time as seen back then and none of the bills was enacted.

The turning point became the Surrogacy (Regulation) Bill, 2016, which proposed an outright ban on commercial surrogacy and confined altruistic surrogacy to close relatives. By then the executive had already closed the market to foreign nationals through a policy decision in

¹⁶*Supra* note 11; *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147.

¹⁷Indian Council of Medical Research, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (2005).

¹⁸Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, Report No. 228 (August 2009).

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2015. The 2016 Bill lapsed and reintroduced in 2019, referred to a Select Committee of the Rajya Sabha, which recommended, among other things, widening the pool of surrogates beyond close relatives to any willing woman.¹⁹ The Act as finally passed embodies that recommendation but retains the prohibition of compensated surrogacy and to close relatives only with certain other criteria/conditions. It was accompanied by the Assisted Reproductive Technology (Regulation) Act, 2021, which regulates clinics and banks,²⁰ along with the Surrogacy (Regulation) Rules, 2022.

The structure of the Surrogacy Act if summarised may be describe into three parts. Firstly, it defines altruistic surrogacy as surrogacy in which the surrogate receives no charges, fees, remuneration beyond medical expenses and insurance cover, further it criminalises commercial surrogacy, with imprisonment of up to ten years and fines of up to ten lakh rupees for the principal offences.²¹ Secondly, it limits access of an intending couple, they must be legally married Indian nationals who hold a certificate of essentiality, certified medically as requiring gestational surrogacy and a certificate of eligibility, specifying age bands of 23 to 50 years for the woman and 26 to 55 years for the man, subject to narrow exceptions, no surviving child.²² An “intending woman”, meaning an Indian widow or divorcee between 35 and 45 years, may also avail of surrogacy.²³ Thirdly, it prescribes conditions for the surrogate, who must be an ever-married woman with a child of her own, aged 25 to 35 years, who may act as a surrogate only once in her lifetime.²⁴

Subordinate legislation has itself been contentious. The Rules were amended in March 2023, to bar donor eggs in gestational surrogacy for couples, a restriction that the Supreme Court stayed in October 2023, as applied to a petitioner with Mayer-Rokitansky-Küster-Hauser syndrome, on the prima facie view it contradicted the Rules’ own medical indications.²⁵ A further amendment in February 2024 permitted donor gametes where a District Medical Board certifies that either partner requires them, while requiring widows and divorcees to use their own eggs with donor sperm.²⁶ The shifting rules illustrate a recurring feature of this

¹⁹*Supra* note 6.

²⁰The Assisted Reproductive Technology (Regulation) Act, 2021 (Act 42 of 2021).

²¹Surrogacy Act, ss. 2(1) and 38.

²²*Id.*, s. 4(iii)(a) and (c).

²³*Id.*, s. 2(1).

²⁴*Id.*, s. 4(iii)(b).

²⁵The Surrogacy (Regulation) Amendment Rules, 2023 (notified 14 March 2023)

²⁶The Surrogacy (Regulation) Amendment Rules, 2024 (notified 21 February 2024).

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field, restrictions imposed in the name of welfare have repeatedly been loosened under judicial pressure, which suggests that their necessity was not self-evident.

IV. The Welfare Case: Directive Principles of State Policy as The Statute's Foundation

The case for the Act rests on a recognisable constitutional vision. Article 38(1) commands the State to promote the welfare of the people by securing a social order informed by justice²⁷ and Article 39(e) directs that citizens not be forced by economic necessity into avocations unsuited to their strength²⁸, while Article 39(f) protects children's development in conditions of freedom and dignity²⁹. Article 42 speaks of just and humane conditions of work and maternity relief³⁰, Article 47 of public health and Article 51A(e) of the duty to renounce practices derogatory to the dignity of women³¹. Article 15(3) empowers the State to make special provision for women and children and Article 23³² prohibits traffic in human beings and forced labour.

The ethnographic record gives vision of ground reality that the commercial surrogacy in India, women are recruited through agents, accommodated in clinic hostels, separated from their families for the duration of the pregnancy and subjected to caesarean deliveries scheduled for the convenience of clinics and commissioning parents.³³ On this evidence, consent given under conditions of poverty is arguably not the free and informed consent that autonomy-based arguments presuppose. The Supreme Court has long recognised that economic compulsion can vitiate apparently voluntary arrangements in *People's Union for Democratic Rights*, it held that accepting work below the minimum wage because of necessity is a form of forced labour under Article 23 and in *Bandhua Mukti Morcha* it placed positive duties on the State to prevent coerced labour.³⁴ If the surrogate's consent is structurally compromised, the State's protective intervention can be presented as vindication, rather than violation of constitutional values.

