



Childwelfare and Parenthood in Artificial Reproduction

Pragnya Parimita Ray ^{1*}, Dr.Shreya Chatterjee ²

¹ PhD Scholar, KIIT School of Law, KIIT Deemed to be University, Odisha, India

² Research Guide, Assistant Professor, KIIT School of Law, KIIT Deemed to be University, Odisha, India

Email: ¹ dimplesamal@gmail.com

Abstract

A mother's desire is always to have a healthy baby and to achieve motherhood without any complications. This curiosity of a "woman" has been brought into reality through the new developed technologies of Assisted Reproductive Technologies (ART) which includes Intra Uterine Insemination, In Vitro Fertilization, Gamete Intra Fallopian Transfer, Tubal Embryo Transfer, Zygote Intra Fallopian Transfer and Gestational Surrogacy and has made her dream come true. It has thus brought the concept of having a "designer baby" fulfilling the imagination of parents by inserting some desired genes into an embryo and bringing a new life to step into the realms of the mother Earth.

Keywords: Surrogacy, Cloning, Altruistic, Commercial, Technology, Bill, Parenthood, Artificial Reproduction.

Theme: Exploring to crack down the controversy involving the original parent of a child born through the method of Artificial Reproduction.

1. Introduction

The natural act of reproduction includes two individuals that is the mother (spouse) and the father (husband). There is no vulnerability in regards to the parenthood of the child right now, uncles aside from in certain circumstances. With the development of technology and its constant use in human reproduction, new gatherings have been brought into the act of multiplication. Upwards of five gatherings can be associated with an act of human reproduction while utilizing the help of technology. They are:

- Sperm Donor: The sperm used in ART can be that of the males partner or can be a from donor.
- Egg Donor: The eggs used in ART can be that of female partner or can be from a donor.
- Surrogate: Surrogate is the gestational mother who carries the child for its full term and delivers the baby for the couples who have hired her.
- Legal Father
- Legal Mother

The parties involved may not be five at all times, it varies according to the requirement of each ART procedure. Peculiar issues which have never heard before are being witnessed by the courts in recent past. In the case of Roman vs Roman, is a divorce case in which the wife request the custody of the frozen embryos but the husband want them to destroy.

Some of the quandaries that arise in ART which can probably lead to bitter legal battle are: infertility clinic directors stealing or misplacing frozen embryos, custody battles between divorcing or separated ex-partner over stored frozen embryos, posthumous reoperation, infertility treatment induced multiple births and related issues, the expanding commercial market in gametes(ova, sperm and pre-embryos), gestational and traditional surrogacy or contractual motherhood arrangement gone away etc.

Some of the common legal issues that arise are:

- Parenthood
- Denial of access to ART
- Disposal and custody of embryos
- Inheritance and Right to know

The *perry-rogers vs. fasano cas* clearly explains the existing scenario on the changing definitions of parenthood. Likewise, the United Nation declaration of Human Rights 1948 recognizes that “ Men and women of full age, without any limitation due to race, nationality or religion have right to marry and found a family but exercising this right has many hurdles when it comes to those couple who are infertile. California health and safety codes section 125315 and Massachusetts general laws 111L are the statutes that are in favour of donation of embryos. Counties are amending their statues to bring in provision regarding the inheritance issue of a posthumous child. The Uniform Parentage (UPA) 1977 of USA is a welcome move towards defining the rights of posthumous child born by using ART. Section 31(4) of the human fertilization and Embryology Act 1990 of UK provides that it is duty of the authorities to provide the necessary genetic information to those children who have come to know that they were born using ART. As against the Indian Scenario where disclosure is allowed only for therapeutic purpose the UK allows access to such information for any person who was born through ART for any purpose.

2. Indian Scenario

The number of infertility clinics in India is increasing rapidly keep up pace with the swell in the number of sterile couples. The clinics in India are on par with the existing clinics in the developed countries like USA and uses state of the art technology. These clinics cater to the needs of both Indian as well as the foreign couples. ART being a highly technical procedure, to understand substantially is the duty of the professionals involved in the ART procedure. The communication fissure between these two is the major cause for the legal scuffle.

