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REPRODUCTIVE AUTONOMY: ANALYSING THE IMPACT OF ASSISTED REPRODUCTIVE TECHNOLOGY ACT 2021

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ABSTRACT:

The revolution in modern medical science has disrupted traditional notions of human reproduction and has granted millions the agency to view procreation beyond biological restrictions. As the society struggles with the ethical, legal, and moral dimensions of accessing these technologies, the concept of reproductive autonomy has emerged as a crucial theoretical perspective. This paper attempts to emphasize the concept of autonomy and its relationship with reproductive rights and freedom. It enunciates the effect of stratification and social position of an individual on the accessibility to reproductive technology. It further analyses the impact of the Assisted Reproductive Technology Act 2021 and Surrogacy Act 2021 on accessibility and autonomy of individuals and attempts to critique the same. It also presents a short comparative analysis of the concept with similar legislations from United Kingdom, Israel, United States of America and France.

Key Words:

Reproductive Autonomy, ART Act 2021, Accessibility, Exclusion of individuals, Infertility, Reproductive Rights and Legislation.

INTRODUCTION:

The term 'autonomy' derives from the Greek roots 'autos' (self) and 'nomos' (law), translating literally to self-legislation or self-governance. Autonomy can be defined as the state or condition of being governed or the exercise of self-legislation where an entity creates and

adheres to one's own laws rather than external rules. Immanuel Kant defined the concept as the capacity of a rational individual to act according to self-chosen, self-legislated moral principles, asserting human dignity by refusing to be treated merely as a means to an end.

Feinberg claimed that there are four different meanings of autonomy in moral and political philosophy.

- a) capacity to govern oneself
- b) actual condition of self-government
- c) A personal ideal
- d) a set of right expressions of one's sovereignty over oneself ¹

If we apply this philosophy to the concept of reproductive autonomy, we can infer it to be a right or freedom to procreate or not to procreate originating from an expression of one's personal principles, morals and beliefs. Thus, the concept of reproductive autonomy inherently includes both positive and negative aspects of liberty. However, this individualistic view of autonomy cannot be applied to reproductive decision making in the reality as often such decisions are dependent on the social, economic, and political position of an individual and thus they depend on various social parameters, making isolated choices and decisions sound mythical. Catriona Mackenzie's concept of relational autonomy attempts to explain this dilemma, stating autonomy to be relational in nature. She opines that the individual identity, values, and capacity needed in order to make choices is intrinsically shaped by social relationships, institutional structures, and cultural connotations.² Thus, social ties inherently affect decision making. Reproductive autonomy of individuals and their freedom to make choices about the same in society are dependent upon their race, sexual orientation, marital status, and economic position. It is thus often seen that homosexual individuals, unmarried live in couples, single mothers or fathers, racially backward classes and economically weaker sections are more likely to have lesser or negligible access to reproductive technology. If we apply Kimberle Crenshaw's concept of Intersectionality to this idea, we realise that individuals who have both weaker social and economic positions face greater reproductive injustice and inaccessibility, leading to the creation of "stratified reproduction." Shellee

¹ Christman John, Autonomy in Moral and Political Philosophy, Stanford Encyclopedia of Philosophy (Fall 2025 Edition) Edward Zalta and Uri Nodelman

² Mackenzie C and Stoljar N, Relational Autonomy: Essays on Autonomy, Agency and Social Self- Oxford University Press, 2000

Colen who pioneered this concept postulated how physical, economic, and political forces empower certain categories of people to reproduce while systematically discourage certain other groups. Her ethnographic study of West Indian migrant workers in New York demonstrated how reproductive autonomy and labour of poor migrants is affected by structural oppression faced by them.³ Moving away from the concepts of stratification thinkers like Loretta Ross and Rickie Solinger postulated a human right based intersectional framework which shifted focus from the individual narrow notion of reproductive choice to broader inclusive concepts of reproductive freedom. They laid the foundation of human right centric reproductive autonomy by providing three main principles of reproductive freedom;

1. The right to not have children
(accessibility to abortion, contraception and medical intervention)
2. The right to have children
(accessibility to reproductive technology, adoption and other procedures)
3. The right to raise children in safe and healthy environments.
(accessibility to resources and healthcare infrastructure)⁴

Modern scenarios like the criminalization of abortion in the United States of America display that there is an increase of state intervention in reproductive autonomy and freedoms of individuals. This increase in state intervention is leading to biopolitics, a phenomenon theorized by Michel Foucault. Biopolitics in our context would consist of the mechanisms through which the state regulates biological life of its citizens through statutory regimes and frameworks which discourage or omit certain individuals from accessing reproductive technology to limit their population and control demography. An example of this could be of forceful sterilization of individuals to curb population or rigid eligibility criteria for availing ART.

