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Parenthood: Is the law in Nigeria fit for assisted reproductive technology?

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Abstract

This paper examines the legal aspects of parenthood and how it is, or could be, determined in Nigeria given the wide popularity and uptake of assisted reproductive technology (ART). It aims to establish whether the existing national laws can sufficiently protect the interests of the child who is born and of the consumers, with an emphasis on the determination of the status of the parents. It also identifies problems and proposes solutions with regard to the specific issue of establishing legal parenthood following the use of ART, either with or without state regulation. The paper concludes by recommending specific ART legislation that could help solve the problems, and advises Nigerian law-makers to pay attention to statutes from other jurisdictions as a guide.

Introduction

In March 2008, Thomas Beatie published a personal account about being pregnant and carrying a child for his wife and himself (1), While transgender reproduction is nothing new, what distinguished Thomas from the others was that he was reported as being the first legal (and married) man on record to give birth. Born biologically female, Thomas underwent gender transition – by taking male hormones and having a double mastectomy – and was legally re-registered as a male on his birth certificate. Like many transgender men, he did not undergo genital re-assignment surgery or have his female reproductive capacity removed. As his wife, Nancy, was unable to have children due to a hysterectomy, when they decided to start a family, Thomas "used [his] female reproductive organs to become a father". Thomas and Nancy have since had two more children.

While Thomas identifies himself as his children's father and Nancy as their mother, the question of whether they are a father and mother in the legal sense is much more complex, given that motherhood is traditionally grounded in gestation and fatherhood either in the genetic connection and/or the man's relationship with the child's mother. Although the details of precisely how Thomas and Nancy were recorded as legal parents on their children's birth certificates in the United States have not been revealed, it may be that they were registered as "parent" and "parent", rather than "mother" and "father". Such a scenario would have presented serious legal challenges in Nigeria. This example of procreating by assisted reproductive technology (ART) shows that our ideas of law and parenthood are not as straightforward as we might intuitively believe. While the law in its current form in Nigeria may "make sense" for now, it does not grapple with the fundamental question of what makes someone a parent and why, especially as it relates to reproductive technologies.

In resolving disputes relating to ART and parenthood, courts in Nigeria rely on laws and statutes drafted before any of the new procreative techniques developed, which can be problematic for the litigants and the judicial system. In unforeseen circumstances, courts are likely to decide whether and how to interpret and apply laws that are fit for the purpose. Judicial reasoning about new issues often proceeds

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by analogy; however, it is critical for policy-makers to consider an underlying policy and possible regulation to fill this gap in the law.

ART encompasses a range of techniques, with varying complexities, designed primarily to aid couples who are unable to conceive without medical assistance (2). These techniques comprise medical and scientific manipulations of human gametes and embryos in order to produce a term pregnancy (2). Any procedure or method designed to enhance fertility or "compensate for infertility" outside the traditional means of procreation (outside the human body) can be labelled ART (3). This victory of modern medicine provides relief for couples who are not only childless, but face increasing cultural and social barriers to adoption (4). Besides giving couples an opportunity to have a child that may or may not be genetically connected to them, these technologies also obviate the need for marriage, intercourse, or even pregnancy to term. Further, the emotional anguish associated with reproductive inability(ies), exacerbated by social stigma, may be consigned to reproductive history with these technologies (4).

This paper examines the concept of parenthood, with a focus on how this concept sits within Nigerian jurisprudence. Parenthood is examined with reference to the provisions of the Nigerian constitution, statutes, international treaties operative in Nigeria, as well as indigenous customary law. In relation to how one becomes a parent, in the sense of being the primary bearer of parental rights and/or responsibilities with respect to a particular child, we explore the various approaches to determining parenthood to ascertain which one best suits the sociocultural and socio-legal need of Nigeria. The main focus is on how parenthood following ART is, or could be, determined under Nigerian law.

Infertility and ART in Nigeria

Infertility is one of the major social, cultural and medical issues plaguing the world, and Nigeria is no exception. An estimated 580 million people – 5%–8% of couples – experience infertility at some point in their reproductive life (5). Of this, according to Isawumi, Africa bears the largest burden – 10%–32% of couples in Africa experience infertility. Since the prevalence of infertility in Nigeria is high compared to most other African countries for which data are available (6), there is a large demand for ART services in Nigeria, where the infertility rates vary across ethnic groups. However, the general infertility rate is estimated at 31.1%. About one-third of Nigerian couples having sexual intercourse have difficulty conceiving within the first 12 months (7).

