

**CROSS-BORDER SURROGACY AND CHILDHOOD STATELESSNESS:
GAPS IN INDIAN CONSTITUTIONAL LAW AND THE SURROGACY
(REGULATION) ACT, 2021**

by

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ABSTRACT

Cross-border surrogacy often results in childhood statelessness due to irreconcilable rules on legal parentage and nationality between the country of birth and the country that the commissioning parents belong to, India was a major destination for such arrangements until the Surrogacy (Regulation) Act, 2021 prohibited commercial surrogacy for foreign nationals and confined altruistic surrogacy to close relatives of the commissioning couple. The Act has curtailed new commercial arrangements involving foreigners. It has not resolved the status of children already born through prior arrangements or the position of Indian citizens who commission surrogacy abroad. The Citizenship Act, 1955 predominantly follows a *jus sanguinis* model. This means that citizenship by birth is not automatic unless at least one of the parent is an Indian citizen. When this rule operates together with the non-recognition of foreign parentage orders, the statutory scheme creates a compound risk of statelessness.

International human rights law, with particular regard to Article 7 of the United Nations Convention on the Rights of the Child, guarantees to every child the right to acquire a nationality. Domestic legal systems nevertheless often refuse to recognise intended parentage established through foreign surrogacy arrangements on public policy grounds. Indian constitutional obligations under Articles 21 and 39(f), as elaborated in *Sheela Barse v Union of India*, impose a duty on the State to protect children. It remains unclear whether these obligations extend to the prevention of surrogacy-induced statelessness.

This paper examines the doctrinal gaps in Indian constitutional and statutory law that permit childhood statelessness in cross-border surrogacy cases. It evaluates whether the Surrogacy (Regulation) Act, 2021 satisfies or aggravates the obligations and considers if it is feasible for steps like targeted legislative amendments, including clearer prohibition and residual

nationality mechanisms, that remain consistent with constitutional values and India's treaty commitments.

Keywords: *cross-border surrogacy, childhood statelessness, Surrogacy (Regulation) Act 2021, Article 7 UNCRC, residual nationality*

I. INTRODUCTION

Cross-border surrogacy in the recent times has become a major part of the global reproductive market. Intending parents from countries with strict laws or high costs travel to places where commercial surrogacy is legal or unregulated. Researchers call this fertility tourism. It happens because people take advantage of the legal differences and loopholes between conflicting national laws¹. The central difficulty is that the state of birth may determine parentage and nationality according to its own rules while the commissioning parents state may refuse to recognise the foreign arrangement on public policy grounds. Neither state then claims the child and statelessness follows².

India served as a major destination for such arrangements for over a decade. The absence of clear statutory rules on parentage and nationality in cross border cases produced several high profile disputes. In *Baby Manji Yamada v. Union of India*³, the Supreme Court addressed the situation of a child born to an Indian surrogate for Japanese commissioning parents whose marriage had ended before the birth. In *Jan Balaz v. Anand Municipality*⁴, the Gujarat High Court confronted twin children born to an Indian surrogate for a German couple and issued directions for Indian passports through judicial improvisation because no governing framework existed. The Norway-India Volden Twins case illustrated the same structural problem. Twin children that were born in India to a woman who belonged from Norway, who used a surrogate mother. These children, however did not get to be citizens of India or Norway. This was as a result of India's laws that does not give citizenship just because a child is born there. The child needs more than that to be a citizen. Norway also did not say these children were citizens

¹Charles P Kindregan Jr and Danielle White, 'International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements' (2013) 36 *Suffolk Transnational Law Review* 527.

²Xin Su, 'Statelessness of Surrogate-born Children in Jus Sanguinis Countries: A Human Rights Perspective on Legal Challenges and Solutions' (SSRN, February 2025).

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

⁴*Jan Balaz v Anand Municipality* 2009 SCC OnLine Guj 10446.

because the Norwegian woman used a surrogate, which is not allowed in Norway. The twin children were left without being citizens of either India or Norway⁵.

The Surrogacy (Regulation) Act, 2021 responded to these difficulties by prohibiting commercial surrogacy for foreign nationals and restricting altruistic surrogacy to close relatives of the commissioning couple⁶. The measure has curtailed new commercial arrangements involving foreign commissioning parents. It has not however resolved the status of children already born through prior arrangements or the position of Indian citizens who commission surrogacy abroad in jurisdictions where the practice remains lawful. The Citizenship Act, 1955 follows a predominantly *jus sanguinis* model. Citizenship by birth is not automatic unless at least one parent is an Indian citizen⁷. When this rule operates together with the non recognition of foreign parentage orders the statutory scheme creates what recent scholarship characterises as a compound risk of statelessness for surrogate born children⁸.