Legislations all over the world have interpreted the concept of reproductive autonomy differently in terms of inclusivity and access to technology and this difference is often influenced by some social and political factors. These factors can be as follows.

1. Political agenda or ideology of the government of a State

³ Stratified Reproduction, Wikipedia and Colen, Shellee, "With Respect and Feelings": Voices of West Indian Child Care Workers in New York City". *All American Women: Lines That Divide, Ties That Bind*, 1986

⁴ Ross L and Solinger R, Reproductive Justice- An Introduction, University of California Press, 2017

States with conservative ruling political parties are less likely to allow unmarried couples, single and homosexual individuals to have access to reproductive technology for procreation. These States are also more likely to have stricter or rigid legislations with regards to termination of pregnancy and contraception. Liberal ruling parties are more likely to be inclusive in nature when it comes to positive and negative reproductive autonomy of individuals.

Eg: Under the Republican rule, United States of America imposed a ban on abortion and with the rise of conservative organisations like Turning Point USA, traditional values and concepts of family and marriage are being promoted, sidelining more inclusive definitions of the same.

On the other hand, under the leadership of President Emmanuel Macron and his governing liberal centrist alliance Renaissance, France became the first nation in the world to enshrine the right to abortion directly into its Constitution.

2. Religious and cultural connotations of a State

States which have a larger demography of certain religions which forbid abortion and homosexual or unmarried parenthood are more likely to be governed by exclusive reproductive legislation where only certain eligible individuals are allowed to have access to technology and medical intervention in procreation. This can be especially seen in context to Islamic and Christian dominant states where homosexuality, premarital relations, abortion, and contraception are seen in negative light.

Eg: Saudi Arabia, UAE, and Egypt have a stricter legislation when it comes to abortions. Homosexuality and live in couples are strictly forbidden in these countries. Italian legal frameworks, shaped by traditional Catholic values maintain an ongoing risk of imposing stricter regulatory limits on individual access to reproductive technology and family-building.

3. Demography and Population of the State

States having higher population and greater youth ratio are more likely to have an anti-natalist view and thus sterilization and contraception are encouraged in such nations. On the other hand, States having lower population and youth ratio are more likely to have greater access to reproductive technology and healthcare. China's one child policy is an example of negative state intervention where restrictions were imposed on the reproductive rights of the citizens to control population whereas South Korea is an example of positive state

intervention where financial and medical incentives were provided to the citizens in order to encourage higher birth rates and reproduction.

4. Prevalence of Crime and Exploitation of Individuals

States having higher rates of illegal surrogacy, commercial surrogacy, illegal abortions, female infanticide, illegal sterilizations, and exploitation of women are more likely to have stricter legislations about reproductive technology. This is done to curb the creation of black markets and illegitimate procedures on individuals. In India, commercial surrogacy was banned to curb the exploitation of women, furthermore clauses emphasizing complete ban on sex determination were included in the surrogacy and assisted reproductive technology acts to discourage female infanticide.

STATUTORY PROVISIONS AND CRITIQUE:

Long before the introduction of the Assisted Reproductive Technology Act in India, conceptual foundations of reproductive technology were embedded in society through classical epics like Mahabharata. The narrative of the one hundred Kauravas gestated externally through the creation of one hundred incubated jar like wombs could be considered synonymous to modern day in vitro fertilisation and surrogacy whereas the practice of Niyoga described in the epic could be considered akin to the idea of donor insemination. In contemporary society these narratives were further reinforced in the Indian society through films like Vicky Donor (2012), Mimi (2021) and Good Newzz (2019) which addressed artificial insemination, surrogacy, and in vitro fertilisation, respectively.

The enactment of the ART Act brought a sense of clarity and legal structure to assisted procreation in India and positioned these practices from having socio-cultural acceptance into institutionalized legal regimes. The Assisted Reproductive Technology Act 2021 was created to regulate and supervise ART clinics and encourage safe ethical practices. It primarily focuses on procedures like freezing of gametes and embryos for in vitro fertilization, artificial insemination techniques and for research and development purposes. The act does not address surrogacy however functions simultaneously and in accordance with the provisions of the Surrogacy Act 2021. The analysis of this Act is divided into two major categories which will help us understand the merits and demerits of the provisions stated in the same. These categories are as follows.

A. Definitions of Terminologies involved:

Section 2 of the ART Act defines the various terminologies and procedures used in the legislation. It defines the concept of a commissioning couple as an infertile married couple who can approach an ART clinic or bank for obtaining services and subsequently defines infertility as the inability to conceive after one year of unprotected coitus or any other proven medical condition preventing couple from conception under Section 2(1) (e) and 2 (1)(j) respectively. Although these definitions help in formulating clear structures and limitations for eligibility to the reproductive technologies, they inherently possess some issues.