While ART appears to present a solution for infertility, it also throws up debates about women's rights (8), same-sex parenting (9), and cultural and social conflicts (10) regarding who a parent is, and this calls for regulation. Nigeria has no legislation expressly regulating, permitting or prohibiting ART. Many jurisdictions[1] have some form of regulation of ART, which vary in scope and influence, thus making it difficult to resolve competing claims to parenthood that arise in collaborative reproduction. The debates over the use of ART have placed these technologies at the intersection of providing great hope as well as creating serious fears regarding how to relate to these offspring as regards family life, citizenship, succession, etc. ART also raises several ethical and legal issues, especially in a country like Nigeria, where childbearing is an important part of the culture.

ART and parenthood

Nigerian law is unclear in relation to the new technologies deployed by ART as to who a parent is. Section 25(1)(b)[2] of the Nigerian constitution (11), which is the highest law of the land, sees heterosexual relationships as traditional parenthood. However, that is a risky assumption because it would mean that there is no provision for children conceived by non-natural means, ie via ART. This provision may give rise to a problem if there is any controversy concerning the nationality of children born via these technologies, and their right to inheritance and succession.

Social parenthood

Social parenthood involves having the primary responsibility for the care of a child, but it also entails an interlocking relationship between the parent and the child that reflects the values and expectations of their society. A sperm donor is genetically related to the baby that results from the egg he has fertilised, but he is largely exempted from the responsibilities that social parenthood entail. A genetic connection is not an essential requirement for social parenthood as exemplified by adoption. Society expects the parents of adopted children to fulfil the very same obligations toward them that biological parents fulfil. The authors maintain that the key to social parenthood must reside in elements that both adoptive and biological parents can share; these include intentions, actions and emotional or conceptual bonds (12).

Adoption

Adoption is the process by which the legal relationship between a child and his/her natural parents is severed and a legal relationship is established between the child and a third party or parties (13). Under common law, the legal relationship between a child and his/her parents is inalienable, and so common law neither provides for, nor recognises adoption (13). In Nigeria, Section 125 of the Child Rights Act, 2003, makes provision for adoptive parents other than natural parents. Section 141 of the same Act, terminates the rights of the "natural" parents to the child, and transfers the same to the adoptive parents. The frequent use of the term "natural child" in this section emphasises "natural" or biological parenthood in law, and parenthood by adoption is only a corollary. Nonetheless, Nigerian law provides an option for intending parents who have participated in collaborative reproduction, to adopt the resulting children and thereby, have full parental rights to them. However, it is unclear whether this provision can be extended to cover situations and disputes in which the parenthood of commissioning parents through ART is being

contested by genetic or biological parents (who are not willing to relinquish their rights over the child). For instance, if one proceeds according to what can be inferred from the law, when a couple has commissioned a surrogate to bear a child they intend to parent, they must adopt that child if they want to be recognised as its parents. However, if the surrogate decides to keep the child, it would be impossible for them to adopt the child, and this poses a problem.

The definition of "child" in the Nigerian constitution includes "a step-child, a lawfully adopted child, a child born out of wedlock and any child to whom an individual stands in the place of a parent" (11: Fifth Schedule, S.19). It is unclear whether those intending to use ART can invoke this section as a legal basis for parenthood. It is noteworthy that all the forms of parenthood identified are natural and there is no mention of, or allusion to, parenthood via artificial means, whether explicit or implied. This provision does not state which relationship takes precedence over the other, nor does it provide for means of identifying the parent in a situation in which a child has three possible parents. It may be argued that since the section recognises anyone who stands in *loco parentis* to the child, it includes persons who undergo ART or collaborative reproduction. Hence, it is plausible that the Nigerian constitution does not constrain or limit parenthood to biology or genetics, but recognises the existence of social parents. It is possible for commissioning couples of children born via ART who have no genetic or biological ties to the child to claim parenthood status under this section of the constitution.

Further, section 63(1) of the Child Rights Act, 2003 states:

> *In any civil proceedings in which the paternity or maternity of a person falls to be determined by the Court hearing the proceedings, the Court may, on an application by a party to the proceedings, give a direction for—*
>
> *(a) the use of scientific tests, including blood tests and DNA tests, to ascertain whether the tests show that a party to the proceedings is or is not the father or mother of that person.*

In Nigeria, the definition of parenthood has undergone, and is still undergoing, fundamental changes. Thus, the traditional notion of parenthood has been altered drastically and given way to more contemporary notions of parenthood.

