

Regulating Reproductive Technologies

A Blow to Inclusive Family Forms

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The Assisted Reproductive Technology (Regulation) Bill, 2020 was tabled in the Lok Sabha in September 2020. It was referred to the department-related Parliamentary Standing Committee on Health and Family Welfare, which submitted its 129th report on the ART Bill, 2020 on 17 March 2021. This article critically engages with the recommendations of this report.

Attempts at regulating assisted reproductive technologies (ARTs), including one of its more controversial applications, namely surrogacy, are nearing fruition. Guidelines issued by the Indian Council of Medical Research in 2005 and subsequent bills on ART (2008, 2010, 2014) all covered ARTs, including surrogacy. However, in 2016, amidst growing concerns over women's exploitation as surrogates and in light of a public interest litigation (PIL), namely *Jayashree Wad v Union of India* (WP [C] No 95/2015), filed before the Supreme Court to ban transnational commercial surrogacy, the government banned foreign commissioning parents from accessing surrogacy in India through administrative fiat. It announced a separate bill on surrogacy, extracting it out of the larger domain of ARTs.

However, parliamentary committees, most recently a select committee of the Rajya Sabha that examined the Surrogacy (Regulation) Bill, 2019 (henceforth, SRB, 2019), recommended that surrogacy and ARTs be regulated in tandem, thus underlining the need for an ART Bill. Consequently, the Assisted Reproductive Technology (Regulation) Bill, 2020 (henceforth, ART Bill, 2020) was tabled in the Lok Sabha in September 2020. It was referred to the department-related Parliamentary Standing Committee (PSC) on Health and Family Welfare which submitted its 129th report on the ART Bill, 2020 (henceforth, the PSC report) on 17 March 2021. In this article, we critically engage with the recommendations of this report. While there is much to be complimented in the PSC report which incorporates the suggestions of various stakeholders, it misses addressing significant issues of constitutional significance. Several of its recommendations are detrimental to redefining families

and recognising inclusive family forms beyond the realm of heterosexual marriage. We argue that this PSC report is yet another instance whereby the law is used to foreclose the possibilities for redefining patriarchal family forms that medical technology opens.

At the outset, it is noteworthy that the PSC makes many laudable recommendations. It suggests that informed consent of the gamete donor be procured twice, at the screening stage and the donation stage. The PSC recommends an extension in insurance coverage for the donor. It also recommends that data about the commissioning couple and donors be anonymised at the primary source so as to protect data privacy and that there be a fixed time duration for which records are maintained at the national registry to comply with data protection principles of purpose limitation and storage limitation. It also recommends that pre-implantation genetic diagnosis be undertaken only in case it is essential and that too as allowed by the registration authority. Unfortunately, the PSC recommends that several of these suggestions (for example, informed consent) be included in the rules rather than in the body of the bill which indicates that minimal changes to the ART Bill, 2020 are preferred. Its greatest contribution, however, lies in its attempt to rationalise the regulatory frameworks of the SRB, 2019 and the ART Bill 2020 while also calling for the creation of an independent and impartial grievance redressal cell within the registration authority to deal with complaints against ART banks and clinics. We now turn to a critical assessment of the report.

Who Can Access ARTs?

The desire to create a family and have children remains one of the most important of human pursuits. Family and kinship forms in India have, however, been determined for long by the need for blood relations within a patriarchal system, and the inability to produce one's biological progeny results in stigma around infertility and childlessness. This is where ARTs play a crucial role in facilitating the formation of families where it is socially or biologically difficult to do so. However,

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the ART Bill, 2020 is oblivious to the important role of such a technology. The bill excludes same-sex couples and live-in couples from accessing ARTs. Unfortunately, the psc report agrees with these provisions of the bill even as it cites the examples of “progressive” legislations (draft or otherwise) from France, Switzerland and Ireland that allow same-sex female partners and single women to access ARTs.

In part, the psc is persuaded by the 102nd report of the select committee on the SRB which restricted the access to surrogacy to married couples. The psc justifies this discriminatory approach by observing that, “[g]iven Indian family structure and social milieu and norms, it will not be very easy to accept a child whose parents are together but not legally married” (para 4.2.15). Underlying this is a concern around parentage issues that may arise in the case of separation of live-in couples and same-sex couples. Yet, the authors of the report display an extremely biased, conventionally patriarchal view that marriage is sacrosanct, permanent and stable while all other modes of coupledness are temporary and are in a state of separation-in-waiting. Further, there is nothing inherently “Indian” about this view of “family structure and social milieu,” where historically a diversity of intimate relationships has been practised, including various types of marriage; for example, *gandharva vivaha*, arguably a form of conjugality where partners come together of their own accord without any ritualistic social ceremony, not too different from what contemporary “live-in” couples are choosing.

