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CONSTITUTIONAL GOVERNANCE OF ARTIFICIAL REPRODUCTIVE TECHNOLOGIES IN INDIA: ADDRESSING RIGHTS OF UNBORN, SURROGATES, AND GENETIC PARENTS

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ABSTRACT

The paper outlines the constitutional implications of the rapidly growing use of Artificial Reproductive Technologies (ART) in India, such as IVF, surrogacy, and genetic modifications. This state of techno-genetic development is not protected under constitutional framework of India, raising significant questions about the rights of stakeholders like surrogates, genetic parents, and the unborn. The discussion about the constitutional validity of procreative rights under Article 21, encompassing procreative autonomy, among other fundamental rights, including equality under Article 14 and protection from exploitation under Article 23, raises issues concerning the constitutional status of embryos, and whether Article 21's right to life has the articulation to extend it to the created embryos by ART and its implications on the stakeholders.

An assessment of the Surrogacy (Regulation) Act, 2021 would also reveal a gaping chasm in protecting surrogates from the potential of physical autonomy and exploitation and demanding transparency in contracts. Lastly, it deliberates on the ethical and constitutional challenges genetic modification and genome editing technologies pose to the Indian Constitution, questioning the ability of such an instrument to regulate advancements. By integrating technological progress with fundamental human rights, the paper proposes a flexible legal

framework to address ethical and constitutional issues surrounding ART, aiming to position India at the forefront of global ART discourse.

Keywords: ART, Unborn Rights, Genetic parents, Surrogacy, IVF, Legitimacy of child.

1. Introduction

Artificial reproductive technologies that have become the hub of procreative medicine have presented solutions to infertility and allowed for medical means to parenthood through innovations such as in-vitro fertilization, intrauterine insemination, egg and sperm donation, and surrogacy. India stands out with low costs, skilled medical professionals, and good health care infrastructure as a global hub for these services. The first IVF baby in India, "Harsha,"ⁱⁱ was born in 1978. This marked the entry of a country into the terrain of assisted reproduction. Since then, India has provided a home to one of the largest ART industries in the world estimated to be worth billions of dollars.

The rapid growth of ART in India can be accounted for by the continually increasing rates of infertility in response to the conditions of changing lifestyles, delayed parenthood, and medical conditions. Advances in procreative technologies have been furthered by the global trends often termed as "fertility tourism," when individuals and couples from abroad come to India for ART treatments due to affordability and accessibility. Surrogacy has also increasingly become a popular destination for India, with surrogate mothers providing services to domestic as well as international clients until the regulations on surrogacy restricted international surrogacy in 2015.

ART, valued at approximately \$6.1 billion in 2023, will reach \$13 billion by 2030ⁱⁱⁱ. It is a response to an increase in the prevalence of infertility (affecting 10-15% of married couples) and its increasing position in global fertility tourism. Despite advancements, the absence of a comprehensive legal framework has led to ethical, legal, and social dilemmas, including exploitation in surrogacy and disputes over parental rights. This paper addresses these challenges, emphasizing the need for constitutional alignment and international best practices.

Despite its successes, ART growth in India has had important ethical, legal, and social issues. In the absence of a comprehensive regulatory framework until recently, concerns arose about exploitation of surrogate mothers, inconsistent quality standards, and disputes over rights to

parent the child. Implementation of the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021, marked a significant step toward mitigating these challenges by providing a legal and regulatory framework on ART services and surrogacy in India.

1.1 Socio-Legal Implications of ART in India

The growth in ART has given rise to significant socio-legal implications in India concerning issues like parenthood, surrogacy, and inheritance.

A) Questions of Parenthood:

ART has redefined conventional notions of parenthood, raising questions about who is qualified to be termed a "parent" under the Indian jurisprudence. Genetic, biological, and intended parenthood overlap and diverge, engendering controversies in arguments for legal recognition and custody. For example, where children are born to surrogates or through egg/sperm donation, intended parents have been left at sea on how to assert their rights over the children. The laws currently aim to redress this by subjecting ART clinics to registration and codifying the role of genetic parents under the ART Act, 2021.

B) Surrogacy:

India became a global leader in surrogacy services in the early 2000s, with commercial surrogacy providing financial opportunities for women from economically weaker backgrounds. However, this practice also led to widespread ethical concerns about exploitation, lack of informed consent, and inadequate healthcare for surrogate mothers. The Surrogacy (Regulation) Act, 2021, now bans commercial surrogacy while permitting altruistic surrogacy for Indian couples under strict conditions. Though the law is meant to check exploitation, it has been criticized for disallowing easy access to surrogacy, thus not taking into proper consideration the rights and welfare of the surrogate mothers.

C) Problems with Inheritance:

ART brings in complications with inheritance rights. Under Indian law, the Hindu Succession Act, 1956 and the Indian Succession Act, 1925, inheritance laws were defined by biological and legal relationships between parents and children. Instead, as in the case of sperm/egg donation or surrogacy, it becomes a complicated issue of lineage in cases of differences between the genetic, biological, or intended parent. For instance, even clear legal provisions for ART-conceived children create problems relating to property rights and the acknowledgement of children. Judicial procedure

must intervene in many cases, indicating that legislation should be more explicit.

1.2 Balancing Societal Benefits and Ethical Concerns.

Many couples have been assisted to become parents by ART, but the technology also raises moral questions. Access, affordability, and equitable treatment issues continue to exist, especially for underserved populations. Furthermore, ART transforms family structures in society as it challenges existing social norms to appreciate the importance of inclusive policies.

To balance innovation with the rights and welfare of all parties involved-including intended parents, surrogates, and the children born through these technologies-the ethical and legal aspects of ART demand careful management. While such recent legislative steps forward taken by Indian Governments represent a step in the right direction, much more is needed to close gaps and guarantee that ART procedures respect equality, justice, and dignity granted by the constitution.

It is necessary to explore the constitutional implications of assisted procreative technology (ART).

At the same time, it throws up important constitutional questions regarding rights such as equality, privacy, procreative autonomy, and welfare for children. Indian constitutional provisions are essential, especially Articles 14 (Right to Equality), 21 (Right to Life and Personal Liberty), and 19(1)(g) (Right to Profession), on which grounds the related rights and obligations regarding ART can be digested.