Genetic or biological parenthood

Genetic theories ground parenthood in direct derivation, thus placing parenthood in the confines of familial relations (14). A biological parent has been defined as the lawful and natural father or mother of a person (15) or a parent who has conceived (biological mother) or sired (biological father) rather than adopted a child, and whose genes are, therefore, transmitted to the child (16). Others have defined biological parents as those whose sperm and eggs come together to form the embryo that will eventually develop into a child. The concept of "biological parent" may appear straightforward and possibly self-evident. However, modern reproductive technology complicates this traditional mode of deciphering parenthood. A child can have genetic parents, gamete providers (who supply the sperm or egg) and a third gestational parent. Each of these is a type of biological parent, by virtue of the fact that he/she makes a biological contribution to producing the child. Hall (17) defends the genetic/biological approach to parenthood by appealing to the Lockean notion of self-ownership—that since genetic parents own the genetic material from which the child is constituted, they have a prima facie parental claim to the child. This position has been criticised because it subsumes parental relations under property relations, by attempting to derive a claim about parenthood from premises involving claims about ownership.

As noted previously, parenthood was traditionally understood to be largely a natural relation founded upon biological reproduction, and legal status as a parent followed easily from the recognition of that natural fact or, in the case of adoption, from the formal creation of a substitute relation designed to replicate as closely as possible the biological original (18). In traditional societies, parenthood is, and has historically been, the category that answers the question: to which family does this child belong? (18) Traditionally, motherhood is defined biologically and the mother is the woman who delivers the child, while the definition of fatherhood is social and more elusive: the father is usually the husband of the mother (19). Motherhood is earned first through pregnancy and childbirth, and later through nurturing (18). The concept of fatherhood is related to the ownership of children, as men are given father's rights over offspring who come from their sperm (20). Traditionally, the rules governing the assignment of parental status were relatively clear and parenthood rested primarily on the establishment of a presumption of a procreative tie with the child (21).

Intention approach

Another approach to parenthood appeals to intentions as the ground of parenthood (22). This approach favours ART as a means of procreation, arguing that because the individuals concerned "carefully and intentionally orchestrated the procreational act, bringing together all the necessary components with the intention of creating a unique individual whom they intend to raise as their own", they should be regarded as parents (14). For the proponents of this theory, parenthood relies on facts rather than biology; parenthood is fundamentally a moral relationship rather than a biological one (23).

Perhaps the most widespread objection to this approach is that it seems to absolve un-intending procreators from parental obligation. However, many share the view that procreators, intending or not, who voluntarily engaged in sex have a moral responsibility to a resulting child due to their role in causing it to exist (24).

Best interest approach

ART has separated the genetic and biological factor that linked children with their parents. Consequently, it is possible

for there to be genetic, gestational and social parents (10). The need to define them legally is becoming compelling in Nigeria. For instance, the legal position of a child who is born via ART and whose would-be social parents have made no genetic contribution is uncertain (4). Section 1 of the Child Rights Act states that in every action concerning a child the best interest of the child shall be the primary consideration. In other words, in disputes surrounding a child, whether between the birth parents, caregivers and courts or on matters of succession and the like, the courts should assess and make decisions based on the best interest of the child.

The general assumption that the child would do better with his/her biological parents has been criticised on the basis that the notion that children are better off with their biological parents cannot be proven by empirical evidence. This argument is supported using the context of adoption. The "best interest of the child" model is fallible, and should be re-evaluated.

Implications of ART

Succession

Succession involves the transmission of the rights and obligations of deceased persons in respect of their estate to their heirs and successors. It deals primarily with the distribution of a deceased person's estate to his/her heirs (25). Succession may be testate or intestate (25). Where it is testate, the testator has already made a will in which he/she has devised his/her property to those whom he/she wishes to be beneficiaries under his/her will. In intestate succession, the deceased has made no will before his/her death and, therefore, dies intestate. The rules governing testate and intestate succession differ and both circumstances may give rise to problems for children born via ART. It is only after the question of whose child it is has been resolved that the child's right to succession can be determined. The legal status of the child in relation to the estate is closely linked to the person whom the law recognises as the father or mother. In common law, a child born during the subsistence of a valid marriage, and even 10 months after the dissolution of such a marriage, is presumed to have been born to the parties to the marriage, i.e parenthood is defined by genetic and biological links[3]. Section 49 of the Administration of Estates Law (of Lagos state) on succession to real and personal estate in the case of intestacy recognises the issues from a marriage as being entitled to the real and personal property of the deceased. The definition of a child includes an unborn child. The means of conceiving the child, however, is not stated. These laws do not accommodate children conceived outside of traditional biological means. There is no clear legal position as to whether a child from a frozen embryo is capable of inheriting from a parent who is dead.

