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Assisted Reproductive Technologies and Rights–Indian Response to the Emerging Structure

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Abstract

The paper focuses on the changing nature of the reproductive rights that have been recognised over time, having been accepted into the notion of right to privacy and personal freedom. A number of technological advances, referred to as Assisted Reproductive Technologies or ARTs have revolutionised human reproduction in the past few decades. The three main legislations in India, that regulate the right to reproductive choices of an individual by way of abortion or adopting ARTs have been discussed along with judicial take on emerging issues. The challenge is to create a cohesive atmosphere for safeguarding the women's rights, addressing changing social context, and technological advances and also not appearing a paternalistic, interventionist State. Then follows an analysis of how far the provisions appear to be likely to achieve their objectives. There is also a need to examine the factum of ARTs having far reaching social, legal, medical and economic implications for women and for society as a whole and that unrestrained 'personal choices' may be mere delusional contentment. It is also a reality that ARTs present bioethical issues that are worth considering.

Keywords: Assisted Reproductive Technologies, ARTs, Assisted Reproductive Technology (Regulation) Act 2021, Surrogacy (Regulation) Act 2021

I. Introduction

Reproductive rights refer to an individual's autonomy to choose whether or not to procreate and to maintain reproductive health. This includes the right to start a family, terminate pregnancy, use contraception and obtain reproductive health care. Broadly these rights refer

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to an individual's right to decide the size of the family, the timing and spacing between children and the right to attain the highest standard of sexual and reproductive health.It refers to a comprehensive whole from the right to health and life, to the rights to equality and non discrimination, privacy, information and to be free from torture or ill- treatment .Another important aspect is that protection of reproductive rights of women, as they are drastically affected, is especially critical to enable gender justice and the equality of women.

The Constitution of India recognises many of these rights as Fundamental Rights including the right to equality and non discrimination (Articles 14 and 15) and the right to life (Article 21) which the Judiciary has interpreted to include the right to health, dignity, freedom from torture and ill treatment and privacy. Besides India is also a signatory to various International Conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Conventions on the Rights of the Child (CRC) all of which recognise reproductive rights. The Government of India is under a constitutional obligation to ensure legal remedies for violations of fundamental rights and human rights and to respect international law and Treaty obligations.

II. Indian Outlook on Reproductive Rights

Although India was among the first countries in the world to develop legal and policy frameworks and guidelines guaranteeing access to abortion and contraception yet it is argued that the focus has been more on controlling demographic trends rather than providing autonomy or rights to women. Concerns have been raised regarding lot of issues including high maternal mortality and morbidity, unsafe abortion and poor quality of post-abortion care, lack of access to the full range of contraceptive methods and reliance on coercive and substandard female sterilization, child marriage and lack of information and education on reproductive and sexual health. The Judiciary, however, have risen up to the challenge and in various judgments have recognised that the denial of reproductive rights is a violation of fundamental and human rights and that womens' and girls' legal rights to reproductive healthcare and autonomy is an obligation on the part of the government.

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➔ In *Suchita Srivastava vs Chandigarh Administration*[38] the Supreme Court observed that "There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

➔ In *Devika Biswas vs Union of India*[39], Supreme Court recognised women's autonomy and gender equality as essential components of their constitutionally guaranteed health and reproductive rights. The Court held that " these reproductive rights would include the right to make a choice regarding sterilisation on the basis of informed consent and free from any form of coercion." The court further laid importance on a woman's right to make a "meaningful choice ".

➔ In *High Court on its Own Motion vs State of Maharashtra*[40], the Bombay High Court emphasised that the burden of an unintended or unplanned pregnancy falls disproportionately on women and especially noted gender discrimination in the discussion surrounding abortion rights. It held that a pregnant woman had the sole right to determine what to do with their bodies including whether or not to get pregnant and stay pregnant.

➔ In *K.S. Puttaswamy vs Union of India*[41] the Supreme Court determined that the right to live with dignity has a fundamental component of privacy. It cited its ruling in Suchita Srivastava and acknowledged that a woman's right to choose her reproductive options falls under the constitutional right to personal liberty under Article 21 and that this right was inferred "from a woman's right to privacy, dignity and bodily integrity." This ruling marks an elaborate and independent expression on the right to privacy which has potential for manifestation in reproductive rights.

