

## Reproductive Rights in the Realm of Assisted Reproductive Technology: The Legal and Ethical Ramifications

By

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### Abstract

The advances made by scientific technology in genetics have resulted in the medical innovation in the field of reproduction. The genesis of genetics and reproductive technology has raised a ray of hope for the infertile couples who cannot have children in the natural way. The new reproductive technologies has helped people with infertility problems or suffering from genetic conditions to provide solutions to their problems. The different techniques like Genetic Counselling, Genetic Diagnosis and treatments are provided to infertile couples to meet their demands of begetting children. The infertile couples are treated with technologies like Assisted Reproductive Technology (ART), in vitro fertilization, Pre implantation Genetic Diagnosis (PGD), Pre implantation Genetic Screening (PGS). These technologies help couples to get the child of their desires. Earlier the ART was used for infertility but now it is used for genetic reasons. The development in genetics and reproductive research has given a new shape to ART. The ray of hope provided by these technologies has raised many other ethical, legal, technical and social issues on the forefront.

**Key words:** Infertility, Assisted Reproduction, in vitro fertilization, Genetic Screening

### Introduction

The birth of the first test tube baby Louise Brown was a ray of hope for the infertile couples. Infertility is more of social taboo rather than a medical problem. It has taken decades in realizing that infertility is a medical problem thus giving birth to the concept of reproductive rights. Reproductive rights focus on the right to procreate and deciding the number of children and spacing among children. The advancement of technology in the field of assisted reproduction has given new meaning to the reproductive rights. The reproduction is not limited to heterosexual couples but it has extended its tentacles to homosexuals, bisexuals and trans genders. The use of new assisted reproductive technology has raised the hope of not only infertile couples but also fertile couples thus posing challenge to the existing family structure. Sexuality and procreation were within the privacy of the home but assisted reproduction has crossed borders and has involved number of persons for the birth of the child.

### Origin of the Reproductive Rights:

The reproductive rights came to the forefront during the twentieth century. The realization about reproductive health care at the international level gave impetus to the origin of reproductive rights at the international level. The emergence of reproductive rights has widened the arena of assisted reproduction thus providing another viable option for begetting children. Adoption the traditional means of having child has been replaced by number of options provided by Assisted Reproduction. The new reproduction provides a genetic relationship at least with one of the parent.

The World Health Organization defines Reproductive rights as, “recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence”.

The development of reproductive rights has taken place at the international level. Number of international instruments directly and indirectly incorporates the concept of reproductive rights. The human rights instruments recognized the right of the heterogeneous couples to get married and form a family. The first human rights instrument Universal Declaration of Human Rights, 1948 has incorporated the right of both men and women of full age to form a family without any limitation of race, nationality or religion. The family is regarded as the natural and fundamental unit of society which requires protection both by the State and society.

On the same pattern the wording is engrafted in the International Covenant on Civil and Political Rights (ICCPR), 1966. It fixes the responsibility of the member states to ensure equality of rights and responsibilities of spouses as to marriage during its subsistence and dissolution.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 has also echoed the importance of the institution of marriage. It bestows the responsibility on the shoulders of the member states to provide widest possible protection and assistance to the institution of marriage. It also emphasizes on protection to expectant mothers before and after delivery of the child, provision for social security measures for women and protection of children from any kind of exploitation.

These human rights instruments were the mitigating factors for the origin of the concept of reproductive rights. The feminist movement further provided lightening to the reproductive rights from the women’s perspective at the United Nations forum. The UN Convention on the rights of the child, 1989 is the first convention of its kind focusing on the rights of the child to know his parentage. The Convention on the Elimination of forms of Discrimination against Women, 1979 (CEDAW) was a building block for the reproductive rights.

The First International Convention of Human Rights, 1968 has defined the reproductive rights comprehensively. The reproductive rights were elevated to the level of human rights. The convention recognized the broader spectrum of reproductive rights by including freedom from forced sterilization, abortion, education about sexual and reproductive health, recognizing rights of the couple for deciding the number and spacing among children.

The International Conference on Population and Development Cairo, 1994 was the first international instrument debating about reproductive rights in unequivocal terms. The program of action was adopted under this conference. There is separate chapter dealing with reproductive rights. It defines reproductive health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes.” Thus it provides a holistic opinion about reproductive health.

Thus the collaborative efforts at the international level have focused on the reproductive rights of the legally married couple. But the new age reproductive technology has brought repercussions for the new family system

## **Assisted Reproduction and India**

The impact of assisted reproduction has brought many ripples in the traditional family system. India being a conservative society, infertility till date is regarded as a social stigma. Being infertile is a taboo attached to the couples. The unguarded growth of assisted reproduction has proved to be a panacea for any kind of infertility. The infertility clinics have mushroomed in India in the absence of any legislation on the subject. The infertility clinics are operating in every nook and corner of the country as there is no system of check and balance. Thus India has emerged as a cheap market for reproductive alias medical tourism. The government of India rose from its slumber when it realized that India is emerging a cheap market of rented wombs. The custody of the children born to Indian Surrogates came for the first time with the famous case of Baby Maji Yamada. The matter went before the supreme court of India. Thus the country realized that the new technology being unknown has brought many legal issues like the determination of the citizenship, custody of the child and rights of the surrogates. Thus in 2002, the government of India permitted Commercial Surrogacy thus permitting the use of poor women as commodities. This saw the rampant growth of infertility clinics providing surrogates thus posing a risk to their health. The misuse of this led the government to come with some guidelines to deal with this problem.

National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India, 2005 were issued by Medical Council of India. The guidelines provide a brief history about the prevalence of assisted reproductive technology in India. The chapter 1 defines certain technical terms as used in the field of assisted reproduction. Chapter 1 also delineates the minimum requirements for the establishment of ART Clinics, qualifications of the professionals involved in ART Clinics and different procedures to be used for infertility treatment.

