BORN WITHOUT A COUNTRY? SURROGACY AND THE UNCERTAIN FUTURE OF CHILD RIGHTS IN INDIA

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ABSTRACT

Surrogacy has long been framed as a conflict between the surrogate mother's autonomy and the commissioning parents' desire for a child. Yet, hidden within this debate lies the quietest and most vulnerable participant—the child born through surrogacy. For them, questions of identity, legitimacy, and belonging are not abstract legal puzzles but matters that shape their very existence. Indian jurisprudence has already witnessed moments of crisis—children rendered stateless, parentless in law, or left in limbo when adults walked away. Despite the passage of the Surrogacy (Regulation) Act, 2021, fundamental concerns remain unresolved: who is the "real" mother-in-law, what happens if intended parents abandon the arrangement, and how does a child born through surrogacy inherit dignity, citizenship, and family? This article examines surrogacy through the lens of child rights, moving beyond adult-centric debates to ask whether India's current legal framework safeguards the best interests of the child. Drawing on constitutional principles, landmark Indian cases, and international jurisprudence, it argues that India's surrogacy law remains incomplete so long as the child's identity and future are left uncertain. Ultimately, the article calls for a shift from regulating contracts between adults to recognising the fundamental rights of the children they bring into the world.

Keywords: Surrogacy, Child Rights, Legal Parenthood, Citizenship, India.

INTRODUCTION: THE FORGOTTEN STAKEHOLDER

In the last two decades, surrogacy has travelled a remarkable journey in India—from being a booming global industry that drew commissioning parents from across the world, to a tightly

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regulated practice permitted only in the most limited of circumstances. For much of the early 2000s, India was known as the "surrogacy capital of the world." Affordable medical facilities, a largely unregulated legal environment, and the availability of women willing to act as surrogates made cities like Anand in Gujarat international hubs for commercial surrogacy arrangements. Couples from countries as far as Japan, Germany, and the United States turned to Indian surrogates to fulfil their dream of parenthood.

This period of unregulated growth was, however, not without its critics. Scholars, activists, and policymakers debated fiercely about whether commercial surrogacy represented empowerment for women through economic opportunity or whether it amounted to exploitation of vulnerable women in desperate financial need. Parliamentary committees, media reports, and civil society discussions became preoccupied with the rights and dignity of surrogate mothers on the one hand, and the reproductive autonomy of commissioning parents on the other.

Amidst this loud and often polarised debate, the child born through surrogacy remained a silent figure in the background. It is the child who ultimately embodies the hopes, fears, and conflicts of the surrogacy arrangement, yet the law has often treated them as a derivative subject—an afterthought whose legal identity depends entirely on how the rights of adults are defined. Questions such as: Who is the legal mother? Who can be recorded as parents in official documents? Can a child claim inheritance from intended parents? What happens if the child is born to foreign nationals in India?—These are not just technical legal puzzles. For the child, some questions determine whether they will be born into certainty or into limbo, belonging or exclusion.

The Indian courts have already witnessed the devastating consequences of legal ambiguity. In Baby Manji Yamada v. Union of India (2008)[1] An infant was left stranded in India after disputes between the commissioning parents, with no clear recognition of parenthood. In Jan Balaz v. Anand Municipality (2009)[2] Twin boys born to an Indian surrogate for German parents were left "stateless," caught between conflicting nationality laws. These cases highlighted an uncomfortable truth: while surrogacy arrangements may create children in the name of family, the law's inability to secure their status risks leaving them without identity, without nationality, and sometimes even without parents in the eyes of the state.

[1] Baby Manji Yamada v Union of India (2008) 13 SCC 518 (SC).
[2] Jan Balaz v Anand Municipality (2009) AIR Guj 21 (Guj HC).

The passage of the Surrogacy (Regulation) Act, 2021, attempted to close some of these gaps by providing a statutory framework. Yet, while it curtailed commercial surrogacy and defined the rights of commissioning parents and surrogates, its provisions concerning the child remain partial, vague, and underdeveloped. Citizenship in cross-border surrogacy remains a grey zone. The child's right to know their origins—recognised in international discourse—is absent from the Act. Safeguards against abandonment or denial of responsibility by commissioning parents are weak. In other words, the most vulnerable stakeholder remains insufficiently protected. This article, therefore, begins with a simple but urgent research question: How well does Indian law protect children born through surrogacy?

CHILDREN AND SURROGACY: A CONCEPTUAL LENS

Surrogacy, in its simplest description, is an arrangement where a woman agrees to carry a child for another person or couple. But such simplicity is deceptive. Behind it lies a complex intersection of biology, intention, law, and ethics. Unlike natural conception, where the biological, gestational, and social mother are the same, surrogacy fractures these roles. A surrogate may provide only her womb, while another woman contributes genetic material, and yet another assumes the role of nurturing and raising the child. In traditional surrogacy, the surrogate is both the egg donor and the gestational carrier, making her biologically tied to the child. In gestational surrogacy, which has become the dominant model globally and is the only legally permitted form in India, the surrogate merely carries an embryo created through in vitro fertilisation, often with no genetic link to the child. This separation of roles unsettles long-settled notions of parenthood: is it biology, gestation, or intent that should define who a child's mother truly is?