[38] (2009) 9 SCC 1
[39] (2016) 10 SCC 726
[40] (2016) SCC Online Bom 8426
[41] (2018) SCC Online SC 1642

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III. Abortion laws

Until the 1960s abortion was illegal in India and was punishable under law. Section 312 of the IPC criminalises the intentional causing of miscarriage if it was not done in good faith for the purpose of saving the life of the woman. It was in this scenario that the Shah Committee was set up to investigate high maternal mortality and morbidity rates in the country as a result of unsafe abortions. The Committee suggested liberalising abortion laws that would help in reducing unsafe abortions and bring down maternal mortality rates in the country. It eventually led to the enactment of The Medical Termination of Pregnancy Act, 1971. Under the Act, registered medical practitioners could carry out abortion under certain specified circumstances, granting them immunity from prosecution under section 312 IPC, if performing an abortion in accordance with the provisions of the Act. The Act allowed the termination of unwanted pregnancy for up to 12 weeks with a doctor's approval and with a second doctor's approval up to 20 weeks of gestational period. Abortions were allowed on the grounds of grave risk to physical or mental health of the woman, pregnancy due to failure of contraceptives, pregnancy resulting from rape or if there was a substantial reason to suspect that the child may be born with deformity or disease. The Act, however, allowed only married women or rape victims to terminate pregnancy. Any abortion beyond the period of 20 weeks was made legal subject to judicial consideration on a case to case basis. But there have been contradictory judgements leading to lack of clarity as to when an MTP beyond 20 weeks could be authorised. The Medical Termination of Pregnancy (Amendment) Act 2021 has brought in some key changes which include -

1. Raising the gestational limit for termination of pregnancy from 20 weeks to 24 weeks for specified categories such as rape survivors, minors, women with physical or mental disabilities, women in humanitarian setting, disaster or emergency situation etc.

2. All pregnancies upto 20 weeks require one doctor’s approval and for that between 20 - 24 weeks for the specified categories of women, approval of two doctors is required.

3. Women can now terminate unwanted pregnancy caused by contraceptive failure regardless of their marital status.

4. If pregnancy must be terminated beyond 24 weeks of gestation, only a four member

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Medical Board established in each State under the Act may do so on the basis of foetal abnormalities.

In a recent judgement of the Supreme Court in *X vs Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi*[42], the Court offered a more progressive interpretation of the provisions under the Act.

1. The artificial distinction between married and unmarried /single women is not constitutionally sustainable and therefore unmarried women too are entitled to seek abortion of pregnancy, arising out of a consensual relationship, in the term of 20 - 24 weeks.
2. Marital rape falls within the definition of rape for purpose of MTP Act
3. Extra legal conditions must not be imposed on women seeking abortions in accordance with the law.
4. Consent from husband /partner for termination of pregnancy is not required, although guardian's consent is required in case of a minor.
5. The State should ensure the right to reproductive autonomy and dignity for all citizens.

Despite all the recognition of women's right to equality and their bodily integrity, the battle for their reproductive and bodily autonomy is far from over. It is still a restricted right for women as the physicians have the final word in deciding whether or not to terminate the pregnancy. It also does not address the reproductive rights of transgender men and people with other gender identities who have the reproductive capacity to become pregnant. Access to non-judgemental safe abortion service is still a far cry for the majority of women especially in the rural areas. This is because they are not aware of the legal options or don't have access to reliable health care facilities.

IV. Assisted Reproductive Technology (ARTs)

Infertility is a serious health issue worldwide affecting approximately 8% to 10% of couples worldwide[43]. India has a population of as many as 27.5 million infertile people, including

[42] 2022 SCC Online SC 1321
[43] WHO Report on Infertility, April 2023

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men and women, according to the Indian Society for Assisted Reproduction. According to All India Institute of Medical Sciences (AIIMS), 10-15 percent of the nation's population exhibit complications related to fertility.[44] Such high prevalence of infertility can largely be attributed to lifestyle changes like late marriages, demanding lifestyle, obesity, anxiety issues, smoking, drinking and drug addiction. But the last half century has also been a witness to significant scientific innovations whereby human procreation has come under direct control of various technologies. Assisted Reproductive Technology refers to fertility treatment and procedures that can help with difficulties for an inability to conceive children. ART techniques involve the manipulation of eggs, sperms or embryos to increase the likelihood of a successful pregnancy. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory and returning them to the woman's body or donating them to another woman. ART refers to a number of techniques:

