



THE DEEMED ORPHAN CRISIS IN INDIAN SURROGACY LAW: JURIDICAL PARENTLESSNESS, CONSTITUTIONAL IDENTITY, AND THE FAILURE OF LEGISLATIVE CONTINUITY

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ABSTRACT

The evolution of assisted reproductive technologies has fundamentally transformed traditional understandings of parenthood, lineage, and family formation within Indian law. A major definitive shift came with the enactment of the Surrogacy (Regulation) Act 2021. It replaced a contract-driven commercial market with a state-enforced, altruistic model of surrogacy. However, this protective framework contains a structural flaw: the legal vulnerability of a fetus whose intending parents die post-conception but before birth. Under Section 8 of the Act, legal parentage vests at the moment of conception, yet the statute remains silent if a double mortality event occurs during the 280-day gestational window. This paper conceptualises the resulting child as a Deemed Orphan, a new legal category caught in an administrative vacuum between the rigid rules of the Surrogacy Act and the standard care pathways of the Juvenile Justice (Care and Protection of Children) Act 2015. Through a doctrinal and constitutional analysis, the article examines the incompatibility between the Surrogacy Act and the Juvenile Justice (Care and Protection of Children) Act, 2015, particularly regarding guardianship, documentary identity, succession, and citizenship. Further, it goes on to argue that the increasing normalisation of donor gametes under the recent amendments to India's surrogacy framework has intensified the crisis by separating genetic, gestational, and legal parenthood. The paper critically evaluates how Indian law regulates entry into reproduction with procedural rigidity while failing to provide mechanisms for posthumous continuity of legal parenthood. This statutory silence creates an arbitrary exclusion that violates the child's fundamental rights to identity and dignity under Articles 14 and 21 of the Constitution of India. Using a comparative analysis of the legal safety nets used in the United Kingdom, California,

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and South Africa, this study provides a concrete set of legislative reforms. It proposes a transition to a consequence-centric framework based on the Doctrine of Indestructible Parentage and mandatory pre-conception contingency guardianships, ensuring that sudden family tragedies do not strip a newborn of their constitutional right to a secure legal lineage. It concludes that Indian surrogacy law must evolve beyond mere regulation toward a constitutionally grounded framework that treats parenthood as a continuing legal responsibility rather than a biologically contingent status.

Keywords: Article 14, Article 21, Surrogacy (Regulation) Act, 2021, Juvenile Justice (Care and Protection of Children) Act 2015.

INTRODUCTION

Historically, parenthood was determined through gestation, biology, marriage and the presumption of legitimacy. However, with the advent of the new technologies such as In Vitro Fertilisation (IVF), Artificial Reproductive Technology (ART), embryo transfer, gamete donation and gestational surrogacy, the landscape of parenthood has significantly changed, fragmenting the classical model of parenthood. Modern reproductive technologies separate: Genetic motherhood which refers to motherhood based on a woman's biological contribution of the ovum, making her genetically related to the child; Gestational motherhood which refers to motherhood arising from carrying and giving birth to a child during pregnancy, regardless of genetic connection; Legal motherhood which refers to the status of a woman recognised by law as the child's mother with corresponding parental rights and duties and Social motherhood which refers to motherhood based on the emotional, caregiving, and nurturing role performed in raising a child.¹

The Indian State gradually transformed parenthood from a biological fact into a legally assigned status through the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021. India strictly criminalises commercial surrogacy and allows surrogacy only for altruistic purposes, where the surrogate mother cannot be financially compensated beyond her medical expenses and insurance coverage during pregnancy.² The Act legally recognises intending parents as the child's parents even before birth, transitioning from Jus Sanguinis (right of blood) to a statutory fiction of anticipatory parenthood. The law assumes

¹ Samantha Brennan and Bill Cameron, 'Parenthood, Gender and the Problem of Genetic Ties' (2011) 34(1) Journal of Applied Philosophy 29

² The Surrogacy (Regulation) Act 2021, s 4(ii)

the child to be biological, effectively severing the genetic or gestational link to the surrogate, and parenthood operates on the legal basis of THE INTENT OF PARENT, i.e., the deliberate intention of the intending couple or intending woman to bring a child into existence and assume permanent parental responsibility.³

The Regulatory Transformation of Indian Surrogacy Law: From Commercialisation to Controlled Altruism. In the pre-legislation era, India emerged as a global fertility destination and a major hub for reproductive tourism; however, the exploitative nature of the regime brought out concerns such as commercialisation of pregnancy, exploitation of economically vulnerable women and the absence of statutory safeguards. There was a lack of formal legislation, and surrogacy was governed by the Indian Council of Medical Research (ICMR) Guidelines, which were ethically persuasive but legally non-binding. During this period, surrogacy was treated as a private contract under the Indian Contract Act, 1872. The Intending Parents and Surrogate were parties to a commercial transaction.⁴

In landmark Supreme Court rulings such as *Baby Manji Yamada v. Union of India* (2008), the Supreme Court bypassed complex legal debate on surrogacy validity to focus strictly on the immediate safety, health, and well-being of the newborn.⁵

The Law Commission of India Report No.228 recommended prohibiting commercial surrogacy and allowing only altruistic arrangements. This report became the philosophical backbone of the current Act.⁶ Finally, the 2021 Act criminalised commercial Surrogacy. It redefined the practice as a service based on kinship and noble intent rather than financial exchange. It introduced the concepts of mandatory Certificates of Essentiality and Certificates of Eligibility. Since then, there have been a lot of amendments in the statute, the most recent being the 2026 Amendment.