The practice of ART, especially *in vitro* fertilisation, raises the question of whether children who were fertilised by another man's sperm are entitled to inherit from the estate of their pater (social father), rather than their genitor (biological father), especially in cases in which the putative father died intestate.

Unlike the adopted child, who, for all legal and practical purposes, is treated as the legal child of his adoptive family, the child born as a result of ART is in an insecure position. It is unclear in whose favour any conflict with respect to the parentage of an ART-born child would be resolved in the Nigerian courts, in the absence of standard regulations (4).

Legitimacy

A child is legitimate if born in lawful wedlock. To be legitimate at birth, the parents of the child must be lawfully married either at the time when he/she was conceived or born (13). Artificial insemination by donor (AID) introduces a third party who produces the semen that is used to fertilise the wife's egg. The question then arises as to what the status of a child born through AID is, since it is against the generally accepted definition of legality and it de-emphasises lawful wedlock. It also raises the question of what the status of a child born to an unmarried woman through AID is, and whether such a child can ever be legitimised.

In the context of customary law, an infertile woman procures another woman for her husband to impregnate so that they may have a child through her. Under customary law, the child is the legitimate child of the husband (13). This, however, does not conform with the reality of those married under the Act. This is because the definition in *Hyde v Hyde* (26), which is the locus classicus when it comes to the definition of marriage, regards marriage as being between one man and one woman to the exclusion of all others. Anything done outside of this would be tantamount to adultery. The logical conclusion is that a couple which wants to undergo an ART procedure via a donor must be married under customary law. This, however, is impracticable, as couples do not foresee the possibility of their infertility. Thus, the question as to whether children born via AID are legitimate or illegitimate remains unanswered.

Citizenship

Under the Nigerian Constitution, a child derives his identity from his parents. Section 25(1)(b) of the 1999 Constitution of the Federal Republic of Nigeria (11), provides:

> *The following persons are citizens of Nigeria by birth- namely- every person born in Nigeria after the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria.*

It is unclear what the constitution meant by "parents" in section 25(1)(b). It is uncertain whether "parents" in this context refers to those whose DNA came together to form the embryo or those who nurtured the child and intended to parent the child after its birth. Besides, in the event that there are three potential parents of a child all of whom are of different nationalities, the question will arise as to who the child will trace his nationality to.

In Nigeria, as elsewhere, the determination of legal parenthood is potentially contentious.

In this and the following section we focus on three methods of ART that have generated controversy: gamete donation, in vitro fertilisation (IVF), and commercial surrogacy.

Gamete donation

This involves the donation of gametes by a man or woman who is not intended to be the resulting child's social parent. Insemination by another man is not a new technology per se, but the modern phenomena of sperm banking and anonymous providers have led some to question the morality of AID (27). Some objections have a religious or cultural basis (28). There are also secular objections to gamete donation by both sexes, such as to the practice of paying gamete providers. Thomas Murray criticises "insemination by vendor" on the ground that it inserts the values of the marketplace into family life and thereby threatens to undermine it (29).

Several philosophers have argued that gamete donation is morally dubious because the providers take their parental responsibilities too lightly (30).

In addition, unmarried women and gay couples can use donated sperm and eggs to achieve a successful pregnancy without copulation. However, Section 1 of the Nigerian Same Sex Marriage Prohibition Act of 2013 prohibits marriage and civil union between persons of the same sex and stipulates that benefits of marriage will not accrue to the couple. Further, the Nigerian Matrimonial Causes Act (31) makes no provision for same-sex marriage. Both laws are silent on the issue of the children of same-sex relationships. Since ART has separated the institution of childbearing from the institution of marriage, it allows lesbian/gay couples to exploit the small gap in Nigerian law. Fortunately for the child, but unfortunately for public policy in these circumstances, Section 42 of the 1999 Constitution of the Federal Republic of Nigeria provides that no one may be discriminated against by virtue of his birth, among other things, which implies that a child born to a homosexual couple via ART, like any other child, has the right to have parents at any point in time. Thus, the law must recognise the homosexual couple as his/her parents, especially in a situation in which either of them has donated sperm or ova for the conception of the child and also intend to raise that child.