Regulation of ART in India

The main cause for the legal battle attached to ART is due to lack of regulations in this field. The National guidelines for accreditation, Supervision and regulation of the ART in fertility clinics, laid down by Indian Council for Medical Research aims to curb exploitation associated with the use of donor sperm, donor ova and donor embryo in ART. The major highlights areas of these guidelines are:

- Minimal requirement to be followed for opening an ART clinic
- Essential qualification of the ART team,
- ART procedure that have to been followed in three-tier prescribed system
- Patient selection, and categories of infertility care units referred to.

Access to Assisted Reproductive Technologies: Susan B. Apel

The use of Assisted Reproductive Technologies (ART) has raised questions about patients access to these new means of reproduction. This article explores existing legal constraints on access, primarily within the United States, including federal and state legislature and professional regulation. The article also raises question as to the appropriate role and form of law in resolving disputes over patient access. The author acknowledges the difficulties in the drafting and use of positive, substantive law, and concludes by suggesting that legal concepts embedded in legal procedure may be useful in the resolution of access disputes.

3. Legal Status of In-Vitro Fertilisation in India

Assisted Reproductive Technology (ART), as commonly understood, comprises procedures such as in-vitro fertilisation (IVF), intra-uterine insemination (IUI), oocyte and sperm donation, cryopreservation and includes surrogacy as well. Social stigmas of being childless and lengthy adoption processes have increased the demand for ART in India. It is thus not surprising that the ART industry is expected to grow by a compounded annual growth rate of 10%.⁵

No legislation currently regulates ART in India. In 2002, the Indian Council of Medical Research (ICMR) laid out guidelines for surrogacy. Further, in 2005, the ICMR issued the 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' (ICMR Guidelines), which *inter alia*, prescribed the conditions that ART clinics need to comply with. Both the above initiatives did not have any legislative backing. Thereafter, the Assisted Reproductive Technology Bill (ART Bill) was first proposed in 2008, with the final version being brought out in 2017.⁶ The Surrogacy (Regulation) Bill, 2016 (Surrogacy Bill) was passed by the Lok Sabha in December, 2018, and is currently pending Rajya Sabha approval.

Some of the provisions of the ART Bill and the Surrogacy Bill merit scrutiny. For instance, only an 'infertile couple' is eligible to avail of ART under the ART Bill with the term 'couple' being narrowly defined to mean only a heterosexual relationship of a marriage or a live-in relationship. A man above 50 years and a woman above 45 years are not eligible for ART, thus preventing older persons (who might be most in need of it) from accessing it.

The Surrogacy Bill bans commercial surrogacy and prescribes only altruistic surrogacy. Similar to the ART Bill, only an infertile Indian couple who have been married for at least five years and having no surviving child (with some exceptions) are eligible to altruistic surrogacy. It is still not certain as to why the existing ICMR Guidelines have been completely disregarded in the drafting of these bills. For instance, the ICMR Guidelines permitted single women to benefit from ART and also provided for 'minimum physical requirement for ART clinics', 'essential qualifications of ART teams', and 'ART procedures', which are missing from both the ART Bill as well as the Surrogacy Bill.

Passage of these bills in the Parliament is not likely to be smooth. Already the 102nd Parliamentary Standing Committee Report on Surrogacy has stated that the Surrogacy Bill is contrary to the Constitution of India. The jury is still out on the question of whether these legislations will stand the test of the Constitution of India. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court equated the right to make a choice in relation to reproduction with personal liberty under Article 21 and clarified that such right includes within it the '*privacy, dignity and bodily integrity*' of the woman and further stated that '*taken*

to its logical conclusion, reproductive rights includes a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children'.

Further, in *Devika Biswas v. Union of India*, the Supreme Court recognised the right to reproduction as an important component of the 'right to life' under Article 21. Thus, restricting ART and surrogacy only to heterosexual relationships within a certain age group and denying reproductive choices to LGBT, single persons and older couples, would be a violation of Article 21. These restrictions also agitate against the concept of right to equality under Article 14.

Other attendant questions merit consideration as well. First is the right to privacy that has been recognised as a facet of right to life under Article 21 in the *Puttaswamy judgment*⁹. For instance, the Surrogacy Bill require couples to procure a 'certificate of proven infertility' from the district medical board. As observed in *B.K. Parthasarathi v. Government of A.P.*, the right to make a decision about reproduction is essentially a very personal decision and the intrusion of the State into such a decision-making process has to be scrutinised. It is thus submitted that requiring couples or persons to procure such certificates is a gross violation of their right to privacy.