THE 2024 AMENDMENT AND THE NORMALISATION OF DONOR GAMETES

The Surrogacy (Regulation) Amendment Rules, 2024, were notified by the Ministry of Health and Family Welfare on 21 February 2024. The Amendment effectively modified the earlier prohibition on donor gametes in surrogacy. The Act now permits the use of one donor gamete

³ The Surrogacy (Regulation) Act 2021, s 2(r)

⁴ Indian Contract Act 1872

⁵ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518

⁶ Law Commission of India, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy* (Law Com No 228, 2009)

if the District Medical Board certifies that either the husband or wife suffers from a medical condition requiring donor gametes, but the child must still have at least one gamete from the intending couple.⁷ The Amendment marks a shift from the earlier biologically unified parenthood towards a fragmented reproductive regime. It effectively transforms surrogacy into a multi-parent reproductive structure where genetic, gestational, and legal parenthood may lie with entirely different individuals. Due to this, the legal vacuum of DEEMED ORPHAN, where the intending parents of the child die during gestation, is no longer merely theoretical, but exponentially probable.

THE LEGISLATIVE SILENCE SURROUNDING DEATH DURING GESTATION

Despite creating a detailed regulatory framework for surrogacy arrangements, Indian law remains silent on the legal consequences when the intending parents of the child die during the gestation period.

Consider a hypothetical situation where a legally approved embryo transfer has already occurred and both intending parents subsequently die in an accident in the fifth month of gestation. The act essentially prohibits the surrogate mother from claiming the child, and there was no guardian named in a will. The current statutes do not provide a clear answer regarding who would be the child's parent, the child's guardian or regarding succession and institutional responsibility.

The Act recognises intended parenthood at the time of gestation; however, it fails to determine whether that parenthood survives the biological death of the intending parents. While Section 7 of the act prohibits the abandonment of the child and the surrogate mother is forbidden from ever claiming the child, the law fails to specify who steps into the shoes of the deceased intending parents in such a case.

CONCEPTUALIZING THE DEEMED ORPHAN: TOWARDS A NEW JURIDICAL CATEGORY

The above-mentioned crisis gives rise to an entirely new legal category of the child upon its birth, which we may refer to as THE DEEMED ORPHAN. The term 'Deemed Orphan' is used in this article as a proposed analytical category to describe a child conceived through legally sanctioned surrogacy who becomes parentless even before birth due to the death of the

⁷ Ministry of Health and Family Welfare, Surrogacy (Regulation) Amendment Rules, 2024 GSR 119(E)

intending parent(s), despite possessing legally recognised parentage at the time of conception. Such a child does not neatly fit into existing traditional categories such as an orphan, abandoned child, surrendered child or a child in need of care and protection, as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015.

The article does not claim statutory recognition of the category. Rather, it proposes the concept as a doctrinal tool for identifying a legislative and constitutional vacuum within India's current surrogacy framework.

SCOPE, METHODOLOGY AND RESEARCH QUESTIONS

The article focuses on gestational surrogacy under Indian law, particularly under the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021. It examines the legal consequences when the intending parents die during gestation.

The article adopts a doctrinal methodology based upon statutory interpretation, judicial analysis, and constitutional examination of India's surrogacy and child protection framework. Comparative references to other countries have also been made for interpretative and reform-oriented purposes.

Research Questions:

1. Does the current Indian surrogacy law recognise any continuity mechanism for intended parenthood in case of the death of intending parents during gestation?
2. Do existing categories under the Juvenile Justice framework adequately accommodate the deemed orphan children?
3. How does the normalisation of donor gametes after the 2024 Amendments complicate the legal architecture of parenthood, guardianship, and succession within surrogacy law?
4. Does the absence of a statutory framework violate constitutional guarantees relating to identity, dignity, equality, and child welfare?
5. What legislative and institutional reforms are necessary to address the phenomenon of deemed orphanhood within India's reproductive governance framework?