In vitro fertilisation

IVF involves fertilising ova outside the womb and transferring the resulting embryos into the uterus. The woman whose ova are used is treated with hormones that induce the production of multiple ova, which are harvested with a needle that is inserted through the vaginal wall. Fertilisation may involve incubating the ovum in sperm or injecting a single sperm into the ovum, known as intra-cytoplasmic sperm injection (ICSI). Several embryos are transferred into the uterus after three to five days (32). Since the birth of the first "test-tube baby" in 1978, IVF has become a fairly common procedure for addressing certain forms of infertility (33).

Similar objections to those raised against gamete donation have been raised against IVF. One objection is that it commodifies children and female reproduction. Feminists have developed a critique that is more subtle than this. Sherwin (34) argues that the powerful desire that many people, especially women, have for their own biological children is the product of problematic social arrangements and cultural values. While reproductive technologies like IVF may help some (privileged) women get what they want, they also further entrench the oppressive societal values that create these powerful desires in the first place. This argument is especially powerful in Africa, where infertile women, other than bearing the personal grief and suffering which infertility may cause them, are stigmatised and isolated from the general community (2).

The Catholic Church to which a majority of Eastern Nigeria belongs is also strongly opposed to IVF. According to its adherents, IVF has repercussions on the child's identity and self-esteem in the future. Thus, the Catholic Church does not recognise ART as a lawful form of procreation[4].

Surrogacy

Surrogacy was defined by the Warnock committee (35) as "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth". Contrary to what one may think, surrogacy is not an entirely new concept in Nigeria, as there have been cases of some forms of indigenous surrogacy. Under some customary laws in Nigeria, certain marriages are contracted that may superficially be described as the union of two women. On the surface, such an arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman. However, there is more to these cases than meets the eye. The true position is that in the background, there is a man in whose name, or on whose behalf the marriage is contracted. Sometimes, an infertile married woman, as a means of securing her position in the family, provides her husband with funds for the bride price for a new wife who is expected to bear children in her place. In that case, the marriage is, in fact, contracted in the name of the husband and there is no question of one woman being married to another (13). Where an infertile woman, in an effort to fulfil her obligation to bear children for her husband, "marries" another wife for him, the children born of the other wife are regarded as the legitimate children of the husband (13). In *Meribe v Egwu* (36), the Supreme Court was called upon to pronounce on the validity of a woman-to-woman marriage similar to the one described above. In that case, the land in dispute belonged to one Nwanyiakoli, who died in 1937 without leaving a child behind. She was one of the wives of Chief Egwu, who had pre-deceased her in 1935. The plaintiff, who contended that the land devolved on him under customary law, claimed that because Nwanyiakoli was barren, she married one Nwanyiocha (the plaintiff's mother) for her husband as a wife. The trial court resolved the case in favour of the plaintiff. On appeal, the Supreme Court dismissed the appeal and agreed unanimously on the validity of woman-to-woman marriage.

Thus, it is evident that biology has little or no effect on the concept of parenthood as far as this custom is concerned. It follows that in a situation of conflict in ART-related proceedings concerning parties subject to customary law, the court would lean in favour of the woman who commissioned the "creation" and delivery of the child, as opposed to the gestational mother. However, there is no equivalent of this custom in Yoruba or Hausa customary law and there is no evidence that the children of the surrogates will be on an equal footing with other children when it comes to inheritance and succession to the estate of their putative parents.

Conclusion

It is our recommendation that the Nigerian government pass specific ART legislation with respect to parenthood. For instance, in the state of Victoria, Australia, the Status of Children Act, 1974, Part II, defines who the parents of a child born via ART are. According to that law, when with the consent of her husband, a married woman has undergone artificial insemination using donor sperm, the husband is presumed to be the father of the resulting child and the donor is presumed not to be the father (37:Pt II, S.10C). The law further provides that where the procedure involves an ovum or embryo transfer (whether or not the woman's ovum or the husband's sperm is used), the woman's husband is presumed to be the father; the sperm or egg donor (if any) is presumed not to be a parent of the child (37:Pt II,10C). Also, when a donor ovum is used to allow a married woman to conceive, she is presumed to be the mother (37:Pt II 10D, E). The Victorian law further provides that when donor sperm is used for the artificial insemination of an unmarried woman, or of a married woman without the consent of her husband, the donor "has no rights and incurs no liabilities" in respect of the resulting child, unless he becomes the husband of the child's mother (37:Pt II, 10F). This is the position of several of the state laws in the USA as well (38). The Victorian law, however, does not state who the mother of a child born via surrogacy is. Thus, it is recommended that in a surrogacy agreement in which the commissioning parents own or acquire all the genetic properties, that is, the egg and the sperm, they, and not the surrogate, should be regarded as the legal parents. This is unlike the position of the English Human Fertilization and Embryology Act (39:S 27)

Until such legislation or regulations are enacted, we suggest that the law should honour the contract or agreement or the intention of the parties.

