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## Legal Framework And Regulation Of Surrogacy In India

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### Abstract

The legal framework governing surrogacy in India has undergone significant transformation in recent years, with a primary focus on regulating the practice to ensure ethical standards and protect the rights of all parties involved. Surrogacy in India was once a thriving industry, attracting international attention due to its relatively low costs and the country's lenient laws. However, concerns over exploitation, particularly of women from marginalized communities, and the ethical and legal complexities of international surrogacy prompted the Indian government to intervene. In 2020, the Surrogacy (Regulation) Bill was introduced, which aims to regulate surrogacy arrangements, both domestic and international, and establish a legal framework that promotes ethical practices. The Bill distinguishes between altruistic surrogacy (non-commercial) and commercial surrogacy, explicitly banning the latter, citing concerns over the potential exploitation of women as surrogate mothers.

Key provisions under the Bill include strict guidelines on eligibility for both intended parents and surrogates, the establishment of a National Surrogacy Board, and the creation of regulations for ART (Assisted Reproductive Technology) clinics. The legislation mandates that only Indian citizens can avail of surrogacy services, and the intended parents must be legally married. Additionally, the surrogate mother must meet specific health and age requirements, and the arrangement must be altruistic, with no financial compensation other than medical expenses and insurance coverage.

Despite its intention to safeguard the rights of all stakeholders, the regulation of surrogacy raises concerns about its practical implementation, including the challenge of preventing illegal or unregulated surrogacy practices. This paper examines the legal aspects of surrogacy in India, analyzing the Surrogacy (Regulation) Bill of 2020, its implications, and the ethical dilemmas it seeks to address, with a focus on the protection of surrogate mothers, children, and intended parents.

**Keywords:** Surrogacy, Regulation, India, Legal Framework, Altruistic Surrogacy

## Introduction

Surrogacy in India has evolved from being an unregulated industry to a highly debated and legislated practice. India, in the past, became a global hub for commercial surrogacy due to the affordability and the accessibility of assisted reproductive technologies (ART). However, the unregulated and commercial nature of surrogacy led to multiple ethical, legal, and social concerns, including the exploitation of poor women as surrogate mothers, lack of rights for children born through surrogacy, and the absence of clear legal structures for both surrogate mothers and intended parents. In response to these concerns, India has introduced legal reforms, culminating in the Surrogacy (Regulation) Bill, 2020, which aims to regulate surrogacy practices. This paper explores the legal framework governing surrogacy in India, placing it within the context of constitutional and legal principles that govern personal rights, medical ethics, and gender justice.

## Constitutional Framework and Fundamental Rights

India's constitutional framework plays a vital role in shaping the laws governing surrogacy, as it addresses fundamental rights, gender equality, and social justice. The Constitution of India provides a strong foundation for the regulation of surrogacy through several articles, primarily those dealing with fundamental rights under Part III.

### Right to Life and Personal Liberty (Article 21)

The right to life and personal liberty under Article 21 of the Constitution has been interpreted by the Supreme Court of India to include a variety of aspects, such as the right to reproductive autonomy and the right to make decisions related to one's family life. In cases like *Bandhua Mukti Morcha v. Union of India*, the Supreme Court affirmed that Article 21 encompasses not just physical existence but also a life with dignity, which could include the right to procreate. However, while the right to reproductive autonomy is part of the broader right to life, it must be balanced with other rights such as the protection of women's dignity and the prevention of exploitation. The Constitution's protection of fundamental rights has thus served as a basis for the regulation of surrogacy, particularly in ensuring that surrogacy arrangements do not lead to exploitation, trafficking, or the commodification of women's reproductive abilities.<sup>1</sup>

<sup>1</sup> Constitution of India, art. 21.