Debates about surrogacy, both in India and abroad, have tended to frame this question in terms of adult rights. The surrogate mother has been cast alternately as a victim of exploitation, renting her womb in conditions of poverty and compulsion, or as an empowered agent making reproductive labour a source of income and autonomy. On the other hand, intended parents—many of whom turn to surrogacy after years of infertility or social barriers to parenthood—assert their family right, often seeing the arrangement as their only path to genetic continuity. These two perspectives dominate legal and political conversations. Parliamentary debates on the Surrogacy (Regulation) Act, 2021, as well as much of the surrounding commentary, focused heavily on whether surrogacy commodifies women's bodies or whether banning commercial surrogacy violates reproductive choice.

Yet, the child—the very reason for which surrogacy arrangements exist—remains a silent stakeholder in this discourse. The child does not negotiate contracts, does not enter courtrooms to argue, and does not speak in parliamentary debates. But it is the child who bears the heaviest consequences of the law's silences and ambiguities**.** When the law fails to define parenthood clearly, the child may find themselves without legal parents. When nationality rules collide across borders, the child may be rendered stateless. When adults disagree or withdraw from the arrangement, it is the child who risks abandonment. In these moments, the absence of a child-focused legal lens becomes glaring.

The central question, then, is whether we are willing to see children born through surrogacy not merely as outcomes of adult arrangements but as independent rights-bearers. This shift is not only philosophical but legal. International human rights law already recognises children as individuals entitled to dignity, identity, and belonging. The United Nations Convention on the Rights of the Child (UNCRC),[3] ratified by India in 1992, guarantees every child the right to a name, nationality, and legal identity (Articles 7 and 8), the right not to be discriminated against based on birth or parentage (Article 2), and the right to family life (Article 9). The Convention's most powerful articulation lies in Article 3, which requires that the best interests of the child be the paramount consideration in all decisions affecting children. This principle is more than a guideline—it is a moral and legal imperative. It insists that when conflicts arise between intended parents and surrogates, or between domestic law and international norms, the final measure of justice must be whether the child's welfare is secured.

In India, courts have often invoked the "best interests of the child" in custody battles, guardianship disputes, and adoption proceedings. Judges have emphasised that parental rights cannot override the child's welfare. However, in cases involving surrogacy, this principle has been applied inconsistently, sometimes subordinated to contractual or statutory concerns. Children have been left in legal limbo, as seen in Baby Manji Yamada v. Union of India (2008),[4] where questions of parentage and guardianship went unanswered, and in Jan Balaz v. Anand Municipality (2009),[5] where twins were denied nationality due to conflicting laws. These examples reveal that while Indian jurisprudence has the tools to adopt a child-centric approach, it has not yet consistently applied them in surrogacy contexts.

[3] UN General Assembly, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).
[4] Baby Manji Yamada (n 1)
[5] Jan Balaz (n 2).

The challenge lies in shifting the lens. For too long, Indian surrogacy law has been written and debated as if it were a negotiation between adults: the surrogate and the commissioning couple. The child appears only as a consequence of these negotiations, not as a participant with independent rights. But this is a fundamental error. To treat children merely as incidental products of surrogacy is to ignore that they are persons in their own right, whose identity, dignity, and security cannot depend on the failings of law or the disputes of adults. The conceptual framework for surrogacy in India must therefore move away from regulating transactions between adults and toward guaranteeing rights for the child.

Unless this reorientation occurs, India risks producing a generation of children who enter the world not with the certainty of belonging, but with the precariousness of legal doubt. To view surrogacy justly is to begin with the child, to see them not as an afterthought, but as the true centre of the legal, ethical, and social discourse.

INDIAN LEGAL FRAMEWORK AND JUDICIAL ENCOUNTERS

The history of surrogacy law in India is not a story of foresight but of reaction. For years, the country functioned as one of the world's busiest hubs for fertility tourism, drawing couples from across continents who sought what their own countries could not offer—affordable medical facilities, willing surrogates, and almost no legal restrictions. Indian law remained silent even as hospitals in cities like Anand became centres of transnational parenthood, and children were born into arrangements that straddled borders. What forced the state and the courts to finally confront the legal questions surrounding surrogacy was not an act of planning but the crises of children left in legal limbo.

The earliest and most striking example was the case of Baby Manji Yamada v. Union of India in 2008.[6] A Japanese couple had commissioned an Indian surrogate to carry their child. Before the birth, the couple separated, and the commissioning mother withdrew from the arrangement. The father still wanted custody, but Indian law had no clarity on whether he could be recognised as a legal parent or whether a foreign national could adopt a child born through surrogacy in India. The infant girl, Baby Manji, became a problem that the law struggled to define. She had been born in India, but to foreign parents, through a surrogate who had no intention of keeping her. She was, in effect, a child without parents in the eyes of the law. The Supreme Court intervened only to allow the grandmother to take the child back to Japan, but the broader

[6] Baby Manji Yamada (n 1).

questions remained unanswered. Who was the legal mother? Could the father claim custody? Was surrogacy itself even legal in India at the time? Baby Manji became a symbol of how a child's existence can be overshadowed by legal ambiguity—she was treated not as a rights-bearing individual but as a complication to be managed.