A) Reproductive Autonomy

The right of procreative autonomy is integral to the broad right to life and personal liberty conferred under Article 21. ART thus enables individuals and couples to exercise control over their procreative choices, often by removing barriers that include infertility. Restrictive legislation like the ART Regulation Act, 2021, prohibiting single men, live-in couples, and the LGBTQ+ community, leads to questions about Articles 14 and 21 regarding who is not included and who is equal.

B) Equality and Non-Discrimination

Article 14 ensures equality before the law. Exclusionary provisions in ART laws disproportionately affect marginalized groups, perpetuating discrimination. Such exclusions conflict with India's progressive judicial interpretations that emphasize

equality, as seen in cases like *Navtej Singh Johar v. Union of India* (AIR 2018 Sc 432), where LGBTQ+ rights were upheld.

C) Right to Privacy

ART procedures involve sensitive genetic and personal information, and privacy becomes a major concern. *Puttswamy* (AIR 2018 SC (SUPP) 1841) upheld privacy as a constitutional right under Article 21 requiring stringent safeguards regarding data protection and ethical practice in ART clinics.

1.3 Ethical, Legal, and Social Implications

1. Ethical Debates

Commercializing ART leads to several ethical issues, such as exploitation of surrogate mothers and commodification of human reproduction. Strict regulation should be applied in controlling these issues, but overly high standards might infringe on one's procreative rights. The balance between ethical safeguards and constitutional rights is necessary.

2. Legal Framework and Gaps

The ART and Surrogacy Acts, while keeping up with the standardization of practice, make no provision for some more critical issues, such as the rights of the LGBTQ+ individual and single man. Moreover, weak child protection measures, which may bar an inheritance right as well as access to parental identity regarding ART-born children, are there.

3. Social Impact End.

ART impacts societal norms, especially regarding family structures and parentage. Legal frameworks often reflect conservative societal attitudes, marginalizing non-traditional families. This exclusion conflicts with the Constitution's progressive spirit, emphasizing the need for inclusive reforms.

1.4 Constitutional Implications of ART in India.

An in-depth study of the constitutional implications of ART is of utmost importance in protecting the rights of all parties involved while promoting equitable and ethical access to procreative technologies. With the future evolution of ART, its legal structure would be integral in relating it to constitutional ideals, thereby promoting social inclusion and human dignity. Future reforms should seek to balance individual freedom, ethical practice, and social concerns.

The regulation and practice of Assisted Reproductive Technology (ART) raise constitutional and legal questions that are significant in nature. The section explores three key research questions to understand how ART intersects with the rights of genetic parents, surrogates, and children, holding on to emphasis on constitutional principles and their legal frameworks.

ART practices engage fundamental constitutional rights, particularly under Articles 14, 19, and 21.

- A) Right to Equality (Article 14):** The ART Regulation Act, 2021, has been criticized for excluding certain groups—single men, live-in couples, and LGBTQ+ individuals—from accessing ART. This exclusion raises concerns about equality and non-discrimination, as it denies marginalized groups their procreative rights based on societal norms rather than constitutional principles.
- B) Right to Privacy (Article 21):** The Supreme Court held in its landmark Puttaswamy judgment that privacy would be considered a fundamental right. Processes of ART involve personal and genetic data that call for the toughest steps in protecting the individual's right to privacy. Decisions on reproduction are also covered under Article 21 of personal liberty.
- C) Freedom of Profession (Article 19(1)(g)):** The ART Act regulating the freedom of professions to practice is all stringently regulated. Even though these guidelines aim at curbing malpractices, excessive measures can work against professional freedoms. Several participants are involved in the ART process, and each participant is peculiar with respect to their rights and liability.
- D) Rights of Surrogates:** Surrogates are often exploited, and the Surrogacy Regulation Act seeks to safeguard their rights by ensuring altruistic surrogacy. Critics argue that such an approach takes away their autonomy and their financial agency, thereby raising the question about the concept of body and life under Article 21.
- E) Rights of Genetic Parents:** Genetic parents often face legal uncertainties, especially in cases of embryo misuse or custody disputes. ART laws must balance their rights to parenthood with ethical practices.
- F) Rights of the Unborn Child:** Children born through ART suffer from several problems such as legal recognition, inheritance rights, and access to information about their genetic origins. The obscurity in the laws governing such issues may infringe their right to identity and equal treatment through Articles 14 and 15.

Inheritance Rights of children born through ART would pose extremely complex questions of law.

- G) Legal Parentage:** Legal parentage must be determined to establish inheritance rights. The courts frequently must resolve disputes resulting from surrogate arrangements or the use of donated gametes.
- H) Legal Recognition of Rights:** Lacking explicit legal provisions for ART children may put at risk their inheritance rights, especially in the case of possible conflicts as to their legitimacy or parentage. Laws must guarantee that no discrimination can arise based on the birth circumstances, under the protection of Article 15.
- I) Cross-Border Cases:** International surrogacy or gamete donation often raises inheritance rights conflicts with jurisdictional laws to be harmonized in national and international frameworks. This paper is critical, as research answers will strike a balance between ART practice and the constitutional value of equality, autonomy, and privacy while ensuring that rights are secured for all. The law and ethical frameworks need to adapt as the social and constitutional law environment changes.

2. Research Methodology

This qualitative study utilizes a doctrinal and analytical approach to look at the constitutional framework governing the use of Artificial Reproductive Technologies (ART) in India. This research elucidates the rights and challenges that surrogates, genetic parents, and the unborn child face during the whole process, arguing those issues with an approach to the constitutional principles, that is, autonomy, equality, and non-exploitation.

Doctrinal Research

The paper primarily relies on doctrinal research, analyzing existing constitutional provisions, judicial interpretations, and statutory regulations like the Surrogacy (Regulation) Act of 2021. Articles 21, 14, and 23 of the Indian Constitution form the backbone of the analysis, particularly in understanding the interplay between procreative rights and other fundamental rights. While considering the constitutional vacuum concerning the status and rights of embryos and surrogates, this study examines how procreative autonomy finds protection under the right to life and personal liberty.