While controversial, it is also important to spare a thought for the surrogate women who potentially stand to lose their income. While no one advocates forced pregnancy, in the case of women who make an informed choice and consent to be surrogates in lieu of monetary compensation, would not a complete ban on commercial surrogacy deprive a person of a form of livelihood? In *Consumer Education and Research center and Ors. v. Union of India*, the Supreme Court stated that the expression 'life' assured in Article 21 of the Constitution has a much wider meaning and includes right to livelihood. This principle was recognised in *Olga Tellis v. Bombay Municipal Corporation* as well. At a time when women are still denied access to education and jobs, should monetary options for women be snatched away statutorily as well?

The way forward on this issue requires sensitive handling. The Supreme Court in *Murlidhar Aggarwal & Anr. v. State of U.P* had remarked that public policy does not remain static in any given community and may vary from generation to generation and even in the same generation. Without abrogating the right to legislate on issues of public welfare and policy such as that of the rights of a surrogate mother or that of the child, it is important to ask whether the State has any business in regulating the reproductive choices of society. The Government should enact laws that are compliant with fundamental rights of citizens and reflect the changing social mores.

4. Assisted Reproduction and the Welfare of the Child:

Government assistance of the kid' S. 13(5) in Human Fertilization and Embryology Act (HFMA) 1990 has activated numerous discussions. This clause was presentation with the reason that the social commitment towards children should be given need. In view of the clause the code of practice of HFEA has given rules to be trailed by authorized fruitlessness facilities. This clause is expected to preclude the chance of causing physical, mental promotion clinical damage to future child before beginning the treatment method.¹⁴ To guarantee the government assistance of the child, the factors that are to be contemplated like stable family, requirement for a father and so forth, are making contentions as the meaning of these factors are evolving. More than government assistance of the youngster it is seems, by

all accounts, to be 'Judgment' on forthcoming parents. This is investigations the requirement for an amendment to the act in the changed situation.

It is likely obvious that one of the most questionable arrangement in the Human fertilization and Embryology Act 1990 is s. 13(5); the 'welfare of the child' arrangement. In spite of the fact that everybody would surely concur that as a general public we have a commitment towards children, the inclusion of the segment into the Act has created extensive scholastic discussion and some expert concern. The section reads as follows:

A women shall not be provided with treatment services uncles account has been taken of the welfare of any child who may be born as a result of the treatment(including the need of that child for a father) and of any other child who may be affected by the birth.

The Report of the committee of investigation into Human Fertilization and Embryology (Warnock Report), which shaped the essential of the UK enactment in the zone of assisted reproduction, considered the topic of how the welfare of the future child could be secured and presumed that 'firm standards' are not appropriate. The beginning of the welfare arrangement lies in a traditionalist way to deal with assisted reproduction and parenting, and specifically reflects concerns encompassing the jump into the dull that was made when assisted reproduction moved from sci-fi to science certainty. When Warnock Committee was reporting, and when the Human Fertilization and Embryology Bill was travelling through its parliamentary stages, much was obscure about the security of different types of assisted reproduction. A guarantee to the most noteworthy specialized standards, and fitting observing of developing damages or dangers would have been clear. That the administrators went past that and moved into the domains of appraisal of value is maybe heart breaking, yet that it might likewise have been reasonable despite vulnerability. In the early piece of 21st Century, things have changed from that point and regardless of whether there is a purpose behind the welfare of the child arrangement somewhere in the range of 1980s and 1990s however then excessively a portion of the guardians turned down for this treatment. One of the numerous instances of *R v. Moral Committee of St. Mary's in Manchester* with an ex-parte Harriott.¹⁸ The welfare of the child can't on the fundamental of recurrence of its utilization yet assessed on the essential of guideline. In the event that on the off chance that any rule should assess the rights and interests of the expecting guardians with the goal that theoretical welfare of their future child. This sort of right is referenced in Article 8 of the European Convention on Human rights and likewise this is joined into UK law by the arrangements of the Human Rights Act, 1998. This privilege contained right now, just on some of restricted grounds: '... Is as per the law and is essential in a majority rule society in light of a legitimate concern for national security, open wellbeing or the monetary prosperity of the nation, for the anticipation of wrongdoing or turmoil, for the assurance of the wellbeing and lesson of all and likewise for the insurance of the rights and opportunities of others.