THE STATUTORY DEADLOCK: CRITIQUING LEGISLATIVE OMISSION

The Conflict of Definition: The deemed orphan emerges not merely due to a legislative silence, but due to the conflicting nature of two statutes: The Surrogacy (Regulation) Act, 2021 and that

of the Juvenile Justice (Care and Protection of Children) Act, 2015. The two laws differ fundamentally in their conceptions of parenthood and child vulnerability. The conflict mainly arises due to the following Sections:

Provisions Under the Surrogacy (Regulation) Act, 2021: Section 2(g) — Intending Couple:⁸ This section defines an intending couple as someone who seeks surrogacy. The whole legal structure of the statute relies on the assumption that the intending couple will be alive throughout the gestation period and will ultimately become the child's legal parents.

Section 2(r) — Surrogate Mother:⁹ The act treats the surrogate mother as merely a gestational carrier who physically gives birth to the child. She is legally stripped of motherhood, which creates the first legal vacuum.

Section 6 — Parentage and Birth Certificate:¹⁰ The child born is deemed to be the biological child of the intending couple/mother, which legally creates parenthood; however, it does not address extinction of parenthood, substitute guardianship or continuity of parenthood after death.

Provisions Under the Juvenile Justice (Care and Protection of Children) Act, 2015: Section 2(42) — Orphan:¹¹ The act defines an orphan as a child without biological/adoptive parents or a legal guardian. Under Section 6 of the Surrogacy Act, the child had legally recognised parents at conception, but under the JJ Act, orphanhood is assessed post-birth. This creates temporal inconsistency.

Section 2(1) — Abandoned Child:¹² This Section defines abandonment through desertion or intentional relinquishment; however, it remains silent on the issue of the death of the intending parents. So, the child born cannot fit into this category.

Section 2(14) — Child in Need of Care and Protection:¹³ This Section defines a category that is the only one broad enough to absorb the legal gap. However, it is still not sufficient because it addresses protection and not continuity of legal parenthood.

⁸ The Surrogacy (Regulation) Act 2021, s 2(g)

⁹ The Surrogacy (Regulation) Act 2021, s 2(r)

¹⁰ The Surrogacy (Regulation) Act 2021, s 6

¹¹ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(42)

¹² The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(1)

¹³ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(14)

In all, we can say that the Surrogacy (Regulation) Act, 2021, creates intended parenthood through anticipatory legal recognition, whereas the Juvenile Justice framework continues to operate through traditional post-birth assumptions regarding orphanhood, abandonment, and guardianship.

The Doctrine of Omission: The issue of parental death during gestation was foreseeable, which can be reflected in the Law Commission of India, 228th Report on Assisted Reproductive Technology Clinics and Rights of Children Born Through ART (2009). The report did not explicitly discuss deemed orphans, but it warned about regulatory complexity, parentage uncertainty and the necessity of comprehensive ART governance.¹⁴ Although the Law Commission recognised the necessity of safeguarding the legal status and welfare of children born through assisted reproduction, the final statutory framework failed to incorporate contingency mechanisms addressing parental extinction during gestation. This reflects not a mere accidental silence, but a structured under-theorisation of child vulnerability within Indian surrogacy law.

The Frustration of Status: When we talk about surrogacy, one of the central questions that arises is whether the death of intending parents during gestation frustrates the surrogacy agreement under the Indian Contract Act, 1872, Section 56?

Section 56 of the Indian Contract Act talks about the frustration of a contract. It assumes obligations may terminate upon impossibility. But in the case of parenthood through a contract-based surrogacy, a child now exists, which may create continuing legal responsibilities beyond death. It may extinguish reciprocal contractual obligations between adults, but it cannot extinguish the legal vulnerability of the child produced through the arrangement; the interests of the child survive contractual frustration.

The Procedural Brittleness of Form-Based Consent: The 2022 procedural framework of the Act revolves around forms and consent-based architecture. The forms are rigid, which creates an absence of individualised clauses and the further inability to nominate contingency guardians or insert testamentary instructions. It treats surrogacy consent as a rigid administrative formality rather than a dynamic legal instrument capable of addressing

¹⁴ Law 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, 2009)

contingency situations. It may seem to privilege administrative uniformity over legal adaptability.

THE DEEMED ORPHAN CRISIS

Birth Registration and the Problem of Documentary Existence: In the modern constitutional state, documentary recognition through birth certificates, registration systems, identity documents, biometric databases, educational records and passports constitutes the foundation of legal personhood. In the Registration of Births and Deaths Act, 1969, registration presumes identifiable parents, and declaration obligations usually fall upon family members or institutions.¹⁵ Birth certificates mandatorily require parentage details. In case of the death of the intending parents during gestation, several questions arise, such as who registers the child? Can deceased intending parents be named? Can the surrogate be temporarily recorded? Would that violate Section 6 of the Surrogacy Act? What happens if donor gametes were anonymous? Who signs consent forms after birth? It is here that the assumptions proposed by the Registration of Births and Deaths Act are destabilised.

When it comes to documentary parenthood, which exists through state records in the contemporary state regime, unrecognised parenthood risks administrative invisibility for the child.

