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Reproductive Justice and Access to Assisted Reproductive Technologies: A Comparative Constitutional Analysis

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Abstract:

The concept of reproductive justice has undergone a profound transformation from a narrow discourse centred upon reproductive autonomy to a comprehensive human rights framework encompassing equality, dignity, privacy, health, and substantive access to reproductive healthcare. Advances in Assisted Reproductive Technologies (ART), including in vitro fertilisation (IVF), gamete donation, embryo cryopreservation, surrogacy, mitochondrial replacement therapy, and preimplantation genetic testing, have significantly expanded the possibilities of parenthood. Simultaneously, these developments have generated complex constitutional and ethical questions concerning bodily autonomy, reproductive liberty, equality before law, discrimination, commercialization of reproduction, parentage, and children's rights. Constitutional democracies have responded to these challenges through divergent legal approaches shaped by their respective constitutional cultures and human rights traditions.

This paper undertakes a comparative constitutional analysis of reproductive justice and access to Assisted Reproductive Technologies by examining the constitutional frameworks of India, the United States, the United Kingdom, Canada, South Africa, Germany, and the jurisprudence of the European Court of Human Rights. It critically analyses the constitutional guarantees relating to privacy, dignity, equality, non-discrimination, reproductive autonomy, and the right to health while evaluating the legislative responses governing ART and surrogacy.

Special emphasis is placed upon India's evolving constitutional jurisprudence following *Justice K.S. Puttaswamy v. Union of India*, the enactment of the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021. The paper argues that although India has taken significant legislative steps to regulate reproductive technologies, several statutory restrictions remain constitutionally vulnerable for disproportionately limiting access by unmarried persons, LGBTQIA+ individuals, and certain categories of intending parents.

Through doctrinal and comparative analysis, this paper proposes a rights-oriented constitutional framework that harmonises reproductive autonomy with legitimate state interests in protecting women, children, and ethical medical practices. It concludes that reproductive justice should be recognised not merely as an extension of reproductive rights but as an indispensable component of constitutional democracy grounded in dignity, equality, and substantive freedom.

Keywords: Reproductive Justice, Assisted Reproductive Technology, Constitutional Law, Right to Privacy, Reproductive Autonomy, Equality, Surrogacy, IVF, Human Rights, Comparative Constitutionalism.

Introduction

The rapid evolution of biomedical science has fundamentally transformed the understanding of human reproduction. The birth of Louise Brown in 1978 through **in vitro fertilisation (IVF)** marked a revolutionary moment in medical history, demonstrating that infertility was no longer an insurmountable biological limitation.[1] Since then, technological advancements including intracytoplasmic sperm injection (ICSI), embryo cryopreservation, gamete donation, mitochondrial replacement therapy, preimplantation genetic testing, artificial

"[1] Robert G. Edwards & Patrick Steptoe, *A Matter of Life: The Story of a Medical Breakthrough* (Hutchinson, London, 1980).

insemination, and gestational surrogacy have dramatically expanded reproductive possibilities for millions of individuals worldwide.

However, technological innovation has simultaneously generated difficult constitutional, ethical, and legal questions. The ability to create, preserve, manipulate, donate, and implant embryos raises fundamental issues regarding the nature of reproductive liberty, parental rights, bodily autonomy, equality, and state regulation. Questions concerning who may access Assisted Reproductive Technologies (ART), under what conditions, and subject to which constitutional limitations have emerged as central concerns in contemporary constitutional democracies.

Traditional legal discourse largely conceived reproductive rights as a woman's negative liberty against state interference, primarily focusing upon contraception and abortion. Contemporary constitutional scholarship, however, increasingly recognises **reproductive justice** as a broader framework encompassing not only the freedom to avoid reproduction but equally the positive right to reproduce with dignity, equality, and meaningful access to medical technologies.[2]

The reproductive justice framework, originally developed by Black feminist scholars in the United States during the 1990s, rejects the narrow conception of reproductive rights as merely individual choice.[3] Instead, it emphasises structural inequalities arising from poverty, race, disability, gender identity, marital status, sexual orientation, and socio-economic exclusion that often prevent individuals from exercising genuine reproductive autonomy.

Within constitutional jurisprudence, reproductive justice intersects with multiple fundamental rights including equality, dignity, privacy, health, family life, and decisional autonomy. Modern constitutions increasingly acknowledge that reproductive decisions form an integral aspect of personal liberty and human dignity. Nevertheless, constitutional systems differ significantly regarding the extent to which they recognise positive obligations upon the State to facilitate access to Assisted Reproductive Technologies.

India presents a particularly compelling constitutional case study. Historically, judicial interpretation under Article 21 of the Constitution focused predominantly upon expanding the right to life and personal liberty through procedural due process. Following the landmark decision in *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court explicitly recognised privacy as a constitutionally protected fundamental right encompassing decisional autonomy over intimate personal choices, including reproductive decisions.[4] Subsequent decisions have further strengthened constitutional protection for reproductive autonomy while simultaneously acknowledging legitimate state interests in regulating emerging reproductive technologies.