- ➔ in-vitro fertilisation, (IVF) in which the fertilisation of an egg by sperm takes place in a laboratory setting.
- ➔ Intracytoplasmic sperm injection (ICSI) in which a sperm is introduced into the egg to be fertilised, also in laboratory setting
- ➔ Artificial insemination which involves artificially delivering semen to a female genital tract; the semen may be from the woman's own partner or a donor and,
- ➔ Gamete intrafallopian tube transfer (GIFT) which involves removing eggs laparoscopically followed by introduction of the mixture of the couple's eggs and sperm into the fallopian tube so that fertilisation occurs in the body.

Surrogacy means an act of reproductive practice where a third party conceives and gives birth to a child. The intending parents and surrogate mother enter into a contractual arrangement that after the birth of the child, the surrogate mother would hand over the child to the intending parents and would abandon any legal obligation over the child. Gestational surrogacy involves an embryo created in a laboratory using the eggs and the semen of the intending couple and then placed inside the uterus of the surrogate mother.

[44] Male Infertility AIIMS.edu

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The world's second and India's first IVF baby came about 2 months after the world's first IVF baby in Britain in 1978. Since then India has experienced one of the highest growth in the ART centres and the number of ART cycles performed every year so much so that it became a global fertility industry with reproductive medical tourism becoming a significant activity. The clinics in India offered nearly all the ART services including facilities for gestational surrogacy. Commercial surrogacy was legal in India between 2002 and 2015. There was a rampant increase in commercial surrogacy, largely unethical as the women involved in surrogacy faced severe hardships such as exploitation, poor living conditions, low cost fertility clinics and unethical treatment. In 2012 the annual turnover of the surrogacy market was estimated to have been worth as much as 2.5 billion US dollars. It is estimated, that of the approximately 25,000 surrogate children born in India every year at least 50% were for couples from the Western world[45]. There was a lack of standardisation of protocols and reporting was inadequate and no law to regulate ART. Though the Indian Council for Medical Research (ICMR) had laid down guidelines on the ART practices in 2005, these lacked legislative backing. In 2009, the Law Commission of India[46] recommended enacting legislation to regulate not only ART clinics but also to address the rights and obligations of all the parties to a surrogacy, including rights of the surrogate child. Considerable efforts and deliberations culminated in the following Acts.

A. The Assisted Reproductive Technology (Regulation), Act 2021

The Act aims at the regulation and supervision of ART Clinics and Assisted Reproductive Technology banks (which collect, screen and store gametes), prevention of misuse and safe and ethical practice of ART services.It lays down the following provisions:-

1. A bank may obtain semen from males between 21 and 55 years of age and eggs from females between 23 and 35 years of age. A woman may donate eggs only once in her life and not more than seven eggs may be retrieved from her. A bank must not supply gametes of a single donor to more than one commissioning party (which can be a married couple or a single woman seeking services)

[45] The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society? Cureus. 2023 Apr; 15(4): e37864
[46] Law Commission Of India ,Report No. 228, April 2009

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2. The clinics must apply the ART services only to a woman over the age of 21 and below 50 years and to a man over the age of 21 and below 55 years.
3. ART procedures must be conducted only with the written consent of the commissioning parties and the donor. The commissioning parties will be required to provide insurance coverage in favour of the egg donor for any loss, damage or death caused.
4. The clinics are required to provide professional counselling to the commissioning couple and the donor about all implications like chances of success of the treatment so that they can arrive at an informed decision that is in their respective best interests.
5. The pre- implantation genetic testing is allowed to be used to screen human embryos for known pre- existing heritable or genetic diseases only. A clinic cannot offer to provide a couple or woman the child of a pre- determined sex.
6. A child born through ART will be deemed to be a biological child of the commissioning couple. A donor will not have any parental rights over the child.