The second concerned branch of welfare is related with the child. Surrogacy raises the risk of abandonment and the risk of commodification, a concern that has echoed in international

²⁷ The Constitution of India, art. 38(1).

²⁸ The Constitution of India, art. 39(e).

²⁹ The Constitution of India, art. 39(f)

³⁰ The Constitution of India, art. 42.

³¹ The Constitution of India, arts. 47 and 51A(e).

³² The Constitution of India, arts.15(3) and 23.

³³ *Supra* note 3.

³⁴ *Supra* note 12.

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reporting. The United Nations Special Rapporteur on the sale and sexual exploitation of children has warned that the commercial surrogacy, where poorly regulated, can amount to the sale of children and has urged States to adopt robust regulation or restrictions.³⁵ In *Gaurav Jain v. Union of India*, the Court stressed that children are to be protected from conditions that undermine their dignity, while referring Articles 21, 39(e) and 39(f) together.³⁶

Finally, to analyse the comparative practice worldwide and to illustrate in few, the United Kingdom prohibits commercial surrogacy arrangements and permits payment of only reasonable expenses,³⁷ and Canada criminalises payment to a surrogate other than reimbursement of prescribed expenses.³⁸ India's choice of an altruistic model, in this sense, is not an outlier. However, that these systems differ from the Indian Act in two respects that matter constitutionally they do not generally limit access to married heterosexual couples of a particular age and parity, they operate against a background of more developed social welfare and healthcare entitlements for pregnant women.

V. Fundamental Rights as The Statute's Challenge

Reproductive Autonomy and Article 21

The strongest constitutional objection arises under Article 21. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court held that a woman's right to make reproductive choices is a dimension of personal liberty, encompassing the right to procreate as well as the right to abstain.³⁹ The nine-judge bench in *K.S. Puttaswamy* confirmed that privacy protects decisions relating to marriage, procreation, family and linked autonomy to dignity.⁴⁰ In *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi*, the Court extended reproductive autonomy to unmarried women and refused to let marital status determine access to reproductive healthcare.⁴¹

³⁵United Nations Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, U.N. Doc. A/HRC/37/60 (2018).

³⁶*Gaurav Jain v. Union of India*, (1997) 8 SCC 114.

³⁷The Surrogacy Arrangements Act, 1985, s. 2 (U.K.); The Human Fertilisation and Embryology Act, 2008, s. 54 (U.K.).

³⁸Assisted Human Reproduction Act, S.C. 2004, c. 2, s. 6 (Can.).

³⁹*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

⁴⁰*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁴¹*X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi*, 2022 SCC Online SC 1321.

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Equality and Classification under Article 14

Article 14 requires that a classification rest on an intelligible differentia bearing a rational nexus to the statute's object. The object of the Act, to protect surrogates and children, does not explain why a legally married heterosexual couple should qualify while an unmarried woman with the same medical need does not or why a widow aged 44 should qualify and a divorcee aged 46 should not. Marital status is, at best, a weak proxy for the capacity to care for a child, which is a concern the adoption regime addresses without requiring marriage. The Court has, moreover, treated the *Navtej Johar* and *Joseph Shine* line of decisions as rejecting State attempts to enforce a conventional morality of family and sexuality through law.⁴²

The jurisprudence on manifest arbitrariness adds a further ground. *Shayara Bano* recognised that a statute may be struck down where it is capricious, irrational or without adequate determining principle.⁴³ Rigid age cut-offs applied to couples who had already begun treatment before the Act, appear difficult to defend on that standard. *Anuj Garg v. Hotel Association of India* adds a caution that goes to the heart of the welfare argument, protective legislation framed for the benefit of women can entrench stereotypes and curtail their choices, and Article 15(3) is not a licence for paternalism.⁴⁴

Livelihood and Article 19(1)(g)

Article 19(1)(g) protects the right to practise any profession or carry on any occupation, trade or business, subject to reasonable restrictions in the public interest under Article 19(6). Surrogacy clinics, agencies and more arguably, surrogates themselves, had built livelihoods around an activity that the Act now criminalises. *State of Maharashtra v. Indian Hotel & Restaurants Association*, which struck down a ban on dance performances in bars, is instructive, the Court accepted the State's professed concern for the dignity of women but held the blanket prohibition disproportionate, observing that the State had not shown why regulation of the activity would not have sufficed.⁴⁵ The analogy is imperfect, since a pregnancy involves bodily risk of a different order from a dance performance and the Court may be more willing to treat gestation as extra commercium. But the structure of the

⁴²*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

⁴³*Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁴⁴*Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.