Notes

[1] Such as the United Kingdom, with the *Human Fertilization and Embryology Act, 1990*; the Infertility Treatment Act, 1995, in Victoria, Australia; Canada's Assisted Human Reproduction Act, 2004; the *Human Reproductive Technology Act, 1991 (WA)* of Western Australia, among others

[2] The section provides that a person is only a Nigerian citizen by birth where either of his/her parents/grandparents belongs to any community in Nigeria

[3] This presumption is known as *pater est quem nuptial demonstrant* and was re-enacted in Section 115 of the Matrimonial Causes Act.

[4] In His encyclical letter "On the value and inviolability of human life", Pope John Paul II condemned assisted reproductive technologies, stating: "The various techniques of artificial reproduction, which would seem to be at the service of life and which are frequently used with this intention, actually open the door to new threats against life. Apart from the fact that they are morally unacceptable, since they separate procreation from the fully human context of the conjugal act, these techniques have a high rate of failure."

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Invisible women in reproductive technologies: Critical reflections

PIYALI MITRA

Abstract

The recent spectacular progress in assisted reproductive technologies (ARTs) has resulted in new ethical dilemmas. Though women occupy a central role in the reproductive process, within the ART paradigm, the importance accorded to the embryo commonly surpasses that given to the mother. This commentary questions the increasing tendency to position the embryonic subject in an antagonistic relation with the mother. I examine how the mother's reproductive autonomy is compromised in relation to that of her embryo and argue in favour of doing away with the subject-object dyad between them, particularly in the contexts of surrogacy and abortion. I also engage with the Surrogacy (Regulation) Bill, 2016. A critical discussion of the privacy judgment passed by the Supreme Court of India helps examine how personal autonomy of the body and mind extends to include the reproductive autonomy of women as well.

Introduction

"Putravati Bhava" – May you be blessed with progeny – is traditionally an extremely coveted blessing for a woman. Progeny is highly prized for most and childlessness appears to be a curse for couples. The essence of female autonomy, particularly in male-dominated societies, lies in women's ability to control their own fertility, and reproductive autonomy provides women with a model for personal autonomy. However, the different reproductive technologies that abound in the contemporary world tend to scale women down to secondary positions, or even, at times erase them. The question may arise as to whether the increasing subjectification of the embryo reduces women to the position of an antagonist. In the first part of this commentary I examine whether the alleged "primacy" of the embryo has in any way contributed to the marginalisation/erasure of women.

While discussing the subject-object dichotomy between the embryo and the mother, the commentary moves from the concept of motherhood to a theorisation of maternal subjectivity. It does not deny the potential of childbearing as a meaningful activity but denies that childbearing is a necessary part of women's nature. There are many women who are not able-bodied and lack the capacity to get pregnant and give birth naturally. If motherhood is viewed as synonymous with womanhood, would women who are infertile, homosexual, or not able to get pregnant naturally, not be considered women? They are women as well, though in a developing context such as India, infertility is commonly viewed as some sort of disability (1: p 117). The situation of infertile women in India is aggravated by their being negatively limited in their social and political participation (1: pp 113,117-119). Infertility may result from delayed pregnancy, sexually transmitted infections, or abortions conducted in unhygienic conditions (2: p 165). Advancements in medical science have made it possible for clinics providing assisted reproductive services, ie, the ART clinics, to promote their services as offering a chance to negotiate infertility. India has more than 1000 in-vitro fertilisation (IVF) clinics offering a range of services including surrogacy (3). Despite the debates and the recommended ban on commercial gestational surrogacy, the demand for surrogacy has scarcely waned; and yet sections of society continue to consider it a taboo (4). This commentary examines how reproductive autonomy and privacy get compromised for women in India; it critically reflects on the abortion and surrogacy debates, especially in the light of the recent verdict on privacy passed by the Supreme Court of India on August 24, 2017.

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