Barely a year later, in 2009, the Gujarat High Court was faced with a similarly unsettling problem in Jan Balaz v. Anand Municipality.[7] Here, twins were born to an Indian surrogate for a German couple. The parents sought Indian passports for their children, but nationality law posed a dilemma. German law did not recognise surrogacy and refused to acknowledge the children as German citizens. Indian law, on the other hand, did not provide for the nationality of children born through such arrangements to foreign parents. The result was devastating: two newborns were rendered stateless. The High Court attempted to resolve the crisis by granting Indian passports, but the Supreme Court stayed the order, leaving the children suspended in uncertainty for years. Once again, the joyous event of a child's birth was transformed into a legal nightmare, where questions of sovereignty, recognition, and parentage mattered more than the child's right to belong.

These early judicial encounters exposed the stark reality that India had entered the world of assisted reproduction without preparing its legal system for the consequences. In both cases, courts improvised solutions without a clear legislative framework, focusing on immediate relief rather than systemic reform. The plight of the children revealed the costs of this ad hoc approach: they were forced into legal liminality not because of anything they had done, but because the adults and the law around them could not agree on how to categorise their existence.

It was only after such crises, and amid growing criticism of India's booming commercial surrogacy industry, that the legislature finally moved to act. After years of drafts and debates, the Surrogacy (Regulation) Act, 2021.[8] It came into force. The Act banned commercial surrogacy and permitted only altruistic surrogacy, where no payment beyond medical expenses is allowed. Much of the parliamentary discussion that preceded it revolved around protecting women from exploitation and ensuring that surrogacy did not become an unchecked

[7] Jan Balaz (n 2).
[8] The Surrogacy (Regulation) Act 2021 (India).

marketplace. In this sense, the Act was more concerned with the rights and dignity of the surrogate than with the uncertain futures of the children born from such arrangements.

Yet the Act did make certain strides. It declared that commissioning parents would be considered the legal parents of a child born through surrogacy and that the child would be treated as their biological child for all legal purposes. This provision aimed to put to rest questions of legitimacy and inheritance that had previously plagued surrogate-born children. In principle, it was meant to ensure that such children would not be stigmatised or deprived of family rights simply because of the method of their birth.

But the comfort offered by these provisions is limited. The Act remains silent on some of the most pressing child-centred issues. The question of citizenship in cross-border surrogacy arrangements remains unresolved. If foreign parents engage an Indian surrogate, and their own country refuses to recognise surrogacy, what is to become of the child? The spectre of statelessness that haunted the Jan Balaz twins still lingers, unaddressed by the statute. Equally troubling is the lack of strong safeguards against abandonment. If commissioning parents divorce, die, or simply refuse to accept a child—especially one born with disabilities—the Act provides little clarity on responsibility. In such moments, the child risks becoming an unwanted consequence rather than a protected rights-holder.

Even in recognising intended parents as legal parents, the Act does not engage with deeper questions about the child's right to identity. Internationally, debates have grown around whether children born through surrogacy should have the right to know their genetic or gestational origins, just as children conceived through sperm or egg donation are often given that right. Indian law, however, remains silent on this matter, reducing children to the legal products of commissioning contracts rather than recognising their independent claims to truth about their origins.

What becomes evident in tracing both the judicial encounters and the legislative response is that India has consistently approached surrogacy through an adult-centred lens. The courts in Baby Manji and Jan Balaz scrambled to find solutions to adult disputes, with the children caught in the middle as afterthoughts. The legislature, too, has crafted the 2021 Act as a tool to regulate adult behaviour—preventing exploitation of women and controlling medical practices—while failing to place the child at the centre of its design. The "best interests of the

child," a principle that Indian courts frequently invoke in custody and guardianship cases, remains curiously absent from the surrogacy framework.

There is no doubt that the judiciary in India has the capacity to think child-centrically. In adoption cases, it has emphasised that the child's welfare overrides procedural delays. In custody disputes, it has been stressed that parental preference cannot outweigh the child's security and stability. These principles, however, have not yet been consistently extended to surrogacy. Instead, surrogate-born children are left dependent on the uncertain interplay of contracts, nationality laws, and adult decisions.

If the Indian legal system is to live up to its constitutional promise of protecting dignity and equality for all, it must begin to see surrogate-born children not as incidental outcomes of medical procedures or private agreements, but as persons entitled to the same security and recognition as any other child. Until that reorientation occurs, every surrogacy arrangement in India will carry with it not just the promise of new life but also the risk of new uncertainty.

COMPARATIVE AND INTERNATIONAL PERSPECTIVES

Surrogacy is not merely a domestic legal issue—it is an inherently global phenomenon. Advances in reproductive technology, combined with vast inequalities in regulation, mean that individuals and couples often cross borders in search of more favourable jurisdictions. A child may be conceived in one country, born in another, and raised in yet another. This transnational character makes it impossible to study surrogacy in isolation. When Indian law grapples with the rights of children born through surrogacy, it cannot ignore the lessons, successes, and failures of other jurisdictions that have struggled with the same questions.