With the recent 2024 amendments and the subsequent allowance on the donor gametes, the problem around documentary uncertainty intensifies even more due to the separation of genetic ancestry from legally recognised parenthood. Important document registries such as Aadhaar registration, passport issuance, school admission, insurance, and bank nominee status all require a stable parental identity. The deemed orphan is therefore threatened not merely with parental absence, but with documentary non-existence itself.

It also violates Article 21 of the Constitution of India. The right to identity and a name is an intrinsic component of the Right to Life and Dignity.

Guardianship Without Parents: Indian law creates intended parenthood but provides no contingency guardianship structure when intended parents die before birth. The guardianship

¹⁵ The Registration of Births and Deaths Act 1969

laws continue to operate upon the traditional assumptions of postnatal family continuity, which can possibly become unstable in the modern arena of technologically mediated reproduction.

The Act further forbids the surrogate mother to have any claim on the child she delivers, as a result of which the surrogate mother becomes physically connected yet juridically excluded from the child she delivers.

Even statutes like The Guardians and Wards Act 1890 provide no automatic substitute guardian, no contingency nominee or no mandatory guardianship declaration in surrogacy agreements.

The Child Welfare Committees, which are in place under the Juvenile Justice (Care and Protection of Children) Act, 2015, play a more reactive role rather than having a proactive approach and that too not specifically designed for gestational parentlessness. The child protection system intervenes only after custodial collapse has already occurred, thereby treating the deemed orphan as an emergency rather than a foreseeable legislative contingency.

The absence of emergency guardianship mechanisms in the Indian Laws reveals major drawbacks that must be addressed.

Succession Rights: The question around succession rights becomes even more complex in a country like India due to the complex interplay of various statutes and personal laws existing at the same time. Indian Succession laws recognise rights of the unborn child, but assume stable parentage, traceable lineage and an intact family continuity.

The doctrine of EN VENTRE SA MERE: A child who has not yet been born can still be treated as if they already exist for certain legal purposes, if it benefits the child after birth. This doctrine is followed in major Indian Laws such as the Hindu Succession Act, 1956 and the Transfer of Property Act, 1882. This traditional rule becomes distorted in surrogacy. If both intending parents die while the surrogate is pregnant, the child's right to inherit their estate hinges entirely on whether they are legally recognised as the 'child' of the deceased at the exact moment of birth. In case the extended relatives challenge the child's legitimacy due to the lack of a proper birth certificate or the absence of the intending parents' names on the hospital release forms, the child can be functionally disinherited. This highlights one of the major legal gaps.

Further, with the normalisation of donor gametes, there is a risk of instability of inheritance systems historically organised around identifiable bloodlines and legally traceable descent.

The question of insurance nomination, probate, testamentary guardianship and estate administration adds an extra layer of sophistication to the already complex issue of the deemed orphan.

Citizenship, Nationality, and Legal Existence: The citizenship regime in India continues to rely upon traditional notions of lineage and descent that become unstable within fragmented reproductive arrangements. Under the Citizenship Act 1955, citizenship by descent (Section 4) requires that a person born outside India, or inside India, has parents who are citizens of India at the time of birth.¹⁶ However, after the recent amendments, allowing donor gametes, if a child is conceived using an international donor egg/sperm, and the Indian intending parents die during gestation, the child's biological and genetic link to India is destabilised, and the problem of citizenship and nationality becomes complex.

Further, if the state refuses to issue a birth certificate with the deceased Indian citizens as the parents, the child cannot establish citizenship by descent. The child enters a dangerous state of de facto statelessness. The state cannot easily deport the child (as there is no foreign country to claim them), yet refuses to grant them the rights of citizenship, violating international law principles of minimising statelessness. This violates the UN Convention on the Rights of the Child 1989, which mandates that every child has the right to be registered immediately after birth, the right to name and the right to acquire a nationality.¹⁷

These uncertainties are not merely theoretical but have been highlighted in various cases. One such issue was taken by the Court in the case *Jan Balaz v Anand Municipality*, which highlighted key legal issues such as whether a child born in India to an Indian surrogate mother, whose biological father is a foreign national, automatically acquires Indian citizenship by birth and the subsequent legal position of the surrogate mother. The Court prioritised the children's right to life under Article 21, declaring the surrogate mother as the legal mother for citizenship purposes, which ultimately exposed India's lack of surrogacy laws.¹⁸

¹⁶ Citizenship Act 1955, s 4

¹⁷ UN Convention on the Rights of the Child 1989, art 7

¹⁸ *Jan Balaz v Anand Municipality* 2009 SCC OnLine Guj 10446

Thus, the deemed orphan crisis reveals that legal existence within the modern state does not depend merely on birth but rather on a complex set of continuous judicial recognition through parenthood, documentation and national structures.

