

# Beyond The Binary Mother-Father: Redefining Legal Parenthood in Contemporary India

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*Abstract- The traditional binary of mother-father as the sole paradigm for legal parenthood is increasingly inadequate in contemporary India. Advances in assisted reproductive technologies (ART), the rise of gestational surrogacy, and changing family structures have created a complex landscape in which intended parents, commissioning parents, genetic donors, and gestational carriers may all claim a connection to the child. This paper critically examines Indian law and its approach towards definition, recognition and allocation of legal parenthood in non-traditional contexts. It analyses the Surrogacy (Regulation) Act, 2021; the Assisted Reproductive Technology Act, 2021; and landmark judicial pronouncements to argue that the legal regime remains bound to a mother-father binary, thus marginalizing commissioning parents in surrogacy arrangements, same sex couples and unmarried persons. This paper contends that the law should develop to acknowledge the presence of multiple parents, including intended and de facto parents, through a functional approach to parenthood that considers the best interests of the child. Using comparative jurisprudence from the UK, US and Canada, the paper develops a legislative framework for recognition of diverse family formations that safeguards accountability and child welfare.*

*Index Terms: Assisted Reproductive Technology, Intended Parents, Legal Parenthood, Multiple Parents, Surrogacy Regulation*

## I. INTRODUCTION

Historically, parenthood was based on biological certainty and marital presumption. The assumption was that a child was the lawful child of a married couple and that legal parenthood followed automatically from this biological and social fact.

However, a radical transformation in the ways families are made has occurred in the late twentieth and early twenty-first centuries. Assisted reproductive technologies have disarticulated biological reproduction from sexual intercourse.

Gestational surrogacy separates genetic, gestational, single-parent, and social motherhood. The law needs to reflect the lived reality of same-sex parenting, single-parent families through ART, and multi-parent families.

India has a unique role to play in this global transformation. It was a global hub for commercial surrogacy and attracted intended parents from across the world till the Surrogacy (Regulation) Act, 2021.

International attention was drawn to the legal vacuum surrounding surrogacy by the Baby Manji and Jan Balaz cases. But the legislative response has been surprisingly conservative.

The Surrogacy Act, 2021 allows only altruistic surrogacy for married heterosexual couples and excludes single individuals, same sex couples and live-in partners. Similarly, under the ART Act, 2021, these services are available only to married couples. This framework creates a paradox: the technologies that enable family formation are regulated in ways that exclude many of those who need them.

This paper contends that Indian law needs to go beyond the binary of mother-father to a more inclusive, functional, and child-centric model of legal parenthood. Part II considers the constitutional foundations of reproductive autonomy. Part III examines the regulatory framework of surrogacy.

Part IV: The ART Act and Its Implications Part V consider judicial responses. Part VI gives comparative perspectives. Part VII presents the findings and recommendations.

## II. CONSTITUTIONAL FOUNDATIONS OF REPRODUCTIVE AUTONOMY

The right to reproductive autonomy in India is grounded in Article 21 of the Constitution, which guarantees the right to life and personal liberty. In *K.S. Puttaswamy v. Union of India* (2017), the Supreme Court recognised reproductive autonomy as part of the right to privacy. Justice Chandrachud explicitly articulated the decision to bear or not bear a child is central to a woman's life, dignity and bodily integrity. This constitutional recognition provides the normative basis to challenge restrictive surrogacy and ART laws.

The right to establish a family, however, has been understood differently for different categories of persons. In *Navtej Singh Johar v. Union of India* (2018) the Supreme Court decriminalised consensual same-sex relationships but did not consider the right of LGBTQ+ persons to form families through ART or surrogacy.

Likewise, in *NALSA v. Union of India* (2014), the Court recognized the right of transgender persons to self-identify their gender, but did not deal with the issues of marriage, parenthood and family formation. The gaps have to be filled in view of the constitutional promise of equality under Article 14 read with the guarantee of dignity under Article 21.

Thus, the confluence of Articles 14, 15 and 21 creates a constitutional imperative for inclusive recognition of parenthood. Any law that prohibits certain categories of persons from accessing ART or surrogacy on the basis of marital status, sexual orientation or gender identity has to pass the test of reasonable classification. As this paper will demonstrate, the Surrogacy Act and the ART Act may not pass this test, especially considering the changing jurisprudence on substantive equality.

## III. THE SURROGACY (REGULATION) ACT, 2021: TENSIONS AND EXCLUSIONS

India's first attempt to regulate surrogacy as a whole is the Surrogacy (Regulation) Act, 2021. The Act prohibits commercial surrogacy and allows altruistic surrogacy only to "intended couples" who are

married Indian citizens for a minimum of five years. It does not include single people, unmarried couples, same-sex couples or foreign nationals. The intending couple must be of sound mind and medically proved to be infertile. The surrogate mother must be a close relative, have had a child at least once and not have been a surrogate more than once.

