

Judicial Trends and Legal Gaps in Surrogacy Laws: A Child Rights Perspective¹Divya Mittal, ²Dr. Aishwarya Aneja¹ Research Scholar, CT University, Ludhiana, divyamittal368@gmail.com² Assistant Professor, CT University, Ludhiana, aishwarya17724@ctuniversity.in**Abstract**

Surrogacy is an important part of assisted reproductive technology (ART). It provides hope for many couples that cannot conceive a child naturally. Surrogacy raises complex cultural, social, economic, legal, and ethical issues as well as issues of human rights. Surrogacy law in India evolved from a largely unchecked commercial sector to the enactment of the Surrogacy (Regulation) Act 2021 to establish a proper balance between a woman's right to make reproductive choices, the need to prevent exploitation, and the protection of children's rights to ensure that they will have proper parents. Notwithstanding this legislative framework, there are still many uncertainties and omissions in the law; particularly with respect to the rights of children born through the process of surrogacy. This examination focuses on judicial trends in India with respect to surrogacy and analyses how courts interpret children's rights in this context. It will also evaluate gaps in the existing legal framework with respect to parentage, citizenship, identity and non-discrimination. It is argued that while the Indian judiciary has recognized children's rights when determining the best interests of a child, the inconsistencies and restrictive provisions of the laws relating to surrogacy will not allow for a true child-centred approach. The study concludes with suggestions of necessary reforms to provide for an adequate legal foundation for child rights jurisprudence.

Keyword: Surrogacy Law, Child Rights, Judicial Trends, Assisted Reproductive Technology, Legal Gaps**1. Introduction**

The exponential growth of assisted reproduction technologies (ART) has profoundly disrupted conventional notions of family, parentage and reproduction. One of these technologies, surrogacy, has proven to be one of the most complicated and controversial, with intricate legal, ethical and human rights implications. Surrogacy arrangements - in which a woman gives birth to a child on behalf of intended parents - upend traditional legal frameworks, which rely on the categories of biological and gestational mothers. In India, these challenges are compounded by issues of social and economic inequality, cross-border reproductive tourism, and dynamic constitutional interpretations of reproductive rights¹.

India's journey into surrogacy started in an unregulated space, and saw it become a destination for commercial surrogacy in the early 2000s. The lack of a robust statutory framework allowed fertility clinics and agents to operate without adequate regulation, often leading to the commercialisation of women's reproductive potential and children born through these arrangements². This unregulated growth while enabling many to become parents also led to concerns of exploitation, informed consent and vulnerability of surrogate mothers and the children. This led to the need for judicial intervention, as Indian courts began to intervene to address these concerns, relying on constitutional values such as dignity, equality and the right to life (Article 21 of the Constitution)³.

The courts, especially the Supreme Court and different High Courts, have played a crucial role in shaping the Indian legal landscape on surrogacy. In a range of cases, courts have tried to reconcile various interests, including the rights of surrogate mothers, the intentions of commissioning parents and, most significantly, the best interests of the child. In this process, courts have consistently prioritized the "best interests of the child", a fundamental principle of child rights jurisprudence and in line with India's obligations under international law on children's rights, as enshrined in treaties such as the United Nations Convention on the Rights of the Child (UNCRC)⁴. Yet, judicial responses have been inconsistent, especially in cases involving international surrogacy, citizenship rights, and multiple claims to parenthood. Acknowledging the need for a framework, the Indian Parliament passed the Surrogacy (Regulation) Act, 2021, which transformed a largely unregulated industry into one that is highly regulated by the state. The Act outlaws commercial surrogacy and allows altruistic surrogacy under strict conditions, reflecting an effort to prevent exploitation while maintaining a limited avenue for access to surrogacy⁵. This legislative development is a step forward in regulating the industry, but has also sparked controversy around the exclusionary nature of the Act and its failure to address child rights. While the legislation focuses on regulating surrogacy and preventing abuse, it fails to address adequately several key concerns such as legal parentage, the rights of children in abandonment scenarios and the long-term well-being and identity of children born through surrogacy. In terms of child rights, surrogacy raises complex issues beyond the point of delivery. Surrogate-born children could potentially encounter legal challenges related to their identity, citizenship and family relationships, especially in cases involving cross-border arrangements. Moreover, stringent legal restrictions that exclude access to surrogacy for certain groups of people - such as single individuals or LGBTQ+ couples - invite questions about discrimination and the constrictions on possible family arrangements. Such concerns highlight the importance of a child-friendly and child-centred approach, which focuses on the best interests and rights of the child, rather than social, political or moral concerns. This paper aims to critically analyse the judicial developments and legal framework relating to surrogacy in India in the context of child rights protection and promotion. It examines landmark court cases to gain insights into the application of child welfare considerations by courts, and it highlights key legal gaps despite recent legislative changes. In this context, it draws parallels between surrogacy and constitutional and international child rights standards to argue that the current Indian approach is still not comprehensive and needs significant improvement. Finally, the research seeks to inform the creation of a more consistent, inclusive, and child-sensitive framework for surrogacy that is consistent with India's constitutional rights and international human rights norms.

