



Himachal Pradesh National Law University, Shimla (India)

*HPNLU*  
Law Journal

---

Journal Articles

ISSN:2582-8533

HPNLU Law Journal

---

Volume III (2022)

**'MISCARRIAGE' OF JUSTICE: Reproductive Laws in India**

*Nandika Seth & Vartika Vaishnavi*

DOI: <https://doi.org/10.70556/hpnlulj-v3-2022-09>

This article can be downloaded from: <https://www.hpnlulj.ac.in/journal-level-3.aspx?ref-id=14>.

---

Recommended Citation:

*Nandika Seth & Vartika Vaishnavi, 'Miscarriage' of Justice: Reproductive Laws in India III* HPNLU. L. J. 109 (2022). <https://doi.org/10.70556/hpnlulj-v3-2022-09>

This Article is published and brought to you for free and open access by Himachal Pradesh National Law University, Shimla. For more information, please contact [lawjournal.editor@hpnlulj.ac.in](mailto:lawjournal.editor@hpnlulj.ac.in)

# Contents

---

Volume III

ISSN: 2582-8533

April 2022-March 2023

---

<i>Articles</i>	<i>Page</i>
1. NEED FOR DEMOCRATISING REFUGEE LAWS IN INDIA: A Turn Towards Refugee Protection or the Return to Eurocentrism <i>Sara Maheshwari &amp; Amritanshu Pushkar</i>	1
2. GREEN INNOVATION, INTELLECTUAL PROPERTY RIGHTS AND ENVIRONMENTAL PROTECTION: Ways and Means to Achieve Sustainable Goals <i>M R Sreenivasa Murthy &amp; Priya Kumari</i>	22
 <i>Notes &amp; Comments</i>	
3. LAW AND MORALITY: Constitutional Morality as a Restraint on Criminalization <i>Chinki Verma</i>	36
4. MANUFACTURED ORPHANS: A Call for Recognition of Illegal Adoption as Child Trafficking <i>Indrasish Majumder &amp; Jhanvi Pakanati</i>	51
5. ANALYSIS OF THE OPINION BY JUSTICE HARI SHANKAR IN RIT FOUNDATION: The Case against the Marital Rape Exception <i>Kartik Ravindran</i>	66
6. THE NEW MEDIATION BILL AND THE POTENTIAL COUNTER-PRODUCTIVE PROVISIONS <i>Divyansh Morolia &amp; Devansh Dubey</i>	78
7. FINDING VALUE IN REGULATION AND ACQUISITION OF PRIVATE PROPERTY: A Quantitative Case Law Analysis <i>Rohan Karan Mehta</i>	91
8. ILLUMINATING THE PATH TO SUSTAINABLE SKIES: A Study on Light Pollution and Environmental Impacts <i>Syamala Kandadai &amp; Dipendu Das</i>	101
9. 'MISCARRIAGE' OF JUSTICE: Reproductive Laws in India <i>Nandika Seth &amp; Vartika Vaishnavi</i>	109

# 'MISCARRIAGE' OF JUSTICE: Reproductive Laws in India

*Nandika Seth\* & Vartika Vaishnavi\*\**

[Abstract: Reproductive rights form an integral aspect of individual autonomy, however, this autonomy gets diluted due to the hegemony of the legislators which propagate an archaic mindset of society. Reproductive rights cover the freedom to get married, have children, and use contraception. The Surrogacy Bill intensifies the bigotry towards certain factions of society by denying them their right to extend their family for not adhering to a certain type of sexuality that society has 'normalised' over the years thereby magnifying their vulnerabilities. The process for obtaining an abortion through the Medical Termination of Pregnancy Act (MTP) is plagued with unwarranted procedures, and layers of hierarchy thereby exacerbating the plight of the woman. This paper examines the ramification of the discourse between religion, morality, ideology, and law trespassing on the interest of the necessary stakeholders which causes their rights to evaporate in obfuscation. It evaluates the reproductive laws such as the Surrogacy Bill, 2021, and the Assisted Reproductive Technology Bill, 2021 and compares the MTP, 1971 to that of the Amended Act of 2021.]