The Act's restrictive framework has faced considerable criticism. First, it excludes the very people for whom surrogacy is most needed by restricting it to heterosexual married couples. Single persons, same-sex couples and those who cannot marry under personal law are excluded. Second, the purely-altruistic model, although well-intentioned, is blind to the economic realities that underlie reproductive choices. Third, the requirement that the surrogate be a 'close relative' is unrealistic and invasive and fails to respect the surrogate's relational autonomy.

The Act has a major gap in the legal parentage of the child born through surrogacy. The Act provides that the couple intending to be the parents shall be the legal parents but does not provide for the status of the child born to a single person, a same sex couple or through an arrangement that is outside the statutory framework.

In these cases, the child may be declared a legal orphan. This legal vacuum is in violation of the child's right to identity, nationality and parental care as provided under Juvenile Justice (Care and Protection of Children) Act, 2015.

## III. THE ASSISTED REPRODUCTIVE TECHNOLOGY ACT, 2021

The Assisted Reproductive Technology (ART) Act, 2021, provides for regulation of clinics, gamete donation, and ART procedures. Like the Surrogacy Act, it restricts access mainly to married couples, though it does allow a single woman (unmarried or divorced) to access ART. The Act prohibits commercial gamete donation but allows altruistic donation and establishes age limits for donors and recipients.

The ART Act takes an important step in acknowledging that legal parentage in ART contexts is not always biologically determined. Section 2(q) provides that the commissioning couple or single woman will be treated as the legal parents.

This is a huge acknowledgement of intended parenthood. However, the Act does not recognise unmarried couples living together, same-sex couples, or transgender persons. The exclusion of same-sex couples is especially problematic when their constitutional personhood has been recognized by the Supreme Court in *Navtej Singh Johar*.

In addition, the anonymity of gamete donors required by the Act creates legal problems in the future for children who want to know their genetic origins. The right to know one's origins is increasingly recognised in international human rights law including the UN Convention on the Rights of the Child.

A legislative framework that permanently cuts the child off from knowledge of their genetic heritage must be balanced against the child's evolving rights to identity.

#### V. JUDICIAL RESPONSES AND THE EVOLVING CONCEPT OF PARENTHOOD

Indian courts have recognized, in a string of landmark cases, forms of parenthood that go beyond the biological mother-father binary. In *Githa Hariharan v. Reserve Bank of India* (1999), the Supreme Court held that the mother is a natural guardian along with the father and rejected the father's primacy under the Hindu Minority and Guardianship Act. The decision implicitly recognized that parenthood is not determined only by patriarchal hierarchy.

In *ABC v. The State (NCT of Delhi)* (2015), the Supreme Court recognized the mother's independent capacity to parent and permitted her to be the sole guardian of the child without the requirement of disclosing the name of the father. In *Shafin Jahan v. Asokan K.M.* (2018) the Court recognised the right of an adult woman to choose her partner and her reproductive life.

In *Baby Manji Yamada v Union of India* (2008) the Rajasthan High Court had to tackle the issue of legal parentage in a surrogacy agreement. The child was born through a gestational surrogacy arrangement with a Japanese couple.

The court granted custody to the genetic grandmother, implicitly acknowledging that legal parenthood may be a matter of intention and genetics, not gestation. In *Jan Balaz v. State of Gujarat* (2009), the Gujarat High Court ruled that a German couple could be declared the legal parents of twins born through surrogacy in India, despite the lack of a surrogacy law.

These cases demonstrate that courts are willing to employ a functional, intent-based approach to parenthood. But the ad hoc nature of judicial responses – each case decided on its own facts without a comprehensive legal framework – breeds uncertainty and does not give systematic guidance for the recognition of diverse family formations.

#### VI. COMPARATIVE PERSPECTIVES ON MULTIPLE PARENT RECOGNITION

Many jurisdictions have moved beyond the binary model of parenthood. In the United Kingdom, the Human Fertilisation and Embryology Act, 2008, allows for two legal parents but, in limited circumstances, also allows a 'parental order,' which grants legal parenthood to intended parents in surrogacy arrangements.

The Act also states that, if certain conditions are met, same-sex couples are legal parents from birth. The Act states that the woman who gives birth is the legal mother, but parental orders transferred to intended parents are recognized (Section 33).

The most progressive stance in Canada has come from Ontario. In *A.A. v. B.B.* (2007). The Ontario Court of Appeal held that there were three legal parents of a child born of an arrangement between a lesbian couple and a gay male friend. The court found that all three parent-child relationships must be recognized in order to serve the child's best interests.