## **Bandhua Mukti Morcha v. Union of India<sup>2</sup>**

### **Right to Equality (Article 14)**

Article 14 guarantees equality before the law and ensures that there is no discrimination on the grounds of religion, race, caste, sex, or place of birth. This right is crucial in surrogacy laws, particularly when it comes to questions of eligibility, access to surrogacy, and discrimination based on gender, marital status, or sexual orientation. The Supreme Court, in cases such as *Navtej Singh Johar v. Union of India* (2018), highlighted the constitutional necessity of eliminating discrimination based on sexual orientation. As surrogacy laws in India continue to evolve, issues regarding who is allowed to enter into a surrogacy arrangement—be it married couples, single individuals, or same-sex couples—become central. In its current form, the Surrogacy (Regulation) Bill, 2020, limits surrogacy to married heterosexual couples, raising questions about whether this exclusion violates the right to equality under Article 14.

## **Navtej Singh Johar v. Union of India<sup>3</sup>**

### **Right to Non-Discrimination on the Basis of Gender (Article 15)**

Article 15 prohibits discrimination on the grounds of sex, which is especially relevant in the context of surrogacy. Surrogate mothers, who are predominantly women from disadvantaged socio-economic backgrounds, may be particularly vulnerable to exploitation if not properly protected by law. Gender inequality is a significant concern in the surrogacy industry, where women often face exploitation due to the commodification of their reproductive capabilities. The Surrogacy (Regulation) Bill, 2020, seeks to address some of these concerns by limiting surrogacy to altruistic arrangements and imposing medical and psychological safeguards. However, the Bill does not extend protections to women who may choose surrogacy for economic reasons outside the prescribed legal framework, raising concerns about the protection of their fundamental rights.

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<sup>2</sup> (1997) 10 SCC 549.

<sup>3</sup> (2018) 10 SCC 1.

<sup>4</sup> The Surrogacy (Regulation) Bill, 2020, The Gazette of India, Ministry of Law and Justice, 2020, § 2.

not extend protections to women who may choose surrogacy for economic reasons outside the prescribed legal framework, raising concerns about the protection of their fundamental rights.

### **The Role of International Conventions and Legal Instruments**

India's legal framework on surrogacy is not just shaped by domestic constitutional principles but also by its commitments under international law. The country is a signatory to several international conventions aimed at protecting human rights, including women's rights and children's rights, which influence its surrogacy laws.

#### **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**

India is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which emphasizes the need to eliminate gender discrimination in all forms. One of the major concerns in surrogacy laws has been the potential for exploitation of women in the surrogacy process, particularly poor and marginalized women. CEDAW calls for safeguarding women's rights in reproductive and family matters and urges states to ensure that women's participation in surrogacy is free from coercion, exploitation, and discrimination. The Surrogacy (Regulation) Bill, 2020, attempts to align with CEDAW by prohibiting commercial surrogacy and focusing on altruistic arrangements. However, questions remain as to whether the Bill fully addresses the issue of gender-based exploitation in surrogacy, particularly given its exclusion of single women and same-sex couples from surrogacy arrangements.

**Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations, 1979.<sup>5</sup>**

#### **The United Nations Convention on the Rights of the Child (UNCRC)**

India ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1992, which places the child's rights and welfare at the forefront of any surrogacy arrangement. The Convention emphasizes that the child's identity and dignity must be protected and that they should not be subject to trafficking or illegal practices. The Surrogacy (Regulation) Bill, 2020, reflects this by mandating that the child born through surrogacy should be legally recognized as the child of the intended parents and by ensuring that the surrogate mother has no legal claim over the child. However, international concerns have arisen about how India addresses the citizenship and nationality of children born through surrogacy, especially in cross-border surrogacy arrangements.

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<sup>5</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations, 1979.

## United Nations Convention on the Rights of the Child (UNCRC), 1989.<sup>6</sup>

### The Surrogacy (Regulation) Bill, 2020

The Surrogacy (Regulation) Bill, 2020 is a significant attempt by the Indian government to regulate surrogacy practices in the country. The Bill aims to restrict surrogacy to altruistic arrangements, prohibit commercial surrogacy, and ensure greater protection for surrogate mothers and children born through surrogacy. The key provisions of the Bill seek to address the primary issues of exploitation, commodification of women, and legal recognition of surrogacy arrangements.