## I

### Introduction

Reproductive rights are based on the right of couples and individuals to decide free from discrimination, coercion and violence whether to have children, how often and when to do so, having the necessary information and means to make such decisions. 'It is also connected with their right to the highest attainable standard of sexual and reproductive health.'<sup>1</sup> 'Reproductive rights are a constellation of freedoms and entitlements that are already recognized in national laws, international human rights instruments and other consensus documents.'<sup>2</sup>

---

\* Nandika Seth, 2<sup>nd</sup> Year Student of Five-Years Law Programme at NMIMS, School of Law.  
Email: [nandikaseth19@gmail.com](mailto:nandikaseth19@gmail.com)

\*\* Vartika Vaishnavi, 3<sup>rd</sup> Year Student of Five-Years Law Programme at NMIMS, School of Law.

<sup>1</sup> United Nations Human Rights, *REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS A HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS*, HR/PUB/14/6, (2014).

<sup>2</sup> *Id.*

In India since time immemorial, women's bodily and autonomy rights were least explored and discussed and often stood mired in society's larger religious and patriarchal hem. Dating back to the colonial era, on one side when a widow was expected to sacrifice herself on her husband's burning pyre by the practice of the Sati, she was expected to give birth regardless of her will. In the discourse between women's and foetus' rights, the interest of the foetus triumphed. The IPC<sup>3</sup> too attracts penal consequences for the offence of abortion. As the woman could not abort the foetus due to the acerbic anti-abortion laws surveilling at that time, they were foisted to gulp a tablet called 'choice' in the entire process.

Women's womb starts ticking post-marriage since they are tormented by society to produce a child which reduces their function in family and society solely to their reproductive role which undermines their purpose in life. Through the course of history, millions of women endured failing and even death from multiple pregnancies and childbirths. Birth control was unreliable and millions of women also suffered serious injury and death from unsafe abortions.<sup>4</sup>

Abortion is a common and essential component of sexual and reproductive health care, yet social norms and stigma influence women's decision-making and create barriers to safe abortion care.<sup>5</sup> The MTP<sup>6</sup> was passed in 1971, which was vested with the obligation to safeguard the reproductive rights of women allowing them access to safe and legal abortion by attenuating the legal encumbrance provided they comply with the stipulations attached. It allowed a married woman to terminate her pregnancy within twenty weeks of gestation provided the conditions adhered to the stipulations attached.

This Act was amended in 2021<sup>7</sup> which expanded the ambit of MTP, by increasing the gestational period to twenty-four weeks on the advice of two Registered Medical Practitioners (RMPs) and allowing unmarried women to avail of abortion free of encumbrance in case of failure of contraceptives. At one extreme, women are exhausted by repeated pregnancy and the burdens of childcare, and at the other, infertile women may have no status or function in their communities or families.<sup>8</sup> From both ends of this clamour woman's voice is muzzled in the rigmarole concerning their bodily interest. Impotency being a ground for a voidable marriage under personal laws, infertile women had no recourse to overcome their fertility. However, the advancement of technology recognized alternate methods of producing a child such as surrogacy, and in-vitro- fertilization to overcome infertility. Initially, these terms were alien to India and

---

<sup>3</sup> Indian Penal Code, 1860.

<sup>4</sup> V.O. Wittenstein, *REPRODUCTIVE RIGHTS: WHO DECIDES?* (2016).

<sup>5</sup> S. Makleff, et.al., *Exploring stigma and social norms in women's abortion experiences and their expectations of care*, 27(3) *SEXUAL AND REPRODUCTIVE HEALTH MATTERS* 50 (2019).

<sup>6</sup> The Medical Termination of Pregnancy Act, 1971, ACT NO 34 OF 1971.

<sup>7</sup> The Medical Termination of Pregnancy (Amendment) Act, 2021, Act No. 8 of 2021.