THE CONSTITUTIONAL DIMENSIONS

Article 21 And the Right to a Legal Lineage: Article 21 of the Indian Constitution does not merely protect the physical survival of beings, but it has been interpreted broadly enough to encompass the right to live with human dignity, identity, and social status. It also protects the child's right to juridical identity, lineage, and a legally recognised belonging. Having a traceable legal lineage in itself forms part of a dignified constitutional existence, which is protected by the constitution. Without a proper lineage, succession fails, documentation collapses, and citizenship becomes unstable, which ultimately contributes to the weakening of one's social identity.

It is here that the deemed orphans' rights may be threatened. When the state recognises a child's conception via a statutory deeming fiction of intentional parenthood but fails to provide an administrative mechanism to register that lineage upon the parents' pre-birth demise, it strips the child of their identity at birth. He/She may biologically exist yet lack a stable juridical placement within family structures. The absence of legally continuous parenthood threatens not merely custodial presence but the constitutional integrity of identity itself. It also violates international statutes such as the United Nations Convention on the Rights of the Child (CRC).

The deemed orphan crisis, therefore, implicates Article 21 not merely because the child lacks immediate care, but because the collapse of legal lineage threatens the constitutional foundations of social identity, dignity, and juridical belonging of the child in itself.

Arbitrariness and Legislative Omission Under Article 14: Article 14 of the Indian Constitution embodies the constitutional guarantee of equality before law and equal protection by the law. Judicial interpretation by the Supreme Court of India has significantly expanded the scope of Article 14 beyond formal equality to include protection against arbitrariness, irrationality, and discriminatory state conduct, particularly through landmark decisions such as *E.P. Royappa v. State of Tamil Nadu* and *Maneka Gandhi v. Union of India*. Consequently, Article 14 functions not merely as a guarantee of equal treatment but as a foundational constitutional principle ensuring fairness, reasonableness, non-arbitrariness, and the rule of law within India's democratic framework.

The Surrogacy Act classifies children born through surrogacy into various categories: those with surviving parents, those abandoned by living parents, and those whose parents divorce. The Act provides legal remedies for all these groups except for children whose parents die during gestation. The legislative silence surrounding the fate of the deemed orphans constitutes unconstitutional arbitrariness. There is also an irrational nexus between this legislative omission and the objective of the Act, which is the protection and welfare of the surrogate child. Differentiating against children based purely on the fact that their parents are alive or dead at the time of their birth may be classified as a discriminating statute.

The statutory framework of the Act reflects hyper regulation at the stage of reproduction entry, such as regulating eligibility intensely, documentation, medical procedure and surrogate conduct, yet it remains silent on the possibility of reproductive collapse. The omission is significant because the vulnerability was foreseeable with the architecture of assisted reproduction itself.

The Doctrine of Parens Patriae: The State as the Ultimate Guardian: The Latin maxim Parens Patriae (parent of the nation) inherent to constitutional law dictates that the State is the ultimate inherent guardian of those who are legally incapable of protecting themselves, such as minors and persons of unsound mind; it imposes upon the State an affirmative obligation to protect children rendered vulnerable through legal and institutional failure. When the State itself creates the legal framework for recognising parenthood based on intention, it cannot remain constitutionally indifferent when that architecture collapses.

The Juvenile Justice (Care and Protection of Children) Act, 2015, provides for Child Welfare Committees, foster care, institutional care and state intervention, but these are often reactive rather than preventive. Also, the State cannot simply relegate the child to the standard bureaucratic pathways of the Juvenile Justice Act (CWC placement) without actively acknowledging its heightened fiduciary duty. The State must step in to protect the child's property, immediate physical custody, and constitutional status from the moment of birth and perform its affirmative constitutional responsibility.

Reproductive Autonomy Versus Child-Centric Constitutionalism: The Surrogacy Act was enacted to balance two main ideas: the reproductive autonomy of the intending parents (under Article 21) and the protection of the child from commercial commodification. The Indian Constitutional law increasingly recognises decisional autonomy, reproductive choice and

bodily integrity. However, the statutory framework of the Surrogacy Law prioritises access to reproduction without developing a parallel constitutional ethic of post-birth responsibility.

Once such reproduction creates a child, the constitutional focus must shift towards child welfare, identity continuity and legal security. Reproductive autonomy cannot remain constitutionally insulated from the long-term legal consequences imposed upon the child born. While reproductive freedom remains crucially important, constitutional governance requires contingency planning, custodial safeguards and identity protection. The current Act is heavily parent-centric and process-centric; it regulates who can access surrogacy and how. However, a child-centric constitutional framework requires that the law be consequence-centric. The failure to plan for the gestational death of intending parents shows that the legislature prioritises regulating adult conduct over protecting vulnerable infant life, tilting the constitutional balance unfairly away from the child.

Hence, the law must balance its legitimate state interest in preventing commercial exploitation with an absolute, non-negotiable commitment to the continuity of a child's legal personhood—ensuring that statutory boundaries are never used as a justification to deny an infant their fundamental right to a family, an identity, and a secure legal lineage at the very moment of birth.

