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Do Men have Reproductive Rights

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ABSTRACT

The three laws that are aimed at empowering the women's right to reproduction are the Assisted Reproductive Technology Regulation Bill, 2020, the Surrogacy (Regulation) Bill, 2020 and the Medical Termination of Pregnancy Amendment Bill, 2020 . The reproductive rights of women are already well established by the Hon'ble Supreme Court while deciding several cases. But what about the reproductive rights of men? In this backdrop, this article analyses a peculiar case that is pending before the Aurangabad Bench of Bombay High Court. This case involves the confliction of rights between husband and wife regarding reproduction. As their relationship was estranged, they no longer live together. So, the wife desires to have a baby by In Virto Fertilization (IVF) using her husband's sperm but her husband refuses to accord for donating his sperm for the IVF process as he has already applied for divorce from his wife.

I. THE THREE LAWS SOUGHT TO PROTECT THE REPRODUCTIVE RIGHTS OF WOMEN IN INDIA

(A) The Assisted Reproductive Technology Regulation Bill, 2020²

The Assisted Reproductive Technology (ART) services have gained immense popularity in India in the last few years. Fertility centres have grown drastically in the country. This technology has assured new promise for couples who cannot bear children. But there are no laws until today to regulate ART. The Assisted Reproductive Technology Regulation Bill aims to regulate and supervise the ART clinics and the assisted reproductive technology banks, prevention of misuse, safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto. Among the various ART services, IVF is the most popular one. In Virto Fertilization is a medical procedure where an egg is fertilized by sperm in a test tube or elsewhere outside the womb and after fertilization, the embryo is implanted into the uterus of a woman. Then the baby grows inside the mother's womb like a natural pregnancy. Almost all fertility centres in India provide this service. But it is also prone to unethical practices like using sperm from another man other than that of

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² http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/97_2020_LS_Eng.pdf

husband's sperm to fertilize the egg without the consent of the couple etc. Hence, regulation of this service is highly essential.

(B) The Surrogacy (Regulation) Bill, 2020³

This Bill was pending to be passed in the Indian Parliament for quite a long time. Surrogacy process involves a Surrogate (woman) giving birth to a baby when a woman cannot conceive and give birth to a baby herself. This has empowered the reproductive right of women (couples) by allowing her (them) to have her biological baby except that the baby is from the womb of another woman. Surrogacy in India and Indian surrogates became increasingly popular among couples in industrialised nations because of the relatively low costs and easy access offered by the Indian surrogacy agencies.⁴ Many people from different countries visit India to have a baby by surrogacy process. Usually, it is poor women who are targeted to be surrogates. As they would get the job done at a low price. This was going out of hand and hence, with the approval of the National Guidelines for the Accreditation, Supervision and Regulation of ART clinics in India, 2002 the government banned commercial surrogacy and surrogacy for foreign homosexual couples and single parents.

(C) The Medical Termination of Pregnancy Amendment Bill, 2020⁵

The Medical Termination of Pregnancy Amendment Bill, 2020 seeks to bring changes to the Medical Termination of Pregnancy Act, 1971. This act deals with the termination of certain pregnancies by registered medical practitioners if the pregnancy involves a risk to the life of the pregnant woman or if the pregnancy can cause grave physical or mental health (unwanted pregnancy by rape) or if the child would suffer from a serious mental or physical abnormality. The 1971 Act had fixed a maximum period of 20 weeks within which period only a woman is legally allowed to terminate her pregnancy. So, many women had to approach courts if they want to terminate their pregnancies. This added agonies to women especially when the pregnancy is caused by rape or unwanted pregnancies. The Amendment Bill, 2020 increased that maximum period of 20 weeks to 24 weeks, thereby women are allowed to terminate their pregnancies without having to approach Courts to permit them to do so even though they have valid reasons for the termination of their pregnancy.

II. BRIEF HISTORY OF KGP VS. PKP

The Appellant (Husband) filed a petition for divorce on grounds of cruelty from his wife in

³ http://164.100.47.5/committee_web/BillFile/Bill/70/137/156-C%20of%202019_2019_12_12.pdf

⁴ [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(12\)61933-3.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(12)61933-3.pdf)

⁵ http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/55_2020_LS_Eng.pdf

the year 2016 before the Aurangabad Family Court. Both the husband and the wife accuse each other of cruelty. Both of them are Doctors. While the case was pending, the wife filed a petition desiring to have a second child (the couple already have a son who was then 6 years old) through IVF as their relationship was estranged. The Respondent (Wife) also stated in her petition that she will not demand maintenance for that second child and also mentioned that she wanted a companion for her son and now that she was already 35 years old, she needs to have the second child as soon as possible as her strength may decrease as days pass by. The Family Court, Aurangabad ordered the Respondent to undergo the IVF procedure, thereby decided the case in favour of wife to have a baby.

The Appellant then approached the Aurangabad Bench of Bombay High Court to quash the order of the Family Court. The High Court allowed the petition on the ground that order was not sound as it did not speak anything about the rights of the future baby (if at all the baby were to be born) and the case is now pending. It is also important to note here that the husband does not stop her from having a second baby but he was just not willing to donate the sperm for the IVF process.

III. ANALYSING THE REPRODUCTIVE RIGHTS OF MEN IN THE LIGHT OF THIS CASE – KGP VS. PKP

This analysis is an attempt to figure out the reproductive rights of men and to show why the case needs to be decided in favour of the husband.