<sup>8</sup> R.J Cook, *Human Rights Law and Reproductive Self-Determination Conference on the Interventional Protection of Reproductive Rights*, 44(4) *AM. U. L. REV.* 978(1995).

they lacked legislation to regulate them. The Surrogacy Bill and the Assisted Reproductive Technology (ART) Bill which were passed in 2021 aimed to monitor ART facilities and surrogacy.

Several cases were presented before the court where reproductive autonomy was upheld. The *Suchita Shrivastava*<sup>9</sup> case opined that women's right to make reproductive decisions is a component of her personal liberty and dignity. Ensuing which it held, enforcement of the reproductive rights of the mother and the right to nutrition and medical care of the newly born child and continuously thereafter till the age of about six years.<sup>10</sup> Post which it held, It is a personal right of a woman to give birth to a child, but it is not the right of a husband to compel his wife to give birth to a child for the husband.<sup>11</sup> Further, the *Puttaswamy*<sup>12</sup> judgment where perceived reproductive rights and the individual's autonomy regarding sterilization to being inherent in the rights of life and liberty under Article 21<sup>13</sup> which gave teeth to the *Navtej Johar*<sup>14</sup> and *Joseph Shine*<sup>15</sup> which reiterated the court's responsibility to revoke laws that trespass into one's sexual sovereignty.

## II

### Dichotomy between Religion, Morality, Law, and Reproductive Autonomy

Religion is believed to emanate from the divine that is out there. It is a response to the sacred.<sup>16</sup> Reproductive rights in and of themselves are seen as a sin against the divine. Within diverse states, dissension still exists between the right to cultural accommodation and the rights of women. Multilingual politics are characterized by the mobilization of groups and the governmental acceptance of cultural differences. Dominant males within cultural groups strive to put limits on the bodies of women in order to defend the veracity of their cultural claims under heterogeneity. Hindu rituals can also be intensely limiting, while Muslim Islamic dogma expressly forbids women from having reproductive autonomy.

---

<sup>9</sup> *Suchita Shrivastava v. Chandigarh Administration*, (2009), 9 SCC 1, (India).

<sup>10</sup> *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, (2010) 172 DLT 9 (Del.)

<sup>11</sup> *Dogra v. Malhotra*, CR No. 6337 and 6017 of 2011 (P & H).

<sup>12</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, (India).

<sup>13</sup> Constitution of India, 1950, article 21.

<sup>14</sup> *Navtej Johar v. Union of India*, (2018) 10 SCC 1, (India).

<sup>15</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39, (India).

<sup>16</sup> C. Maguire Daniel, *Sacred Rights: The Case for Contraception and Abortion in World Religions*, OXFORD UNIVERSITY PRESS 3 (2003).

Hindu women are not prohibited from having abortions but they are deprived of their emotional and sexual independence because their husbands and natal family govern the majority elements of their lives. Human rights get tampered when such control methods are hegemonized. Human rights violations against Hindu women can sometimes take the form of forced abortions, marital rape, and mobility limitations. However, a woman's choice to dissociate from a conservative society must be supported regardless of her religious affiliation for a policy to be considered 'progressive.' The interests of women, the bearer and the primary rearers of children are often overlooked and sacrificed when they clash with those with the State, government, or its political program.<sup>17</sup>

Three fundamental human rights are: the right to life, liberty, and right to personal safety are frequently cited as justifications for the presence or lack of legislation restricting abortion. Abortion is legally allowed in India, but there are conditions that must be completed before one may be performed. Often, but not always, this involves adopting a trimester-based system to limit the time frame during which an abortion is still permissible. Discussions on abortion, particularly those involving abortion laws are recurrently led by advocacy groups that fall into two categories. People who underpin outlawing abortion do so under the guise of being pro-life while those who oppose such restrictions do it under the guise of being pro-choice. Both are used to denote the key tenets of pro- and anti-abortion arguments: 'Is the foetus a human being with a fundamental right to life' for pro-life activists, and 'Does a woman have the right to choose whether or not to have an abortion' for pro-choice advocates.'<sup>18</sup>