In Europe, surrogacy has been met with deep scepticism, often rooted in cultural and ethical concerns about the commodification of women's bodies. Countries such as France and Germany prohibit all forms of surrogacy, including altruistic arrangements. Yet, prohibition has not eliminated the practice—it has merely pushed citizens to seek surrogacy abroad, often in jurisdictions like the United States or Ukraine, where the practice is permitted. The consequences for children returning to countries with bans have been severe. For instance, in Mennesson v. France (2014),[9] French authorities refused to recognise the parentage of twin girls born in California through surrogacy to French parents. The children, though raised in

[9] Mennesson v France App no 65192/11 (ECtHR, 26 June 2014).

France, were denied legal recognition of their parent-child relationship, creating uncertainty in areas ranging from inheritance to citizenship. The European Court of Human Rights intervened, holding that France's refusal violated Article 8 of the European Convention on Human Rights,[10] which protects the right to private and family life. The Court stressed that the children's best interests could not be sacrificed to the state's disapproval of surrogacy. Even if states had the sovereign right to prohibit surrogacy domestically, they could not deny children recognition and identity simply because of the circumstances of their birth.

This case illustrates a principle of profound relevance to India: that moral or political debates about surrogacy cannot justify compromising the fundamental rights of children. A child does not choose to be born through surrogacy, and punishing them with statelessness or legal invisibility is a grave injustice. Indian cases like Jan Balaz echo Mennesson—children stranded between conflicting legal systems, treated as anomalies rather than as persons with inherent dignity. The European experience teaches that while states may regulate or even ban surrogacy, they must find ways to protect the legal status of children regardless of those choices.

In contrast to France's prohibitionist model, the United Kingdom has adopted a cautious but pragmatic regulatory approach. Surrogacy is permitted, but the law ensures that children are not left without a legal mother at birth. Under the Human Fertilisation and Embryology Act.[11] The woman who gives birth is considered the legal mother, regardless of genetics. Intended parents must apply for a parental order to transfer parentage. This system has its critics: the process can be slow, and it places the intended parents in a vulnerable position immediately after birth. Yet, it provides one critical safeguard—the child is never left in a legal vacuum. At least one legal parent exists from birth, ensuring that the child's identity is secure until the court formalises the transfer. Additionally, British law recognises the child's right to know their genetic origins, allowing donor-conceived and surrogate-born individuals to access identifying information about donors upon adulthood. This recognition aligns closely with Article 8 of the UNCRC,[12] which protects the right to identity. For India, where the 2021 Act remains silent on the child's right to know their origins, the UK's example offers a path toward balancing parental privacy with the child's autonomy and dignity.

[10] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 8.
[11] Human Fertilisation and Embryology Act 2008 (UK).
[12] UNCRC (n 3)

The United States provides yet another model, though one marked by inconsistency. Because surrogacy law is determined at the state level, the legal status of surrogate-born children varies dramatically. In states like California, surrogacy is openly permitted and well-regulated. Courts issue pre-birth orders recognising intended parents as the legal parents from the moment of birth. This system provides certainty, sparing children the limbo that plagued Baby Manji or Jan Balaz. But in other states, surrogacy is restricted or prohibited, creating a patchwork of recognition. The American model demonstrates how early legal recognition can prevent the uncertainties that have haunted Indian jurisprudence. However, it also reveals the dangers of inconsistency: a child's rights should not depend on geographical happenstance.

At the opposite end of the spectrum lie countries like Ukraine and Georgia, where surrogacy is openly embraced and structured to favour commissioning parents. In Ukraine, for example, the intended parents are automatically recognised as the legal parents, and the surrogate has no parental rights. This model provides maximum certainty for children—no risk of statelessness, no disputes over guardianship, and no delays in recognition. Yet, this clarity comes with its own concerns. Critics argue that by prioritising the intentions of adults, such frameworks risk commodifying both women and children, reducing complex human relationships to contractual arrangements. Nonetheless, from the perspective of children's rights, these jurisdictions at least guarantee that every child is born into a family with clear legal recognition, a guarantee that Indian law still struggles to provide.

Beyond domestic jurisdictions, international law also offers important guidance. The United Nations Convention on the Rights of the Child, ratified by India, requires states to ensure that every child has the right to a name, nationality, and identity. The Committee on the Rights of the Child has emphasised that states must protect children born through assisted reproduction from discrimination and ensure their legal recognition. Similarly, the Hague Conference on Private International Law[13] has been studying the cross-border implications of surrogacy, recognising that international cooperation is essential to prevent children from falling into gaps between conflicting legal systems.

The comparative landscape, then, reveals no perfect solution. France's prohibitionist stance leaves children vulnerable to non-recognition. The UK's cautious system secures children but burdens parents with cumbersome procedures. The American model provides certainty in some

[13] Hague Conference on Private International Law, Parentage/Surrogacy Project (HCCH, ongoing).

states but chaos in others. Ukraine's clarity secures children's rights but raises concerns of commodification. What unites these systems, however, is a growing recognition that children's rights must not be subordinated to adult disputes or state ideology. Whether through judicial intervention, parental orders, or automatic recognition, these jurisdictions acknowledge that children are entitled to identity, family, and belonging.