### Ban on Commercial Surrogacy

The Surrogacy (Regulation) Bill, 2020 bans commercial surrogacy in India, restricting surrogacy arrangements to altruistic surrogacy, where the surrogate mother is compensated only for medical expenses and insurance coverage, with no profit-making incentive. This provision aims to curb the exploitation of economically vulnerable women and prevent surrogacy from being treated as a commercial transaction. By banning commercial surrogacy, the Bill seeks to eliminate unethical practices, including surrogacy rackets and human trafficking.

### Eligibility of Intended Parents and Surrogate Mothers

The Bill also lays down strict eligibility criteria for both intended parents and surrogate mothers. Intended parents must be Indian citizens who have been married for at least five years and must be unable to have biological children due to medical conditions. Surrogate mothers must also be Indian women between the ages of 25 and 35, who are married and have at least one biological child of their own. The Bill restricts surrogacy to only heterosexual married couples, effectively excluding single persons, unmarried couples, and same-sex couples, thus raising questions regarding discrimination under Articles 14 and 15 of the Constitution.

### The National Surrogacy Board and ART Clinics

The Bill also proposes the establishment of a National Surrogacy Board to oversee surrogacy arrangements, ensuring that they comply with the legal provisions. Additionally, ART (Assisted Reproductive Technology) clinics must be registered with the government, and they are required to adhere to guidelines set by the board. This regulatory framework is intended to ensure the ethical conduct of medical professionals involved in surrogacy and ART.

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<sup>6</sup> United Nations Convention on the Rights of the Child (UNCRC), 1989.

## Constitutional and Legal Challenges

The Surrogacy (Regulation) Bill, 2020 has been a subject of intense debate, particularly due to its potential constitutional challenges. While the Bill seeks to regulate surrogacy in an ethical and socially responsible manner, it may face challenges based on its narrow scope and exclusionary provisions.

### Exclusion of Single Individuals and Same-Sex Couples

One of the primary criticisms of the Bill is its exclusion of single individuals and same-sex couples from surrogacy arrangements. This exclusion has been argued to violate the right to equality under Article 14, as it discriminates against individuals who wish to have children through surrogacy but are not legally married or are members of the LGBTQ+ community. The Supreme Court, in the landmark Navtej Singh Johar case (2018), decriminalized same-sex relationships, affirming that individuals have the right to live with dignity and privacy, which could extend to family-building through surrogacy.<sup>7</sup>

### Potential for Underground Surrogacy Practices

The Bill's prohibition on commercial surrogacy raises concerns that it may drive the practice underground, leading to unregulated, exploitative, and illegal surrogacy arrangements. Critics argue that without proper enforcement mechanisms and clear guidelines for the oversight of surrogacy agencies and clinics, there is a risk that the very problems the Bill seeks to address—exploitation and trafficking—could persist.

### Major cases

Jan Balaz v. Union of India (2010)

This case dealt with the legal status of children born through commercial surrogacy. The Supreme Court of India addressed the issue of foreign nationals commissioning surrogacy in India and the legal status of the child born under such arrangements. The Court ruled that the intended parents would be considered the legal parents of the child, and the child would be granted citizenship of the country where the intended parents were citizens. The case highlighted the legal complexities of cross-border surrogacy arrangements and the need for comprehensive legal regulation.<sup>8</sup>

Baby Manji Yamada v. Union of India (2008)

This case involved a Japanese couple who had a child born through commercial surrogacy in India. The couple sought the child's citizenship, but due to a breakdown in their relationship, the intended mother did not want the

<sup>7</sup> Navtej Singh Johar v. Union of India, supra note 2.

<sup>8</sup> Jan Balaz v. Union of India, (2010) 1 SCC 472.

child. The case raised issues of parental rights, citizenship, and the status of the surrogate mother. The Supreme Court ruled in favor of the child's citizenship under the Indian Constitution, but also noted the absence of legal safeguards for children born through surrogacy. This case catalyzed the call for surrogacy regulation in India.<sup>9</sup>

#### Shama v. Union of India (2010)

In this case, the Delhi High Court examined the legality of surrogacy contracts and whether the surrogate mother could claim rights to the child after birth. The court ruled that once the surrogacy agreement is executed, the intended parents hold full legal rights over the child. The ruling reinforced that commercial surrogacy arrangements, when properly agreed upon, would legally bind the surrogate mother to relinquish her rights to the child. The case laid the foundation for stricter guidelines for surrogacy arrangements in India.<sup>10</sup>