One of the most politically consequential Supreme Court rulings in history, *Roe v. Wade*<sup>19</sup> reshaped American politics, sparked the citizen's emotions, and dissected the country into 'pro-choice' and 'pro-life' camps. The historic ruling by the US Supreme Court held that 'fundamental' right to abort a pregnancy, a right the Court anchored to a concept of personal autonomy derived from the due process guarantee.<sup>20</sup> However, in *Dobbs v. Jackson*<sup>21</sup>, the Court said 'that linking abortion to a right to autonomy or to 'define one's concept of existence' would also license fundamental rights to 'illicit drug use, [or] prostitution.'<sup>22</sup> With this, hypothetical fears have given way to real-world repercussions of a disastrous

---

<sup>17</sup> Portugese Jacqueline, *Fertility Policy in Israel: The Politics of Religion, Gender, and Nation*, GREENWOOD PUBLISHING GROUP (1998).

<sup>18</sup> Hiya Iliyas, *Reproductive Rights of Women: A Way to Gender Justice*, SSRN 34 (2015).

<sup>19</sup> 410 U.S. 113 (1973).

<sup>20</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 381 (1985).

<sup>21</sup> *Dobbs v. Jackson Women's Health Organisation*, 597 U.S. (2022).

<sup>22</sup> CORNELL LAW SCHOOL, *Dobbs vs Jackson Women's Health Organisation* (June 2022) available at: [https://www.law.cornell.edu/wex/dobbs\\_v.\\_jackson\\_women%27s\\_health\\_organization\\_%282022%29](https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29) (last visited on April 29 ,2024).

constitutional reversal in American law, but as noted in the minority opinion, the overruling in Dobbs judgement is exceptional since it clamps on an individual's freedom that was originally considered to be recognized by the Constitution. *'With Roe overturned and the country was thrown into legal, political, and social chaos, the lives and health of millions of women have been jeopardized with women being compelled to give birth endure unsafe abortions, and perhaps face punishment.'*<sup>23</sup>

Initially, India was grappling with the identification of those whose gender was incongruous with that which was assigned to them at birth or those who are attracted to people of the same sex. Reproductive laws also subjugate the subjugated factions of society such as transgenders and homosexuals by snatching away their reproductive rights by denying them the right to extend their family through surrogacy. Medical professionals completely ignore reproduction in discussions around transgender persons' bodies, believing them to be asexual or hypersexual perverts incapable of having children.<sup>24</sup> Law too did not extend a helping hand to them which can be seen in the *Queen Empress*<sup>25</sup> case where a transgender was arrested on the air of suspicion of the person being a 'habitual sodomite'. Morality too sweeps into the dilemma creating a quagmire of questions such as *'Is it morally permissible for a doctor to remove healthy organs? Is it acceptable to give puberty-delaying drugs to children who feel gender conflict? Is it ethical for society to require people to live as one gender if they identify strongly with the other?'*<sup>26</sup>

### III

#### Reproductive laws in India

Abortion which comprises a core aspect of the reproductive autonomy of a woman is a highly sensitive issue that has been contested on grounds of religion and humanity. This shrouds the shoulders of the legislature with a mammoth responsibility to frame laws keeping the interest of all relevant stakeholders in mind. Due to the acerbic sanctions spelt under the IPC, women were denuded of recourse and bore the brunt of illegal

<sup>23</sup> Vishwanath Apurva, *Explained: What is Roe v. Wade which the US Supreme Court overturned, and why is it significant?* INDIAN EXPRESS, ( June 24, 2022), available at: <https://indianexpress.com/article/explained/explained-roe-v-wade-us-supreme-court-overturned-significant-abortion-constitutional-right-7989490/> (last visited on April 29,2024).

<sup>24</sup> Mohamed Shereen, *Reproductive Justice and Transgender Rights | Roundtable 4 | Transform 2021*, (1<sup>st</sup> February,2022), available at: <https://clpr.org.in/blog/reproductive-justice-and-transgender-rights-roundtable-4-transform-2021/> (last visited on April 30,2024).