⁴⁵*State of Maharashtra v. Indian Hotel & Restaurants Association*, (2013) 8 SCC 519.

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argument is the same and the State must show that nothing short of prohibition could achieve its protective ends.

The Rights of Surrogate's

The most difficult dimension is that the Act's principal beneficiary may also be its principal casualty. A woman with limited alternatives who would have chosen to act as a surrogate for payment is now barred from doing so and a woman who acts altruistically gets no remuneration for a nine-month undertaking that involves risk, loss of earnings and physical burden and altruistic surrogacy may itself conceal unpaid reproductive labour performed within families, with the pressure to act as a surrogate for a relative or friend replacing the pressure of the market with pressure of kinship.⁴⁶

The Court recognised in *Vishaka* that constitutional guarantees can be read consistently with international commitments, including those concerning the elimination of discrimination against women,⁴⁷ and those commitments emphasise agency alongside protection.

VI. Balancing the Two Parts: Proportionality as a Bridge

If the doctrine of harmony is to be more than a statement, it requires an operational test. The Supreme Court has increasingly supplied one in the form of proportionality. In *Modern Dental College v. State of M.P.* and in the *Aadhaar* decision, the Court articulated a four-stage inquiry, the measure must pursue a legitimate aim, must be rationally connected to it, must be necessary that no less restrictive but equally effective alternative is available and must strike a proper balance between the benefit achieved and the harm to the right.⁴⁸

The protection of vulnerable women from coercion and of children from abandonment or commodification are objectives anchored in Articles 15(3), 23, 39 and 42, and have been recognised by the Court in other contexts. This conclusion matters because it disposes of the argument that surrogacy law is inherently illegitimate and the dispute concerns how the aim is pursued.

⁴⁶*Supra* note 3.

⁴⁷*Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁴⁸*Modern Dental College and Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353; *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2019) 1 SCC 1; *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012).

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A complete prohibition on compensated surrogacy is not the only means of protecting surrogates, the less restrictive alternatives include licensed and State-supervised compensation, standard-form contracts reviewed by an independent authority, mandatory independent medical and legal counselling for the surrogate, guaranteed health insurance and post-natal care, caps on the number of embryo transfers, prohibition of agents and brokers, payments through a regulated fund instead of directly from the commissioning parents. Several of these were canvassed in the legislative process, and the Select Committee itself advocated a more substantial recognition of the surrogate's expenses. The Union has not shown, on the record before the courts, that such measures would be ineffective and the experience of the black market that tends to follow prohibitions suggests that blanket bans may drive exploitation underground, leaving unwitting participants outside the protection of law.⁴⁹

Directive Principles of State Policy cannot be used to inflate the weight of the State's interest. A Directive Principle is not an independent ground for overriding a right, it reflects the legitimacy of the aim, but the means must still pass through the Fundamental Rights filter. Secondly, proportionality is not a rule of automatic invalidity. Nor does the framework require the Court to adopt the view that gestation may be freely traded, it requires only that any ban be demonstrably the least intrusive effective measure. A court applying it to the Act would likely sustain the prohibition of coercive and brokered surrogacy while questioning the breadth of the eligibility rules and the absence of safeguards for compensated but regulated arrangements. The result would be a narrower, better-fitted statute, not the abolition of regulation.

VII. Minimalist Judicial Response in the Absence of a Legislation

The constitutional challenges before the Supreme Court, including *Arun Muthuvel v. Union of India*, raise most of the issues identified above, including the validity of the age limits, the exclusion of single persons and the inconsistency between the Surrogacy Act and the ART Act. Judicial engagement so far has been cautious. In October 2025, a bench of Justices B.V. Nagarathna and K.V. Viswanathan held that the age restriction in section 4(iii)(c)(I) operates

⁴⁹Kanishta Naithani, "Commercial or Altruistic Surrogacy: The Indian Supreme Court Finds Middle Ground", *Oxford Human Rights Hub* (2023), available at <https://ohrh.law.ox.ac.uk/> (last visited 4 October 2026).