2. Evolution of Surrogacy Laws in India

India's legal regime for surrogacy has evolved from an unregulated, commercialised practice to a severely restrictive statutory framework. This shift is a response by the State to reconcile reproductive freedom with ethical considerations, especially the rights of women and children in the context of surrogacy.

2.1 Pre-Laws: Judicial Interventions and Regulatory Void

Before the advent of specific legislation, surrogacy in India was governed by a legal vacuum, with non-binding guidelines from the Indian Council of Medical Research (ICMR)⁶. These guidelines had no legislative backing, enabling the growth of commercial surrogacy, particularly for foreign commissioning parents who sought affordable treatment⁷. India quickly became a destination for "reproductive tourism," prompting concerns regarding exploitation, commodification, and the lack of legal protections for surrogates and their children.

In this regard, the judiciary played a pivotal role. In *Baby Manji Yamada v. Union of India*, the Supreme Court upheld the legality of surrogacy and the need to safeguard the rights of children born through these methods⁸. Likewise, in *Jan Balaz v. Anand Municipality*, the Gujarat High Court dealt with citizenship and parentage issues, pointing to the legal challenges faced by children born through international surrogacy⁹. These cases highlighted the need for a legislative framework.

2.2 Legislative Responses: Regulation

The rise of commercial surrogacy prompted several legislative initiatives, culminating in the passage of the Surrogacy (Regulation) Act, 2021¹⁰. The Act was a game-changer in outlawing commercial surrogacy and allowing only altruistic surrogacy in limited circumstances. It provided criteria for intending couples and registration of surrogacy clinics, ensuring that surrogate mothers were not exploited. The Act is a step towards regulation, but has been criticised for its exclusionary nature. By restricting surrogacy to married heterosexual couples and excluding single persons and LGBTQ+ couples, it raises concerns from the perspective of

¹ See generally Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 Signs 969 (2010).

² Id.; Law Commission of India, *Report No. 228: Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* (2009).

³ *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India); INDIA CONST. art. 21.

⁴ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁵ The Surrogacy (Regulation) Act, No. 47 of 2021, § 4 (India).

⁶ Indian Council of Medical Research, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (2005).

⁷ Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 Signs 969 (2010).

⁸ *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India).

⁹ *Jan Balaz v. Anand Municipality*, Special Civil Application No. 3020 of 2008 (Guj. H.C. Nov. 11, 2009).

¹⁰ The Surrogacy (Regulation) Act, No. 47 of 2021 (India).

constitutional equality and non-discrimination¹¹. And the fact that the Act focuses on regulating the process of surrogacy rather than the future rights and best interests of the child is a critical oversight.

2.3 Evolution from Judicial to Legislative Power

India's journey in surrogacy law showcases a transition from activism to statutory regulation. In the pre-legislative period, courts played an active role in interpreting constitutional provisions and emphasising the welfare of the child. But the passage of the 2021 Act has limited the flexibility of the courts by introducing strict statutory criteria. This has not precluded the continued importance of courts in interpreting and filling gaps in the law. Recent case law has shown a readiness to embrace a more inclusive and child-friendly approach, especially when rigid application of the statutory provisions may not be in the best interests of the child.