<sup>25</sup> *Queen Empress v. Khairati*, (1884) ILR 6 All 204.

<sup>26</sup> CHRISTIANITY TODAY, *Where Evangelicals Stand on Transgender Morality*, (July 14,2016), available at: <https://www.christianitytoday.com/news/2016/july/where-evangelicals-stand-on-transgender-morality-lifeway.html> (last visited on April 29,2024).

abortions or imperilled their bodies by undergoing an illegal abortion to escape the detection of the law. *'In the era of globalization, and urbanization, societies need their own solutions, grounded in a vision of justice and gender equality and consistent with their cultures and conditions, to provide a better life for both women and men.'*<sup>27</sup> Acting as an offspring of a spate of legislations, the first legislation governing the reproductive rights of women was passed, the MTP Act 1971<sup>28</sup> which stood as an exception to IPC and allowed one to terminate her pregnancy.

The Act permitted a woman to terminate her pregnancy within the gestational limit of twelve weeks or if the gestation period exceeds twelve weeks but does not exceed twenty weeks, a woman needs to take the consent of not less than two RMPs who opine that *'(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.'*<sup>29</sup> However, termination is permissible at any stage if an RMP *'is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.'*<sup>30</sup> It too interprets a broader definition of 'grievous hurt' to include the distress pregnancies caused due to the failure of contraceptives.

*'Unfortunately, in spite of this legislative protection, unsafe abortion remains the third leading cause of maternal mortality in India, and close to eight women die from causes related to unsafe abortion each day.'*<sup>31</sup> Regardless of the consent of the woman, an RMP is bestowed with unbridled power to determine the fate of a pregnant woman since abortion would be allowed only if the RMP deems it necessary. *'A woman has to justify that her pregnancy occurred despite her having tried to prevent it or that it had been intended but circumstances changed or made it unwanted later.'*<sup>32</sup> Though the pregnancy was the result of coercion, the onus to prove that the pregnancy was a result of the failure of a contraceptive is shrouded on the shoulder of the women by creating a quagmire of deception.

Sometimes, doctors have a callous attitude while examining the woman which was corroborated in *R v. Haryana*<sup>33</sup>, the petitioner was not examined diligently and no pregnancy test was conducted regardless of the fact that the doctor was aware that the petitioner was a minor and was raped. Confining the maximum gestational threshold to avail of a safe abortion to merely twenty weeks ensued in a myriad of cases unfurling

<sup>27</sup> S. Kosgi, et.al., *Women reproductive rights in India: Prospective Future*, 10(1) ONLINE JOURNAL OF HEALTH AND ALLIED SCIENCES 1(2011).

<sup>28</sup> The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971).

<sup>29</sup> The Medical Termination of Pregnancy Act, 1971, S.3.

<sup>30</sup> *Id*, S.5.

<sup>31</sup> Susheela Singh, Rubina Hussain, *Abortion and Unintended Pregnancy in Six Indian States: Findings and Implications for Policies and Programs*, GUTTMAR UNIVERSITY 2 (2018).

<sup>32</sup> Siddhivinayak, *Abortion Law, Policy and Services in India: A Critical Review*, REPRODUCTIVE HEALTH MATTERS 117 (2004).

<sup>33</sup> *R v. State of Haryana*, (2016), (WPC 6733/2016).



before the court where the petitioners wished to terminate their pregnancy when the gestational period has crossed the acceptable limit. In the above-mentioned case, the court repudiated the petitioner's appeal to terminate her pregnancy in the twenty-first week which was the product of rape since the medical report did not consent to an abortion.

Lamentably, the beneficiaries who can avail of safe abortion are confined only to married women. Keeping unmarried, widows, or separated women outside the ambit of 'eligibility' who are shunned by society to the ambience of apathy and the only recourse available to them is to wait for the judiciary to intervene in the matter and acknowledge their autonomy. However, the Supreme Court's decision to permit unmarried women to access a safe and healthy abortion thereby acknowledging the colossal injustice perpetrated by the MTP, 1971 and obliterating the artificial barrier that legitimized sexual intercourse between a married couple and forbids sexual intercourse between an unmarried couple.