Parliament's enactment of the **Assisted Reproductive Technology (Regulation) Act, 2021** and the **Surrogacy (Regulation) Act, 2021** represents India's first comprehensive legislative attempt to regulate reproductive medicine. While these statutes aim to prevent exploitation, commercialisation, and unethical medical practices, they have attracted significant constitutional criticism for excluding unmarried couples, LGBTQIA+ persons, foreign nationals, and several other categories from accessing reproductive services.[5] These restrictions invite constitutional scrutiny under Articles 14, 15, 19, and 21 of the Constitution.

Comparative constitutional jurisprudence reveals no uniform global consensus. The United States historically recognised reproductive autonomy under substantive due process jurisprudence before the Supreme Court fundamentally altered its approach in *Dobbs v. Jackson Women's Health Organization*.[6] Canada has adopted a more autonomy-centred constitutional framework under the Canadian Charter of Rights and Freedoms, whereas Germany accords greater constitutional weight to human dignity and protection of embryonic life. South Africa's

[2] Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* (University of California Press, Berkeley, 2017).
[3] Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (Vintage Books, New York, 1997).
[4] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.
[5] Assisted Reproductive Technology (Regulation) Act, 2021 (Act No. 42 of 2021); Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).
[6] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

transformative Constitution emphasises equality, dignity, reproductive healthcare, and socio-economic justice, while the European Court of Human Rights has developed a nuanced proportionality analysis balancing reproductive autonomy against legitimate governmental interests.[7]

The constitutional regulation of Assisted Reproductive Technologies therefore represents one of the most dynamic intersections between medical science and constitutional law. It requires courts to reconcile competing constitutional values including liberty, equality, dignity, morality, public health, protection against exploitation, and children's welfare.

This paper argues that reproductive justice should be understood as a constitutional guarantee extending beyond formal reproductive choice to encompass substantive equality in accessing reproductive technologies. Constitutional protection should therefore not merely restrain arbitrary state interference but also impose positive obligations upon governments to ensure equitable access to scientifically safe reproductive healthcare consistent with constitutional guarantees of dignity, equality, and privacy.

Research Objectives

The principal objectives of this research are:

1. To examine the constitutional evolution of reproductive justice in contemporary constitutional democracies.

2. To analyse the constitutional dimensions of Assisted Reproductive Technologies within international human rights law.

3. To undertake a comparative constitutional study of India, the United States, the United Kingdom, Canada, Germany, South Africa, and the European Court of Human Rights.

4. To critically evaluate the constitutional validity of the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021.

5. To identify constitutional challenges concerning equality, privacy, dignity, reproductive autonomy, and access to reproductive healthcare.

6. To propose constitutional reforms consistent with international human rights standards and comparative constitutional jurisprudence.

Research Methodology

This study adopts a **doctrinal and comparative constitutional methodology**. Primary sources include constitutional provisions, statutes, judicial decisions, international treaties, parliamentary debates, law commission reports, and governmental policy documents. Secondary sources include peer-reviewed journal articles, scholarly monographs, comparative constitutional literature, reports of international organisations, and academic commentaries on reproductive rights and reproductive technologies.

The comparative analysis employs a functional constitutional approach, examining how different constitutional systems reconcile reproductive autonomy with legitimate governmental interests. Rather than merely comparing statutory frameworks, the paper analyses underlying constitutional values, interpretative methodologies, and judicial reasoning across jurisdictions.

Conceptualising Reproductive Justice

The expression **"reproductive justice"** represents one of the most significant conceptual developments in contemporary constitutional and human rights discourse. Unlike traditional reproductive rights, which primarily focus upon the negative liberty of individuals against governmental interference, reproductive justice encompasses broader questions of social justice, equality, structural discrimination, and substantive access to reproductive healthcare.

[7] *Evans v. United Kingdom*, App. No. 6339/05, European Court of Human Rights, Judgment of 10 April 2007.

The concept was first articulated by African-American feminist activists in 1994, who criticised conventional reproductive rights discourse for privileging formal legal choice while ignoring socio-economic realities that prevent many women from exercising meaningful reproductive autonomy.[8] The reproductive justice movement argued that legal recognition of reproductive rights remains illusory unless individuals possess practical access to healthcare, education, financial resources, and freedom from discrimination.

Professor Dorothy Roberts defines reproductive justice as encompassing three interrelated rights:

- the right to have children;
- the right not to have children; and
- the right to raise children in safe, healthy, and dignified environments.[9]

This tripartite framework significantly broadens constitutional analysis by recognising that reproductive liberty extends beyond abortion jurisprudence to include infertility treatment, assisted reproduction, adoption, surrogacy, prenatal healthcare, maternal health, and family integrity.

Contemporary constitutional scholarship increasingly regards reproductive justice as inseparable from constitutional guarantees of equality and human dignity. Decisions concerning reproduction directly affect an individual's identity, bodily integrity, family life, psychological well-being, and participation in society. Consequently, constitutional adjudication concerning reproductive technologies cannot be confined merely to questions of medical regulation but must address broader constitutional commitments to substantive equality and human flourishing.