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prospectively and cannot disqualify couples who had begun the surrogacy process, by freezing embryos, before the Act came into force.⁵⁰

High Courts have followed the same path, with a somewhat sharper constitutional edge. The Allahabad High Court, granting relief to a couple who had initiated treatment before the Act, observed that rigid application of the age restriction infringed reproductive autonomy as part of personal liberty under Article 21.⁵¹ The Kerala High Court, dealing with age limits under the ART Act, read them as applying to the person undergoing the procedure.⁵² In the donor-gamete cases, the Supreme Court stayed the contested rule in individual cases, leaving the larger question undecided until the Union itself amended the Rules.⁵³ The Court has also reportedly agreed to examine the bar on surrogacy for couples with a surviving child, while observing at an early stage that the restriction appeared reasonable in light of population concerns.⁵⁴

This pattern may be described as constitutional minimalism. Courts resolve the dispute before them through narrow doctrines, such as non-retrospectivity, interpretive reading and applied relief, without ruling on the validity of the statutory scheme. Minimalism has virtues and preserves legislative space, avoids premature rulings on contested ethical questions allowing evidence to develop. It has costs as well which produces uncertainty for those who cannot afford litigation, it leaves the law's underlying justification unexamined and allows a statute with significant rights implications to operate largely unreviewed on its constitutional merits. Significantly, case-by-case method does not answer the question this article poses, namely what the State must show when it invokes welfare to limit rights. Without an explicit proportionality analysis, the harmony doctrine of *Minerva Mills* remains a general principle, unapplied to the facts of the Act.

VIII. Towards a Reconciliatory Model

A constitutionally defensible surrogacy regime would preserve the protective purpose while redesigning the means. Firstly, the prohibition on all compensation should give way to a regulated model of fair compensated surrogacy, considering surrogate's time, risk and loss of

⁵⁰*Arun Muthuvel v. Union of India*, 2024 SCC Online SC 140.

⁵¹*Anshu Shukla v. Union of India*, 2026 SCC Online All 22006.

⁵²*Sathi T. v. Union of India*, 2026 SCC Online Ker 4922.

⁵³*Supra* note 23.

⁵⁴*Supra* note 44.

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physical fitness, recovery, earnings fixed or approved by a statutory authority and paid through a supervised fund prohibiting any kind of brokerage, without denying that gestation is labour. Secondly, the surrogate's protections should be placed at the centre of the statute. A surrogatecentred statute which may bring the Act into closer alignment with Articles 39(e), 41 and 42. Thirdly, the eligibility classifications should be reconsidered in light of Articles 14 and 21. Fourthly, the offence provisions should be calibrated and appropriate criminal sanctions should be emphasized but not for the surrogate herself or for intending parents who, acting in good faith, make payments for medical or livelihood needs within the permitted framework. Fifthly, the State should commit to systematic data collection and periodic strict review. Judicial review would also benefit from a clear articulation by the Supreme Court of the proportionality standard applicable to restrictions on assisted reproduction. Such a standard would not predetermine the result but would require the State to show its reasoning.

IX. Conclusion

The Surrogacy Act while analysing through the lens of provisions of Constitution of India is often described as a contest between a welfare State and a rightsbearing individual. The Act pursues aims that Directive Principles of State Policy legitimately encourages, but the means by which, it does so, affect rights protected under Fundamental Rights and the persons affected include the very women whose welfare the Act seeks to secure. The doctrine of harmony requires that neither Part of the Constitution of India, be allowed to eclipse the other, it requires reconciliation and reconciliation requires reasons.

Measured by the proportionality framework, the Act's aims are legitimate and its core prohibition of exploitative commercial arrangements is defensible though an absolute bar on regulated compensation, its eligibility filters and the lack of an evidence base for its assumptions is more difficult for justification. The judiciary's current approach, which relies on narrow, case-specific relief, has softened the statute's sharpest edges, but it has deferred the constitutional question rather than responding. A surrogacy jurisprudence will eventually have to do go through questions and challenges that why every restriction what Indian constitutional law seeks of every restriction on a right, what is the major purpose and is the balance fairly struck. The welfare which can be advanced only at the price of dignity and choice, setting Fundamental Rights and protection under Directive Principle of State Policy

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against one another, will only lead to dilemma and unworthy endeavours to move towards lawful practice.

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