Likewise, the Family Law Act of the province of British Columbia permits children to have more than two parents if there is a written agreement and it is in the best interest of the child.

In the United States there has been scattered but significant recognition of multi-parent families. In cases of same-sex couples and biological parents, the courts in California have recognized three parents. The Uniform Parentage Act (2017) provides a structure for establishing legal parentage based on intent, genetics, gestation, and functional parent-child relationships.

The Act expressly contemplates the possibility of more than two legal parents when it is in the child's welfare.

These comparative models have common features: recognition of intended parenthood based on agreement and intent; flexibility to recognise more than two parents where the child's interests demand it; a functional approach that looks at actual caregiving relationships; and a robust child welfare framework. These models can guide India to develop its own model of inclusive parenthood.

#### VII. THE CASE FOR MULTIPLE PARENT RECOGNITION

The recognition of multiple legal parents is not merely a matter of accommodating contemporary family forms; it is a child welfare imperative. Where a child has been raised by two parents in a same-sex relationship, and a biological or genetic parent also maintains a relationship, the child benefits from the legal recognition of all meaningful parent-child bonds.

Multiple parent recognition ensures that the child has access to inheritance, maintenance, citizenship, and the emotional security of legally recognized relationships.

A functional approach to parenthood, one that asks who performs the parental role rather than who provided the genetic material or gestation, is the most appropriate framework for contemporary India. Such an approach would recognize intended parents in surrogacy arrangements from the moment of the

child's birth; permit the recognition of three or four parents where the child's welfare requires it; and protect the interests of all parties, including the surrogate, the gamete donor, and the child.

The reform of parenthood law also needs to address the status of children born from surrogacy arrangements that do not comply with the regulatory framework. The current situation, in which such children remain in a state of legal limbo, is incompatible with the constitutional rights of the child. A mechanism for validating parentage must be based on the best interests of the child, regardless of the regulatory status of the surrogacy arrangement.

#### VIII. RESULTS

The Surrogacy (Regulation) Act, 2021, and the ART Act, 2021 are based on a mother-father binary which excludes single persons, same-sex couples and unmarried couples from assisted reproduction and surrogacy.

The constitutional framework of articles 14, 15 and 21 read with Puttaswamy and Navtej Singh Johar, supports a more inclusive model of reproductive autonomy and family formation, which is not reflected in the present legislation.

Courts in India have taken a functional and intent-based approach to parenthood in cases such as Baby Manji, Jan Balaz, Githa Hariharan and ABC, but these decisions are ad hoc and case-specific.

Comparative jurisdictions (UK, Canada and the US) have created legal frameworks for the recognition of intended parents, multiple parents and de facto parents, which focus on the best interests of the child. The best regulatory framework of modern family formations in India is one based on legal parenthood that is determined by intention, caregiving and agreement instead of biology or marriage alone.

#### IX. RECOMMENDATIONS

Amend the Surrogacy Act and ART Act to allow single persons, same sex couples and unmarried couples to access surrogacy and ART with adequate safeguards.

Pass a Parentage Act that names intended parents in a surrogacy contract as the legal parents at birth, eliminating the need for a post-birth adoption process.

Allow for the recognition of more than two legal parents (three or more) when such an arrangement is in the best interests of the child and there is an agreement between the parents.

Develop a mechanism for validating parentage for children born through surrogacy arrangements outside the statutory framework, based on the best interests of the child.

Give children born through ART and surrogacy a reasonable chance to get information about their genetic origins, based on their developing capacity and the right to identity.

#### X. CONCLUSION

The binary model of mother-father as the only paradigm for legal parenthood is no longer suited for contemporary India. Developments in assisted reproductive technologies, the emergence of gestational surrogacy as a practice, and the growing recognition of different family forms have created realities that the law must answer.

The current regulatory regime of the Surrogacy Act and ART Act is a missed opportunity to design a progressive, inclusive, and child-centric law of parenthood.

This paper has made the case for a functional, intent-based approach to legal parenthood, acknowledging intended parents, commissioning parents and de facto parents in addition to, or instead of, genetic and gestational parents. It has set out a framework informed by constitutional principles, judicial precedent and comparative models that prioritises the best interests of the child, respects reproductive autonomy and accommodates the diversity of contemporary family formations.

Legal reform in this area is not only a matter of legislative convenience but also a constitutional imperative based on the rights to equality, dignity,

and privacy. The surrogate child asks the same question as the natural child: Who are my parents? The law needs to be able to provide an answer that reflects the reality of their family, not the limits of a failed legal framework.

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