We should likewise referenced here that the welfare chief cannot be said to fulfil any of the consent criticism from the essential rights. Through, we cannot deny the way that it has been depicted as something a harmful and crafty intrusion of a portion of the barren individuals' security. It can likewise further said that if article 8 of the said convention is locked in by the welfare arrangement yet additionally article 14 run afoul of the non-separation arrangement of the convention. What else we have to centre is that: What is welfare arrangement for? Its

moral status must be question on the off chance that it depends on next to zero exact evidence or on the off chance that it is only occasionally included to deny access to treatment. On twelfth July, 2006 in her evidence the Select committee, the clergyman demonstrated their anxiety with respect to this issue 'the children will be similarly as, to be a piece of adoring family'. In any case, we as a whole know the cruel truth of this as it is basically an unthinkable test. This circumstance which a couple or any individual when they look for help of assisted reproduction can't unchanging. The odds of getting 'cherishing family' is similarly hard to foresee and precise estimation are probably not going to be created.

Grounding Paternity in the Context of Assisted Conception: Is Fatherhood a Symbolic or Active Legal Construct? :

This topic seeks us to explore that how to consider critically that the gendered nature of parenthood and also how paternity is legally constructed of assisted conception. It act as symbolic care for the institution for the area of legislature which work to foment the development of fatherhood. The analytical argument about this symbolic care for legal development of fatherhood had been discuss in the section 28 of Human Fertilisation and Embryology Act, 2003 and also in the case of R. vs. ex parte Blood (1997) 2 ALL ER 687 in Court of appeal and High Court. In UK the law for both women and man regarding to gender neutrality remains differently by their family relation while 'good fatherhood' have been constructs normative idea in section 28 of Human Fertilisation and Embryology Act 1990.

The Concept of the Sexual Family

During last few years had been very important for the work that had been to explore the assisted conception's lived experience and also they tried to research about the how anyone can denaturalize the biological model of kinship which has come to command the contemporize awareness about them. Some of section like 2 to 4 of the children act 1989 exceptionally talks about the context of the parentage which is disputed in nature. In the assisted conception of parentage which also remains malleable scheme developed, committed to one father and one mother model. The Adaptation and Children Act,2004 which allow to same-sex as legal parents to have a child as it define same sex as couple which is more alike the Children act,1989.HFEA which help the assisted conception procedure to define the 'The Meaning of Father' and also its purpose as given in section 28.

According to the legislature it is responsibility which lies with the male partner or husband of fatherhood with the women who is getting treatment. In this there is no role of sperm donor as he is out form the legal picture. Women are having benefits in this as they are not prohibited to receive any kind of treatment without their sperm donor and male partner. The legal maternity and unforeseen upon this act of giving birth or even in surrogacy as defined in section 27 and as per section 28 which state desire to contain the family form challenges of cooperate interpretation to this sexual family system. This constructs enticing fatherhood in the context of heterosexual relations which in turn construct fatherhood in a binate gender sequence. The old people thinking still prepare remain of some powerful influence which is difficult to provoke any change like in blood ultimately. The construction of fatherhood is still yet to reform legislature clearly as it challenge the gendered care about it but still legislature is complicated. HFEA's parentage framework can be hopeful as it disrupts the ideological premise.

There should be better parentage provision of HFEA and it should be reconsider rather than arguing the idea of ideological premise which gives better sorority to the a main purpose of parenthood rather than opposing to the fermenting of the gender order. It is unfair for the construction of fatherhood as recent changes to parentage has state for the dead father is not in favour of them but if we compare with the 'care for' construction of motherhood which is dramatic. The status of legal parentage is still no more clear as it remain impose condition despite its understanding for most of the parents.