Further, even while citing the Supreme Court’s path-breaking decision in *Navtej Singh Johar v Union of India* [(2018) 10 SCC 1], the psc was persuaded by the argument of the Department of Health Research that although Section 377 of the Indian Penal Code, 1860 decriminalises consensual sex between same-sex partners, the law does not legalise same-sex relationships. Unfortunately, this is a formalistic reading of a path-breaking decision which could have been read to reiterate its spirit of constitutional morality and commitment to equality and

non-discriminatory treatment of same-sex couples. In any event, the word of the Supreme Court should be given priority over the views of parliamentarians who wrote the 102nd psc report excluding same-sex couples from accessing surrogacy to complete their families. The psc thus missed an opportunity to recommend that reproductive rights, which are internationally and constitutionally recognised as universal, be extended to live-in couples and same-sex couples (para 4.2.15).

Paradoxically, the psc cites the decision of the Supreme Court in *Puttaswamy v Union of India* [(2017) Writ Petition Civ 494/12, (SC)] upholding women’s right to reproductive autonomy. It even fixes the minimum age for a woman to access ARTs at 21 rather than linking it to the age at marriage. Thus, single women who are unmarried, divorced or separated can access ARTs.¹ Yet, when those very women enter into relationships (that is, as live-in couples or same-sex couples), their rights cease to be of consequence. The report thus uses pro-women constitutional rhetoric very selectively as if women’s reproductive rights can be altered according to their relationship status.

The desire to confine reproduction to the marital form at any cost is reinforced even beyond one’s life. Thus, the report recommends that

posthumous reproduction should be permitted, even in the absence of the deceased’s prior consent unless the deceased person has previously objected to it or there are strong indications that the person would not have agreed to the collection of gametes, posthumously. (para 4.17.12)

In essence, a dead person is presumed to have consented to the collection of their gametes for use by their partner, but it is indeed ironic that the desire of single men and live-in or same-sex couples to reproduce is sidelined by the ART Bill and psc report. The social condition of childlessness is thus constructed as a “problem” towards which ARTs are to be geared, albeit selectively. Technology is prevented from being used to re-define families or imagine any alternatives. Rather, it is viewed as a mere instrument to reproduce in a manner licensed by patriarchy.

Interestingly, the psc report recommends that persons living with HIV, infertile intersex individuals and couples who do not wish to transmit genetic diseases to their child should be allowed to access ARTs, and for that matter, anyone with a medical condition and similar concerns of transmission. However, such crucial eligibility criteria for accessing ARTs, which are not related to infertility per se, cannot be included in the rules and regulations to the ART Bill, 2020, as suggested by the psc report. It needs to be spelt out in the legislation itself. It is noteworthy that the eligibility for access to surrogacy under the SRB, 2019 includes a “medically necessitated condition” but the ART Bill, 2020 restricts it only to “infertility.” This produces differential criteria between commissioning couples which are contrary to the guarantee of the right to equality under Article 14 of the Constitution.

Who Can Donate Gametes?

One of the crucial oversights of the psc report is its failure to fully address the rights of donors, especially egg donors. This is despite the fact that hormonal treatment is necessary for an egg donor and that the procedure for the extraction of eggs is invasive and can potentially be life-threatening too. The psc report does recommend insurance coverage for the donor for 12 months and social security insurance, the parameters of which are not clear. It also recommends the payment of maternity benefits to an egg donor who suffers from miscarriage. This is perplexing as a gamete donor is not carrying a pregnancy so the question of a miscarriage does not quite arise. Further, there is a bias here against egg donors who may not perform paid work for the market. However, beyond these recommendations, there is no provision for donor compensation or even the reimbursement of expenses for loss of salary, time and effort. The labour involved in producing and sharing biomaterial for the benefit of third parties is not recognised. Any compensation is available only when there is an untoward medical incident by way of a miscarriage. This is justified in keeping with the altruistic nature of the

ART Bill, 2020. However, as argued elsewhere (Banerjee and Kotiswaran 2021), reproductive labour has been recognised by the Supreme Court as labour, and therefore, the lack of compensation for such labour violates Article 23 of the Constitution which prohibits forced labour (defined in turn as labour which is paid less than the minimum wage).