International human rights law supplies a normative framework for addressing this risk. The United Nations Convention on the Rights of the Child to which India became a part of in the year 1992, says that every child has the right to get a nationality if possible⁹. When we look at this with regard to the 1961 Convention on the Reduction of Statelessness it means that countries have to make sure kids do not become stateless no matter how they were born. The law in India has always said that the government has a duty to protect children. For example, in the case of *Sheela Barse v. Union of India* the Supreme Court said that the Constitution, Articles 21 and 39(f) tells the government that it must make sure children are safe¹⁰. It is not clear if this also means the government has to prevent children from becoming stateless when they are born from cross border surrogacy arrangements. This is a question that people who study law have not really looked at yet.

Cross border surrogacy arrangements frequently result in children being rendered stateless because of irreconcilable rules on legal parentage and nationality between the country of birth and the country of the commissioning parents. International human rights law guarantees every child the right to acquire a nationality. Domestic legal systems nevertheless often refuse to

⁵Sanoj Rajan, 'Ending International Surrogacy-Induced Statelessness: An International Human Rights Law Perspective' (2018) 58 *Indian Journal of International Law* 1.

⁶The Surrogacy (Regulation) Act 2021, ss 3, 4 and 38

⁷The Citizenship Act 1955, s 3.

⁸Su (n 2).

⁹Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 7. India ratified the Convention on 11 December 1992.

¹⁰*Sheela Barse v Union of India* (1986) 3 SCC 596.

recognise intended parentage established through foreign surrogacy arrangements on public policy grounds. This leaves children in legal limbo as illustrated by the Norway India Volden Twins case and the Indian precedents of *Baby Manji Yamada v Union of India* and *Jan Balaz v Anand Municipality*.

The legal treatment of foreign parentage orders arising from surrogacy remains uncertain under Indian law. The Surrogacy (Regulation) Act 2021 has restricted commercial surrogacy for foreigners and has confined altruistic surrogacy to close relatives. It has not resolved the deeper problem of how Indian law should respond when Indian surrogates give birth to children for foreign commissioning parents or when Indian citizens commission surrogacy abroad. In the absence of clear rules on the recognition of foreign parentage and coordinated nationality mechanisms children continue to face the risk of statelessness. The structural question that existing literature has not addressed is whether Indian law together with its treaty obligations under the UNCRC creates an operative legal obligation to adopt mutual recognition or pre birth order mechanisms and whether the Surrogacy (Regulation) Act 2021 satisfies or aggravates that obligation.

The primary objective of this research is to examine the gaps in Indian constitutional and statutory law that permit childhood statelessness in cross border surrogacy arrangements and to evaluate possible legal mechanisms for their prevention that remain consistent with India's international obligations and constitutional values.

The specific objectives are as follows:

1. To analyse how conflicting rules on legal parentage and nationality in cross border surrogacy arrangements produce statelessness.
2. To examine the extent to which Article 7 of the UNCRC read with the principle of the best interests of the child and the 1961 Convention on the Reduction of Statelessness imposes operative obligations on states to prevent statelessness arising from surrogacy.
3. To evaluate whether the Indian constitutional and statutory framework, particularly the Surrogacy (Regulation) Act, 2021, provides an adequate legal basis for recognising or refusing foreign parentage determinations in cross-border surrogacy cases and effectively addresses the risk of statelessness, while identifying any remaining legislative or judicial gaps requiring intervention.

4. To identify and analyse the legal mechanisms relevant to preventing statelessness in cross-border surrogacy cases in India and examine their compatibility with constitutional principles and international human rights standards.

II. RESEARCH METHODOLOGY

This research adopts a doctrinal legal research methodology supplemented by comparative and policy oriented analysis. The approach is primarily analytical and critical rather than empirical.

Primary sources of data include the Citizenship Act 1955, the Surrogacy (Regulation) Act 2021 (Act No. 47 of 2021), the Guardians and Wards Act 1890 and relevant provisions of the Constitution, particularly Articles 21 and 39(f). Judicial decisions of the Supreme Court of India and High Courts of various states of India form a central primary source with detailed examination of *Baby Manji Yamada v Union of India*, *Jan Balaz v Anand Municipality* and *Sheela Barse v Union of India*. International legal instruments including the United Nations Convention on the Rights of the Child and the 1961 Convention on the Reduction of Statelessness are analysed to determine the content of India's treaty obligations.

Secondary sources comprise the scholarly literature identified and reviewed in the source map and thematic grouping including the works of Kindregan and White, Rajan, Iliadou, Su, Wojtan, Nichol and others. Reports and policy documents from international bodies such as the UNHCR and the Hague Conference on Private International Law are consulted where relevant.

The method of analysis involves close reading and critical interpretation of statutory text, case law and treaty provisions to identify internal inconsistencies and gaps. Comparative analysis is employed to examine how other *jus sanguinis* jurisdictions have addressed similar problems and to assess the feasibility of remedial mechanisms such as pre birth orders and mutual recognition agreements. Normative evaluation tests proposed reforms against the standards of constitutional welfare obligations and international human rights law.

