

Critical Analysis of the Assisted Reproductive Technology (Regulation) Act, 2021

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Abstract: *The study addresses the multifaceted nature of infertility and the socio-technical response through Assisted Reproductive Technology ART, highlighting its evolution, societal implications, and legislative interventions in India. Initially perceived as a modern-day predicament, infertility's recognition as a significant issue was catalyzed by social science, the acknowledgment of male infertility, and the stigma associated with it, especially in contexts like India. ART emerged as a transformative solution, offering various intricate procedures like in-vitro fertilization and gene tweaking to aid reproduction. However, the accessibility of these technologies was skewed, predominantly benefiting the affluent due to the high costs involved. India's position as a hub for medical tourism, particularly for commercial surrogacy, is scrutinized, revealing a lucrative industry operating under a lax legal framework. The ensuing ethical, social, and legal complexities prompted the establishment of regulatory measures like the National Guidelines for ART Clinics and the enactment of the Assisted Reproductive Technologies Act and the Surrogacy Regulation Act in 2021. These legal instruments aim to address the exploitation of ART for commercial purposes, protect the rights of children born through these technologies, and mitigate economic disparities affecting access to ART. However, challenges persist, including the enforcement of altruistic surrogacy, exclusion of certain social groups, and the potential for black-market activities, indicating the intricate balance between technological advancement, ethical considerations, and societal norms in the realm of reproductive health.*

Keywords: Infertility, Assisted Reproductive Technology, Commercial Surrogacy, Legislative Intervention, Socio-Economic Inequality

1. Introduction

Why Legislation for Art Services Needed

Infertility as an issue is largely attributed to 20th Century but it existed within the folds of society even before.

The acknowledgment of 'infertility' as a modern-day problem and hence the pressing need to look for alternatives in science and technology was the result of following factors¹:

- Social Science recognizing infertility as an issue
- Acceptance of existence of male infertility

In case of countries like India, another pulling factor was: the social stigma attached with infertility.

Assisted Reproductive Technology addresses the issue of fertility by using technology to assist reproduction when natural methods are not successful. With scientific advancement, the technology involves various complicated procedures from in-vitro fertilization to gene tweaking.

The ART techniques thus emerged as life (as well as family) saver; however, the access remained lopsided because of high cost involved in the procedure and deny the poor boons of assisted parenthood.

In recent past, India emerged as one of the top medical tourism destinations because of thriving business of commercial surrogacy which attracted willing customers from all over the world. ²The main attraction were the cheaper cost of surrogacy and the absence of sound legal framework that allowed the parties involved to escape if any

disputes arose. The industry had turnover of over \$400 million a year, according to a UN backed study³.

This necessitated the legislative and judicial intervention, and in 2005 the government approved the National Guidelines for the Accreditation, Supervision and Regulation of ART (Assisted Reproductive Technology) Clinics in India. It brought a number of bans, such as ban on surrogacy by foreign homosexual couples and single parents in 2013, Commercial surrogacy in 2015. The entry of embryo was permitted only for research purpose.

In the 228th Report of the Law Commission of India⁴, the guidelines about ART procedures and surrogacy were proposed. Based on these observations and the existing disputes arising out of surrogacy, the Parliament passed two Acts in 2021 – Assisted Reproductive Technologies (ART) Act⁵, and Surrogacy (Regulation) Act. ⁶

Key Issues Identified

From above discussion following issues have been identified:

- Exploitation of ART techniques for commercial benefits rather social.
- No legislative framework to protect rights of child born out of these techniques.
- Inequitable access to ART because of Economic inequalities

Key Issues of Art Act

³MOHAN RAO, Why All Non-Altruistic Surrogacy Should Be Banned, pp. 15-17, Economic and Political Weekly, Vol. 47, No. 21 (MAY 26, 2012),

⁴Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy, 18th Law Commission, Report No. 228, Year 2009

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

⁶Surrogacy (Regulation) Act, 2021, Act No. 64 of 2021, Acts of Parliament, India

¹TULSI PATEL, ARTs and Public Health: Exploring the oxymoron, Indian Anthropologist, January - June 2013, Vol. 43, No. 1, SPECIAL ISSUE ON ANTHROPOLOGY AND PUBLIC HEALTH (January - June 2013), pp. 65-78

² Elizabeth S. Scott, Law and Contemporary Problems, SUMMER 2009, pp. 109-146. Vol. 72, No. 3, Show Me the Money: Making Markets in Forbidden Exchange (SUMMER 2009),

ART technique is the process through which the sperm or eggs cells are handled outside human body and then transferring of embryo into the woman's reproductive tract. This technique is used in IVF as well as surrogacy.