The emergence of Assisted Reproductive Technologies has further expanded the scope of reproductive justice by creating new possibilities for individuals who were previously excluded from biological parenthood due to infertility, medical conditions, sexual orientation, gender identity, or age. At the same time, these technologies expose new forms of inequality arising from economic disparities, restrictive legislation, and discriminatory eligibility criteria.

Constitutional Foundations of Reproductive Justice

The constitutionalization of reproductive justice represents one of the most significant developments in contemporary human rights jurisprudence. While earlier constitutional adjudication largely conceived reproductive rights as negative liberties restraining governmental interference, modern constitutional courts increasingly recognize reproductive autonomy as a multidimensional right encompassing dignity, equality, privacy, bodily integrity, health, and family life. The constitutional discourse has consequently shifted from merely protecting individuals against coercive reproductive policies to affirmatively safeguarding meaningful access to reproductive healthcare and Assisted Reproductive Technologies (ART).

Constitutional protection of reproductive justice derives from the broader principle that decisions concerning procreation constitute among the most intimate and personal choices an individual can make. These decisions profoundly influence personal identity, familial relationships, psychological well-being, and participation in social life. Accordingly, restrictions upon reproductive decision-making must withstand rigorous constitutional scrutiny and satisfy the principles of legality, necessity, proportionality, and non-arbitrariness.[10]

Although constitutional texts seldom explicitly recognize a "right to reproduce through ART," courts across several jurisdictions have interpreted guarantees relating to life, liberty, equality, dignity, privacy, and family life as encompassing reproductive autonomy. The constitutional legitimacy of ART regulation therefore depends not merely upon legislative competence but also upon its compatibility with fundamental rights.

[8] Loretta J. Ross, "Understanding Reproductive Justice", *Trust Black Women Partnership* (2006).
[9] Dorothy Roberts, "Reproductive Justice, Not Just Rights", 117 *Dissent* 79 (2015).
[10] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A. Knopf, New York, 1993).

Reproductive Justice in International Human Rights Law

International human rights law provides the normative foundation for contemporary constitutional approaches to reproductive justice. Although no universal treaty expressly guarantees access to Assisted Reproductive Technologies, multiple international instruments collectively establish a framework protecting reproductive autonomy, bodily integrity, equality, health, and family life.

Universal Declaration of Human Rights (UDHR), 1948

The Universal Declaration of Human Rights, while non-binding, constitutes the foundational document of modern international human rights law.

Article 1 proclaims that all human beings are born free and equal in dignity and rights.[11] This principle of inherent dignity underlies contemporary constitutional recognition of reproductive autonomy.

Article 3 guarantees the right to life, liberty, and security of person, while Article 12 protects individuals against arbitrary interference with privacy and family life. Article 16 further recognizes that men and women have the right to marry and found a family.

Although drafted decades before the emergence of ART, these provisions have been interpreted progressively to encompass reproductive decision-making and access to infertility treatment.

International Covenant on Civil and Political Rights (ICCPR), 1966

The ICCPR reinforces constitutional protection of reproductive autonomy through several provisions. Article 17 protects privacy against arbitrary or unlawful interference. Article 23 recognizes the family as the natural and fundamental unit of society entitled to protection. The Human Rights Committee has repeatedly emphasized that reproductive decisions constitute private matters falling within Article 17. Consequently, governmental restrictions affecting reproductive autonomy must satisfy the principles of legality, proportionality, and necessity.[12] The Committee has also clarified that discriminatory barriers preventing individuals from exercising reproductive rights may violate Articles 2, 17, and 26 of the Covenant.

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

Unlike the ICCPR, the ICESCR adopts a positive rights framework. Article 12 recognizes the right of every person to enjoy the highest attainable standard of physical and mental health. General Comment No. 22 of the Committee on Economic, Social and Cultural Rights significantly expanded this guarantee by recognizing sexual and reproductive health as an essential component of the right to health.[13] The Committee expressly observed that States must eliminate barriers restricting access to reproductive healthcare, infertility treatment, reproductive information, and scientifically appropriate medical services. Although resource constraints may justify gradual implementation, States are expected to avoid discriminatory exclusion from reproductive healthcare.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

CEDAW constitutes the principal international treaty concerning women's reproductive rights. Article 12 obligates States to eliminate discrimination in healthcare. Article 16 guarantees equal rights relating to marriage and family planning. General Recommendation No. 24 further requires governments to ensure equitable access to reproductive healthcare services, including infertility treatment.[14] The CEDAW Committee has consistently emphasized that reproductive autonomy forms an indispensable component of women's equality and human dignity. Importantly, the Committee discourages reproductive policies founded upon stereotypes concerning marital status, disability, or gender identity.

[11] Universal Declaration of Human Rights, 1948, arts. 1, 3, 12 & 16.
[12] Human Rights Committee, *General Comment No. 28: Equality of Rights Between Men and Women*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).
[13] Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12)*, U.N. Doc. E/C.12/GC/22 (2016).
[14] CEDAW Committee, *General Recommendation No. 24: Women and Health*, U.N. Doc. A/54/38/Rev.1 (1999).