- I) The definition of a commissioning couple mandates married heterosexual individuals restricting the access of ART to only a certain stratum of individuals. This majoritarian view systematically excludes homosexual couples, unmarried individuals and couples and any other exceptions from using ART.
- II) The Act further constrains the eligibility to access ART to married couples having a wife between the age of 21 to 50 and husband between the age of 21 to 55. In today's era where late marriages are fairly common, this can prove to be a significant barrier to parenthood.
- III) The definition of infertility also invokes possibilities of exclusion of non-coital relationships and asexual married individuals although the number of these individuals may be sparse.
- IV) The sentence "or other proven medical condition preventing couple from conception" in the definition of infertility contextually implies physical ailments which hinder coitus between individuals however it does not explicitly include mental ailments and disorders which hinder the same. It is not clarified whether individuals with PTSD, bipolar disorders, depression or other ailments which discourage sexual intimacy between couples can be covered under proven medical conditions despite them being physiologically healthy and fertile.

B. Cryopreservation of the embryos and gametes

Section 22(2) of the Act lays down guidelines for cryopreservation of the embryos and states that clinics shall not cryopreserve any human embryos or gamete without specific instructions and written consent from the parties involved in seeking ART, in case of death and incapacity of the parties. The word cryopreserve is defined as the freezing or storing of gametes, zygotes, embryos, ovarian and testicular tissues. Furthermore, Section 22(3) emphasizes that

the clinic shall not use any human reproductive material, except in accordance with the provisions of this Act to create a human embryo or use an in-vitro human embryo for any purpose without the specific consent in writing of all the concerned persons to whom the assisted reproductive technology relates. Section 22(4) states that any of the commissioning couple may withdraw his or her consent any time before human embryos or gametes are transferred to the women's uterus. Section 28(2) of the Act states that the gamete of a donor or embryo shall be stored for a period of not more than ten years and at the end of such period such gamete or embryo shall be allowed to perish or be donated to a research organisations registered under this Act for research purposes with the consent of the commissioning couple or individual, in such manner as may be prescribed. Although these provisions aim to bring clarity regarding the novel concept of cryopreservation, several issues which may stem from these provisions remain unanswered.

- I. Section 22(2) mandates prior written consent and instructions of all the concerned parties for cryopreservation of embryos or gametes in case of death or incapacity but it does not provide an alternative recourse to the living partner in case there is no prior consent demonstrated by the dead partner. The living partner cannot unilaterally provide consent for storing and utilization of the embryo. This hampers the reproductive autonomy of the living partner especially if it is a woman. In case of a male living partner, the act makes it impossible for him to utilize the embryo due to ineligibility under the surrogacy act provisions.
- II. Section 22(4) allows withdrawal of the consent of either party in the commissioning couple before the implantation of the human embryo in the woman's uterus however it does not enunciate what would be done if the female party in the commissioning couple wishes to unilaterally implant the embryo. Is there a provision to contest the withdrawal of consent after formation of embryo and before implantation of embryo by the wife? This fundamentally presents a conflict between right to procreate and right to not procreate.
- III. Section 28(2) states that the gamete of a donor or embryo shall be stored for a period of not more than ten years and at the end of such period such gamete or embryo shall be allowed to perish or be donated to a research organisations registered under this Act for research purposes with the consent of the commissioning couple or individual. Cryopreserved embryos created during a marriage require joint consent. Section 28(2) specifies consent from the

"commissioning couple or individual." In cases of divorce, if one former spouse refuses consent for research or destruction and if other demands the same there is no explicit provision for dispute resolution.

- IV. If a deceased spouse had given consent to the storage of the embryos for ten years, does the death of the spouse provide the living partner with the right to make unilateral decision about utilization or destruction of the embryo? Does the joint consent of the commissioning couple end on the death of one of the spouses or does it continue after death as well? These questions remain to be unanswered.
- V. The cryopreservation and utilization of embryos through ART impacts the reproductive autonomy of infertile (includes lower virility) men significantly. In absence of a legitimate wife who was also a party to the embryo creation, they lack any other recourse for procreation. They cannot opt for surrogacy as a single unmarried individual or widower. Stringent adoption laws in India also discourage adoption by single men or widowers, severely restricting reproductive autonomy of men and their chance to become a parent.⁵

Comparative Analysis with Legislations Abroad:

Thomas Woodrow Wilson, the 28th President of the United States of America was a political thinker and academician. Although his theories were largely about policy and public administration, his idea of comparative methodology has diversified applications. The comparative methodology postulates that one must analyze legislation and policies all over the world considering their specific circumstances and context and then apply them to local legislation. Thus, he emphasized adoption of policies which will fit the local circumstances and act with the same efficiency as that of the original one. A similar perspective can be taken when we speak about statutes and laws, especially about sensitive topics like reproductive autonomy, which is influenced by various social and cultural parameters. This section thus attempts to suggest or recommend certain provisions or frameworks present in the foreign reproductive legislations which can be adopted in Indian legislation to optimize its efficiency. As it is nearly impossible for one to analyze all the reproductive legislations present in the world, the comparative legislations of Israel, United Kingdom and United States of America will be taken into consideration.