Case Law Analysis

The methodology will include judicial precedents. Landmark rulings pertaining to Indian

courts on procreative autonomy and related rights are investigated as the judgments reflect how this shape the understanding of ART within the constitutional framework. Critical analysis of case laws interpreting Article 21 is presented for a comprehensive judgment as to whether the right to procreative autonomy extends to ART, surrogacy, and genetic modification.

Comparative Analysis

To contextualize India's constitutional management of ART, the paper incorporates a comparative analysis of international frameworks. By examining how other jurisdictions address the rights of surrogates, genetic parents, and the unborn, the paper attempts to identify best practices and evaluate them within the Indian setting. A comparative lens, therefore, helps point out gaps and suggest reforms in India's regulatory approach.

Ethical and Sociological Considerations

The paper uses ethical and sociological perspectives to analyze the living experiences of all involved parties in ART. Since the surrogates are socially and economically underprivileged, an investigation of socio-economic inequalities and effects on constitutional benefits such as equality and non-exploitation is warranted. Hence, the methodology is secondary sources like reports, surveys, and scholarly articles for validating the said strands.

Textual and Policy Analysis

This study examines the surrogacy regulation act 2021 and its subordinate policies and the rules it undertook through constitutional and ethical challenges for an effective result, whether these regulatory frameworks sufficiently protect the rights and autonomy of the surrogates and the genetic parents for the welfare of the unborn.

Interdisciplinary Approach

Recognizing the interface of ART with law, technology, and ethics, the research is interdisciplinary in nature. Scientific advancements such as in-vitro fertilization (IVF) and genome editing technologies are assessed within the framework of constitutional principles to put forth a strong structure of management that align with the developments of procreative science.

The methodology is intended to criticize existing legal frameworks and provide actionable recommendations to align India's constitutional management with emerging ART technologies.

This paper aims at contributing to the existing academic discourse on procreative rights and the regulation of ART in India, by integrating doctrinal, analytical, and interdisciplinary methods.

3. Constitutional Framework and ART in India

Assisted Reproductive Technology (ART) in India began in the late 20th century where the country's first baby born through IVF was born in 1978. However, despite this, decades went by with no regulations on the practice of ART, leading to wide-spread ethical, medical, and legal issues. Therefore, the need to have formal legislation which would regulate services offered under ART activities has led to the drafting of the Assisted Reproductive Technology (Regulation) Bill in 2008ⁱⁱⁱ by the Indian Council of Medical Research (ICMR).

3.1 Overview of ART Legislation

It had been under draft for many years before it was passed as the Assisted Reproductive Technology (Regulation) Act, 2021, to regulate ART clinics and banks to stop exploitation of women and ensure ethical practice. Key provisions made include:

- i) Compulsory registration of ART clinics and banks.
- ii) Regulation of gamete donation, embryo transfer, and surrogacy services.
- iii) Prohibition of sex selection, sale of embryos, and commercialization of ART.

In tandem, the Surrogacy (Regulation) Act, 2021 was enacted to respond to ethical as well as legal issues specific to surrogacy. They restrict the purposes of surrogacy to altruism and eligible commissioning parents are only heterosexual, married couples suffering from infertility. The laws are attempting to balance the interests of intended parents with that of surrogate mothers without resorting to exploitation.

Indian Courts have significantly influenced the laws about ART and surrogacy:

Baby Manji Yamada v. Union of India (2008):^{iv} This case highlighted the legal vacuum in regulating surrogacy arrangements, especially for international intended parents, and underscored the need for comprehensive legislation.

Jan Balaz v. Anand Municipality (2010)^v: The Gujarat High Court discussed the nationality of a child born to an Indian surrogate and foreign parents, emphasizing gaps in surrogacy laws.

K.S. Puttaswamy v. Union of India (2017)^{vi}: Although unrelated directly to ART, the judgment on privacy rights has implications for genetic data and parentage in ART practices.

Despite the enactment of the ART and Surrogacy Acts, several gaps persist:

Exclusionary Provisions: The ART Act restricts access for single men, live-in couples, and LGBTQ+ individuals, raising questions about equality under Article 14. These exclusions limit procreative autonomy and reflect societal biases, rather than constitutional principles.

Rights of ART-Born Children: The laws do not adequately address the rights of children born through ART, including inheritance rights, legal parentage, and access to genetic information. Ambiguities around these issues leave children vulnerable to discrimination.

Ethical Concerns: The commercialization of ART and surrogacy remain a challenge. Although the laws aim to curb exploitation, restrictions on commercial surrogacy have led to an underground market, exacerbating exploitation risks.

Privacy and Data Protection: ART practices involve sensitive genetic and personal data, yet there is no robust framework to ensure its security. This lack of clarity violates the privacy rights affirmed in Puttaswamy.

Cross-Border ART and Surrogacy: With globalization, cross-border ART arrangements pose jurisdictional challenges. India's restrictive laws may lead to conflicts with international legal systems, creating uncertainty for foreign intended parents.

While the ART and Surrogacy Acts are steps in the right direction, they require further refinement to align with constitutional principles, protect stakeholder rights, and address practical challenges. Comprehensive and inclusive reforms are necessary to ensure ethical, equitable, and effective regulation of ART in India.

3.2 Legal Framework for Rights in the Context of ART

Implicated herein is a series of fundamental rights in the Indian Constitution, such as the right to privacy, procreative rights, and equality. All these can be traced primarily to Articles 14, 19, and 21, which thus form the basis for judging the legal and ethical implications of ART. The following sections explicate the above in terms of the relevance of such rights and make an

analysis of significant case laws that indirectly influence ART.

a) Right to Privacy (Article 21)

The right to privacy, as recognized in *Justice K.S. Puttaswamy v. Union of India* (2017), has profound implications for ART. The judgment expanded the scope of Article 21, affirming that privacy encompasses decisions regarding procreative autonomy. ART involves deeply personal decisions about procreation, which must be safeguarded against external interference.