Overall, the trajectory of surrogacy law in India showcases the interaction between the courts and the legislature. Although the shift to a regulated approach was essential to prevent exploitation, the existing legal framework is not yet comprehensive. The lack of a holistic child rights approach remains a challenge, requiring both legislative and judicial efforts to address it.

3. Judicial Trends in Surrogacy Law

The Indian judiciary has played a transformative role in shaping surrogacy law, particularly in the absence of comprehensive legislation prior to 2021. Through a series of landmark decisions, courts have sought to balance competing interests while consistently prioritizing the welfare of the child. Judicial trends indicate an evolving approach that integrates constitutional values, child rights principles, and concerns about exploitation.

3.1 Child Welfare as Paramount Consideration

Indian courts have consistently upheld the principle that the "best interests of the child" must remain paramount in all surrogacy-related disputes. This principle, rooted in both constitutional jurisprudence and international obligations, has guided judicial reasoning in cases involving legitimacy, custody, and nationality of children born through surrogacy¹².

In *Baby Manji Yamada v. Union of India*, the Supreme Court recognized the legitimacy of a child born through surrogacy and underscored the need to protect such children from legal uncertainties¹³. Similarly, courts have emphasized that children should not be penalized or disadvantaged due to the circumstances of their birth, whether arising from unconventional reproductive arrangements or cross-border disputes.

Judicial intervention has also been crucial in addressing issues of statelessness. In several cases, courts have ensured that children born through international surrogacy arrangements are granted legal recognition and access to nationality, thereby safeguarding their fundamental rights under Article 21 of the Constitution¹⁴. This child-centric approach reflects a broader commitment to ensuring dignity, identity, and security for surrogate-born children.

3.2 Recognition of Parentage and Identity

Determining legal parentage remains one of the most complex issues in surrogacy law. Indian courts have generally adopted a pragmatic approach, recognizing the intended parents as the legal parents of the child, particularly when the surrogacy arrangement is consensual and medically supervised¹⁵.

In *Jan Balaz v. Anand Municipality*, the Gujarat High Court addressed the issue of parentage in the context of cross-border surrogacy, holding that children born to Indian surrogate mothers could claim citizenship through their genetic parents¹⁶. This case highlighted the intersection of surrogacy with nationality laws and underscored the importance of establishing clear legal parentage to avoid uncertainty.

At the same time, courts have acknowledged the child's right to identity, including access to information about their genetic and gestational origins. However, the absence of a uniform statutory framework has resulted in inconsistencies, particularly in cases involving foreign commissioning parents or disputes between surrogate mothers and intended parents. This lack of clarity continues to pose challenges for the legal recognition of familial relationships.

3.3 Expansion of Reproductive Rights

Recent judicial trends indicate a broader and more progressive interpretation of reproductive rights. Courts have increasingly recognized reproductive autonomy as an integral component of the right to life and personal liberty under Article 21. This has led to a more inclusive approach in interpreting surrogacy laws, particularly in cases where strict statutory provisions may result in injustice.

For instance, High Courts have, in certain cases, permitted surrogacy arrangements despite medical or genetic anomalies that would otherwise disqualify intending parents under the Surrogacy (Regulation) Act, 2021¹⁷. Such decisions reflect judicial sensitivity to individual circumstances and highlight the need for flexibility in applying rigid statutory criteria. Moreover, courts have begun to question exclusionary provisions that restrict access to surrogacy based on marital status or sexual orientation. Although these issues are still evolving, the judiciary's approach suggests a gradual shift towards inclusivity and non-discrimination, aligning surrogacy law with broader constitutional principles of equality under Article 14.

3.4 Judicial Concern over Exploitation and Trafficking

While expanding reproductive rights, Indian courts have simultaneously expressed strong concern over the exploitation of women and the commercialization of surrogacy. Judicial decisions have repeatedly emphasized the need to prevent the commodification of both surrogate mothers and children.

In recent cases involving illegal surrogacy rackets, courts have taken a stringent approach, highlighting the risks of trafficking, coercion, and financial exploitation.⁹ The judiciary has supported strict enforcement of regulatory laws and has called for greater oversight of fertility clinics and intermediaries.