The study is library based and does not involve collection of primary empirical data from human participants. Limitations include the relative scarcity of reported judicial decisions after 2021 on the recognition of foreign parentage orders in surrogacy contexts and the absence of comprehensive official statistics on the number of children affected by statelessness in such arrangements. These limitations are addressed by focusing on doctrinal coherence and normative justification rather than quantitative measurement.

This methodology is appropriate for the research questions which centre on legal interpretation, gap identification and the formulation of constitutionally and internationally defensible recommendations. It aligns with the analytical and comparative dimensions of legal research and supports the production of a rigorous academic paper suitable for journal submission.

III. LITERATURE REVIEW

The literature surveyed for this paper can be meaningfully grouped into four coherent themes.

Theme 1: The Statelessness Problem in Cross-Border Surrogacy: Doctrinal Foundations and Case Studies

The earliest and most structurally foundational body of literature identifies and anatomises the precise legal mechanism through which cross-border surrogacy produces statelessness. Kindregan and White provide the most systematic early account, arguing that “fertility tourism” creates a structural conflict: the country of birth attributes parentage and citizenship by reference to its own domestic rules, while the commissioning parents’ country refuses to recognise the surrogacy arrangement on public policy grounds. The result is that neither State claims the child as a national¹¹. Mohapatra, while writing from a bioethical standpoint, situates this outcome within a broader critique of commercial surrogacy. She contends that statelessness is not an aberration but a predictable structural consequence of arranging reproduction across legal systems that are fundamentally incompatible on questions of parentage and status¹². Rajan primarily grounds this analysis in specifically Indian precedents. The Supreme Court of India’s order in *Baby Manji Yamada v Union of India* and the Gujarat High Court’s decision in *Jan Balaz v Anand Municipality* both arose because Indian surrogacy law did not recognise the foreign commissioning parties as legal parents and the commissioning States refused to recognise the children as their nationals¹³.

The Norway-India Volden Twins case belongs squarely to this cluster. The twins born to an Indian surrogate for a Norwegian single woman were rendered stateless because India does not follow *jus soli* as a general principle and Norway refused to extend Norwegian citizenship to children born through a surrogacy arrangement that Norwegian law did not recognise. The

¹¹Kindregan and White (n 1).

¹²Seema Mohapatra, ‘Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy’ (2012) 30 *Berkeley Journal of International Law* 412.

¹³Rajan (n 5); *Baby Manji Yamada* (n 3); *Jan Balaz* (n 4).

literature in this theme demonstrates that the statelessness outcome is neither incidental nor remediable through administrative goodwill. It is a structural product of the absence of mutual recognition norms and must be resolved at the doctrinal and legislative level.

Theme 2: International Human Rights Law, Article 7 UNCRC and the Child's Right to Nationality

A second body of literature moves from the descriptive account of the problem to its normative architecture under international human rights law. De Groot provides one of the most systematic doctrinal treatments of the child's right to nationality. He demonstrates that while Article 7 of the UN Convention on the Rights of the Child guarantees that every child shall have the right to acquire a nationality "as far as possible," the phrase is widely interpreted as imposing a residual positive obligation on States to prevent statelessness rather than merely a permissive aspiration¹⁴. Iliadou, in a more recent contribution, further elaborates this analysis by examining how the UNCRC's guarantee interacts with the 1961 Convention on the Reduction of Statelessness. She argues that the two instruments together impose a composite obligation on States parties to provide nationality to a child who would otherwise be rendered stateless, regardless of how the child was conceived or born¹⁵. Ni Ghráinne and McMahon advance this argument further, proposing a public international law framework that would operationalise this obligation as a default rule: where no State's domestic law secures citizenship for a surrogate-born child, a residual obligation of nationality acquisition falls on the State of birth¹⁶.

This literature operates predominantly at the level of treaty obligation and has not fully addressed how the obligation interacts with States that treat the "best interests of the child" standard as a hortatory rather than an operative legal rule. India's engagement with Article 7 UNCRC is itself ambivalent. India ratified the UNCRC in 1992 but has not translated the nationality guarantee into domestic surrogacy or citizenship legislation. This is a gap that the present paper specifically addresses.

Theme 3: The Jus Sanguinis Problem and Comparative Domestic Legal Frameworks

¹⁴Gerard-René de Groot, 'Children, their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 165.

¹⁵Marianna Iliadou, 'International Surrogacy and Stateless Children: Article 7 UNCRC and the Harmful Effects of Statelessness' (SSRN, 14 May 2024).

¹⁶B Ní Ghráinne and Aisling McMahon, 'A Public International Law Approach to Safeguard Nationality for Surrogate-born Children' (2017) 37 *Legal Studies* 481.