For India, the lesson is urgent. Like France before Mennesson, India risks allowing moral anxieties about surrogacy to overshadow the realities of children's lives. The Surrogacy (Regulation) Act, 2021, has narrowed the scope of permissible surrogacy, but it has not secured the rights of children born within or beyond its framework. Unlike the UK, India has not created a judicial mechanism to ensure recognition from birth. Unlike California, it does not provide pre-birth certainty. And unlike Ukraine, it does not guarantee automatic parentage. Instead, children remain at the mercy of adult choices, bureaucratic delays, and legislative gaps.

The international experience demonstrates that there is no single "correct" regulatory approach to surrogacy. But it also demonstrates something more profound: that while states may disagree about the morality of surrogacy, there is little room for disagreement about the rights of children. A child, wherever born and however conceived, must not be left invisible in the eyes of the law. For India, which has already witnessed the tragedies of Baby Manji and Jan Balaz, ignoring these lessons risks repeating old mistakes at the cost of the most vulnerable lives.

CONSTITUTIONAL ANALYSIS

If international law situates the child born through surrogacy within a framework of universal rights, the Indian Constitution[14] offers a parallel, and in many ways stronger, mandate. At its heart, the Constitution promises equality, dignity, and liberty to every person. The difficulty is not in locating these promises but in ensuring that they are extended to children born in unconventional circumstances, including those born through surrogacy. The true test of constitutional values lies not in how they protect the majority, but in how they shield those at the margins—those who risk invisibility because they do not fit easily into pre-existing categories. Surrogate-born children are precisely such figures, simultaneously at the centre of adult desire and yet at the periphery of legal recognition.

[14] Constitution of India 1950, arts 14, 15, 21.

Article 14, which guarantees equality before the law and equal protection of the laws, offers an entry point. A child born through surrogacy is, in every respect, as much a child as one born through natural conception. Yet the law, by omission or design, often places them in a separate category. When questions of legitimacy, inheritance, or nationality arise, surrogate-born children may face hurdles that naturally born children never encounter. To the extent that these children are treated differently, not because of who they are but because of how they were conceived, a constitutional problem emerges. Discrimination based on birth is not only contrary to Article 14's promise of equal protection but also inconsistent with Article 15's prohibition on discrimination. The Supreme Court has, in multiple contexts, recognised that the Constitution frowns upon distinctions that stigmatise or disadvantage individuals for circumstances beyond their control. To deny surrogate-born children full equality is to penalise them for choices made by adults, a stance that cannot be reconciled with constitutional morality.

If Article 14 anchors the argument in equality, Article 21 provides the soul of the child's claim. Over the years, Article 21 has been expanded far beyond the simple guarantee of life and personal liberty. The Supreme Court has read into it the right to live with dignity, the right to identity, the right to health, the right to education, and the right to family life. For a child born through surrogacy, each of these dimensions is at stake. To live with dignity requires legal recognition, not a status of limbo where citizenship is denied or parentage is uncertain. To enjoy identity requires a name, nationality, and the ability to know one's origins. To claim family life requires recognition of the bond with intended parents, even if those parents are unmarried, divorced, or outside the heterosexual paradigm traditionally assumed by Indian law.

The Supreme Court's decision in Justice K.S. Puttaswamy v. Union of India (2017),[15] which affirmed the fundamental right to privacy, adds a further dimension. Privacy, as the Court articulated, is not merely about secrecy but about autonomy, identity, and the freedom to define one's own existence. If adults have the right to make intimate choices about family and reproduction, children, too, must have the right to control their identities and histories. The Puttaswamy judgment, with its sweeping emphasis on dignity and autonomy, opens the door to recognising that children born through surrogacy cannot be denied the right to know their

[15] Justice KS Puttaswamy (Retd) v Union of India (2017) 10 SCC 1 (SC).

genetic and gestational origins. To withhold such information is to deny them a part of their identity, a denial that strikes at the core of dignity under Article 21.

At the same time, the constitutional principle of the "best interests of the child," though not explicitly articulated in the text, has been repeatedly endorsed in Indian jurisprudence. In custody disputes, courts have insisted that welfare trumps parental preference. In adoption, they have prioritised the stability of the child's future over procedural hurdles. This principle flows naturally from Articles 14 and 21, which together demand that the state protect vulnerable individuals and ensure their holistic development. Yet, in surrogacy, this principle remains more invoked than applied. The Surrogacy (Regulation) Act, 2021, for example, does not frame itself around the child's best interests; rather, it is drafted to regulate adult behaviour and medical practice. The absence of explicit recognition of child-centric constitutional values leaves a dangerous gap.

This gap is particularly glaring when viewed against the backdrop of evolving constitutional morality in India. Landmark judgments like Navtej Singh Johar v. Union of India (2018)[16] and Shafin Jahan v. Asokan K.M. (2018)[17] Have reaffirmed that the Constitution protects the freedom to form relationships, the right to choose one's family, and the principle that dignity cannot be compromised by social or political disapproval. If these values are extended to adults, why should children born through surrogacy—whose very existence is tied to these choices—not receive constitutional protection as well? To deny them equality, dignity, or recognition is to perpetuate a hierarchy of childhoods, where some are celebrated as legitimate while others are tolerated as anomalies.