In *X v. NCT*<sup>34</sup>, the appellant became pregnant due to consensual sexual intercourse with her partner, who repudiated marrying her at the last stage. She was already in a vulnerable situation because of her unplanned pregnancy which was ensued by being abandoned by her partner. Thus, she did not want to extend this grief to her family compounded by the lack of financial resources to sustain her pregnancy and supplement the child. The High Court rejected her contention since pregnancy due to intercourse outside marriage was not covered under the ambit of Section 3(2)(b) of the Act, however, the Supreme Court held the microscopic perusal of Section 3(2)(b) would constitute it to be unconstitutional for divesting unmarried women to access safe abortion and propagates the notion that legitimizes sexual-intercourse only between a married couple.

The MTP Act was amended in 2021 and it sought to create a congenial environment for accessing abortions and liberalizing the draconian regime governing abortions in our country. It increased the gestational limit for terminating the pregnancy '*(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or (b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners.*'<sup>35</sup>

It widened the definition of woman to, '*(a) survivors of sexual assault or rape or incest; (b) minors; (c) change of marital status during the ongoing pregnancy ; (d) women with physical disabilities, (e) mentally ill women including mental retardation; (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the*

---

<sup>34</sup> *X v. The Principal Secretary and Others*, (2023) 9 SCC 433.

<sup>35</sup> Medical Termination of Pregnancy Act 2021, Act No. 8 of 2021, S3(2).

*Government*<sup>36</sup> to avail an abortion beyond the twenty-four gestational limit. It also constitutes a pregnancy caused by rape as a 'grave injury' to a woman's mental health and permits one to terminate her pregnancy beyond twenty-four weeks with the consent of a Medical Board.

India has managed to make a spot globally for becoming the medical capital of the world for providing medical facilities at an abysmally low cost. '*A subset of medical tourism is reproductive health care, including treatments such as assisted reproductive technology (ART) and surrogacy.*'<sup>37</sup> *Surrogacy is defined as the process by which another becomes pregnant and carries the child to term for another person or persons who will become the child's parent(s) after birth.*'<sup>38</sup> Leap in science and technology enabled one to bridge the lacuna of infertility and build the family of their dreams. Often, poor women were baits for surrogacy agencies who would undertake pregnancy to bridge their financial void. '*When one's identity as a mother is regulated and terminated by a contract, being a good mother often conflicts with being a good worker, which makes the perfect surrogate subject rather difficult to produce.*'<sup>39</sup>

This led to the passing of the Surrogacy Regulation Bill, 2021 which vehemently prohibits the commercialization of surrogacy which is when '*payment is made to the gestational woman for her services, and may also be made to a third-party broker or agent who brought the commissioners and gestational women together*'<sup>40</sup> since it undermines motherhood which is characterized by selflessness and commodifies the child making it an 'object' of exchange in a contract. It advocates altruistic surrogacy '*in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, is given to the surrogate mother or her dependents or her representative.*'<sup>41</sup> Only a legally married couple could avail of surrogacy on '*medical indication necessitating gestational surrogacy*'<sup>42</sup> or an '*Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy*'<sup>43</sup> by obtaining a certificate of recommendation by the Board.

---

<sup>36</sup> *Id.*, S.3(b).

<sup>37</sup> S. Saravanan, *An ethnomethodological approach to examine exploitation in the context of capacity, trust, and experience of commercial surrogacy in India*, 8 PHILOSOPHY ETHICS HUMANITY IN MEDICINE10 (2013).

<sup>38</sup> Batista A. David, *The Need for Psychological Evaluations in the New York's Child Parent Security Act*, SETON HALL U 1 (2021).

<sup>39</sup> Amrita Pande, *Commercial surrogacy in India: Manufacturing a perfect mother-worker* 35(4) THE UNIVERSITY OF CHICAGO PRESS 969 (2010).