A third body of literature examines the specific vulnerability created by *jus sanguinis* citizenship systems. Boillet and Akiyama show that the dominant European model of citizenship by descent creates a structural vulnerability in surrogacy arrangements. A child is only a national if its legal parents under domestic law are citizens, and the recognition of intended parentage from a foreign surrogacy arrangement is uniformly refused on public policy grounds by the overwhelming majority of European and Asian *jus sanguinis* States¹⁷. Su extends this analysis to Asian jurisdictions, including India, demonstrating that *jus sanguinis* citizenship rules combine with the non-recognition of foreign parentage orders to create what she characterises as a “compound statelessness risk”. The child is not a national of the birth State because citizenship is not acquired by birth alone, and not a national of the commissioning State because the parentage order is refused¹⁸.

Kanics and Wojtan complement this theme from a policy and structural perspective. Kanics argues that the international community has treated statelessness in surrogacy cases as a problem for the individual child to resolve through administrative channels, rather than as a systemic failure requiring a coordinated legal response¹⁹. Wojtan characterises the global absence of a binding legal regime as a “legal vacuum” that cannot be resolved through national solutions alone, since each State’s unilateral refusal to recognise foreign parentage simply transfers the problem to another jurisdiction²⁰. This theme directly informs the paper’s examination of whether India’s Surrogacy (Regulation) Act, 2021 has filled or deepened the structural gap.

Theme 4: Proposed Legal Mechanisms and Reform Frameworks

The fourth body of literature is prescriptive rather than descriptive and offers concrete legal mechanisms to address surrogacy-induced statelessness. Nichol proposes three principal remedial instruments: pre-birth parentage orders, bilateral mutual recognition agreements between States with significant surrogacy flows, and a residual nationality guarantee in domestic citizenship statutes²¹. Ni Ghráinne and McMahon converge on the pre-birth order

¹⁷V Boillet and Hajime Akiyama, ‘Statelessness and International Surrogacy from the International and European Legal Perspectives’ (2017) 27 *Schweizerische Zeitschrift für internationales und europäisches Recht* 1.

¹⁸Su (n 2).

¹⁹Jyothi Kanics, ‘Preventing and Addressing Statelessness: In the Context of International Surrogacy Arrangements’ (2014) 28 *Journal of Immigration, Asylum and Nationality Law* 1.

²⁰Paulina Wiktoria Arias Wojtan, ‘The Legal Vacuum of Surrogacy and Its Implications for Childhood Statelessness’ (2025) 11 *Polish Journal of Political Science* 47.

²¹Brittany M Nichol, ‘A Child Without a Country: Dissolving the Statelessness of Children Born Through Surrogacy’ (2016) *Michigan State Law Review* 1187.

mechanism and argue that it is consistent with public international law obligations because it does not require the commissioning State to validate the surrogacy arrangement as a matter of contract but only to recognise the resulting parentage determination as a status order²². Iliadou and Su each add the dimension of international coordination through the Hague Conference on Private International Law's ongoing work on parentage and surrogacy. They note that the 2023 Hague Principles on Parentage offer a framework for mutual recognition that could be incorporated into domestic laws without requiring States to endorse commercial surrogacy²³.

This theme is the most directly relevant to the paper's final research question. The literature demonstrates that the remedial mechanisms are technically available and legally coherent. What is missing is the doctrinal analysis of whether and how they can be accommodated within India's specific constitutional and statutory framework. No existing scholarship has performed this constitutional integration, and that is the specific contribution of the present paper.

IV. RESEARCH GAP

Existing scholarship on cross-border surrogacy and statelessness has developed in two parallel streams. The first stream documents specific cases such as the Volden Twins case, *Baby Manji Yamada v Union of India*, and *Jan Balaz v Anand Municipality*, and highlights the problem of conflicting parentage and nationality rules between the country of birth and the country of the commissioning parents²⁴. The second stream examines international human rights standards, particularly Article 7 of the UNCRC, and calls for better protection against statelessness²⁵.

These two streams have not, however, been systematically integrated with Indian constitutional and statutory law. There is insufficient analysis of how the absence of mutual recognition of foreign parentage orders interacts with India's legislative and judicial approaches to parentage and citizenship. The literature also lacks a focused examination of whether India's current regulatory approach under the Surrogacy (Regulation) Act, 2021 adequately prevents new instances of statelessness. Most importantly, there is no sustained doctrinal analysis of how Indian courts should treat foreign parentage determinations in surrogacy cases or of whether the constitutional obligation to protect children's welfare, as elaborated in *Sheela Barse v Union of India* under Articles 21 and 39(f), imposes an independent obligation on Indian courts

²²Ní Ghráinne and McMahon (n 16).

²³Iliadou (n 15); Su (n 2).

²⁴*Baby Manji Yamada* (n 3); *Jan Balaz* (n 4); Rajan (n 5).

²⁵Iliadou (n 15); Ní Ghráinne and McMahon (n 16).

to prevent surrogacy-induced statelessness²⁶. The absence of this integrated doctrinal analysis is both the gap in the literature and the justification for the present paper.

V. THE INDIAN CONSTITUTIONAL AND STATUTORY FRAMEWORK

Indian law approaches the problem of parentage and nationality through a combination of the Citizenship Act, 1955, the Surrogacy (Regulation) Act, 2021, and constitutional principles under Articles 21 and 39(f).