This reflects a dual judicial approach: on one hand, courts seek to protect reproductive autonomy and the rights of intending parents; on the other, they aim to prevent abuse and uphold ethical standards. Balancing these competing concerns remains a central challenge in the judicial regulation of surrogacy.

Overall, judicial trends in India reveal a dynamic and evolving approach to surrogacy law. Courts have consistently prioritized the welfare of the child while adapting legal principles to address emerging challenges. However, inconsistencies and gaps persist, particularly in relation to parentage, identity, and the application of restrictive statutory provisions. These trends underscore the need for a more coherent and child-centric legal framework.

4. Legal Gaps in Surrogacy Laws: A Child Rights Perspective

Although the Surrogacy (Regulation) Act, 2021, has been enacted, the Indian surrogacy law still has considerable gaps, especially from the perspective of child rights. Although the law is focused on regulating the practice of surrogacy and to avoid exploitation, it does not deliver on the long-term well-being, identity and rights of children born out of surrogacy. An examination of the framework shows that it is more regulatory than rights-based, and therefore requires a re-thinking of its underlying principles.

4.1 Exclusionary Eligibility and the Children

A critical aspect of the 2021 Act is its restrictive eligibility criteria that restrict surrogacy to married heterosexual couples that fulfil certain conditions¹⁸. This exclusionary approach ignores changing family structures and denies single persons and the LGBTQ+ community the right to use surrogacy to have children.

From a child rights standpoint, this approach is concerning as it curtails the potential for varied and competent parenting environments. Equality as enshrined in the Constitution under Articles 14 and 15 calls into question the legitimacy of such exclusions¹⁹. Further, the best interests of the child should be determined by the quality of parenting and care, rather than the parents' marital status or sexual orientation.

4.2 Legal Parentage and Custody

The issue of legal parentage is not adequately addressed in the Act. While the Act acknowledges intended parents in some instances, it does not fully address disputes that may arise between the surrogate mother and the commissioning parents, such as in instances of abandonment, divorce, or death²⁰.

¹¹ INDIA CONST. arts. 14, 15.

¹² Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

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

¹⁴ INDIA CONST. art. 21.

¹⁵ Law Commission of India, *Report No. 228: Need for Legislation to Regulate Assisted Reproductive Technology Clinics* (2009).

¹⁶ *Jan Balaz v. Anand Municipality*, Special Civil Application No. 3020 of 2008 (Guj. H.C. Nov. 11, 2009).

¹⁷ The Surrogacy (Regulation) Act, No. 47 of 2021 (India).

¹⁸ The Surrogacy (Regulation) Act, No. 47 of 2021, § 4 (India).

¹⁹ INDIA CONST. arts. 14, 15.

²⁰ The Surrogacy (Regulation) Act, No. 47 of 2021 (India).

While case law like *Jan Balaz v. Anand Municipality* has sought to address issues of parentage and citizenship, the lack of clear statutory provisions can be problematic²¹. This uncertainty can lead to significant issues for the child in relation to legal identity, inheritance, and social benefits. The law needs to be child-friendly by clearly establishing parentage from the child's birth, thereby avoiding situations that may not be in the child's best interest.

4.3 Limited Attention to the Long-Term Interests of Children

The Act focuses on regulating surrogacy, but there are no specific provisions on the long-term interests of children born through surrogacy. Concerns relating to mental health, genetic information and abandonment are not adequately addressed

The "best interests of the child", as enshrined in international law, demands a comprehensive approach beyond the initial birth²². Yet, the current regulations do not include provisions for ongoing monitoring or protection of the child's welfare. This shows a significant gap in harmonising national legislation with international child rights law.

4.4 Issues with Cross-Border Surrogacy and Citizenship

There are many legal complexities in cross-border surrogacy, especially related to citizenship and statelessness. Legal clashes between different jurisdictions may result in children being stateless and therefore lacking basic rights²³.

The courts in India have played an active role in preventing statelessness, as in *Baby Manji Yamada v. Union of India*²⁴. But relying on judicial action is not an adequate long-term response. The lack of clear legislation to address international surrogacy arrangements leaves children vulnerable to legal and procedural complexities.