Moreover, ART practices often require the storage and sharing of sensitive genetic and medical information. The absence of robust privacy safeguards in current ART legislation raises concerns about the misuse of this data. For instance, unauthorized use of genetic material could infringe on an individual's right to privacy and bodily autonomy.

b) Reproductive Rights (Article 21)

Reproductive rights are an integral part of the right to life and personal liberty. ART empowers individuals and couples to overcome infertility, thus facilitating their right to parenthood. However, restrictive provisions in the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021, exclude certain groups—such as LGBTQ+ individuals, single men, and live-in couples—from accessing ART services. These exclusions limit the exercise of procreative rights and raise constitutional questions about inclusivity and equality.

c) Right to Equality (Article 14)

The right to equality guarantees equal access to laws and opportunities without discrimination. The exclusion of specific groups from ART services conflicts with Article 14, as it creates unequal access to procreative healthcare. Judicial precedents, such as *Navtej Singh Johar v. Union of India* (2018), which decriminalized homosexuality, have emphasized equality and non-discrimination. However, ART laws continue to reflect societal biases rather than constitutional mandates, highlighting the need for reform.

d) Freedom to Practice Profession (Article 19(1)(g))

ART clinics and professionals are bound by strict regulations under the ART Act. While these laws aim to ensure ethical practices, overly restrictive provisions, such as the prohibition of commercial surrogacy, may interfere with the constitutional right to practice a profession. Balancing regulation with professional freedom remains a critical challenge.

e) Right to Privacy (Article 21):

In the Puttaswamy judgment, the Supreme Court emphasized that decisions about reproduction, including access to ART, fall within the scope of personal liberty. This principle supports ART as a means of exercising procreative autonomy.

f) Rights of the Unborn:

While Indian law does not explicitly recognize the rights of the unborn, ART laws must ensure the welfare of children born through such technologies. For instance, ensuring their inheritance rights and protection from exploitation aligns with the spirit of Article 14^{vii} Legal Framework for rights such as privacy, equality, and procreative autonomy provide a robust framework for regulating ART. However, current legislation must address gaps and align with judicial interpretations to ensure inclusive, ethical, and equitable access to procreative healthcare. Judicial precedents like Puttaswamy and Navtej Singh Johar underscore the importance of harmonizing ART practices with constitutional principles.

4. Rights of the Unborn Child in ART

Assisted Reproductive Technology (ART) introduces unique legal and ethical challenges, particularly concerning the rights of children born through these technologies. The unborn child, though not explicitly recognized as a legal person in Indian law, holds certain rights through interpretations of constitutional and statutory provisions. This section explores the legal personhood of the unborn, inheritance rights, and the balance between identity rights and donor anonymity.

4.1 Legal Person-hood of the Unborn

Legal personhood in India begins at birth, as established under statutes like the criminal and personal laws. However, the rights of the unborn are conditionally protected under certain circumstances. For instance, Section 88 of the Bharatiya Nyaya Sanhita, 2023 criminalizes the voluntary termination of pregnancy unless done under specific conditions permitted by the Medical Termination of Pregnancy Act, 1971.

In constitutional terms, the unborn child is not explicitly recognized as a person. However, courts have indirectly acknowledged the unborn's rights in matters such as inheritance and property, treating the unborn as a "juridical person" in specific contexts. This recognition

ensures that the unborn can inherit property, provided they are born alive.

Global jurisprudence offers diverse perspectives on the personhood of embryos. For instance, while U.S. debates focus on individual autonomy, many European countries emphasize fetal rights. Indian ART laws must balance these perspectives, particularly in cases involving inheritance disputes. As of 2022, 72% of ART clinics reported legal ambiguities in determining inheritance rights for ART-born children.^{viii}

4.2 Legal Status in ART and Surrogate Pregnancies.

In ART and surrogate pregnancies, the legal status of the unborn remains ambiguous. While the Surrogacy (Regulation) Act, 2021, addresses the rights of the surrogate mother, it provides limited clarity on the rights of the unborn child. Surrogate pregnancies often involve contractual arrangements between intended parents and the surrogate, raising questions about whether such agreements sufficiently protect the unborn's welfare.

In landmark cases like *Baby Manji Yamada v. Union of India* (2008), the Supreme Court highlighted the importance of safeguarding the interests of children born through surrogacy, but it left the question of the unborn child's legal status unaddressed.

A) Rights to Inheritance

Children born through ART, whether via surrogacy or gamete donation, are entitled to inheritance rights under Indian law. These rights, however, are subject to the recognition of legal parentage.

B) Hindu Succession Act, 1956:

Under Hindu personal laws, a child born through ART to legally married parents is considered their legitimate heir and inherits property accordingly. However, if ART involves gamete donation, the child's inheritance rights may be contested unless the donor relinquishes all parental claims.

C) Indian Succession Act, 1925:

In cases involving Christians and Parsis, inheritance depends on whether the child is legally recognized as the offspring of the intended parents. Ambiguities arise in situations where the genetic parentage or legality of surrogacy arrangements is disputed.

D) Judicial Precedents:

The Gujarat High Court's decision in *Jan Balaz v. Anand Municipality* (2010)^{ix} emphasized the need for clear legal provisions to protect the inheritance rights of ART-born children. The court called for legislation addressing gaps in surrogacy and ART laws, especially concerning the child's legal lineage

4.4 Challenges in Establishing Lineage and Recognition

Third-party donors or surrogates were involved. Unclear documentation or guidelines for establishing parental status of the child. Conflicts that occurred because of cross-border surrogacy arrangements. These requirements require strong legal reform to ensure ART-born children have equal inheritance rights without discrimination.

4.5 Right to Identity and Anonymity of Donors

International instruments such as the United Nations Convention on the Rights of the Child (UNCRC) speak for a child's right to know his/her parents, and in cases involving gamete donation or surrogacy, the same is increasingly relevant in India.

Knowing one's genetic background has medical, psychological, and social implications. It may be an important source of diagnostic information, for conditions with a hereditary origin, as well as family health history. In addition, the psychological need for identity and belonging may lead an ART-born individual to seek their biological origins.