The Citizenship Act, 1955 follows a predominantly *jus sanguinis* model. Section 3 provides that a person born in India shall be a citizen only if at least one parent is an Indian citizen at the time of birth, subject to certain limited exceptions²⁷. Citizenship is therefore not acquired merely by birth on Indian soil, unlike countries like the United States. When a child is born to an Indian mother surrogate for such foreign parents, the child can easily end up stateless. The laws of India may refuse to recognise the foreign intended parents as legal parents, leaving the child without Indian citizenship. At the same time, the parents' home country might reject the child entirely if its laws ban international surrogacy. The result is the compound risk of statelessness already identified in the literature²⁸.

The operation of Section 3 of the Citizenship Act, 1955 creates a particularly acute risk in surrogacy cases. Under the provision, a child born in India acquires citizenship only if at least one parent is an Indian citizen at the time of birth. When the birth mother is an Indian surrogate and the intended parents are foreign nationals, Indian law ordinarily treats the surrogate as the legal mother. At the same time, the intended parents' home State frequently refuses to recognise the Indian birth certificate or any parentage order that may have been issued, on the ground that commercial surrogacy violates its public policy. The child therefore falls between two legal systems: India may not confer citizenship because the intended parents are not recognised as legal parents under Indian private international law rules, while the home State of the intended parents declines to treat the child as its national. This is precisely the "compound statelessness risk" identified in the literature²⁹.

Constitutional doctrine supplies a further layer of analysis. In *Sheela Barse v Union of India*, the Supreme Court held that Articles 21 and 39(f) impose affirmative obligations on the State

²⁶*Sheela Barse* (n 10).

²⁷The Citizenship Act 1955, s 3.

²⁸Su (n 2).

²⁹Su (n 2); Boillet and Akiyama (n 17).

to protect children and to ensure conditions in which they can develop with dignity³⁰. Although the case concerned children in adult prisons, the principle that the State cannot leave children without basic protections necessary for a dignified existence is capable of wider application. Nationality is not merely an administrative status; it is a precondition for the enjoyment of a wide range of civil, political and social rights. A child left without any nationality is effectively denied the foundational legal identity that Articles 21 and 39(f) seek to protect. The present statutory framework, by failing to provide any residual pathway to nationality in surrogacy cases, sits uncomfortably with this constitutional standard.

The court's reasoning in *Sheela Barse* is significant and not merely for its holding but for the method by which the court arrived at it, Articles 21 and 39(f) were not confined to the specific facts of custodial detention. The two articles were read together as generating a freestanding positive obligation, one that affirmatively requires the state to secure the conditions for a child's development rather than merely refraining from interference. This feature of the judgement matters for the present argument. Statelessness is a form of physical detention, but it produces a form of legal incapacity, a stateless child cannot access education, healthcare and travel documents and remains permanently exposed to administrative discretion in place of legal entitlement. If Articles 21 and 39(f) impose a duty on state to rescue children from one form of institutional invisibility as it did in *Sheela Barse*, the same reasoning extends with comparable force to a legal status that renders a child invisible to every state action at once. This is treated in the present paper as an interpretive extension rather than settled holding, since no Indian court has yet applied the *Sheela Barse* reasoning to a stateless claim, but it is the extension that the doctrine's own logic supports³¹.

The earlier judicial interventions in *Baby Manji Yamada* and *Jan Balaz* further illustrate the difficulty. In both cases the courts were forced to fashion temporary solutions in the absence of clear legislative guidance. These decisions demonstrate that the judiciary has already recognised the welfare implications of leaving surrogate-born children without a clear legal status. What is missing is a coherent statutory response that translates the constitutional principle into a workable rule of nationality law.

The Surrogacy (Regulation) Act, 2021 was enacted in response to the difficulties created by commercial cross-border surrogacy. The Act prohibits commercial surrogacy and restricts

³⁰Sheela Barse (n 10).

³¹*Id.*

altruistic surrogacy to intending couples who are Indian citizens and to a surrogate who is a close relative³². It has effectively closed the door to new commercial arrangements involving foreign nationals. However, the Act is silent on two important residual questions. First, it does not address the status of children already born through earlier commercial arrangements. Second, it does not provide any mechanism for the recognition of foreign parentage orders when Indian citizens commission surrogacy abroad in jurisdictions where the practice remains lawful.

Constitutional principles supply an additional layer of obligation. In *Sheela Barse v Union of India* the Supreme Court was dealing with the problem of children below the age of sixteen who were being kept in adult jails. The Court held that Articles 21 and 39(f) impose a positive duty on the State to protect the welfare of children and to ensure that they are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity³³. The Court said that the State cannot leave children without the basic protections necessary for a dignified life. It is important to note that *Sheela Barse* was not a case about nationality or surrogacy. The present paper is only trying to extend the logic of that decision to the problem of childhood statelessness.