<sup>40</sup> Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U OF P. J. INT' L. 1436 (2009).

<sup>41</sup> The Medical Termination of Pregnancy Act, 1971, S.2(b).

<sup>42</sup> *Id.*, S.2(r).

<sup>43</sup> *Id.*, S.2(s).

A married couple was entitled to avail of surrogacy provided they *'have not had any surviving child biologically or through adoption or through surrogacy earlier'*<sup>44</sup> It spells out the criteria to become a surrogate, *'no woman, other than an ever-married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise, no woman shall act as a surrogate mother by providing her own gametes; no woman shall act as a surrogate mother more than once in her lifetime.'*<sup>45</sup> It also allows *'the surrogate mother shall have an option to withdraw her consent for surrogacy before the implantation of human embryo in her womb.'*<sup>46</sup>

The ART Bill seeks to administer ART clinics, and banks and dissipate the abuse of unethical practices which sweep into ART services which allows one to embrace parenthood by freezing gametes, embryos, and, embryonic tissues. It defines ART as *'all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman.'*<sup>47</sup> It lays down the procedure to avail of ART services and establishes a National and State level ART and Surrogacy Board. It curtails the stakeholders in the Act to the commissioning couple or woman and donor, confining only married couples and women to avail of surrogacy.

It also states that banks should obtain semen from males between twenty-one to fifty years of age and oocytes should be obtained from women between twenty-three to thirty-five years. *'A bank shall not supply the sperm or oocyte of a single donor to more than one commissioning couple.'*<sup>48</sup> *'An oocyte donor shall donate oocytes only once in her life and not more than seven oocyte shall be retrieved from the oocyte donor.'*<sup>49</sup> The gamete would be stored only for ten years post which it would be destroyed, or used for research purposes.

## IV

### Locating the Interest of the Stakeholders involved under the Reproductive Laws

The reproductive laws are plagued with shortcomings that fail to adequately safeguard the interest of the necessary stakeholders involved. The MTP 2021 liberalized the framework circumscribing abortion, but access to safe abortion yet remains a challenge. It allows a woman to terminate her pregnancy only on certain grounds but does not

---

<sup>44</sup> *Id.*, S.4(c)(II).

<sup>45</sup> *Id.*, S.4(b).

<sup>46</sup> *Id.*, S.6(2).

<sup>47</sup> The Assisted Reproductive Technology Bill, 2021, (Act No. 42 of 2021) S.2b(a).

<sup>48</sup> *Id.*, S.27(3).

<sup>49</sup> *Id.*, S.27(4).

recognize abortion as an assertion of a woman's right. It states the need for the opinion of one RMP to terminate a pregnancy up to twenty weeks and two RMPs for the termination of a pregnancy of up to twenty-four weeks thereby curating layers of authorization. Access to healthcare is disproportionate between the rural and urban classes and caste-based prejudice trickles down in healthcare as well.

Nor does it provide any remedy to a woman who has exceeded the acceptable threshold which results in several women moving to the court. In the *Pratibha*<sup>50</sup> case, the court allowed a woman to terminate her pregnancy in her twenty-eighth week since the foetus was suffering from a rare heart condition. In most cases, courts bank on the opinion of the Medical Board, even in cases involving rape survivors, the courts rely on the opinion of the Board that has arrived at a conclusion based on inconsistent criteria. In the *Murugan*<sup>51</sup> case, the court allowed a thirteen-year rape survivor to terminate her pregnancy relying on the decision of the Board. Pursuance of litigation to terminate an unwanted pregnancy causes unwarranted time loss, which is a debacle of women's mental and physical health.

It also prescribes an abortion can be carried out post-twenty-four weeks in case of foetal 'abnormality', thereby magnifying the stereotype that people with disabilities are belittled than people without disabilities instead it should be the sole decision of the pregnant woman with the consent of the doctor whether she wants to proceed with the pregnancy. The establishment of a Medical Board in every State to administer cases involving the termination of pregnancy beyond twenty-four weeks causes a redundant delay in abortion decisions due to third-party intercession. Besides, it is arduous to find a competent Medical Board due to the dearth of qualified doctors, especially in rural areas. The Act sparks a sense of alarm since it only recognizes 'woman' in the strict cis-gender as the beneficiary to avail of abortion and excludes non-cis pregnant women who have received judicial acknowledgement.