Dimension of Equality in regulating Assisted Reproductive Technologies:

We have some concern about the amount of freedom of nature and its extent of individual but it also have some tented to dominate discussion on the proliferation and access to Assisted Reproductive Technologies (ARTs) for equality. There are three types of equality concern exist relevant to discussion about ARTs which could be suggested as they are: (a) There should be equality of parenthood and access to ARTs,(b) There should be no discrimination in the dispute arising from the use of ARTS, and (c) The use of trait selection process should be in equality.

It is quite diverse for the bases for potential inequality in which the development of ARTs is touted as ameliorating existing in inequalities, by which in others it is suspected of exacerbating those inequalities. We have taken an example in which technology has some potential which suggest that women equalize with the position with men in the reproductive work and also this process is known as biological clock. In the year 1980s and 1990s pregnancy contracts or surrogacy was criticised as it exploit the "breeder class" of poor women by powerful and rich couples who want obtain child but this is could be also seen as different perspective as some couples have new opportunity to create family.²⁷This could be new blessing for them. Through some question is still unanswered that whether they want artificial treatment like ARTs or want to go by natural process like sexual intercourse.

Equality of access to ARTs

There could be number of circumstance which could be deny or impede access to ARTs for anyone seeking to have children. Denials could be anyone, from the legal treatment of participate of ARTs or from disparities in insurance coverage to financial wherewithal which provide the decision about whom it will be served. This could be categorize in three wide heading: Firstly, it could be suggested the role that provide in screening may also play some inequalities in access to ARTs which could be head in *access inequality based on participate status*. Secondly, Due to high monetary cost, some financial institution may produce series disparities to receive ART services which is also known as Access Inequality Based on Insurance Coverage and Finances. Third and the last *Issues in Responding to Access Inequality* which regulate ARTs in such a way in which could change law or enact, regulate or anyway which could help that there is greater equality to access ARTs until and unless there is need of an inequality and some sound reason to exist to justify existing inequalities.

The use of ARTs leads to often dispute related to participation on the issue of parentage the law often came to picture deployed to resolve the disputes or clarify relationships. This extent to which the legal framework employed display the biases presented another dimension of potential inequality worthy of exploration.

Issues of social inequality raised by trait Selection Practice explains the contrast, concentrates not on whether participates in the ART process are treated equally but instead on

that risk that could be used while ARTs, which may also contribute more to material inequality in the conditions of persons lives. This could be further divide into mainly two parts: (a) *Trait Selection Practice Today* which trait selection methods gives authority to the parents to decide the once a particular trait of a foetus or embryos have been identified to continue with or to terminate the reproductive process with respect of the embryo or foetus. It also give option of seek to enable prospective parents to choose the sex of their offspring prior to conception and require the use at least artificial insemination.²⁸ (b) *Trait Selection Practice on the Horizon*- The stance of prospective parents today is largely reactive²⁹ to information about a limited set of traits. More importantly, the less imminent but predicted development of gene therapy technology what could permit correction of any disease or any disability causing gene and enhancement of other genetic characteristic such as athleticism or behaviour, intelligence that may permit prospective parents to manipulate the genetic makeup of their offspring.

Thus, there could be question in which suggest the different and unequal treatment at the control of private or state sector in which a set of propose network is suggested in which different way of development and proliferation of ARTs can issue inequality. This also develop tension between different dimensions of equality from this framework. Policy makers must re-consider about their opinion and think again carefully that whether they should suggest any regulation of ARTs that could accommodate competing equality, it also important to get clear answers to question related to equality that ARTs raises recognition the tensions presents present between scholars and policy makers.

It's a designer Baby!' Opinions on Regulation of Preimplantation Genetic Diagnosis:

Pre implantation Genetic Diagnosis (PGD) is a procedure that identifies genetic defects in early embryos conceived via In Vitro Fertilization (IVF) technique.³⁰It doesn't bring about extra risks to the fetus or the child. Numerous physicians have performed more than 3,000 PGD methods. The reported pregnancy pace of 24% is practically identical to assisted reproduction practice not including biopsy. Through US federal doesn't allow PGD and various individuals like the overall population and ripeness experts have an alternate perspective on it. The issue is whether to choose undeveloped organisms is worthy or not. Rivals contended that undesirable loss of early stage life and disregard for the serendipity that has traditionally went with childbearing while supporters of this express parental reproductive decision extends to the use of PGD and ought to be shielded against government intrusion. The legislature of this territory is a lot of dubious than anticipated as there is a contention of perspectives at both the side. The significant issue which can be tended to right now lawful, political, moral and down to earth concerns.