The earlier surrogacy cases also show the difficulties that arise when there is no clear law. In *Baby Manji Yamada v Union of India* the Supreme Court was mainly dealing with a custody and welfare petition under Article 32³⁴. The Court did not decide the question of the child's nationality in any final way. It only said that any grievance about the child's rights could be taken to the Commission for Protection of Child Rights and that the application for travel documents would be processed by the government. In *Jan Balaz v Anand Municipality* the Gujarat High Court was dealing with twin children born to an Indian surrogate for a German father³⁵. In the absence of clear rules, the Court held that the children were Indian citizens because the surrogate mother was an Indian citizen, and it directed the passport authorities to issue travel documents so that the father could take the children out of India. The Court used its powers under Article 226 to give these directions. Both these cases show that the courts had to invent temporary solutions because the law was silent.

³²The Surrogacy (Regulation) Act 2021, ss 3, 4 and 38

³³*Sheela Barse* (n 10).

³⁴*Baby Manji Yamada* (n 3).

³⁵*Jan Balaz* (n 4).

The reasoning in *Jan Balaz* is instructive for what it reveals about the limits of judicial improvisation as a substitute for legislation. The Gujarat High Court did not locate its conclusion in any statutory citizenship rule addressed to surrogacy, it inferred citizenship from the fact of the surrogate mother's own Indian Citizenship, extending to a gestational surrogate the ordinary presumption that the Indian Law attaches to a birth mother. This was a defensible result on the facts before the court, but it is not a rule capable of principled replication. It leaves unanswered, for instance, what should happen, where the surrogate herself supplies no presumption, a court is prepared to extend, or where the child's documentary trail, is contested by the commissioning state. *Jan Balaz* solved one case, it did not supply a principled rule for the next. This is precisely the deficit that legislative intervention, rather than continued reliance on Article 226 writ jurisdiction, is required to correct³⁶.

The gap between the constitutional obligation recognised in *Sheela Barse* and the present statutory framework under the Citizenship Act and the Surrogacy (Regulation) Act, 2021 is therefore the main doctrinal problem that this paper is trying to examine.

VI. EVALUATION OF THE SURROGACY (REGULATION) ACT, 2021

The Surrogacy (Regulation) Act, 2021 marked a decisive shift in Indian policy on surrogacy. Prior to its enactment, India had functioned as a major destination for commercial cross-border surrogacy for more than a decade. The Act sought to end that phase by prohibiting commercial surrogacy and restricting altruistic surrogacy to intending couples who are Indian citizens and to a surrogate who is a close relative³⁷. Sections 3, 4 and 38 of the Act make commercial surrogacy a punishable offence and close the door to foreign nationals commissioning surrogacy in India. In this limited sense the Act has been effective. New commercial arrangements involving foreign commissioning parents have largely come to an end.

However, the Act does not resolve the deeper structural problems that produce childhood statelessness. First, it contains no transitional or residual provisions for children already born through commercial arrangements before the Act came into force. Children such as those involved in the *Baby Manji*, *Jan Balaz* and *Volden* cases continue to exist in a legal grey zone. The Act offers them no pathway to nationality or clear parentage recognition. Second, the Act is silent on the position of Indian citizens who commission surrogacy abroad in jurisdictions where commercial or altruistic surrogacy remains lawful. When such children are brought to

³⁶*Id.*

³⁷The Surrogacy (Regulation) Act 2021, ss 3, 4 and 38.

India, questions of parentage recognition and citizenship under the Citizenship Act, 1955 remain unanswered. Third, the Act provides no mechanism for the recognition or non-recognition of foreign parentage orders. Indian courts are left without legislative guidance on how to treat such orders when questions of nationality arise.

The 2021 Act's silence on residual cases is particularly significant when viewed against India's treaty obligations. Article 7 of the UNCRC requires States parties to ensure that every child has the right to acquire a nationality and to take measures to avoid statelessness "as far as possible."³⁸ The phrase "as far as possible" has been interpreted in the literature as imposing a residual positive obligation rather than a mere aspiration³⁹. By closing the domestic avenue for commercial cross-border surrogacy without simultaneously creating any residual nationality mechanism, the Act leaves a category of children those already born and those who may still be born to Indian citizens abroad without an effective pathway to nationality. This legislative choice prioritises the regulation of the practice of surrogacy over the prevention of the distinct legal harm of childhood statelessness.

The position of Indian citizens who commission surrogacy abroad remains equally unresolved. Nothing in the 2021 Act prevents an Indian couple from travelling to a jurisdiction where commercial or altruistic surrogacy is lawful, entering into an arrangement there, and later seeking to bring the child to India. When such a child arrives, questions of legal parentage and citizenship under the Citizenship Act, 1955 arise immediately. In the absence of any statutory guidance on the recognition of foreign parentage orders, the child may again be left in a legal vacuum. The Act therefore addresses only one part of the cross-border problem while leaving the outbound dimension completely unregulated.