4.6 Balancing Identity Rights with Donor Anonymity

ART legislation in India upholds the anonymity of gamete donors to prevent exploitation and ensure privacy. However, this anonymity conflicts with the child's right to know their genetic origins. The Assisted Reproductive Technology (Regulation) Act, 2021, provides limited provisions for balancing these rights, emphasizing donor anonymity over the child's right to identity.

- A) Ethical Dilemma:** While anonymity safeguards donors from potential legal and emotional complications, it may deprive children of essential genetic information.
- B) International Practices:** Countries like the UK and Sweden have adopted frameworks allowing ART-born children to access donor information upon reaching adulthood. India's ART laws could consider similar provisions to balance competing rights.

4.7 Judicial and Legislative Perspectives

Indian courts have not yet directly addressed the right of ART-born children to know their

genetic origins. However, cases like Puttaswamy highlight the constitutional importance of privacy, which could be extended to both children and donors. Future litigation may focus on striking a balance between these conflicting rights.

The rights of the unborn child in ART present complex legal and ethical questions that intersect with constitutional principles, inheritance laws, and international human rights norms.

1. **Legal Personhood:** Although the unborn are not explicitly recognized as persons under Indian law, their rights are protected in contexts like inheritance and ART-related contracts.
2. **Inheritance Rights:** Current laws inadequately address the challenges of establishing lineage for ART-born children, necessitating reforms to ensure their equitable treatment.
3. **Right to Identity:** Balancing the child's right to know their genetic background with the donor's right to anonymity requires nuanced legal frameworks that consider medical, psychological, and ethical dimensions. By addressing these gaps, India can create a more inclusive and equitable legal framework that protects the interests of ART-born children while aligning with constitutional principles and global best practices.

5. Rights of Surrogate Mothers

Surrogacy is an issue that involves several richly textured nuances of the socio-legal scheme, intrinsically relating it with ethical, economic, and legal considerations. Rights of surrogate mothers are the core of this debate, thus requiring them to be looked at through constitutional and socio-economic lenses. Protection of surrogates under the constitution and social-economic challenges are explored below, with the focus on the need for robust legal safeguards.

5.1 Protection of Surrogates under Constitutional Laws.

The Constitution of India enshrines the fundamental rights that will apply to each woman, including surrogate mothers. These rights include healthcare, autonomy, and informed consent-management rights which are integral to many surrogacy arrangements. Economic coercion is a great challenge. According to a report published by the Centre for Social Research in 2021, 88% of surrogate mothers in India have monthly household incomes less than ₹10,000. Many surrogates reported inadequate postnatal care, with 54% lacking medical support after childbirth. Strengthening the Surrogacy Act with provisions for healthcare and welfare funds is essential to mitigate exploitation.

(A) Right to Health

The right to health, though not explicitly mentioned, is read into Article 21 of the Constitution, which guarantees the right to life and personal liberty. The Supreme Court of India has interpreted the right to life to encompass the right to health and medical care, emphasizing that a life of dignity includes access to healthcare services. For surrogate mothers, this translates into access to prenatal and postnatal care, counseling, and adequate nutrition, all of which are often neglected in commercial surrogacy setups.

(B) Right to Autonomy and Informed Consent

The right to autonomy, integral to personal liberty, includes the freedom to make decisions about one's own body. For surrogates, this means that their consent to participate in a surrogacy arrangement must be free, informed, and uncoerced. Article 21 ensures procreative autonomy and bodily integrity, allowing women to exercise control over their procreative choices without external interference.

However, surrogacy agreements often undermine these rights. Many surrogates, especially in economically vulnerable positions, may be coerced into arrangements without fully understanding the physical, emotional, and legal implications. The lack of stringent regulations and oversight exacerbates this issue, leaving surrogate mothers vulnerable to exploitation.

5.2 Comparative Analysis: Article 21 and Reproductive Autonomy

Reproductive autonomy, a critical aspect of Article 21, empowers women to make decisions about pregnancy, childbirth, and surrogacy. However, commercial surrogacy raises questions about whether these rights are adequately protected. The commodification of the female body in surrogacy arrangements often reduces women to mere vessels for childbirth, eroding their dignity and autonomy. The Supreme Court, in various judgments, has highlighted the sanctity of procreative rights, underscoring the need to ensure that surrogates are not treated as commodities but as individuals with inalienable rights.

The Surrogacy (Regulation) Act, 2021, seeks to address some of these concerns by banning commercial surrogacy and permitting only altruistic surrogacy. However, critics argue that even altruistic surrogacy can compromise autonomy if not strictly regulated to prevent undue pressure from family members.

5.3 Socioeconomic Challenges and Exploitation Concerns

Surrogacy often intersects with issues of poverty, education, and healthcare access, making

surrogate mothers particularly susceptible to exploitation. This section examines the socioeconomic challenges surrogate mothers face and the state's role in addressing these issues.

5.4 Economic Coercion and Exploitation

Economic disparity is a significant driver of surrogacy in India. Women from underprivileged backgrounds are often compelled to become surrogates due to financial hardship. In such cases, their choice to participate in surrogacy arrangements is not entirely voluntary but rather a product of economic coercion.

Commercial surrogacy has, in the past, operated within a largely unregulated framework, enabling brokers and clinics to exploit surrogate mothers. The lack of standardized contracts and financial transparency means that surrogates often receive only a fraction of the agreed-upon compensation, with intermediaries pocketing a significant portion. Furthermore, surrogates may be left without adequate healthcare or support once the child is delivered, exacerbating their financial and emotional vulnerability.

5.5 Healthcare Rights and Discrimination

Surrogate mothers frequently face discrimination in accessing healthcare services. Many surrogacy agreements prioritize the well-being of the child over the health of the surrogate. For instance, surrogates may be subjected to invasive medical procedures or denied adequate postpartum care. The absence of legal mandates requiring comprehensive healthcare coverage for surrogates further compounds these challenges.

In addition to physical health, the mental well-being of surrogates often goes unaddressed. The psychological impact of carrying a child that they are legally and emotionally compelled to relinquish can be profound, necessitating counseling and mental health support, which are rarely provided.