The Surrogacy Act was implemented to impede unethical practices and the exploitation of surrogates by agencies and intermediaries. The Act criminalizes commercial surrogacy and harmonizes altruistic surrogacy and allows a woman to become a surrogate only once in her life. Sometimes destitution compels women to become surrogates, and the ban on commercial surrogacy snatches away their right to livelihood which is constitutionally defended. This amplifies their vulnerabilities since surrogates earn a lumpsum amount that can be equivalent to years of their income for a few surrogates. It would be rare that a woman would carry the pain of pregnancy and labour for another woman/couple with no monetary incentive. Instead of imposing a blanket ban on commercial surrogacy, there should be legislation to govern it. The conditions that need to be met to qualify a woman to become a surrogate are that she should be genetically related to the intending couple or intending woman, she should

---

<sup>50</sup> *Pratiba v. NCT Delhi*, 31<sup>st</sup> December, (2022), W.P.(C) 14862/2021.

<sup>51</sup> *Murugan Nayakkar v. Union of India*, (2017) SCC OnLine SC 1906.

be married, have a child of her own, and should be between twenty-five to thirty-five years of age. With so many conditions attached, it makes it onerous for the beneficiaries to find a 'perfect match'.

The Act grants one to avail of surrogacy only on grounds of infertility since the intending couple needs to procure a certificate of infertility from a competent Board, however, some women though capable of conceiving do not prefer to adopt the natural process and opt to have a child through surrogacy since pregnancy halts one's career. The Bill allows only married couples '*between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification*'<sup>52</sup>, widows or divorcees between thirty-five to forty-five years to be its beneficiaries, and excludes unmarried women and men, live-in-couples who desire to procreate but are unable to do so on medical grounds. The age bracket for married couples debar those married couples beyond the permissible limit who have lost their child/children and wish to revive parenthood to overcome the void in their life.

MTP, 1971 forbids pregnancy in an unmarried couple nor does the Surrogacy Bill recognize an unmarried person to hone parenthood through surrogacy leaving unmarried couples remediless. It disqualifies those couples who '*had any surviving child biologically or through adoption or through surrogacy earlier*'<sup>53</sup>It also disqualifies homosexuals from availing of surrogacy highlighting the gender prejudice that exists in our culture and preventing same-sex couples from sharing in the joy of parenting which juxtaposes '*intended parent may be a single male or a male homosexual couple.*'<sup>54</sup>

## V

### Conclusion

The evolving mindset of society coalesced with the advent of technology has enabled India to come a long way in terms of its reproductive laws. Though these laws are heralded for being progressive, they do reflect the archaic notions of society and fail to reflect the perspective of various sections of society. Ironic that women have to be at the mercy of men who frame laws governing their reproductive autonomy. Though equality was considered the substratum on which the edifice of the Constitution was erected, reproductive laws catalyse a sense of prejudice towards the subjugated sections such as LGBTQ, transgenders, couples in live-in relationships whose rights dwindle away in obscurity since they are denied the right to extend their family through ART for not complying with the norms that society deems 'normal'.

---

<sup>52</sup> The Medical Termination of Pregnancy Act, 1971.

<sup>53</sup> *Id.*

<sup>54</sup> *Baby Manji v. Union of India*, (2008) 13 SCC 518, (India).

Doctors are the fulcrum around which reproductive laws revolve, thereby concentrating greater authority instead of the woman whose greater interest is at stake. While upholding the rights of the foetus, the rights of a woman are largely compromised hence, there is a need to strike a balance between the two. The present legal rubric menaces the welfare of the necessary stakeholders disabling them from availing of safe healthcare. Laws should be heterogenous to incorporate the interests of all sections of society thereby upholding the constitutional tenets.