Recent scholarly commentary has observed that this approach deepens rather than closes the doctrinal gap⁴⁰. A statute that prohibits a practice without providing residual protection for the children who fall outside its scope fails to discharge the positive obligations that flow from both the Constitution and the UNCRC. The next section therefore considers whether targeted amendments can supply the missing residual protection without requiring a reversal of the policy choice already made by Parliament in 2021.

³⁸Convention on the Rights of the Child (n 9) art 7.

³⁹De Groot (n 14); Iliadou (n 15); Ní Ghráinne and McMahon (n 16).

⁴⁰Su (n 2); Wojtan (n 20).

The result is that the Act has closed one route to new cases of statelessness while leaving existing and residual cases unaddressed. In doing so, it has not discharged the positive obligation under Article 7 of the UNCRC to ensure that no child is left without a nationality. Nor has it fully responded to the constitutional duty under Articles 21 and 39(f), as interpreted in *Sheela Barse v Union of India*, to protect the welfare of children⁴¹. The Act treats the problem primarily as one of regulating the practice of surrogacy within India. It does not treat the problem as one of preventing childhood statelessness as a distinct legal harm.

Recent scholarship has noted that the Act deepens rather than closes the doctrinal gap. By removing the domestic legal basis for commercial cross-border surrogacy without simultaneously creating residual nationality or parentage recognition mechanisms, the statute leaves children who fall outside its protective scope without a clear legal status⁴². The legislative choice to prioritise the prohibition of commercial arrangements over the prevention of statelessness therefore requires critical examination. The next section considers whether targeted amendments to the Act, together with residual nationality provisions under the Citizenship Act, can address this gap while remaining consistent with constitutional principles and India's international obligations.

VII. POSSIBLE LEGAL MECHANISMS AND RECOMMENDATIONS

The literature reviewed earlier identifies three principal mechanisms that States have used or proposed to prevent surrogacy-induced statelessness: pre-birth parentage orders, mutual recognition of foreign parentage determinations, and residual nationality guarantees in domestic citizenship law⁴³. Each of these mechanisms must be assessed against the specific features of the Indian legal system.

Pre-birth parentage orders allow a court in the country of birth to determine legal parentage before the child is born. Such orders reduce uncertainty and can facilitate the acquisition of nationality. In the Indian context, however, the introduction of pre-birth orders would require significant procedural reform and would sit uneasily with the policy choice reflected in the 2021 Act to restrict surrogacy to a narrow class of domestic altruistic arrangements. Mutual recognition of foreign parentage orders presents similar difficulties. Indian public policy, as currently expressed in the Surrogacy (Regulation) Act, is strongly opposed to commercial

⁴¹*Sheela Barse* (n 10); Convention on the Rights of the Child (n 9) art 7.

⁴²*Su* (n 2); *Wojtan* (n 20).

⁴³*Nichol* (n 21); *Ní Ghráinne and McMahon* (n 16).

surrogacy. Automatic recognition of foreign parentage orders arising from commercial arrangements would undermine that policy.

This difficulty can be located more precisely within the private international law framework that ordinarily governs the recognition of foreign status orders. Indian courts recognise foreign judgements and status determinations subject to public policy exception, and the Surrogacy (Regulation) Act, 2021 operates as exactly the kind of overriding mandatory rule that this exception exists to protect. A parentage order that is obtained abroad through commercial surrogacy arrangement concerns a practice that Indian Law has deliberately criminalised at home, recognising the order for immigration and citizenship purposes while treating the underlying arrangement as unlawful would produce an internal contradiction that no court shall be likely to accept. Mutual recognition is accordingly not merely difficult as a matter of public policy preference; it sits in direct tension with the structure of the 2021 Act itself. Any reform proposal must therefore work within, rather than against, the prohibition of cross-border surrogacy, which is why the residual nationality mechanism proposed below targets the child status rather than the validity of the arrangement that produced it⁴⁴.

A more coherent approach for India lies in a combination of two measures. The first is a targeted amendment to the Surrogacy (Regulation) Act, 2021 that expressly brings cross-border commercial surrogacy within the scope of the existing prohibition and clarifies the legal consequences of such arrangements for parentage and nationality. The amendment should make clear that any arrangement in which an Indian surrogate carries a child for foreign intending parents, or in which an Indian citizen commissions commercial surrogacy abroad, falls within the prohibited category of commercial surrogacy. This would remove residual ambiguity and reinforce the legislative policy already adopted in 2021.

A residual nationality provision under the Citizenship Act, 1955 offers the most coherent solution within the existing Indian policy framework. Such a provision would operate only where a child born through surrogacy would otherwise be left without any nationality. It would not require Indian courts to validate the underlying commercial arrangement or to recognise foreign intended parents as a matter of private international law. It would simply ensure that the child is not left without a legal identity. This approach is consistent with the residual

⁴⁴*Id.*

obligation under Article 7 of the UNCRC and with the constitutional duty under Articles 21 and 39(f) to protect the welfare of children⁴⁵.