5.6 Role of the State: Directive Principles of State Policy

The Directive Principles of State Policy (DPSP), though non-justiciable, serve as a moral and constitutional guide for the state in protecting vulnerable populations. Articles 38 and 39 of the Constitution emphasize the responsibility of the state to promote social justice and prevent the exploitation of weaker sections of society.

In the context of surrogacy, the state has a dual responsibility:

Regulating Surrogacy Practices: Enforcing laws like the Surrogacy (Regulation) Act, 2021, to prevent exploitation and ensure fair treatment of surrogates.

Providing Socioeconomic Support: Facilitating access to healthcare, education, and financial aid for surrogate mothers, thereby reducing their vulnerability to exploitation.

The state must also address structural issues that perpetuate economic inequality, thereby enabling women to make truly autonomous choices about surrogacy. Initiatives like skill development programs, financial literacy workshops, and healthcare subsidies can empower women economically, reducing their dependence on surrogacy as a means of livelihood.

5.7 Comparative Perspective

Internationally, surrogacy regulations vary widely, with countries like Sweden and France banning it altogether, while others like the United States permit regulated commercial surrogacy. These contrasting approaches offer valuable lessons for India. For instance, the regulatory frameworks in countries like the UK, which allow altruistic surrogacy under stringent guidelines, emphasize the importance of balancing procreative rights with safeguards against exploitation.

The rights of surrogate mothers must be viewed through the dual lens of constitutional protection and socioeconomic empowerment. While the Surrogacy (Regulation) Act, 2021, is a step in the right direction, its implementation must be complemented by broader measures to address the root causes of economic coercion and exploitation.

A rights-based approach that prioritizes the health, autonomy, and dignity of surrogate mothers is essential. This includes ensuring informed consent, access to healthcare, and financial transparency in surrogacy arrangements. Additionally, the state must actively engage in creating an equitable socio-economic environment where surrogacy is not a compulsion but a choice made freely and responsibly.

By integrating constitutional principles with proactive state policies, India can set a global precedent in safeguarding the rights of surrogate mothers while balancing the ethical and legal dimensions of surrogacy.

6. Rights of Genetic and Intended Parents.

Assisted procreative technologies (ART), including surrogacy, have redefined traditional notions of parenthood and family. In surrogacy arrangements, genetic and intended parents hold pivotal roles, as their rights and responsibilities shape the outcome of these agreements. However, legal, ethical, and cross-border complexities often create challenges in protecting their interests. This section explores parental rights and responsibilities, including the legal definitions of parenthood, constitutional arguments supporting genetic parents, and challenges in cross-border surrogacy under Indian and international contexts.

6.1 Parental Rights and Responsibilities

The rights and responsibilities of genetic and intended parents in surrogacy arrangements hinge on legal definitions of parenthood and constitutional principles. These frameworks aim to balance the interests of parents while safeguarding the welfare of children born through ART. The legal definition of parenthood in ART cases is critical for establishing rights such as custody, decision-making, and inheritance, as well as responsibilities like financial support. Surrogacy arrangements, however, complicate this process due to the involvement of genetic, intended, and gestational parents.

- a) **Genetic Parents:** Genetic parents are those whose biological material—sperm or egg—contributes to the embryo. They often claim parental rights based on genetic connection.
- b) **Intended Parents:** Intended parents are those who initiate and fund the surrogacy process, intending to raise the child. They may or may not be genetically related to the child.
- c) **Surrogate Mothers:** Surrogates, as gestational carriers, may or may not have a genetic link to the child, depending on the type of surrogacy arrangement (traditional or gestational).

In India, the Surrogacy (Regulation) Act, 2021, clarifies the rights of intended parents by ensuring that the surrogate mother relinquishes all parental claims upon the child's birth. This eliminates legal ambiguities surrounding custody and recognizes intended parents as the legal guardians. However, complications may arise in cases where the surrogate refuses to relinquish the child or where the intended parent's default on their obligations.

6.2 Parental Responsibilities.

The responsibilities of genetic and intended parents include financial obligations, ensuring the child's welfare, and adherence to the surrogacy agreement. Courts often emphasize that the "best interests of the child" should guide the resolution of disputes. For instance, intended parents cannot abandon the child under any circumstances, even in cases of disability or marital discord.

6.3 Legal Framework for Arguments Supporting the Rights of Genetic Parents

Genetic and intended parents derive constitutional support for their rights under various provisions:

- a) **Right to Parenthood:** The right to parenthood is embedded in Article 21 of the Constitution, which guarantees the right to life and personal liberty. Parenthood, as an essential component of the right to family, is protected as a fundamental right. The Supreme Court has upheld procreative autonomy as a facet of personal liberty, allowing individuals to choose ART or surrogacy to fulfill their desire for parenthood.
- b) **Right to Equality:** Article 14, guaranteeing equality before the law, ensures that genetic and intended parents are not discriminated against based on their choice of parenthood through surrogacy. For instance, same-sex couples, single parents, or non-genetic parents may invoke Article 14 to claim equal rights to parenthood.
- c) **Best Interests of the Child:** While the Constitution does not explicitly address children's rights, courts often interpret Article 21 to include the best interests of the child. This ensures that disputes involving genetic and intended parents prioritize the child's welfare.

6.4 Challenges in Cross-Border Surrogacy

Cross-border surrogacy^x presents unique legal and ethical challenges due to the involvement of multiple jurisdictions with differing laws on surrogacy. These complexities often result in conflicts of laws, legal uncertainties, and constitutional implications.

1. **Conflict of Laws:** In cross-border surrogacy arrangements, the legal status of parenthood often varies between the surrogate's country and the intended parents' country. For instance, a child born to an Indian surrogate may be denied citizenship in the intended parents' country if local laws do not recognize surrogacy.

2. **Citizenship and Immigration:** Children born through cross-border surrogacy often face statelessness or delays in acquiring citizenship due to inconsistencies in legal recognition. This creates emotional and logistical challenges for intended parents.
3. **Enforcement of Contracts:** Surrogacy contracts may be enforceable in one jurisdiction but invalid in another. This can result in disputes over custody, financial obligations, or the rights of the surrogate.