COMPARATIVE JURISPRUDENCE: GLOBAL MODELS OF CONTINUITY

The United Kingdom: The Parental Order Regime and Posthumous Intent: The UK operates a tightly regulated non-commercial surrogacy regime governed primarily by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008 (HFEA). The system relies on licensed fertility clinics monitored by the Human Fertilisation and Embryology Authority to oversee the technical and medical delivery of Assisted Reproductive Technology (ART). Unlike the Indian model of immediate intention-based parenthood, the United Kingdom adopts a judicially mediated transfer mechanism where the surrogate mother remains the legal mother initially and parenthood transfers later through a parenthood order. This system prevents immediate legal vacuums because the surrogate initially retains legal motherhood, thereby ensuring continuity of legal parenthood at birth.¹⁹

¹⁹ Human Fertilisation and Embryology Act 2008

The question of contingency handling can also be seen in the UK Statutory Framework. Under Section 54 of the HFEA 2008, the court has the discretion to grant a parental order. If an intending parent dies during the pregnancy, the surviving partner can still apply for the order alone. Under Section 54 of the HFEA 2008, the court has the discretion to grant a parental order. If an intending parent dies during the pregnancy, the surviving partner can still apply for the order alone. If both the intending parents die before the parental order is finalised, the UK courts utilise their inherent wardship jurisdiction. Instead of leaving the child in a legal vacuum, the courts look at the intended lineage set out in the initial surrogacy clinic agreements to appoint guardians, prioritising the wishes and intent of the deceased.²⁰

The UK courts exercise the power of judicial discretion, which prioritises welfare, the use of equitable interpretation and the preservation of continuous parenthood. Time and again, the courts have upheld welfare-centred parental orders, judicial accommodation and a rather flexible approach to intention-based parenthood, unlike the Indian Surrogacy Law, which is comparatively rigid and leaves little room for judicial autonomy.

California (USA): The Intent Doctrine and Pre-Birth Standby Guardianship: California's surrogacy jurisprudence represents one of the most developed frameworks of intentional parenthood within assisted reproduction law globally. It recognises intended parenthood, contractual surrogacy and prebirth parentage orders; unlike India, California integrates contingency planning more effectively. Governed by the California Family Code (Sections 7960–7962), the state does not restrict surrogacy to an altruistic nature or marital status. It regulates the process through mandatory legal representation, where both the surrogate and the intending parents must have independent legal counsel before executing a surrogacy agreement, thereby ensuring complete contractual transparency.²¹

The significance of intent-based parenthood was upheld by the court in *Johnson v Calvert*, where intentional parenthood prevailed over gestation and determined legal motherhood.²² This case influenced surrogacy laws globally.

At the same time, California's framework stresses that reproductive intention alone is insufficient unless accompanied by legally enforceable contingency structures that safeguard the child after birth. As it treats surrogacy with a lens of contractual obligation, potential

²⁰ Human Fertilisation and Embryology Act 2008, s 54

²¹ California Family Code, s 7960-7962

²² *Johnson v Calvert* 851 P2d 776 (Cal 1993)

contingencies are managed through mandatory standby guardianship clauses within the surrogacy contract itself. If both intending parents die during the gestation period, the Pre-Birth Order remains valid, and legal custody of the child shifts instantly to the designated contingent guardian. The child never enters state custody or institutional foster care, and their legal lineage to the deceased parents remains completely unbroken.

The Indian Surrogacy Laws adopted intent-based parenthood but rejected contingency-oriented legal planning. Hence, California offers India a functional blueprint for administrative mechanics in the form of the Pre-Birth Order.

South Africa: Pre-Conception Judicial Validation: South Africa provides one of the most constitutionally sophisticated surrogacy systems globally. South Africa implements a strict judicial-altruistic model under Chapter 19 of the Children's Act 38 of 2005. Commercial Surrogacy is banned; it permits only altruistic surrogacy. However, its administrative process is entirely different. South African Law requires judicial approval even before the fertilisation takes place.²³ Some of the significant provisions of the statute include confirmation of surrogate motherhood agreements, judicial scrutiny and welfare review. There is a major role of the judiciary in the whole process, as the entire validity of a surrogacy arrangement lies within the domain of the High Court, which acts as the supreme guardian of all minors. A surrogacy agreement has no legal effect unless it is confirmed by the High Court before any artificial insemination takes place. The court reviews the psychological, financial, and physical background of all parties involved in the procedure. Legal parentage lies automatically with the intending parents at the moment of birth, provided that the surrogacy contract was judicially confirmed by the High Court. It operationalises child-centric constitutionalism through anticipatory judicial overview rather than post-facto welfare intervention.

In case the intending parents die during the gestation period, the matter remains actively within the court's protection because the agreement is already an existing Order of the High Court. This prevents one of the major dilemmas of immediate legal parentage/guardianship of the born child and its foster care.