The Act excludes single men, unmarried couples, trans persons and homosexual couples from availing ART services. It also extends ART services only to those commissioning couples who have been unable to conceive after one year of unprotected coitus.

B. The Surrogacy (Regulation) Act 2021

The Applicability of the Act Requires

1. Commercial surrogacy is strictly prohibited and only altruistic surrogacy can be practised.
2. Surrogacy services can be utilised by an intending couple or an intending woman (an Indian woman who is a widow or divorcee in between age of 35 to 45 years).The intending couple shall be a legally married Indian man and woman for a period of 5 years with proven infertility. The man shall be between the ages of 26 to 55 years and the woman shall be between the ages of 23 to 50 years and shall not have any previous surviving biological, adopted or surrogate child.The condition is waived off in case a child is physically/ mentally disabled or has life threatening

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conditions.

3. Provision has to be made for the medical costs and insurance of the surrogate mother.
4. The surrogate mother shall be an Indian woman, between the age of 25 to 35 years, ever married and should have a child of her own and a willing woman to undergo surrogacy as prescribed. A woman cannot be a surrogate for more than once in her lifetime and is allowed only gestational surrogacy (cannot be the egg donor)
5. A child born out of surrogacy will be treated as the biological child of the intending couple or the intending woman.

A close reflection on the provisions of the two Acts bring to the fore the legal, ethical and social repercussions that are extensive and pervasive in the society.

➔ The two Acts contemplate services being availed by specific classes of beneficiaries depending upon the age, marital status prescribed for intending/commissioning couple and intending/ commissioning woman. Further there is unequivocal exclusion of unmarried men, divorced men, widowed men, live-in heterosexual couples and same-sex couples. The classification of the beneficiaries of the Acts so sought is arbitrary and irrational, thus violating Articles 14 and 15(1) of the Constitution. This is disconcerting especially in the wake of the *Navtej Singh Johar*[47] judgement which proclaimed no discrimination on account of sexual orientation of an individual and assured equal legal rights to LGBTQ+ communities.

Further, Supreme Court has held that family, procreation and sexual orientation are integral to the dignity of an individual[48]. The reproductive choice of a woman to give birth has been held to be a dimension of her personal liberty under Article 21 of the Constitution[49].

➔ The requirement of the surrogate mother being 'ever married','with a child of her own' and 'between 25 to 35 years of age' curtails the reproductive options available to the intending parents. Although there is a legitimate objective under the Acts in

[47] Navtej Singh Johar vs. Union of India AIR 2018 SC 4321
[48] Suchita Srivastava vs. Chandigarh Administration (2009) 9 SCC 1
[49] K. S. Puttaswamy vs Union of India (2018) SCC Online SC 1642

protecting women, the paternalistic view also restrains women from making autonomous decisions about their bodies. Moreover, requiring the surrogate mother to undergo pregnancy, along with a child and husband to take care of, and not being entitled to any compensation, seem incongruous.

➔ In spite of all the advancements and improvements over the years, pregnancies achieved by ART still bear risks for the mother and the unborn child. The adverse effects to embryos during infertility treatments are predicted to lead to future obesity, type-2 diabetes and cardiovascular diseases. The related ethical concerns include the privacy rights of the donors and of intending/commissioning parents and surrogate mothers, management of the frozen embryos, misuse of pre-implantation genetic diagnosis for sex-selective embryos. These require strict adherence to national interest, morality and bioethical principles on the part of ART clinics and banks and under the constant vigil of the Authorities.

V. Conclusion

With an increased incidence of infertility, altered societal ethos, and readily accessible ART techniques have all led to the social acceptance of such techniques. There is a dire need to address the restricted reach of the benefits of employing ART techniques under the Acts and its implications for marginalised segments of society. It would be also prudent to bear in mind that ARTs and associated gene-editing technology poses real risk to individuals and society and can have serious implications for the future generations. The State therefore is obligated to review the ethical domain of the ARTs before it affects the public. The ultimate decision to adopt ART must be based on autonomy and personal freedom of an individual or a couple. For making meaningful and appropriate reproductive choices, the would-be parents require informative and non- directive counselling regarding chances of success and associated risks and adverse effects of ARTs. In the words of Nelson Mandela, "*May your choices reflect your hopes, not your fears.*"

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