The constitutional analysis thus reveals a disjuncture. On one side stand lofty promises: equality, dignity, identity, autonomy, and best interests. On the other side lies the reality of surrogate-born children left stateless, stigmatised, or uncertain of their place in the law. Bridging this gap requires not a new constitutional invention but fidelity to existing principles. If Article 14 promises that no child shall be disadvantaged for circumstances of birth, and Article 21 promises dignity and identity to all, then surrogate-born children must be brought fully within the embrace of these rights.

[16] Navtej Singh Johar v Union of India (2018) 10 SCC 1 (SC).
[17] Shafin Jahan v Asokan KM (2018) 16 SCC 368 (SC).

In the final analysis, the Constitution demands a shift in perspective. The law must stop treating surrogacy as merely a transaction between adults and begin recognising it as a process that creates citizens, each endowed with rights. The moral anxieties of society, the contractual expectations of parents, and the regulatory focus on surrogates cannot eclipse the child's constitutional entitlements. To see surrogate-born children through the lens of Articles 14 and 21 is to recognise them not as products of ambiguity but as full rights-bearers, entitled to the same protection, dignity, and belonging as every other child in India.

LOOPHOLES AND CRITICAL GAPS IN THE 2021 ACT

When Parliament finally enacted the Surrogacy (Regulation) Act, 2021, it was heralded as a landmark effort to end the unregulated and exploitative practices that had turned India into what many critics called the "surrogacy capital of the world." The Act was presented as a corrective, designed to shut down commercial surrogacy and to ensure that only altruistic arrangements—framed in the language of compassion and family ties—would remain permissible. In political debates, it was celebrated as a victory for women's dignity and as a safeguard against the commodification of motherhood. Yet, when the Act is examined through the lens of the child, its deficiencies quickly become visible. Far from being a comprehensive framework to protect the rights of surrogate-born children, it leaves critical questions unanswered and risks reproducing the very vulnerabilities it sought to cure.

One of the Act's most glaring limitations is its silence on the question of nationality and citizenship. The tragedies of Jan Balaz[18] and Baby Manji[19] Made evident the risks of cross-border surrogacy: children stranded in legal limbo because the country of the commissioning parents refused to recognise surrogacy, while India refused to extend citizenship. Yet the 2021 Act does not resolve this dilemma. By prohibiting foreign commissioning parents from accessing surrogacy in India, it attempts to sidestep the problem rather than confront it. But in an era of global mobility, prohibitions rarely achieve their intended effect. Indian surrogates may still be approached through clandestine arrangements, and Indian children may still be born into uncertainty. The Act offers no clear guarantee that no child born within India's borders will be left stateless, despite India's obligations under the UNCRC to prevent such outcomes.

[18] Jan Balaz (n 2).
[19] Baby Manji Yamada (n 1).

Another critical gap lies in the Act's treatment of abandonment. It stipulates that commissioning parents are the legal parents of the child from birth, a provision intended to prevent disputes over legitimacy and inheritance. Yet, it provides no mechanism to address situations where intended parents refuse to take custody. What happens if a child is born with a disability, or if the intended parents divorce before the birth, or if they simply change their minds? The law is silent. In such circumstances, the surrogate—who has no parental rights—cannot step in, and the child risks being treated as an unwanted burden. The absence of clear provisions for guardianship, state responsibility, or child welfare in these cases reveals a troubling indifference to the child's vulnerability.

The Act also fails to address the child's right to identity. In international discourse, particularly following cases like Mennesson and the jurisprudence of the European Court of Human Rights, it is increasingly recognised that children born through assisted reproductive technologies should have the right to know their origins. This includes information about genetic parents and gestational surrogates. The UNCRC[20] similarly, it emphasises a child's right to preserve their identity. Yet, the Indian law approaches surrogacy as a closed arrangement, treating the child as the unquestioned offspring of the commissioning parents. By erasing the surrogate and any donors from the child's legal narrative, the Act denies children access to an important dimension of their personal history. This silence may appear to offer simplicity, but it does so at the expense of the child's autonomy and dignity.

Equally troubling is the narrow definition of "eligible parents" under the Act. Only Indian married couples are allowed to commission surrogacy, and they must satisfy certain medical conditions of infertility. This excludes single parents, divorced or widowed individuals, and same-sex couples. The exclusion is often justified as protecting "family values," but from the perspective of children's rights, it creates an artificial hierarchy. It suggests that some children—those born into legally recognised heterosexual marriages—are more deserving of recognition and belonging than others. Such a framework is difficult to reconcile with Article 14's guarantee of equality, and it risks perpetuating the very stigma the Act claims to eliminate. Moreover, it fails to account for the reality that children raised in diverse family structures can thrive, so long as they are provided with love, care, and legal security.

[20] UNCRC (n 3) arts 7–8.