South African law treats surrogacy not as a purely private arrangement but as a constitutionally supervised reproductive institution. In *Ex Parte WH*, the court affirmed its role and constitutional duty to evaluate the best interests of the unborn child before they are even

²³ Children's Act 38 of 2005 (South Africa), ch 19

conceived, ensuring all economic, psychological, and contingency risks are insulated.²⁴ It demonstrates that reproductive autonomy and child-centric constitutionalism need not exist in tension with each other, which can be one of the most compatible models for India.

PROPOSED LEGISLATIVE REFORMS: A UNIFIED REFORMATIVE CODE

Recognising the “Deemed Orphan” Within the Juvenile Justice Framework: The existing categories under Section 2(42) of the Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act) are inadequate, as the Act restricts the definition of an orphan to a child whose biological or adoptive parents are dead.²⁵ However, the deemed orphan emerges through gestational collapse of intended parenthood. Thus, existing classifications remain conceptually insufficient.

Section 2(42) must be textually amended to explicitly include a Deemed Orphan via Assisted Reproductive Technologies, as previously also suggested by the courts.²⁶ The Deemed orphan is a child born or to be born through assisted reproductive arrangements whose legally recognized parents die or become permanently incapacitated before the birth of the child. This amendment will transform the present administrative anomaly into a legally manageable category. This modification will grant the Child Welfare Committee (CWC) immediate statutory jurisdiction under Section 27 of the JJ Act to allow them to treat the newborn surrogate infant as a child in need of care and protection from the moment of birth. It will further prevent the violation of constitutional rights of equality (Article 14) and dignity (Article 21) under the Indian Constitution. Recognition constitutes the first constitutional step toward transforming the deemed orphan from a category of exclusion into a subject of legal protection.

Mandatory Contingency Guardianship Before Embryo Transfer: The current Forms under the Surrogacy (Regulation) Act 2021 require extensive procedural documentation, but it remains silent on contingency clauses. It does not address substitute guardianship, an emergency custody plan or testamentary disclosure. Borrowing from California's model, India must make it mandatory to name a Standby or Contingent Guardian before any medical procedure begins. There must be a necessary Amendment to Section 4(iii) of the Surrogacy (Regulation) Act 2021. The District Surrogacy Board must not issue the mandatory ‘Certificate

²⁴ *Ex Parte WH and Others* 2011 (6) SA 514 (GNP)

²⁵ Juvenile Justice (Care and Protection of Children) Act 2015, s 2(42)

²⁶ *Exploitation of Children in Orphanages in State of Vikram v Union of India* (2017) 4 SCC 1

of Essentiality'²⁷ unless the intending parents submit a notarised, legally binding Contingency Guardianship Declaration. This declaration must nominate the next-of-kin who formally consents to step into the shoes of the intending parents and assume full parental rights and liabilities if both the intending parents die during gestation. This ensures that embryo transfer never takes place without a designated legal safety net. This reform would help convert reproductive intention into sustained legal responsibility.

Establishing a Surrogacy Child Protection Authority: The existing institutional framework for assisted reproduction in India is fragmented into Assisted Reproductive Technology (ART) Boards, Child Welfare Committees (CWC), District Child Protection Units (DCPU), local authorities and registration offices. There exists no single institution to coordinate the entire custody, documentation, succession and emergency intervention during the surrogacy process. This fragmented responsibility produces regulatory paralysis when immediate child-centric intervention becomes necessary.

Technologically mediated parenthood requires equally specialised institutional governance. Therefore, a specialised new institutional body such as the Surrogacy Child Protection Authority (SCPA) should be created, operating at both central and state levels. Unlike the existing boards, the SCPA must feature full-time judicial and child welfare experts, including family court judges, pediatric psychologists, and representatives from the Central Adoption Resource Authority (CARA). This reform builds directly on the Supreme Court's reasoning in *Arun Muthuvel v. Union of India*, where the court recognised that the rapid evolution of assisted reproductive technologies requires a highly responsive, continuous administrative machine rather than static, slow-moving committees.²⁸

This specialised authority may transform the fragmented landscape of surrogacy governance into coordinated child protection administration.

Institutional Parens Patriae: Empowering the DPCU: Another strong alternative could be to strengthen the existing institutional frameworks rather than creating an entirely new one. While the higher judiciary acts as the ultimate Parens Patriae, day-to-day enforcement must be localised. The District Child Protection Unit (DCPU), established under Section 106 of the JJ Act, must be given specific statutory powers over surrogacy arrangements. Its current

²⁷ Surrogacy (Regulation) Act 2021, s 4(iii)

²⁸ *Arun Muthuvel v Union of India* 2023 INSC 904

framework is reactive rather than preventive, underutilised, and not integrated within surrogacy regulation. There should be mandatory DCPU involvement if the intending parents pass away or become permanently incapacitated. The DCPU should be legally designated as the temporary institutional guardian of the child at birth. This temporary designation allows the DCPU to place the child directly with the pre-nominated contingent guardian or in an approved foster home. This bypass the long delays of standard institutionalisation, which can cause severe attachment issues and developmental harm to a newborn.