Convention on the Rights of Persons with Disabilities (CRPD), 2006

Historically, persons with disabilities experienced forced sterilization, involuntary contraception, and systematic denial of reproductive rights. The CRPD fundamentally altered this approach. Article 23 expressly recognizes the right of persons with disabilities to found families and retain fertility on an equal basis with others. Article 25 obligates States to provide reproductive healthcare without discrimination.[15] Consequently, blanket statutory prohibitions excluding persons with disabilities from ART may be constitutionally vulnerable under equality jurisprudence.

Convention on the Rights of the Child (CRC), 1989

Although the CRC primarily protects children rather than intending parents, it assumes increasing significance in ART jurisprudence. Articles 3, 7, and 8 require governments to prioritize the best interests of the child while preserving identity and family relationships. Consequently, constitutional adjudication concerning donor anonymity, surrogacy, embryo donation, and parentage frequently balances reproductive autonomy against children's rights to identity and welfare.[16]

UNESCO Universal Declaration on the Human Genome and Human Rights

Rapid developments in reproductive genetics prompted UNESCO to adopt ethical principles governing human genetic technologies.

The Declaration emphasizes:

- respect for human dignity;
- prohibition of reproductive discrimination;
- informed consent;
- protection against commercialization of genetic material;
- ethical regulation of reproductive biotechnology.

Although not legally binding, UNESCO principles significantly influence constitutional interpretation concerning embryo research and reproductive genetics.[17]

Reproductive Justice under the Constitution of India

The Constitution of India does not expressly recognize reproductive rights. Nevertheless, judicial interpretation has progressively transformed Articles 14, 15, 19, and 21 into a robust constitutional framework protecting reproductive autonomy.

The Supreme Court has repeatedly emphasized that constitutional interpretation must remain dynamic and responsive to evolving social realities and scientific developments. Reproductive technologies therefore require constitutional analysis consistent with dignity, liberty, equality, and substantive justice.

Article 14: Equality Before Law

Article 14 prohibits arbitrary state action and mandates equal protection of laws. The Supreme Court has consistently held that legislation creating unreasonable classifications or arbitrary exclusions violates Article 14.[18]

Restrictions under the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 limiting access to specified categories of intending parents have consequently generated constitutional debate regarding discriminatory classification.

[15] Convention on the Rights of Persons with Disabilities, 2006, arts. 23 & 25.
[16] Convention on the Rights of the Child, 1989, arts. 3, 7 & 8.
[17] UNESCO Universal Declaration on the Human Genome and Human Rights, 1997.
[18] *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

Excluding unmarried couples, LGBTQIA+ persons, and several other categories requires justification based upon constitutionally permissible objectives rather than moral preferences. The doctrine of manifest arbitrariness, reaffirmed in *Shayara Bano v. Union of India*, provides an additional constitutional standard for evaluating reproductive legislation.[19]

Article 15: Non-Discrimination

Article 15 prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. Contemporary constitutional interpretation increasingly recognizes that discrimination based upon gender identity, sexual orientation, marital status, or reproductive capacity may indirectly violate Article 15.

Following *Navtej Singh Johar v. Union of India* and *NALSA v. Union of India*, constitutional equality extends beyond formal classifications and encompasses substantive equality for marginalized communities.[20] Consequently, reproductive legislation denying ART solely because an individual belongs to a sexual minority may invite constitutional scrutiny.

Article 19: Personal Freedom

Although reproductive autonomy primarily falls within Article 21, Article 19 also contributes indirectly. Decisions concerning marriage, family formation, medical treatment, movement for reproductive services, and professional practice by fertility specialists engage freedoms protected under Article 19(1). Restrictions upon fertility clinics or reproductive practitioners must therefore satisfy the test of reasonable restrictions under Article 19(6).

Article 21: Right to Life and Personal Liberty

Article 21 constitutes the constitutional foundation of reproductive justice in India. Beginning with *Maneka Gandhi v. Union of India*, the Supreme Court transformed Article 21 into a repository of substantive due process protecting dignity, autonomy, privacy, and personal liberty.[21]

Subsequent constitutional jurisprudence recognized that personal liberty includes intimate decisions concerning marriage, family, sexuality, reproduction, and bodily integrity. The constitutional meaning of life extends beyond mere animal existence and includes the right to live with dignity. Consequently, reproductive decision-making forms an integral aspect of constitutional liberty.

Evolution of Judicial Recognition of Reproductive Rights in India

The constitutional evolution of reproductive justice in India reflects a gradual expansion from procedural liberty toward substantive autonomy.

Initially, judicial decisions concerning reproductive issues largely addressed sterilization, abortion, maternal healthcare, and family planning.

However, constitutional jurisprudence increasingly recognizes that reproductive liberty encompasses positive dimensions, including access to medically appropriate reproductive technologies.

This evolution is particularly visible in decisions such as *Suchita Srivastava*, *Puttaswamy*, *Navtej Singh Johar*, *NALSA*, *Joseph Shine*, and **X v. Principal Secretary, Health & Family Welfare Department**, where the Supreme Court repeatedly emphasized constitutional morality over majoritarian social morality.

These judgments collectively establish that reproductive autonomy derives from constitutional dignity rather than legislative grace.