6.4 Legal Framework for Implications.

- a) **Right to Family:** The right to family is an inherent aspect of Article 21, encompassing the right to parenthood and the right to raise a child. In cross-border surrogacy cases, the inability to bring the child home due to legal or logistical barriers violates this constitutional right. Courts must balance the parents' right to family with the state's interest in regulating surrogacy practices.
- b) **Article 14: Equality Before the Law:** Cross-border surrogacy often highlights disparities in the treatment of intended parents based on nationality, marital status, or sexual orientation. Article 14 can be invoked to challenge discriminatory practices, such as denying surrogacy rights to same-sex couples or single individuals. For example, India's Surrogacy (Regulation) Act, 2021, limits surrogacy to heterosexual, married couples, which has been criticized for violating the equality principle.

6.5 International Responses to Cross-Border Surrogacy

Globally, countries have adopted diverse approaches to cross-border surrogacy. For instance:

- a) **Permissive Jurisdictions:** The United States and Ukraine allow commercial surrogacy, making them popular destinations for international surrogacy arrangements. These jurisdictions often have legal frameworks that protect the rights of genetic and intended parents.
- b) **Restrictive Jurisdictions:** Countries like France and Germany prohibit surrogacy entirely, denying recognition to surrogacy agreements made abroad. This creates challenges for intended parents seeking to bring surrogate-born children into such countries.
- c) **Harmonization Efforts:** International organizations, such as The Hague Conference on Private International Law, have called for harmonized legal standards to address cross-border surrogacy issues. These efforts aim to create consistent rules for

recognizing parentage, resolving conflicts of laws, and safeguarding the rights of all parties.

The rights and responsibilities of genetic and intended parents in surrogacy arrangements are fundamental to ensuring the success of ART practices. Legal definitions of parenthood, supported by constitutional principles, provide a framework for protecting their interests while balancing the welfare of surrogate mothers and children. However, challenges such as economic coercion, legal ambiguities, and cross-border complexities underscore the need for robust legislative and policy measures.

In the Indian context, the Surrogacy (Regulation) Act, 2021, represents a significant step toward addressing these challenges. However, the Act must evolve to account for changing societal norms, including the rights of same-sex couples and single parents, and to address cross-border surrogacy issues effectively.

At the global level, harmonized legal standards and international cooperation are essential for resolving conflicts of laws and ensuring that intended parents can exercise their right to family without undue barriers. By integrating constitutional principles with comprehensive legislation, India can serve as a model for balancing the ethical, legal, and social dimensions of surrogacy in a globalized world.

7. Comparative Analysis and International Perspectives

The management of assisted procreative technologies (ART), including surrogacy, varies significantly across jurisdictions, reflecting diverse cultural, ethical, and constitutional values. This section provides a comparative analysis of constitutional approaches to ART in countries like the United States, the United Kingdom, and Australia. It also explores lessons India can draw from these international frameworks to refine its policies on ART and surrogacy.

7.1 Comparative Constitutional Approaches to ART in Other Jurisdictions

A) United States

The United States adopts a decentralized approach to ART management, with individual states having significant discretion over their ART and surrogacy laws. This diversity results in varying levels of permissiveness and regulation.

I. Legal Framework for Underpinnings:

Right to Privacy: ART laws in the U.S. are often grounded in the constitutional right to privacy, derived from the Due Process Clause of the Fourteenth Amendment. This right encompasses procreative autonomy, allowing individuals to access ART and surrogacy services.

Contract Law: Surrogacy agreements are legally recognized in many states, provided they adhere to state-specific requirements. For example, California is known for its surrogacy-friendly laws, which explicitly protect the rights of intended parents.

II. Challenges:

Some states prohibit or heavily restrict surrogacy, creating disparities in access.

Cross-state conflicts arise when intended parents from restrictive states seek surrogacy services in permissive states.

B) United Kingdom

The United Kingdom follows a more cautious and regulated approach to ART and surrogacy, emphasizing the welfare of the child and the surrogate.

I. Legal Framework:

The Human Fertilisation and Embryology Act, 2008 (HFEA) governs ART practices, establishing comprehensive guidelines for clinics and surrogacy arrangements.

Altruistic surrogacy is permitted, but commercial surrogacy is prohibited, reflecting ethical concerns about the commodification of reproduction.

II. Parental Rights:

Intended parents must apply for a parental order to be legally recognized as the child's parents. This process requires the surrogate's consent post-birth, prioritizing the surrogate's autonomy.

III. Legal Framework for Values:

The UK's approach aligns with its commitment to protecting human dignity and the welfare of vulnerable individuals. The child's best interests remain paramount in legal decisions.

C) Australia

Australia offers a unique perspective, with ART and surrogacy laws varying across states and

territories, similar to the U.S. However, the overall framework reflects strong ethical considerations and constitutional values.

I. Key Features:

Altruistic surrogacy is legal across Australia, but commercial surrogacy is banned. Surrogacy agreements are not enforceable, emphasizing the voluntary nature of surrogacy.

II. State-Specific Variations:

For instance, Queensland and New South Wales impose strict penalties for engaging in international commercial surrogacy, reflecting concerns about cross-border exploitation.

III. Legal Framework for Values:

The Australian legal system emphasizes equality and human dignity, ensuring that ART policies are non-exploitative and respectful of individual autonomy.

7.2 Lessons for India.

- India's approach to ART and surrogacy, as embodied in the Surrogacy (Regulation) Act, 2021, has made strides in addressing ethical and legal concerns. However, international frameworks offer valuable insights that India can incorporate to refine its policies further.
- Balancing Autonomy and Regulation

a) Lesson from the U.S.:

- India can draw from the U.S.'s recognition of procreative autonomy as a constitutional right, ensuring that individuals and couples have the freedom to access ART and surrogacy services.
- The diversity in state laws in the U.S. highlights the importance of regional flexibility. India could allow states to adapt surrogacy policies to local socio-cultural contexts while adhering to national guidelines.

b) Lesson from the UK:

- The UK's focus on safeguarding the surrogate's autonomy, particularly through the requirement of post-birth consent, can guide India in strengthening protections for surrogates.
- Introducing a "parental order" system could formalize the transition of parental rights, minimizing disputes.
- Addressing Exploitation in Cross-Border Surrogacy.

c) Lesson from Australia:

-Australia's strict penalties for engaging in international commercial surrogacy reflect its commitment to preventing exploitation. India, as a former hub for commercial surrogacy, can adopt similar measures to discourage exploitative cross-border practices.