Other powers of the DCPU may include coordination with CWCs, registration support or succession referral. The State's responsibility must be seen to be preventive in nature; it cannot begin only after abandonment; it must extend to foreseeable reproductive contingencies generated within legally regulated systems. Empowering DCPUs would constitutionalise child protection at the earliest stage of custodial instability.

From Contractual Obligation to Statutory Status: The Doctrine of Indestructible Parentage: Intent-based parenthood created through technology-assisted reproduction should not collapse merely due to gestational death of the intending parents. Despite recognising intentional parenthood, the current law fails to ensure its legal continuity, which often results in identity rupture, succession uncertainty, or guardianship vacuum.

The juridical status of parenthood must become independent from the biological survival of the intending parent once reproductive creation has been legally authorised. This gives rise to a new legal concept in Indian jurisprudence: The Doctrine of Indestructible Parentage. Once a Certificate of Intent is issued and an embryo is successfully implanted, the legal parentage of the intending parents must become permanent and irrevocable. Death shall not dissolve this status. If the intending parents die, the child is born not as an orphan of unknown lineage, but as the legal child of the deceased couple. This status ensures their lineage remains intact and creates a continuity in inheritance rights, nationality claims, insurance benefits and estate rights.

Under Section 56 of the Indian Contract Act, contractual obligations may frustrate upon death, yet juridical parenthood must persist in order to preserve the continuity of legal identity of the child and to preserve its interests. Hence, the Doctrine of Indestructible Parentage would shift Indian surrogacy law from transactional reproduction toward enduring constitutional responsibility.

Harmonising Surrogacy Law with Succession and Birth Registration Statutes: Indian reproductive law currently operates in isolation from succession law, birth registration law, guardianship law and citizenship law, which creates systematic instability. The deemed orphan crisis ultimately reflects not merely legislative silence but the absence of inter-statutory coordination within Indian family regulation. There shall be cross-referencing provisions within various statutes in order to streamline succession and birth registration.

Section 10 of the Registration of Births and Deaths Act 1969 can be amended to add a new provision stating that for children born to deceased intending parents, the birth certificate must list the deceased intending parents as the mother and father, with an additional sub-clause naming the judicially approved contingent guardian.²⁹

Also, Section 20 of the Hindu Succession Act 1956 (and parallel provisions in the Indian Succession Act 1925)³⁰ shall be amended to expand the definition of a child en ventre sa mere to explicitly include a child conceived via assisted reproductive techniques carried by a gestational surrogate.³¹ This ensures their right to inherit their deceased parents' estate vests automatically at birth, protecting them from being disinherited by extended relatives. These amendments would ensure child-centric constitutionalism and the protection of its interests.

CONCLUSION

The emergence of assisted reproductive technologies has exposed a fundamental tension within Indian family law; while the law increasingly recognises technologically mediated parenthood, it continues to operate upon traditional assumptions of biological continuity and postnatal family stability. The Deemed Orphan crisis reveals the consequences of this contradiction with particular sharpness. A child conceived through a legally sanctioned surrogacy arrangement may, upon the death of the intending parents during gestation, become a completely new legal category of a child that is not effectively covered in any provisions. The child also risks losing documentary identity, succession continuity, custodial certainty, and even juridical belonging itself.

From a constitutional perspective, the issue extends beyond family law into the domain of dignity, identity, equality, and state responsibility. The absence of legally continuous

²⁹ Registration of Births and Deaths Act 1969, s 10

³⁰ Indian Succession Act 1925, s 99

³¹ Hindu Succession Act 1956, s 20

parenthood threatens the child's right to legal lineage and stable juridical existence under Article 21, while legislative omission within an intensely regulated reproductive regime raises concerns of arbitrariness under Article 14. The doctrine of *parens patriae* further imposes upon the State an obligation to protect children rendered vulnerable through institutional and legislative failure.

Comparative analysis demonstrates that several jurisdictions have attempted to regulate child-centric governance through judicial oversight, contingency planning, and continuity-preserving parentage structures. These models reveal that reproductive freedom and constitutional child protection need not exist in opposition. Rather, they can coexist within frameworks that become ready for vulnerability instead of merely reacting to a crisis. The reforms proposed in this article, therefore, seek not simply to fill a statutory gap but to reform the legal foundations of parenthood itself. Recognising the deemed orphan within the juvenile justice framework, mandating contingency guardianship before embryo transfer, harmonising surrogacy law with succession and birth registration statutes, and developing the doctrine of indestructible parentage together represent an attempt to construct a more resilient and child-centric legal order.

As reproductive technologies continue to transform the meaning of family, the law can no longer treat parenthood as a purely biological or contractual phenomenon. It must instead evolve into a durable constitutional relationship capable of preserving the continuity, dignity, and legal identity of the child even in the face of death, fragmentation, and technological change.