Comparative experience supports the feasibility of such a rule. Several *jus sanguinis* jurisdictions have introduced limited residual nationality pathways for children who would otherwise be stateless, without thereby endorsing the commercial arrangements that produced the difficulty⁴⁶. The Indian provision could be drafted narrowly: it would apply only where neither the State of birth nor the State of the intended parents confers nationality, and where the child has a genuine connection with India through birth on Indian territory or through an Indian surrogate. Administrative safeguards such as a requirement of proof that no other nationality is available could prevent abuse while still discharging the core obligation to avoid childhood statelessness.

Taken together, a clarifying amendment to the Surrogacy (Regulation) Act, 2021 and a residual nationality clause in the Citizenship Act would address both the preventive and the residual dimensions of the problem. The former would reinforce the existing legislative policy against commercial cross-border surrogacy. The latter would ensure that children who nevertheless fall into the gap are not left without a nationality. This combination remains faithful to the policy choices already made by the Indian Parliament while giving effect to the constitutional and international obligations that the present framework leaves unfulfilled.

The second and more important measure is the introduction of a residual nationality provision under the Citizenship Act, 1955. Where a child born through surrogacy would otherwise be left without any nationality, Indian Law should provide a pathway to citizenship. Such a residual guarantee would give effect to India's obligations under Article 7 of the UNCRC and would be consistent with the constitutional duty under Articles 21 and 39(f) to protect the welfare of children⁴⁷. The residual provision need not require India to recognise the validity of the underlying surrogacy arrangement. It need only ensure that no child is left stateless as a result of conflicting parentage and nationality rules.

Taken together, these two measures would address both the preventive and the residual dimensions of the problem. The amendment to the Surrogacy (Regulation) Act would strengthen the existing prohibition on commercial cross-border arrangements. The residual

⁴⁵Sheela Barse (n 10); Convention on the Rights of the Child (n 9) art 7.

⁴⁶See generally Nichol (n 21); Ní Ghráinne and McMahon (n 16).

⁴⁷Sheela Barse (n 10).

nationality provision under the Citizenship Act would ensure that children who nevertheless fall into the gap are not left without a nationality. This approach remains consistent with the policy choices already made by the Indian Parliament while discharging the constitutional and international obligations that the current framework leaves unfulfilled.

VIII. CONCLUSION

Cross-border surrogacy continues to generate a distinct and foreseeable risk of childhood statelessness. The risk arises from the simultaneous operation of incompatible legal systems. The country of birth determines parentage and nationality according to its own rules. The country of the commissioning parents frequently refuses to recognise the arrangement on public policy grounds. Neither State claims the child. The result is a legal vacuum in which the child is left without a nationality.

India experienced this problem in a particularly acute form during the period when it functioned as a major destination for commercial surrogacy. Cases such as *Baby Manji Yamada v Union of India*, *Jan Balaz v Anand Municipality*, and the Norway-India Volden Twins litigation demonstrated the human cost of the absence of clear rules on parentage and nationality. The Surrogacy (Regulation) Act, 2021 responded to these difficulties by prohibiting commercial surrogacy and restricting altruistic arrangements to a narrow class of domestic cases. The Act has succeeded in curtailing new commercial cross-border arrangements involving foreign nationals. It has not, however, resolved the residual problems that the earlier regime left behind, nor has it addressed the position of Indian citizens who continue to commission surrogacy abroad.

The present paper has argued that this incomplete response leaves a doctrinal gap. The Citizenship Act, 1955, with its predominantly *jus sanguinis* character, does not automatically confer nationality on a child born in India to an Indian surrogate for foreign intending parents. The Surrogacy (Regulation) Act, 2021 provides no mechanism for the recognition of foreign parentage orders and contains no residual nationality guarantee. At the same time, India's obligations under Article 7 of the United Nations Convention on the Rights of the Child, read with the constitutional duty under Articles 21 and 39(f) as elaborated in *Sheela Barse v Union of India*, require the State to take effective steps to prevent childhood statelessness.

The paper has therefore proposed a two-part legislative response. First, a targeted amendment to the Surrogacy (Regulation) Act, 2021 should expressly bring cross-border commercial arrangements within the existing prohibition and clarify the legal consequences of such

arrangements for questions of parentage. Second, a residual nationality provision should be introduced under the Citizenship Act, 1955 so that a child who would otherwise be left without any nationality is able to acquire Indian citizenship. These measures do not require India to endorse commercial surrogacy. They require only that no child is left without a nationality as a consequence of conflicting legal rules.

The prevention of childhood statelessness is not merely a matter of administrative convenience. It is a constitutional and international obligation. The current statutory framework falls short of that obligation. Targeted legislative intervention of the kind proposed in this paper would close the remaining gap and ensure that Indian law discharges its responsibility toward children born through surrogacy.



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