Despite the altruistic orientation of the ART Bill, 2020, one of the concerns expressed by stakeholders has been that it might result in the shortage of gametes. The psc endorses the provisions of the ART Bill, 2020 whereby a single source of sperm or oocyte should be supplied to single commissioning couple on the grounds that it would help avoid parentage issues. However, the psc seems to have overlooked Section 31(2) of the ART Bill, 2020 which already states that donors cannot assert parental rights in the future. Similarly, in relation to the likely paucity of egg donors, the psc brushes away the argument that the lack of compensation for egg donation would result in donor scarcity. Instead, it recommends expanding the eligibility criteria for egg donation so that marital status is no longer a criterion in the hopes that this would offset any scarcity (para 4.20.14).

While the delinking of marital and donor status is welcome, it will only marginally increase the number of women willing to inconvenience themselves severely to donate their eggs. Further, the psc report unrealistically states that commissioning parents will most likely be able to procure gametes on their own and somewhat vaguely “in coordination with” ART clinics and banks (para 4.20.16). Previous versions of the ART Bill did not allow gametes to be gifted and donated and the market was the only intermediary so allowing commissioning couples to access gametes through relatives and friends is a welcome move. However, accessing gametes in this manner is easier said than done and the prospect of gamete shortage is real.

The Regulatory Framework

The SRB, 2019 and ART Bill, 2020 envision the creation of numerous bodies for the regulation of ARTs and surrogacy, but the relationship between these bodies is

unclear from the text of the bills. The psc rightly recommends that these bodies be consolidated in the form of National and State ART and Surrogacy Boards; the National ART and Surrogacy Registry and the Appropriate ART and Surrogacy Registration Authority or AASRA.² This is indicative that the psc recognises the necessity of bringing the two bills in consonance with each other. However, when it comes to ART banks and ART clinics, the psc notes that there is no clarity on their separate and overlapping roles. The Department of Health Research in its response to the psc expressed that it wants to maintain the independence of the ART bank from the clinic, but there is lack of clarity on whether the bank has the necessary personnel to screen and collect gametes, especially oocytes. Notably, the power of the privatised ART sector arises from this very concentration of functions—leaving this dimension unaddressed would be a major shortcoming of the ART Bill, 2020.

Crucial definitions in both bills remain unsynchronised. For example, the SRB, 2019 does not define ART, ART clinics or ART banks. The ART Bill, 2020 defines these terms. Then there are terms defined in the SRB, 2019 but not in the ART Bill (for example, fertilisation, implantation, foetus, sex selection). The definition of infertility differs between the two bills. Given the overlap between surrogacy and ART procedures, precision in and consistency between the two bills when it comes to medical terms are critical. Unfortunately, the psc report makes no mention of this.

Finally, when it comes to penalties, several stakeholders have criticised the ART Bill, 2020 for prescribing long prison sentences with punishment being disproportionately high in relation to the offence committed. The psc on the whole agrees with this critique. It distinguishes differential penalties under the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act and the ART Bill, 2020 in terms of the act sought to be prohibited. It recommends graded punishment for advertising sex-selective ART and has brought down the period of imprisonment from 5–10 years to three–five years, aligning it with the PCPNDT Act

(where punishment can go up to three years). However, the rationale for a minimum mandatory punishment of three years is not convincing. The psc also recommends reduced sentencing for commercialising aspects of ART and exploiting and abusing stakeholders from 8–12 years’ imprisonment to 5–10 years’ imprisonment. This aligns the maximum punishments (10 years) under the SRB, 2019 and ART Bill, 2020.

However, the psc recommends retaining a minimum mandatory sentence of five years. Further, in operationalising these sections, parity would be needed in prosecution practices between the two bills because the underlying offending activity can attract the provisions of both bills. For example, a medical professional who imports human embryos or human gametes would attract prosecution under Section 35(f) of the SRB, 2019 as well as Section 33(1) of the ART Bill, 2020. This person could be liable for any time up to 10 years under the SRB, 2019 but would be subject to a minimum mandatory sentence of five years under the ART Bill, 2020. Further, the offences are cognisable but bailable under the ART Bill, 2020, but non-bailable under the SRB, 2019. So, the medical professional in the above instance would not be able to avail of bail under the SRB, 2019 but can be given bail under the ART Bill, 2020 for the same offending behaviour. Differential treatment of defendants who have committed the same offences under both bills will constitute arbitrary executive action that is unconstitutional.