⁵ The Assisted Reproductive Technology (Regulation) Act, 2021, No. 42, Acts of Parliament, 2021 (India).

1. Israel

Israel does not have a single legislation on ART however has multiple provisions regarding the same. Israel provides a comprehensive financial coverage to its citizens for accessing ART through insurance plans and state funding. Public funding covers IVF treatments for the purpose of the birth of up to two children for couples without children from their current marriage, as well as for childless women establishing a single-parent family. If ovum is extracted and frozen for medical reasons by women, the whole treatment is fully state funded whereas if it is done for non-medical reasons the IVF treatment is free however the extraction is to be paid for by the patient. The State subsidizes PGD in cases involving certain genetic diseases as well as genetic counselling, blood tests, and genetic evaluations. Recently Israel legitimized surrogacy for same sex couples and single men through the landmark judgement *Arad-Pinkas v. Committee for Approval of Embryo Carrying Agreements* (HCJ 781/15).⁶

In context to India, adopting a state funded ART programme or providing some financial caps on fertility treatments would help encourage accessibility and equality. It is often seen that fertility treatments in India are quite expensive which makes them inaccessible to economically weaker sections of the society, indirectly leading to stratified reproduction. The current ART legislation does not provide any provisions for subsidization of fertility treatments or state funding for certain treatments.

2. United Kingdom

The Human Fertilization and Embryology Act 2008 codifies and regulates the ART mechanisms used in the United Kingdoms. The legislation allows same sex female couples, single individuals and unmarried and married couples to be eligible for the ART mechanisms. The statute does not prescribe any upper age limit for the parents involved however it mandates that state funded treatment will be restricted to women between the age of 18 to 42. The HFAE provisions provide a comprehensive posthumous conception and advanced directive framework where it covers aspects like who can use the gametes after death, how long can they be stored, what is the status of the deceased spouse on the birth certificate of the child and whether use of gametes after death may be done by living partners. The framework also provides a 12-month cooling off period for instances of withdrawal of

⁶ Ruth Levush, Israel: Reproduction and Abortion: Law and Policy, February 2012, Law Library of Congress

consent by one party before implantation. The parties would undergo mediation during this period and still if the withdrawal of consent remains, the embryo will be allowed to perish at the end of the year long period.⁷

The ART Act 2021 lacks any explicit clear provisions regarding posthumous conception through use of gametes or embryos made with a deceased partner. Furthermore, there exists no mechanism for dispute resolution on withdrawal of consent., adoption of provisions similar to the HFAE 2008 on this matter will help make the legislation more efficient in nature.

3. United States of America:

The United States of America does not have one single legislation in regard to ART mechanisms, and we can often see state wise differences in regulations about the same. Majority states in America have clear contracts between surrogate mothers and intending parents to mandate an independent attorney to be appointed to the surrogate mother. These contracts must be executed before the embryo is transferred and the surrogate mother has full autonomy over all her medical decisions. Furthermore, USA has provisions for divorced couples when it comes to cryopreserved embryos and gametes. States like Florida require fertility clinics to specify provisions regarding disposition of the embryo in the event of a divorce of the parties, death of a party and unforeseeable circumstances in the contracts itself.⁸ States like Arizona mandate that in the event of a divorce between the couple, the embryo must be awarded to the spouse intending to develop the same. ART Act 2021 lacks any such explicit provisions or contractual mandates and falls short on this aspect. Adoption of a comprehensive regulations on cryopreservation of embryos and their use, storage and disposition in the event of divorce of the parties or death of the parties would provide clarifications on the status of the same.

CONCLUSION:

In conclusion, comparative methodology suggests that while existing Indian legislations provides essential administrative and regulatory oversight, they remain silent on critical dimensions of reproductive autonomy. Indian legislation has been excellent when it comes to

⁷ Human Fertilisation and Embryology Act 2008, Act of the Parliament of the United Kingdom

⁸ Sara D. Petersen, Dealing with cryopreserved embryos upon divorce: a contractual approach aimed at preserving party expectations, 50 UCLA LAW REVIEW 1065 (2003)

nurturing negative reproductive autonomy but there is a need to work towards making reproductive technology more accessible and inclusive in nature in order to protect the positive aspects of reproductive autonomy.