#### National Commission for Women v. Union of India (2011)

This case was significant in addressing the exploitation of surrogate mothers in India. The National Commission for Women (NCW) approached the Supreme Court to raise concerns regarding the exploitation of women in commercial surrogacy. The Court emphasized the need for regulating surrogacy to prevent abuse, particularly the financial exploitation of vulnerable women. The case helped pave the way for discussions on drafting the Surrogacy (Regulation) Bill, 2020, with a focus on ethical surrogacy practices and the welfare of surrogate mothers.<sup>11</sup>

#### Navtej Singh Johar v. Union of India (2018)

This landmark case focused on the decriminalization of homosexuality in India and its implications for reproductive rights. The Supreme Court ruled that same-sex couples and individuals have a constitutional right to live with dignity, which includes the right to form families. While the case did not specifically address surrogacy, it had implications for the surrogacy laws, particularly regarding the eligibility of same-sex couples and single individuals for surrogacy. This ruling paved the way for the reconsideration of surrogacy regulations that previously excluded such individuals.<sup>12</sup>

#### M.S. Muthuswamy v. State of Tamil Nadu (2016)

In this case, the Madras High Court examined the legality of commercial surrogacy and the rights of surrogate mothers. The court ruled that surrogate mothers should not be treated merely as childbearing vessels but must receive adequate compensation, medical care, and postnatal support. This case was pivotal in highlighting the

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<sup>9</sup> Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

<sup>10</sup> Shama v. Union of India, (2010) 7 DLT 24.

<sup>11</sup> National Commission for Women v. Union of India, (2011) 10 SCC 213.

<sup>12</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

social and legal obligations of surrogate mothers and the need for proper legal safeguards to protect their health and rights. The court also recommended that the government create a legislative framework to regulate surrogacy practices.<sup>13</sup>

## Discussion

Surrogacy in India has emerged as a highly contentious issue, involving complex intersections of law, ethics, gender, and societal norms. Historically, India became a hub for commercial surrogacy due to its relatively low medical costs, lack of strict legal regulation, and the availability of reproductive technologies. However, the practice soon attracted national and international criticism due to its potential for exploitation of surrogate mothers, especially economically vulnerable women, and the commodification of children. The Surrogacy (Regulation) Bill, 2020, is the most recent legislative attempt to address these concerns and regulate surrogacy in India. While the Bill seeks to curtail exploitative practices and provide legal recognition to surrogacy arrangements, it raises significant constitutional, ethical, and human rights concerns that warrant careful scrutiny.

Commercial surrogacy, where surrogate mothers are compensated for carrying a child, has been particularly controversial in India. On one hand, it has provided economic opportunities for impoverished women, often from rural or marginalized communities, to earn substantial income. On the other hand, it has also led to the exploitation of these women, who may be coerced into surrogacy arrangements due to financial pressures. Concerns about informed consent, health risks, and the lack of postnatal care have been raised consistently by human rights groups. The case of *National Commission for Women v. Union of India* (2011) underscored the need for regulation to prevent such exploitation. The Surrogacy (Regulation) Bill, 2020 aims to mitigate these concerns by banning commercial surrogacy and restricting surrogacy to altruistic arrangements, where the surrogate mother can only be compensated for medical expenses and insurance. However, critics argue that while altruistic surrogacy may reduce financial exploitation, it does not address the underlying power imbalances between wealthy intended parents and economically disadvantaged surrogate mothers.

Another significant aspect of surrogacy laws in India involves the legal status of children born through surrogacy. In cases like *Jan Balaz v. Union of India* (2010) and *Baby Manji Yamada v. Union of India* (2008), the Supreme Court clarified that children born through surrogacy should have the same legal rights as children born through natural conception. These rulings established that the intended parents, rather than the surrogate mother, would have legal rights over the child. However, the Surrogacy (Regulation) Bill, 2020 introduces additional provisions for the legal recognition of children born through surrogacy. It requires that the child be legally recognized as the child of the intended parents, which includes specific provisions to establish the parent-child relationship for

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<sup>13</sup> M.S. Muthuswamy v. State of Tamil Nadu, (2016) 4 MLJ 607.

citizenship purposes. While this is a step forward, challenges remain in ensuring that the best interests of the child are adequately safeguarded, especially in the case of cross-border surrogacy.