[19] *Shayara Bano v. Union of India*, (2017) 9 SCC 1.
[20] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.
[21] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

Legislative Regulation of Assisted Reproductive Technologies in India

India remained one of the world's leading destinations for assisted reproductive services for nearly two decades due to comparatively affordable medical infrastructure and the absence of a comprehensive statutory framework governing infertility treatment and surrogacy. While this regulatory vacuum encouraged innovation in reproductive medicine, it simultaneously resulted in inconsistent clinical practices, commercial exploitation of surrogate mothers, ambiguity regarding legal parentage, and the absence of effective oversight over fertility clinics. In response, Parliament enacted the **Assisted Reproductive Technology (Regulation) Act, 2021** and the **Surrogacy (Regulation) Act, 2021**, representing India's first comprehensive legislative attempt to regulate reproductive technologies and balance individual reproductive autonomy with ethical and public policy considerations.[22]

The Assisted Reproductive Technology (Regulation) Act, 2021 seeks to establish a transparent and accountable regulatory mechanism governing fertility clinics and banks engaged in ART procedures. The Act mandates compulsory registration of clinics, prescribes qualifications for medical practitioners, regulates procurement, storage and use of gametes and embryos, ensures informed consent of donors and intending parents, and creates National and State ART Boards for supervision and policy implementation. By imposing statutory obligations upon fertility institutions, the legislation attempts to safeguard patients against fraudulent practices and improve professional accountability within reproductive medicine.[23]

Although the regulatory framework has been widely appreciated for addressing long-standing deficiencies, several provisions have generated constitutional controversy. The statutory scheme imposes restrictive eligibility criteria regarding access to reproductive technologies and creates differential treatment among intending parents. Critics argue that such restrictions disproportionately affect unmarried individuals, same-sex couples and other non-traditional families despite the Supreme Court's consistent recognition that constitutional rights cannot be denied merely because an individual's family structure differs from conventional social expectations. Since reproductive autonomy constitutes an integral aspect of dignity and privacy under Article 21, statutory exclusions must satisfy the constitutional requirements of proportionality and reasonable classification under Articles 14 and 21.[24]

The Surrogacy (Regulation) Act, 2021 introduced an even more restrictive framework by prohibiting commercial surrogacy while permitting only altruistic surrogacy under narrowly defined circumstances. The legislation was enacted primarily to prevent exploitation of economically vulnerable women, eliminate commercialization of childbirth, and ensure protection of children born through surrogacy. Parliament considered that the absence of regulation had transformed surrogacy into an unregulated commercial industry where financial necessity frequently compelled women to undertake repeated pregnancies for monetary consideration.[25]

While the legislative objective of preventing exploitation undoubtedly constitutes a legitimate state interest, constitutional concerns arise from the restrictive eligibility conditions prescribed under the Act. The legislation substantially limits the categories of intending parents who may avail surrogacy services, thereby excluding numerous individuals who may otherwise possess the medical or social need for assisted reproduction. The constitutional validity of such exclusions requires examination through the proportionality doctrine developed in *Justice K.S. Puttaswamy v. Union of India*, which mandates that restrictions upon fundamental rights must bear a rational nexus with legitimate governmental objectives and must impair constitutional freedoms only to the minimum extent necessary.[26]

The constitutional debate surrounding reproductive legislation illustrates the tension between two competing constitutional values. On one hand lies the State's obligation to prevent exploitation, trafficking and unethical commercialization; on the other stands the individual's constitutionally protected autonomy to make intimate reproductive decisions. Constitutional adjudication therefore requires courts to balance reproductive liberty with

[22] Assisted Reproductive Technology (Regulation) Act, 2021 (Act No. 42 of 2021).
[23] Id., Chapters III–VI.
[24] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.
[25] Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).
[26] *Modern Dental College and Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

legitimate governmental interests without allowing paternalistic assumptions or prevailing social morality to determine constitutional rights.

Judicial intervention has played a decisive role in shaping India's reproductive jurisprudence even before legislative regulation. In **Baby Manji Yamada v. Union of India**, the Supreme Court confronted complex questions concerning international surrogacy arrangements and the legal status of a child born through a surrogate mother in India. Although the Court refrained from laying down comprehensive principles governing surrogacy, it acknowledged the growing importance of assisted reproductive technologies and emphasized the necessity of a coherent legal framework capable of protecting both intending parents and children born through ART.[27]

Similarly, the Gujarat High Court in **Jan Balaz v. Anand Municipality** addressed issues concerning citizenship and legal parentage of children born through gestational surrogacy. The Court recognised the legal complexities created by cross-border reproductive arrangements and highlighted the urgent requirement for legislative regulation governing parentage, nationality and the rights of surrogate-born children.[28] These decisions significantly influenced subsequent legislative developments culminating in the enactment of the 2021 statutes.