The Act also suffers from a broader structural problem: it is drafted primarily with the surrogate woman in mind, not the child. Much of its language focuses on regulating who can act as a surrogate, the conditions under which she can do so, and the penalties for commercialisation. While these provisions are important, they overshadow the child, who appears in the statute mostly as an afterthought. This imbalance reflects a deeper cultural discomfort: the state is willing to regulate adult choices but less willing to grapple with the child's independent rights. As a result, the Act is protective of women but paternalistic toward children, treating them as extensions of adult arrangements rather than as rights-holders in their own right.

The implementation of the Act further exposes its fragility. Bureaucratic requirements—such as eligibility certificates for commissioning parents and surrogates—introduce delays and uncertainties that may affect the timing of a child's legal recognition. If applications are rejected or stalled, what becomes of the child already conceived or born during the process? The Act provides no transitional protections, leaving children vulnerable to the gaps created by paperwork and procedure. In practice, these risks reduce the child's status to a function of bureaucratic efficiency, an outcome at odds with constitutional and international principles of dignity and best interests.

Finally, the punitive structure of the Act raises additional concerns. Harsh penalties are imposed for commercial surrogacy arrangements, including imprisonment. While these penalties are aimed at deterring exploitation, they also carry the risk of indirectly punishing children. If a child is born out of a prohibited arrangement, will their legal recognition or citizenship be compromised? The Act does not clarify this. By focusing heavily on policing adults, the law leaves children exposed to collateral consequences.

The Surrogacy (Regulation) Act, 2021, thus reveals itself as a law shaped more by anxiety than by vision. It seeks to protect women from exploitation and to restore a moral order to family-making, but it does so by ignoring the independent position of the child. It closes doors rather than opening protections, prohibits rather than resolves, and regulates adults while leaving children vulnerable. In doing so, it risks undermining the very constitutional values of equality, dignity, and best interests that ought to guide family law in a democratic society.

RECOMMENDATIONS: TOWARDS A CHILD-CENTRIC SURROGACY LAW

If the Indian surrogacy framework is to move beyond its anxieties and prohibitions, it must begin to see the child not as the by-product of adult arrangements but as the central subject of law and policy. The experiences of the past—the stateless twins of Jan Balaz,[21] the abandoned infant of Baby Manji,[22] and the uncertain futures of countless other children are not isolated tragedies. They are symptoms of a deeper problem: a legal system that responds to crises rather than anticipating them, and that privileges adult morality over child welfare. A child-centric surrogacy law must reverse this logic, placing the best interests of the child as the guiding principle at every stage of the process.

The first and most urgent reform lies in the area of nationality and citizenship. No child should ever be left stateless, regardless of the circumstances of their birth. India's commitments under the UN Convention on the Rights of the Child[23] require this, but constitutional morality demands it even more strongly. The law must explicitly guarantee that any child born within Indian territory through surrogacy has an automatic claim to Indian citizenship, irrespective of the parents' nationality or the legality of the arrangement. Where foreign commissioning parents are involved, India must establish cooperative frameworks with other states, possibly through bilateral agreements or adherence to emerging international conventions, to ensure that children are recognised in both jurisdictions. Statelessness is not a misfortune to be tolerated; it is a violation of the most basic human rights, and legislation must foreclose this possibility entirely.

Closely connected is the question of abandonment. The 2021 Act[24] Recognises commissioning parents as the legal parents from birth, but this recognition is hollow if it is not backed by enforceable responsibility. The law must make clear that commissioning parents cannot withdraw from their obligations, whether due to disability of the child, the breakdown of marriage, or a change of intent. In cases where commissioning parents refuse to take custody, the state must provide immediate protection, treating the child as a ward of the state with guardianship mechanisms triggered without delay. Surrogates should not be left in legal limbo, and children should not become institutional casualties of adult indecision. To safeguard

[21] Jan Balaz (n 2).
[22] Baby Manji Yamada (n 1).
[23] UNCRC (n 3).
[24] The Surrogacy (Regulation) Act 2021 (India) (n 8).

against such abandonment, surrogacy contracts should be legally enforceable in a manner that prioritises the child's welfare above all else.

Equally pressing is the recognition of the child's right to identity. Indian law must move beyond its current erasure of the surrogate and genetic contributors. While commissioning parents must be recognised as the legal parents, children should, upon reaching maturity, have access to non-identifying and eventually identifying information about their genetic and gestational origins. Such access is not about destabilising family structures but about respecting the child's autonomy and dignity. International models, such as the UK's donor-conception disclosure system, provide workable templates. To withhold this information is to deny children a part of their truth, a denial inconsistent with Article 21's expansive vision of dignity and the Puttaswamy.[25] The court's emphasis on identity as a component of privacy.

The law must also broaden its understanding of family. By restricting surrogacy to married heterosexual couples, the 2021 Act perpetuates a narrow vision of kinship that does not reflect India's constitutional trajectory. Single parents, widowed individuals, and same-sex couples should not be excluded from commissioning surrogacy, especially when adoption laws are slowly moving toward greater inclusivity. To deny these groups access to surrogacy is not merely discriminatory under Article 14 but also harmful to children, who are deprived of potential loving families. The focus of the law should not be on policing who may form a family but on ensuring that every child who is born is welcomed into a secure and supportive one.