The Assisted Reproductive Technology Act, 2021 makes it mandatory for ART clinic and bank to be registered under the National Registry of Banks and Clinics of India. Some important guidelines under the Act are the restrictions that the bank can use the semen of donor to one couple only. Female donor can donate upto seven eggs only once in her lifetime. She needs to be married, and having at least one child of her own, aged at least three. The rationale behind these safeguards is to prevent use of technology for commercial purpose, sex-selection.

An important legal provision both under ART and surrogacy is that the once the child is born, it will deem to be biological child of the intended couple for all intents and purposes. Also, the abortion of such foetus is allowed only with the consent of surrogate mother and authorities.

2. Issue Analysis

Issue 1 - Exploitation of Art Techniques for Commercial Benefits Rather Social.

A central database of ART clinics through National Registry is to be established. It has two purposes – to ensure that the clinics adhere to the set standards, and no other clinic but the registered ones off the service.

The eligibility criteria for donors, commissioning parties and intended parents have been so designed that the scope of the service is limited to 'desire of child for familial fulfilment' but not at the cost of exploitation of the surrogate or desire for designer babies. Further, restricting the service to only on condition of infertility and to Indian nationals in case of surrogacy, the unchecked commercialisation is put under leash.

The definition clause covers all the scientific techniques that are employed in assisted reproduction, thus leaving no legislative gap in this regard.

Thus, the Act allows ART only for altruistic purpose. However, this very characteristic is criticized for its forced altruism by many for bringing forced altruism which deprives the surrogates from the economic benefit. This has another underlying issue as the surrogate's eligibility is restricted to family relative, there are chances that this may bring disputes within family where a female is pressurized to be surrogate to save family relations. Further, a major criticism is limiting the techniques to only married and heterogeneous couples, thus leaving LGBTQ+ from the benefits of science. Lastly, the tight-compartment approach of the Act may defeat its very purpose by mushrooming of black-market of ART within the creases of society.

Issue 3 – Enforceable Rights of the Child Born Through Art

A grave issue related to unregulated ART is that the service has customer-care approach and hence in unwanted scenarios the child bears the brunt of the dispute.

The Act clearly lays down the rights of the child as a deemed to be biological child. Abandoning, selling, exploiting children born through ART are listed as offence that draws penalty and punishment. The setting up of grievance redressal system through Boards bring transparency in the process and a tighter legislative control and monitoring.

The shortcoming of these provisions is that the Court will take cognizance of these offences only on complaint by the National or State Board. Another criticism is the quantum of punishment is not serious enough to deter people with sufficient economic means.

Issue 2 - Inequitable Access to Art Because of Economic Inequalities

The Act binds the service providers in maintaining the standard in the procedure which reduces the chances of unfair practice and subsequent swindling of the service seekers. However, the fee and cost-involved remains the same even after the shift from commercial to altruistic reasons as the insurance cost are borne by the ones commissioning the service. Thus, the services give inequitable access to those with economic means or desperate needs. As ART remains out of consolidated health framework of the country, they serve interest of only certain section which have means to employ the service.

3. Conclusion

The two Acts primarily aim to regularize the assisted reproductive technology on ethical aspect. The focus in on the check on exploitation of the surrogates and protection of legal rights of the child which should not be lost to the mindset of 'womb on rent.'

The ACT is able to tackle the commercial aspect to an extent. While the access to technology on equity bases is still not met.

The Acts are criticized for a forced 'altruism' on the surrogates. It is believed that by taking away the monetary benefits from the surrogates, the rights of surrogates are curtailed as the notion that ban on 'commercial' aspect will end exploitation is superfluous. Another criticism is the limited access to surrogacy by making only legally married, heterogeneous couples eligible. If we go by the Supreme Court judgments on Right to Marriage as fundamental right under Article 21, then for many having a child completes a family, even for a homosexual couple, but the Surrogacy Act leaves out LGBTQ+ community and unmarried individuals from the egalitarian benefits of Surrogacy.

A major criticism of the Act is that its stringent regulations defeat the very purpose for which it is intended, because the regulations will only incite the illegal market of egg donation and surrogacy. However, one cannot undermine the noble intention behind the Acts and the initiative to bring to end the commodification of human embryo by bringing a functional legal framework that ensures its fruitification as a scientific advancement beneficial to humankind.

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