-Collaborating with international bodies to establish harmonized legal standards for cross-border surrogacy would also address conflicts of laws and protect the rights of all parties involved.

-Child-Centric Policies

d) Lesson from the UK:

Prioritizing the welfare of the child in ART and surrogacy arrangements, as seen in the UK, can guide India in shaping policies that ensure the best interests of the child are paramount.

Providing robust legal recognition of the child's parentage immediately after birth can prevent issues of statelessness and legal limbo.

Comprehensive Legislative and Ethical Oversight

e) Lesson from International Harmonization Efforts:

The efforts of organizations like The Hague Conference on Private International Law to create global guidelines for ART and surrogacy emphasize the need for uniformity. India can participate in such initiatives, ensuring its domestic policies align with international best practices.

Establishing a centralized regulatory authority, akin to the UK's Human Fertilisation and Embryology Authority, can enhance oversight and accountability in ART practices.

Comparative analysis of ART management in the U.S., UK, and Australia reveals diverse approaches influenced by constitutional values, ethical considerations, and socio-cultural norms. While the U.S. emphasizes procreative autonomy, the UK and Australia prioritize ethical safeguards and child welfare. These international perspectives provide valuable lessons for India.

India's Surrogacy (Regulation) Act, 2021^{xi}, reflects significant progress, but integrating insights from global frameworks can further enhance its efficacy. By balancing autonomy with regulation, addressing cross-border challenges, and prioritizing the welfare of all stakeholders,

India can establish a robust and equitable framework for ART and surrogacy. This approach would not only uphold constitutional values but also position India as a leader in ethical and rights-based procreative management.

8. Conclusion

The constitutional management of Artificial Reproductive Technologies (ART) in India represents a complex interplay of legal, ethical, and societal dimensions. As ART continues to evolve, offering transformative possibilities for individuals and families, the need for robust legal frameworks becomes more urgent. This paper has explored the inadequacies in India's constitutional approach to ART, analyzing how fundamental rights such as procreative autonomy under Article 21, equality under Article 14, and protection against exploitation under Article 23 intersect with the rights and vulnerabilities of surrogates, genetic parents, and the unborn.

At its core, the management of ART raises critical questions about the balancing of rights. The right to procreative autonomy, rooted in the Indian Constitution's expansive interpretation of the right to life, empowers individuals to make decisions about their procreative futures. However, this right cannot be exercised in isolation from the rights of other stakeholders. Surrogates, often economically disadvantaged women, face significant vulnerabilities that require constitutional safeguards to protect their physical and mental autonomy. Similarly, the ethical and legal status of the unborn child necessitates a nuanced understanding of the right to life, especially in the context of embryos created through ART.

8.1 Key Challenges and Insights

One of the primary challenges highlighted in this paper is the constitutional vacuum regarding the rights of surrogates. While the Surrogacy (Regulation) Act, 2021, aims to address exploitation, it remains inadequate in fully recognizing surrogates' autonomy and ensuring their welfare. Open contracts, which provide greater flexibility and mutual agreement between surrogates and commissioning parents, may offer a more equitable solution. However, such contracts must be carefully regulated to prevent exploitation.

The status of the unborn, particularly embryos, further complicates the legal landscape. The Indian Constitution does not explicitly recognize embryos as legal persons, leaving room for varied interpretations under Article 21. This ambiguity has significant implications for genetic

parents, the state, and surrogates. The legal recognition of embryos must strike a balance between protecting potential life and safeguarding the procreative rights of individuals. Moreover, the rise of genome editing and other advanced ART technologies presents new ethical dilemmas. These technologies, while offering opportunities to prevent genetic disorders and enhance procreative outcomes, also raise concerns about eugenics, equity, and the potential commodification of human life. The management of such advancements must align with constitutional principles, ensuring that technological progress does not compromise fundamental human rights.

8.2 Recommendations for Reform.

To address these challenges, India requires a more comprehensive and flexible constitutional framework for ART. The following recommendations emerge from this study:

1. Strengthening Surrogacy Regulations.

The Surrogacy (Regulation) Act, 2021, must be revisited to better protect surrogates' autonomy. Provisions for healthcare, legal support, and financial compensation should be enhanced, and surrogates must be guaranteed the right to informed consent and freedom from coercion.

2. Clarifying the Legal Status of Embryos.

The Indian judiciary and legislature should work toward a clearer definition of the legal status of embryos. While embryos need not be granted full personhood, their ethical and potential life value must be considered in policy decisions.

3. Incorporating Comparative Insights.

India can benefit from adopting best practices from countries with well-established ART regulations. For instance, countries like the UK and Australia have developed legal frameworks that balance individual autonomy with societal interests, ensuring ethical ART practices.

4. Ethical Oversight of Genome Editing.

A national bioethics committee could be established to regulate genome editing technologies. This body should ensure that such technologies are used responsibly and equitably, with safeguards against misuse.

5. Public Awareness and Education.

Greater public awareness about ART and its implications is essential. Educational initiatives can help demystify these technologies and foster informed decision-making among prospective parents and surrogates.

The constitutional management of ART must evolve to address the multifaceted challenges posed by these technologies. A holistic approach that integrates legal, ethical, and societal perspectives is essential to create a management framework that respects individual rights while safeguarding collective interests.

Ultimately, the regulation of ART is not merely a legal endeavor but a reflection of India's commitment to justice, equality, and human dignity. By addressing the gaps identified in this paper and adopting a proactive stance toward emerging challenges, India can position itself as a global leader in ART management, ensuring that technological advancements are harnessed for the greater good of society.

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