Procedural reforms are equally necessary. The bureaucratic hurdles created by the requirement of eligibility certificates and medical boards risk delaying recognition of the child's parentage. These processes must be streamlined, with strict timelines to ensure that children are not caught in administrative limbo. Courts should also be empowered to grant immediate parental orders, similar to the UK model, ensuring that children have legal recognition from the moment of birth. Safeguards against delays are not mere conveniences—they are essential guarantees of the child's right to stability and certainty.

Finally, the punitive character of the Act requires recalibration. While it is important to deter exploitation, harsh criminal penalties for commercial surrogacy risk creating underground markets and exposing children to even greater vulnerability. A child born from a prohibited arrangement must not suffer for the illegality of adults. The law should therefore adopt a

[25] Puttaswamy (n 15)

welfare-first approach: penalising exploitative intermediaries, regulating medical practices, and monitoring compliance, but always ensuring that the child's recognition and protection remain paramount.

Taken together, these reforms suggest a paradigm shift: from a law that is primarily about adults—about regulating women's bodies, policing parents' intentions, and enforcing morality—to a law that is about children. The best interests of the child must be the golden thread running through every provision, from nationality to parentage, from identity to family recognition. India has the constitutional resources to make this shift: Articles 14 and 21 already promise equality and dignity, and the jurisprudence of welfare and best interests already exists in custody and adoption law. What is needed is the will to extend these principles to surrogacy, to accept that the child is not a secondary figure in the story but its central protagonist.

CONCLUSION

The story of surrogacy in India is, at its core, the story of how law often lags behind life. For decades, arrangements were carried out in clinics across the country with little regulation, transforming India into a global hub for fertility tourism. Children were born, families were created, and lives were changed, yet the legal system looked away until it could no longer ignore the crises accumulating at its doorstep. It was only when infants were stranded without citizenship, when parents turned away from the children they had commissioned, and when international headlines cast India as the site of exploitation that the law began to take shape. But by then, the child—the very person at the centre of these arrangements-had already been forgotten, relegated to the background of debates framed around exploitation of women, autonomy of parents, and the morality of markets.

This article has sought to place the child back at the heart of the conversation. From the early judicial encounters in Baby Manji[26] and Jan Balaz,[27] where children became symbols of legal confusion, to the legislative experiment of the Surrogacy (Regulation) Act, 2021,[28] the same pattern emerges: adults dominate the discourse, while children appear only as complications to be managed. Yet the Constitution of India, as well as international commitments under the UNCRC,[29] demand the opposite. They require that the child be seen not as incidental but as

[26] Baby Manji Yamada (n 1).
[27] Jan Balaz (n 2).
[28] The Surrogacy (Regulation) Act 2021 (India) (n 8).
[29] UNCRC (n 3).

central, not as a passive object of adult intent but as an independent rights-bearer entitled to equality, dignity, and identity.

Comparative experiences reinforce this lesson. France's prohibition left children unrecognised until international courts intervened. The UK's parental order system, while imperfect, ensures that no child is ever left without a legal parent. The United States' pre-birth orders demonstrate the importance of certainty, while Ukraine's automatic recognition shows the value of clarity, even if it raises other ethical concerns. Across these models, the common thread is not uniformity of approach but an acknowledgement that children must not pay the price of adult choices. India, in choosing altruistic surrogacy and closing its borders to foreigners, has taken a restrictive path. But restriction without protection is insufficient. Unless the law secures the child's rights to nationality, family, and identity, it will remain a framework of prohibitions rather than a system of care.

The constitutional analysis makes the stakes clearer still. Article 14[30] forbids discrimination based on birth. Article 21 guarantees dignity, identity, and the fullness of life. The Puttaswamy judgment affirms privacy as autonomy and selfhood, while the doctrine of best interests—so often invoked in custody and adoption cases—demands that children's welfare be paramount. Surrogate-born children, denied recognition or reduced to products of contractual arrangements, are living contradictions of these constitutional values. To continue ignoring them is to perpetuate a constitutional blind spot that undermines the very promise of equality and dignity that anchors Indian democracy.

Reform is therefore not optional—it is imperative. The law must guarantee citizenship to every surrogate-born child, safeguard against abandonment, recognise the right to identity, and expand the definition of family to reflect the realities of contemporary India. Procedures must be streamlined to prevent bureaucratic limbo, and punitive measures must never compromise the welfare of children. Above all, the guiding principle must shift: the best interests of the child must no longer be an afterthought but the starting point of all surrogacy law and policy.

In the end, surrogacy is not merely a question of contracts, wombs, or intent. It is about children—children who arrive in the world through unconventional paths but who deserve no less dignity, security, or belonging than any other child. To forget them is to betray both constitutional morality and human conscience. To remember them is to affirm that the measure

[30] Constitution of India (n 14) arts 14, 21.

of a just society lies not in how it treats its majority, but in how it protects its most vulnerable. Surrogate-born children are among those vulnerable voices. It is time the law heard them.