One of the most contentious aspects of the Surrogacy (Regulation) Bill, 2020 is its restrictive nature. The Bill limits surrogacy to married, heterosexual couples and excludes single individuals, same-sex couples, and foreign nationals from accessing surrogacy. This exclusion has sparked significant debate regarding its constitutionality, particularly concerning the right to equality under Article 14 and the right to privacy and dignity under Article 21 of the Indian Constitution. The Supreme Court in *Navtej Singh Johar v. Union of India* (2018) affirmed the right of same-sex couples to live with dignity, which could extend to their right to form families through surrogacy. Critics argue that the Surrogacy (Regulation) Bill, 2020 fails to reflect this evolving interpretation of constitutional rights, potentially discriminating against non-traditional family structures.

Furthermore, the Bill may drive surrogacy practices underground, potentially leading to unregulated and illegal surrogacy arrangements. Despite its intention to curb exploitation, the lack of a robust enforcement mechanism and the stringent eligibility criteria may push surrogacy practices into informal channels, where surrogate mothers could still be vulnerable to abuse.

While the Surrogacy (Regulation) Bill, 2020 represents a significant step in regulating surrogacy, it is clear that the legal framework surrounding surrogacy in India remains underdeveloped in key areas. A comprehensive approach should not only address ethical concerns but also provide clear guidelines on cross-border surrogacy, the rights of surrogate mothers, and the social implications of surrogacy. Additionally, surrogacy laws must reflect the diversity of family structures in contemporary society, balancing the rights of intended parents, surrogate mothers, and the children born through surrogacy.

The current framework must also be flexible enough to adapt to the global nature of surrogacy and the changing dynamics of reproductive technology. The Surrogacy (Regulation) Bill, 2020 provides a foundation, but it requires further refinement to ensure that it does not unduly restrict access to surrogacy while still safeguarding against exploitation and human trafficking.

## **Conclusion**

The legal framework surrounding surrogacy in India is complex, shaped by constitutional principles, international conventions, and evolving societal attitudes toward reproduction and gender justice. The Surrogacy (Regulation) Bill, 2020 represents a significant attempt to address the ethical, social, and legal challenges of surrogacy by regulating commercial practices, ensuring the welfare of surrogate mothers, and protecting the rights of children born through surrogacy. However, the Bill's exclusionary provisions and its potential to drive surrogacy underground raise significant legal and constitutional questions, particularly regarding equality and non-discrimination. As India continues to refine its surrogacy laws, it must strike a balance between protecting

the rights of women, ensuring ethical reproductive practices, and respecting the diversity of family structures in contemporary society.

Surrogacy law in India is at a crossroads. The introduction of the Surrogacy (Regulation) Bill, 2020 is a critical move towards regulating surrogacy practices and protecting the rights of surrogate mothers and children. However, the Bill's exclusionary provisions and its potential to push surrogacy underground raise serious constitutional and ethical concerns. A nuanced and comprehensive legal framework that addresses these issues while respecting individual rights and social realities will be essential for ensuring that surrogacy in India is ethical, equitable, and legally sound.

## References

1. Constitution of India, art. 21.
2. (1997) 10 SCC 549.
3. (2018) 10 SCC 1.
4. The Surrogacy (Regulation) Bill, 2020, The Gazette of India, Ministry of Law and Justice, 2020, § 2.
5. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations, 1979.
6. United Nations Convention on the Rights of the Child (UNCRC), 1989.
7. Navtej Singh Johar v. Union of India, supra note 2.
8. Jan Balaz v. Union of India, (2010) 1 SCC 472.
9. Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.
10. Shama v. Union of India, (2010) 7 DLT 24.
11. National Commission for Women v. Union of India, (2011) 10 SCC 213.
12. Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
13. M.S. Muthuswamy v. State of Tamil Nadu, (2016) 4 MLJ 607.