Conclusions

In conclusion, the psc report has made several positive suggestions. However, the psc has omitted intervening on significant issues with constitutional ramifications, such as access to ARTs and compensation for the egg donor. In sum, the shape that the regulation of reproductive technologies is taking, as bolstered by the psc report, has paternalist conservatism at its core, presenting itself at the service of the heteronormative family form to the exclusion of all others. It is apparent that the restrictive logic of the SRB, 2019 is driving the ART Bill, 2020 when in fact it should have

been the other way round, given that the ART sector is much larger than the surrogacy sector. After all, surrogacy necessarily implicates the use of ARTs given that only gestational surrogacy is permitted and the woman acting as a surrogate cannot contribute her gametes. On the other hand, the use of ARTs need not implicate surrogacy (for example, a couple may use their own gametes for in-vitro fertilisation [IVF] with the woman carrying the baby). Even the most successful of surrogacy clinics have delivered only a few thousand babies, whereas there are 27 million infertile couples in India today and an estimated two lakh cycles of IVF undertaken each year (Sharma 2018; Murdia 2020). Moreover, couples commissioning surrogacy tend to be able to afford the services of a surrogate where couples requiring fertility treatment span the entire socio-economic spectrum. For these reasons, a (flawed) regulatory framework aimed at preventing exploitative transnational commercial surrogacy cannot become the template for the more routine practice of using ARTs.

We need to also analyse the likely distributive effects of the ART Bill, 2020. In a welcome move, the PSC report laments the fact that there are only six IVF clinics in the government sector. It calls for increased access to ARTs in public institutions for the “poor masses” and price regulation but again suggests that these be incorporated in the rules and regulations rather than be mandated within the body of the bill. Even if these suggestions were incorporated, the ART Bill, 2020 is skewed towards poor redistributive outcomes. Unlike in the case of surrogacy, the ART Bill, 2020 allows foreign commissioning couples to access ART services, thus allowing the government to benefit from international medical tourism. This is likely to increase demand for ART services and drive up the prices, as foreign commissioning couples arguably have the resources to bear high tariffs put in place by private clinics. Meanwhile, the sector seeks to rely on the altruism of gamete donors, which will reduce the supply of gametes, thereby producing a shortage in gamete supply. This will result in higher prices for gametes, which is highly likely to incentivise

an underground market in gametes. While intermediaries will benefit from these increased prices, women who act as egg donors will benefit only marginally given the threat of enforcement of the ART Bill, 2020. Their health will be at greater risk since extraction of their eggs for money will likely happen in clandestinely operated clinics which are under the radar of the authorities. In representations before the PSC, the Delhi-based Sama Resource Group for Women and Health did suggest that clinics be routinely inspected, but there is no recommendation to this effect from the PSC.

Permitting medical tourism and access for foreigners changes the economics of the ART market. In the absence of pricing regulation for ART clinics and banks, these organisations will continue to grow unbridled such that only the wealthiest can access ARTs excluding millions from non-elite socio-economic groups who aspire to form families. Meanwhile, women who provision reproductive materials and labour will continue to be devalued, uncompensated and unprotected as underground markets for egg donors and surrogacy thrive. Also missing entirely in the ART Bill, 2020 is any mention of the rights of the child born out of ARTs to know their parentage, which is crucial to their best interests, and is increasingly accepted as a norm globally and was protected under previous drafts of the ART Bill. The PSC mistakenly assumes that such rights are available under the bill. In effect, the ART Bill, 2020 (and the PSC report supporting the framework

of the bill) will facilitate medical tourism, produce gamete scarcity and likely lead to the development of an underground market. Ultimately, women will bear the brunt of the bill’s desire to promote altruism while all other stakeholders in the system can continue to profit off of wealthy and middle-class Indian and foreigner heterosexual married commissioning couples. In other words, it will be business as usual for the thriving private ART sector rendering the benefits of ARTs, a hollow promise for millions of infertile and childless couples and individuals.

NOTES

- 1 Significantly, where single women can access ARTs, it remains to be seen how access for transwomen is ensured, because there are no specific safeguards to ensure non-discrimination.
- 2 Note here that the word *aasra* in Hindi literally translates to refuge, support or shelter aligning with the government’s decision to selectively support those it considers as deserving, while others are systematically kept out.

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