First discussing the US Regulatory Framework which is laissez-faire in nature encourages in way to deal with the reproductive issue has brought about the nonattendance of federal statutory expert for the guideline of prenatal genetic diagnosis, and no common law points of reference on the point exist to fill in as direction. Food and Drug Administration (FDA) starts the trend for the guideline of biologics that exists under the auspices. The ward over PGD technique, which is like what it has done in incipient organisms move can be additionally guaranteed by them. A state can characterize what is an individual is, up to a definition doesn't repudiate established norms. The Construction of a rule controlling the

Preimplantation Genetic Diagnosis should focus on impacts at the state level. It is essential to name the proposed PGD statute or charge and characterize the issue so that the court will perceive an authentic, convincing discerning enthusiasm for the state's guideline of both the wellbeing profession and the organic presence of its residents. Discussing Substantive Due Process and Fundamental Rights, as in 2003, the Supreme Court doesn't allow encroachment of fundamental rights by the administration dependent on the craving of the dominant part to force its ethical conviction on the individual existences of people. Put obtusely in the contradicting perspective on Justice Scalia, Lawrence "effectively decrees the end of all morals legislation." Accordingly, to abstain from being constitutionally stricken, the bill should cease from discussing cultural good norms. Uniformity of treatment and fair treatment rights are connected in significant regards. Under the Supreme Court's reason premise standard of survey, "legislature is dared to be substantial and will be sustained if the characterization drawn by the resolution is rationally identified with a genuine state intrigue." A portion of the Interference in Health professional-patient Relationship can be "holy" physicians like patient connections and security issues. A portion of the solid analysis of the bill to manage PGD could be normal from the promoters of the increments in individual flexibility in the opportunity in the dynamic zone of clinical practice. The Interest and Rights of the Future Child in the legitimate framework perceive parental obligations to children to think about the children however much as could reasonably be expected. With regards to solidified incipient organisms focus, on the child's "wellbeing" as of late got support in the courts. In a similar way Policy Consideration, a state can contend that reproductive genetic technologies in the US should be managed as an issue of public policy.³¹ The public support for the policy has been shown by late overviews that it demonstrate Americans support genetic technologies for solid infants yet according to now, not for architect babies. This public review is like the UK, which showed that PGD is based determination of solid undeveloped organisms, however the public is as yet stressed over its more extensive ramifications of the method. Now the inquiry emerges that Who Decides, the US Supreme Court held that, "States are allowed to institute laws to give a sensible framework to ladies to make a reproductive deskin.

The state may advance inclinations by subsidizing childbirth, by making, by making and keep up option in contrast to premature birth, and by espousing the ethics of family...." In assisted reproduction, educated assent is one significant apparatus to help evade any arguments about incipient organism destiny and manner. Before mentioning PGD, planned guardians should any geneticist or genetic advocate to assess the risk of moving their genetic abnormality to offspring. Various nations have an alternate view as in Belgium, France, and Greece Italy, Norway and the United Kingdom PGD is restricted to clinical uses while provinces like Austria, Germany, Ireland, and Switzerland is totally precluded. The expense of PGD for wellbeing purposes ought to be authority should defend the nature of the genetic tests. Guideline and practice ought to be in a harmonious relationship, and they ought to be continually illuminating one another.

5. Conclusion

The existing law in India which when interpreted does not hold good in the interests of an AID child, and there is a lot of confusion regarding the legal implications of artificial insemination. Since it is a device which brings hope to thousands of childless couples it is

bound to be more and more popular. In order to avoid complications and unpleasant situations proper legislative provisions should be enacted, otherwise declaration of such child as illegitimate deprives it of all the rights to which it would have otherwise been entitled and puts the child to great hardship which is quite unjust. After study of the laws of other countries it is precisely noted that legitimacy will be conferred on an AID child if the husband consents for the same. Undoubtedly the existing Indian laws are totally incompatible with modern medical advancement. The current legal position is inadequate and warrants a suitable amendment to all existing laws which are related directly and indirectly about the status of an AID child, and which are almost silent.

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