The constitutional evolution of reproductive autonomy was substantially strengthened by **Suchita Srivastava v. Chandigarh Administration**, wherein the Supreme Court unequivocally held that reproductive choice forms an inseparable component of personal liberty under Article 21. Although the case concerned termination of pregnancy, the Court's reasoning possesses broader constitutional implications by recognizing that decisions relating to procreation, contraception and motherhood constitute deeply personal choices protected by constitutional liberty and dignity.[29]

The subsequent decision of the Supreme Court in **X v. Principal Secretary, Health and Family Welfare Department** further expanded reproductive constitutionalism by holding that reproductive autonomy extends equally to unmarried women and that constitutional protection cannot depend upon marital status. The Court emphasized that the Constitution protects decisional autonomy rather than socially approved models of family life. This reasoning assumes considerable significance while examining statutory restrictions limiting access to reproductive technologies based upon marital status or other personal characteristics.[30]

The Court's decision in **Devika Biswas v. Union of India** likewise affirmed that reproductive health constitutes an essential aspect of Article 21 and imposed positive obligations upon the State to ensure safe reproductive healthcare services while respecting bodily integrity and informed consent.[31] Collectively, these decisions indicate that reproductive justice under the Constitution encompasses not merely freedom from coercive state action but also affirmative protection of reproductive dignity.

10. Comparative Constitutional Analysis

Comparative constitutional jurisprudence demonstrates that constitutional democracies have adopted diverse approaches towards regulating assisted reproductive technologies while recognizing that reproductive autonomy forms an important dimension of personal liberty.

In the United States, reproductive rights were historically protected under substantive due process jurisprudence beginning with *Griswold v. Connecticut*, *Roe v. Wade* and *Planned Parenthood v. Casey*. These decisions recognised privacy and decisional autonomy concerning reproductive choices as fundamental constitutional liberties. However, the Supreme Court's decision in **Dobbs v. Jackson Women's Health Organization** fundamentally altered American constitutional law by overruling *Roe* and holding that abortion rights are not constitutionally guaranteed under the Fourteenth Amendment. Although *Dobbs* principally concerns abortion, its reasoning has generated wider academic debate regarding constitutional protection for reproductive autonomy

[27] *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.
[28] *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.
[29] *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.
[30] *X v. Principal Secretary, Health and Family Welfare Department*, (2022) 10 SCC 1.
[31] *Devika Biswas v. Union of India*, (2016) 10 SCC 726.

and assisted reproductive technologies because the judgment significantly narrows substantive due process analysis in matters involving personal reproductive decisions.[32]

The constitutional position within the United Kingdom differs substantially because Parliament retains legislative supremacy while the Human Rights Act, 1998 incorporates the European Convention on Human Rights into domestic law. Fertility treatment is comprehensively regulated through the Human Fertilisation and Embryology Act, 1990, which establishes one of the world's most sophisticated regulatory frameworks governing embryo research, IVF, gamete donation and parentage. British law attempts to balance reproductive freedom with ethical oversight through independent regulatory authorities rather than constitutional adjudication alone.[33]

The jurisprudence of the European Court of Human Rights has significantly influenced constitutional discourse concerning reproductive technologies. In **Evans v. United Kingdom**, the Court held that disputes involving stored embryos engaged Article 8 of the European Convention protecting private and family life, while simultaneously recognizing a wide margin of appreciation permitting States to regulate sensitive bioethical issues.[34] Likewise, **Dickson v. United Kingdom** held that denial of fertility treatment to prisoners interfered with their right to family life and required careful proportionality review.[35] In **Costa and Pavan v. Italy**, the Court concluded that restrictions preventing access to pre-implantation genetic diagnosis violated Article 8 because the legislative framework irrationally permitted abortion while prohibiting earlier genetic screening capable of preventing hereditary diseases.[36]

The Court further expanded reproductive jurisprudence through **Mennesson v. France**, where refusal to recognise legal parentage arising from foreign surrogacy arrangements was held to violate the child's right to private life under Article 8.[37] Although States retain discretion concerning surrogacy regulation, children's identity and legal status cannot be disproportionately prejudiced by legislative prohibitions.

Canada adopts a distinctly autonomy-oriented constitutional framework. The Canadian Charter of Rights and Freedoms protects liberty, security of the person and equality under Sections 7 and 15. Canadian courts generally interpret reproductive decision-making through the principles of personal autonomy, bodily integrity and substantive equality while simultaneously permitting proportionate regulation necessary to protect public health and ethical medical practice.[38]

Germany adopts a comparatively restrictive constitutional approach founded upon the constitutional guarantee of human dignity under Article 1 of the Basic Law. German constitutional jurisprudence accords substantial protection to embryonic life and consequently imposes stricter statutory regulation upon embryo research and reproductive technologies than many liberal constitutional democracies. Nevertheless, individual dignity remains central to constitutional interpretation, ensuring that reproductive legislation cannot arbitrarily interfere with personal autonomy.[39]

South Africa represents perhaps the strongest constitutional model of reproductive justice among contemporary constitutional democracies. The Constitution expressly guarantees equality, dignity, privacy and access to healthcare services. Section 27 imposes positive obligations upon the State to progressively realise access to healthcare, while the Constitutional Court has consistently interpreted socio-economic rights as enforceable constitutional guarantees. This transformative constitutional framework recognises reproductive healthcare as part