1.) Given the facts of the case, it could be seen that both the husband and the wife are fighting over each other's right to reproduction. The wife seeks to exercise her right to reproduction by desiring to have a second child through her lawfully wedded husband. While the husband refuses to donate the sperm for IVF. This case needs to be decided cautiously as it does not just involve the rights of two individuals but it is also about the right of the boy (first child) and the second child if the child were to be born.

2.) Our Constitution does not promote discrimination of one gender over the other.⁶ It is well established that women have control over their body. She has the right to procreate or to refuse to participate in sexual act.⁷ But what about men? Is it something that needs to be established or something that was already established? Given that women have the Right to reproduction and control over her body, so should men. But if the husband is forced to donate sperm for the wife to have a second child, then it will be forcing the husband to submit to the

⁶ Article 14, 15, 16 of Indian Constitution, 1950

⁷ Suchitra Srivastava vs Chandigarh Administration (AIR 2010 SC 2)

wishes of his wife which is equivalent to forcing him to have sexual intercourse with wife without his consent. That would be a clear infringement of the husband's reproductive rights. Just how women cannot be subjected to the whims and fancies of men, men should not also be subjected to whims and fancies of women. Only then, there will be gender equality.

3.) Now that both the husband and the wife have the right to reproduction, the question that needs to be decided here is, who's right overweighs whose right in the light of the facts of this case?

4.) If the court would decide the case in favour of the wife, i.e., if the husband was ordered to donate his sperm for the IVF then it would be an infringement of the husband's reproductive rights. On the other hand, if the case were to be decided in favour of the husband, i.e., if the wife was denied to conceive, then it would amount to infringement of her right to procreate. But this infringement will not be an absolute denial of the right to reproduction of the wife as she has the opportunity to conceive if she decides to remarry in the future. It shall not be misunderstood here that the wife may be guided to have a child by solemnising another marriage. The point that is emphasised here is that the wife's right to procreate is not absolutely denied as she has another chance and more so her husband does not stop her from exercising her right to reproduction. In this context, the wife's right to reproduction is not put to an end just because her husband refused to donate sperm for the second child. Furthermore, the wife already has the custody of the first child.

5.) The wife also stated that she will not demand maintenance for the second child, which means she will have to bear all the responsibilities of raising the second child with not even financial support from her husband. No wonder single parents do their best in taking care of their children, but the fact that the children will still be deprived of the love and support that comes from the other parent can't be rebutted. The first child is already undergoing that, now bringing another child to the world to suffer the same will be inhumane. Just how adults have right to marry and find a family⁸, children also have the right to family, a family where both the child's mother and father live together and provide love and support to the child. The right of the child also needs to be respected here.

6.) A 3-judges-bench of Supreme Court in *Javed Vs. High Court of Haryana*⁹, emphasized the National Population Policy and the need to popularise family planning programme in India. They are for economic development and social justice including family

⁸ Article 16 of Universal Declaration of Human Rights, 1948 and Article 23 of International Covenant on Civil and Political Rights, 1966.

⁹ AIR 2003 SC 3057

welfare and women and child development. It needs no mention that, India ranks 2nd in the world in terms of population next to China. That is the reason why the government stresses on family planning. Taking this and the present case into consideration, it will be wise to decide the case in favour of the husband. The wife is not going to be prejudiced and left aloof as she already has a child in her custody. Moreover, her grounds for asking second child is merely imaginary.

7.) To tell more, if all she wants is a support to herself and her first child, she can even go for adoption. She being a well-educated and an independent woman may consider adoption as the best choice. Central Adoption Resource Authority (CARA) that was set up in 1990 is an autonomous and statutory body functioning under the Ministry of Women and Child Development in the Government of India. It functions as a nodal body for the adoption of Indian children. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the 1993 Hague Convention on Inter-country Adoption, ratified by the Government of India in 2003.¹⁰ CARA primarily deals with the adoption of orphaned, abandoned and surrendered children through its associated and recognised adoption agencies.

IV. CONCLUSION AND SUGGESTION

Too often we are busy establishing different rights of woman that we forget to realise that men too have these rights. In the name of anti-discrimination, one gender should not be discriminated over the other. Yes, women are vulnerable and are prone to abuse by men. But that should not be used as a tool to discriminate or control men. Many laws are framed by the government and many old laws are amended now and then to ensure that women are protected. Speaking of women, children are also most vulnerable in society. If children with both parents are vulnerable, think about the children who are abandoned, neglected, orphaned. The government while it is promoting family planning must also promote the importance of adoption. Family is not defined by genes, but it is built and maintained by love. A person adopting a child may not change the world but it does change the world of the child. In India, couples who cannot bear their biological children are still being looked with disdain. Indians praise motherhood but if a woman cannot conceive and bear her child, she is wounded with words and shunned in society. We must understand that “motherhood is a part of womanhood and not the definition of womanhood”. A couple deciding to adopt a child is more to be praised than the couple who bears their biological child. The act of adoption

¹⁰ <http://pib.nic.in/newsite/PrintRelease.aspx?relid=94192>

would be the most selfless act. Adoption is always considered as only a last resort when all their medical treatments fail. This needs to change. Rather than spending all their hard-earned money in fertility centres, couples can adopt a child and may use that money to provide a better life and quality education to the child they have adopted. That would redefine not just the life of the child but the entire nation itself.