4.5 Possibility of Exploitation and Commercialisation

While the ban on commercial surrogacy seeks to protect against exploitation, it might push the practice underground, rendering it vulnerable to illegal transactions and trafficking²⁵. These unregulated practices are dangerous not just for surrogate mothers but also for children who may find themselves as a commodity in these markets.

Recent judicial observations in cases of surrogacy rackets have emphasised the need for more stringent enforcement and regulation. A nuanced approach is needed, which maintains restrictions on exploitation without completely blocking access, to ensure that children are born through legally and morally safe practices.

4.6 Need for a Child-Centric Legal Framework

India's current surrogacy framework exhibits a regulatory framework that is more concerned with control than comprehensive rights protection. India needs to prioritise a child-centric approach where the child's rights - including identity, nationality, non-discrimination, and welfare - are clearly acknowledged.

This framework should also take into account judicially evolved principles, such as the supremacy of the child's best interests, and the importance of legal certainty with regard to parentage and citizenship. In the absence of such changes, a disconnect between the legislative will and judicial interpretation will remain.

In summary, although the Surrogacy (Regulation) Act, 2021 is a welcome development in regulating surrogacy in India, it falls short on key child rights issues. The continued existence of ambiguities, over-restrictions and inadequate welfare considerations highlight the need for reform. An effective surrogacy regime should not only regulate but also adopt a rights-based approach with the child as a central consideration.

6. Recommendations for Reform

Given the current state of India's surrogacy law and judicial developments, there is a pressing need to overhaul the law to adopt a more balanced and child-focused approach.

First, the law must explicitly adopt a child rights approach, acknowledging principles like the best interests of the child, the right to identity and non-discrimination. This should be reflected in the Surrogacy (Regulation) Act to align it with international standards under the Convention on the Rights of the Child.

Second, intended parents should be permitted to include single people and LGBTQ+ couples. Exclusionary criteria not only contravene constitutional principles of equality but also restrict the ability to create diverse and supportive families. An inclusive approach would ensure surrogacy legislation is responsive to social changes and judicial interpretations of reproductive autonomy.

Third, the law needs to establish clear and detailed regulations for legal parentage. This includes legal presumption of parentage at birth, and processes for dispute resolution. Legal certainty over parentage is important to ensure legal identity, inheritance and social entitlements of the child.

Fourth, it is important to enhance regulatory frameworks and enforcement. Although commercial surrogacy is banned to protect against exploitation, weak enforcement can result in the growth of the black market. Designation of independent oversight bodies, transparency in the operations of clinics and heavy penalties for breaches can address these concerns.

Fifth, the legislative framework needs to address interstate surrogacy by introducing guidelines on citizenship, nationality, and recognition of international surrogacy. Multilateral cooperation and bilateral treaties may be needed to avoid situations of statelessness and leave unrelated children in limbo.

Lastly, courts should continue to take an active role by establishing consistent interpretative principles that focus on the best interests of the child. Training and awareness-raising of judges on surrogacy matters can also help achieve greater consistency.

7. Conclusion

Surrogacy regulation in India is a multifaceted legal, ethical and human rights concern. Although the Surrogacy (Regulation) Act, 2021 is a major advancement in regulating the burgeoning commercial surrogacy industry, it fails to adequately protect the rights and best interests of the children born through such arrangements. Indian court cases exhibit a strong focus on the best interests of the child, with courts placing paramount importance on the child's welfare in cases of parentage, custody, and citizenship. But the need for judicial intervention to fill gaps in the law reflects the shortcomings of existing legislation.

From the point of view of children's rights, the regime is hampered by narrow eligibility criteria, uncertainty in legal parentage and a general lack of provision for long-term child welfare. Moreover, complexities from international surrogacy and concerns about exploitation highlight the need for a more balanced and sophisticated approach.

The new regime should go beyond regulatory responses and embrace a rights-based framework that prioritises the child. This involves bringing domestic laws into alignment with constitutional values and international standards, and promoting inclusivity and legality.

Ultimately, effective surrogacy regulation in India will rely on achieving a balance of interests without impinging on the dignity, identity and welfare of the child. A progressive, child-friendly legal framework - backed by judicial and legislative support - is crucial in this regard.

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