[32] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[33] Human Fertilisation and Embryology Act 1990 (UK).
[34] *Evans v. United Kingdom*, App. No. 6339/05, ECtHR, Judgment dated 10 April 2007.
[35] *Dickson v. United Kingdom*, App. No. 44362/04, ECtHR, Judgment dated 4 December 2007.
[36] *Costa and Pavan v. Italy*, App. No. 54270/10, ECtHR, Judgment dated 28 August 2012.
[37] *Mennesson v. France*, App. No. 65192/11, ECtHR, Judgment dated 26 June 2014.
[38] Canadian Charter of Rights and Freedoms, 1982, ss. 7 & 15; *Assisted Human Reproduction Act Reference*, 2010 SCC 61.
[39] German Basic Law (Grundgesetz), arts. 1 & 2; Embryo Protection Act, 1990 (Germany).

of broader social justice and equality, thereby moving beyond the traditional negative-rights model prevalent in earlier constitutional jurisprudence.[40]

A comparative examination of these jurisdictions demonstrates that despite differences in constitutional structures, modern constitutionalism increasingly accepts that reproductive decisions involve fundamental questions of dignity, privacy and equality. The principal divergence lies not in whether reproductive autonomy deserves constitutional protection but rather in determining the extent to which the State may regulate emerging reproductive technologies to safeguard ethical concerns, public health and protection against exploitation. India's constitutional jurisprudence, particularly after *Puttaswamy*, *Navtej Singh Johar* and *X v. Principal Secretary*, appears progressively aligned with international constitutional trends recognising reproductive justice as an essential component of human dignity. Nevertheless, certain statutory exclusions under the ART and Surrogacy Acts remain susceptible to constitutional challenge because they may disproportionately burden specific classes of intending parents without adequately satisfying the rigorous proportionality standard mandated by Articles 14 and 21.

Challenges in Achieving Reproductive Justice through Assisted Reproductive Technologies

Despite significant legislative and judicial developments, the realization of reproductive justice through Assisted Reproductive Technologies (ART) continues to encounter numerous constitutional, ethical, and socio-economic challenges. These challenges transcend the conventional debate surrounding reproductive autonomy and necessitate a nuanced constitutional inquiry into the interplay between individual liberty, equality, public morality, scientific advancement, and State regulation.

One of the foremost constitutional concerns relates to **restricted access to ART**. The ART (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 prescribe eligibility criteria that effectively exclude several categories of individuals, including unmarried couples, same-sex couples, transgender persons, and certain foreign nationals. Such exclusions raise serious constitutional questions under Articles 14, 15, and 21 of the Constitution. The Supreme Court has consistently held that constitutional rights cannot be conditioned upon conformity with traditional social norms or majoritarian conceptions of family. In *Navtej Singh Johar v. Union of India*, the Court observed that constitutional morality must prevail over social morality, and every individual is entitled to equal protection of law irrespective of sexual orientation.[41] Similarly, in *National Legal Services Authority v. Union of India*, the Court recognised the constitutional rights of transgender persons to equality, dignity, and autonomy, thereby reinforcing the principle that reproductive rights cannot be denied on the basis of gender identity.[42]

Economic inequality further complicates the realization of reproductive justice. Although ART has become increasingly sophisticated, the cost of procedures such as in vitro fertilisation, intracytoplasmic sperm injection, embryo freezing, and preimplantation genetic testing remains prohibitively expensive for a substantial segment of the population. The constitutional promise of equality becomes largely illusory if access to reproductive technologies is determined solely by economic capacity. From a reproductive justice perspective, the State's obligation extends beyond regulating fertility clinics to facilitating equitable access to infertility treatment through affordable healthcare policies, insurance coverage, and public reproductive health infrastructure. Such an approach is consistent with Articles 38, 39, 41, and 47 of the Constitution, which obligate the State to promote social justice and improve public health.[43]

Another persistent concern relates to the **commercialization of reproduction**. Prior to the enactment of the Surrogacy (Regulation) Act, India had emerged as one of the largest global centres for commercial surrogacy. While commercial surrogacy generated significant income for economically disadvantaged women, it also raised concerns regarding coercion, exploitation, inadequate healthcare, unequal bargaining power, and the commodification of the female body. The legislative prohibition on commercial surrogacy seeks to eliminate these

[40] Constitution of the Republic of South Africa, 1996, ss. 9, 10, 14 & 27; *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC).
[41] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
[42] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.
[43] Constitution of India, arts. 38, 39, 41 & 47."

abuses; however, critics argue that an absolute prohibition may inadvertently encourage underground surrogacy arrangements and cross-border reproductive tourism. A constitutionally balanced framework may therefore require stringent regulation rather than complete prohibition, ensuring informed consent, fair compensation, comprehensive medical care, and legal protection for surrogate mothers while preventing exploitative practices.

The rapid advancement of reproductive genetics introduces additional constitutional and ethical dilemmas. Technologies such as preimplantation genetic testing, mitochondrial replacement therapy, genome editing, and artificial gamete development possess enormous therapeutic potential but simultaneously raise concerns regarding eugenics, genetic discrimination, designer babies, and human dignity. Constitutional courts are increasingly required to determine the permissible limits of scientific innovation while preserving the fundamental values of equality, dignity, and non-discrimination. The precautionary principle, combined with rigorous ethical oversight, remains essential in regulating emerging reproductive technologies.

Cross-border reproductive arrangements present another complex challenge. Variations in national laws governing surrogacy, donor anonymity, embryo transfer, and legal parentage frequently create conflicts relating to citizenship, nationality, inheritance, and parental responsibility. Judicial decisions such as *Baby Manji Yamada* and *Mennesson v. France* illustrate that children born through international surrogacy arrangements often become unintended victims of conflicting legal regimes. International cooperation and harmonization of reproductive laws are therefore indispensable to protect the rights of intending parents, surrogate mothers, and children alike.

Finally, the absence of comprehensive data protection standards concerning genetic and reproductive information presents a significant constitutional concern. Fertility clinics routinely collect highly sensitive personal information, including genetic profiles, reproductive histories, medical records, and donor information. Following *Justice K.S. Puttaswamy (Retd.) v. Union of India*, informational privacy constitutes an integral aspect of the right to privacy under Article 21. Consequently, reproductive data must receive the highest degree of legal protection through robust confidentiality standards, informed consent mechanisms, and secure data governance.

Recommendations

A rights-based constitutional framework governing Assisted Reproductive Technologies should reconcile reproductive autonomy with legitimate State interests in preventing exploitation and protecting public health. First, legislative provisions restricting access to ART and surrogacy should be revisited to ensure that eligibility is determined by objective medical and ethical criteria rather than marital status, sexual orientation, or gender identity. Such reforms would align domestic law with constitutional guarantees of equality and dignity as well as evolving international human rights standards.

Secondly, Parliament should establish a comprehensive regulatory mechanism governing reproductive genetics, embryo research, artificial intelligence in fertility treatment, and emerging biomedical technologies. Independent ethical review authorities comprising constitutional scholars, medical experts, bioethicists, and representatives of civil society should periodically evaluate scientific developments and recommend appropriate regulatory responses.

Thirdly, infertility treatment should be progressively integrated into the public healthcare system. Insurance coverage for medically necessary ART procedures should be expanded, thereby reducing financial barriers and ensuring substantive equality in access to reproductive healthcare. The constitutional vision of social justice requires that reproductive technologies should not remain the exclusive privilege of economically affluent sections of society.

Fourthly, statutory safeguards protecting surrogate mothers, gamete donors, and children born through ART should be strengthened through standardized counselling, psychological support, informed consent procedures, post-treatment healthcare, and effective grievance redressal mechanisms. Reproductive justice requires equal consideration of the rights and welfare of all stakeholders rather than an exclusive focus on intending parents.

Finally, India should actively participate in international efforts directed towards harmonizing legal principles governing cross-border reproductive arrangements. Uniform standards concerning parentage, citizenship, donor

anonymity, and recognition of foreign reproductive judgments would significantly reduce legal uncertainty while promoting the best interests of children born through ART.

Conclusion

Reproductive justice represents one of the most dynamic and evolving dimensions of contemporary constitutional law. Advances in Assisted Reproductive Technologies have transformed the meaning of parenthood by enabling millions of individuals to overcome infertility and exercise reproductive autonomy. At the same time, these scientific developments have challenged traditional legal doctrines relating to family, parentage, privacy, equality, and human dignity. Constitutional democracies are therefore confronted with the difficult task of balancing individual reproductive liberty against legitimate concerns relating to ethics, commercialization, exploitation, and child welfare.

The comparative constitutional analysis undertaken in this paper demonstrates that although jurisdictions adopt divergent regulatory models, there exists an emerging global consensus that reproductive decisions constitute matters of profound constitutional significance. Judicial decisions across India, Canada, South Africa, the United Kingdom, the United States, and the European Court of Human Rights consistently recognize that reproductive autonomy derives from broader constitutional values of dignity, privacy, liberty, equality, and family life. Differences primarily arise regarding the permissible scope of State regulation rather than the existence of constitutional protection itself.

In the Indian context, constitutional jurisprudence following *Suchita Srivastava*, *Justice K.S. Puttaswamy*, *Navtej Singh Johar*, and *X v. Principal Secretary* reflects a progressive movement towards recognizing reproductive autonomy as an indispensable component of Article 21. The enactment of the Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 constitutes a significant legislative milestone by introducing long-awaited regulation of fertility services and surrogacy. Nevertheless, certain statutory exclusions continue to invite constitutional scrutiny because they may disproportionately restrict access for unmarried persons, LGBTQIA+ individuals, and other marginalized groups without satisfying the proportionality requirements mandated by Articles 14 and 21.

Ultimately, reproductive justice cannot be reduced to a narrow question of medical technology or legislative policy. It is fundamentally a constitutional commitment to ensuring that every individual possesses the substantive freedom to make informed reproductive decisions with dignity, equality, and autonomy. As biomedical science continues to evolve, constitutional law must remain sufficiently flexible to accommodate innovation while steadfastly protecting human rights. A rights-oriented and inclusive constitutional framework, grounded in the principles of equality, privacy, dignity, and social justice, offers the most coherent path towards achieving genuine reproductive justice in the twenty-first century.

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