Chapter –II provides provisions for screening of patients and complications with ART procedures. Chapter –III provides a code of ethics and legal considerations in assisted reproduction. Chapter –IV provides for sample consent forms and chapter- V makes provision for training. Chapter- VI was focused on future research prospects and chapter –VII for providing ART related services to economically weaker sections of society. Chapter-VIII provided for establishment of National Database for Human Infertility and Chapter – IX for composition of the National Accreditation Committee.

These guidelines though without any legal sanctions but it provided a beacon to look forward in the future for enactment of a legislation regulating ART and surrogacy arrangements.

The Law Commission of India in its 18<sup>th</sup> report on “Need for Legislation to Regulation Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”. The thrust area of the report is with regard to regulation of infertility clinics in India. The Commission has also hinted towards having a proper law regulating the infertility clinics.

With the growing number of surrogacy cases in the absence of any regulations, the government of India, the Ministry of Health and Family Welfare published a draft bill in the year 2008 for the purpose of regulating surrogacy in India. The bill provides for the establishment of National Advisory and state boards for the purpose of regulating infertility clinics and research in assisted reproduction. The bill could not see the light of the day.

The Assisted Reproductive Technologies (Regulation) Bill, 2010 was made with the objective of providing a national framework for the purpose of regulating assisted reproduction. The bill was a comprehensive piece of legislation but it could not be passed.

The Assisted Reproductive Technologies (Regulation) Bill, 2013 was again an attempt to remove the loopholes prevalent in the earlier bills. This bill also provided for National Advisory and state boards and National Registration Authority for regulating assisted reproductive clinics. The 2013 bill was an improvement of the earlier bills but it also met with the same fate.

## **The Assisted Reproductive Technology (Regulation) Act, 2021**

After so many attempts in regulating ART, the government of India finally came with the legislation on regulating assisted reproduction. The objective of the bill is to regulate clinics providing for infertility services, to protect reproductive health and to keep a check if the technology is used for unethical reasons. The Act also provides for promoting research in the field of assisted reproduction.

## **The Surrogacy (Regulation) Act, 2021**

The objective of the Surrogacy Act, 2021 is to establish National and States Assisted Reproductive Technology and Surrogacy Board, to establish appropriate authorities for the purpose of regulating the practice of surrogacy.

Both the Acts deal with the subject of assisted reproduction. Surrogacy is one of the aspects of assisted reproduction. Hence there was no need for having separate legislations on the same subject. The authorities established under both the legislations are also common. Thus it has created more confusion and the legislations suffer from many loopholes. There is a conflict on the part of the state on balancing the exploitation of surrogates and women's reproductive rights. The Surrogacy Act provides for altruistic surrogacy thus limiting the right within the near and dear ones only. It also provides for surrogacy arrangements to heterogeneous couples thus preventing same sex couples from the benefits of assisted reproduction. The provision under the act is applicable to legally married couples thus preventing the rights of the same sex couples. As the institution of marriage is undergoing transformation, the act fails to fulfill the aspirations of the single couples. The Act has been enacted keeping in view the welfare of the child. But it is a presumption only that the welfare of the child is only with the heterogeneous couple. But sometimes the welfare of the child can be better taken care of by the single parents also. Both the acts though comprehensive piece of legislation covering the subject of assisted reproduction. But both the legislations fail to address the issue the legal and ethical concerns in the field of assisted reproduction.

## **Legal and Ethical Ramifications**

As these technologies are new the many risks involved in these technologies cannot be anticipated. The most important issue here is the procreative liberty of the couples to beget children. The point is do these technologies provide new liberty to the couple to separate and recombine the various factors of reproduction which are different from the natural process of reproduction. Even if we take the plea of procreative liberty for using new reproductive technologies then for whom the liberty matters. Are we are talking about the liberty of the infertile couple, the genetic progenitors or the gestational host. The problem here is that as all are involved

in the process of procreation so everybody has a claim for the parental status. These are the conflicts which emerge in the collaborative reproduction. These techniques are technologizing reproduction thus alienating men, women and children from the natural order. As the failure of these technologies result in the suffering to the victims as there are no regulations to help people who become the losers by using such techniques. As these issues are new there is no law to deal with such cases of failure of the technology. The courts are flooded with cases of conflicts between the natural parents and genetically related parents of the children born of such technologies. Even the courts are helpless to decide such issues as a legal vacuum exists in these new technologies. The courts are baffled with the question of fixing the medical responsibility in case the technology aims at taking any kind of risk. In case as a result of the technology an affected child is born then it is very difficult to fix the responsibility. The parents of the affected child will make the doctor, the clinic, the donor or the counsellor responsible for the wrong birth. It would be very difficult to liable any person for negligence in the birth of the affected child and compensate the parents for the wrong birth of the affected child. These new reproductive technologies also hinge at having babies without intercourse which is again emerging as a challenge for our families. It also interferes with the natural process of procreation resulting in the weakening of the genetic pool and increasing infertility. The problem with ART is that it results in multiple pregnancies thus increasing the risk for the child and the mother. The risks involved here are still births, early postnatal deaths, high rate of caesarean deliveries and congenital disability. Moreover the growth in genetics research has gone a long way from the practice of traditional medicine and doctor – patient relationship. The innovation in genetics poses a strange question for the medical law when this technique poses challenges for the application of traditional legal principles. Thus we are searching for a new language for the entities created by extracorporeal fertilization and the application of genetics to it. The problem with the genetics and reproductive technologies is that they fail to provide for the legal parenthood. As in the birth of child there are more persons involved like the sperm donor, egg donor, the bank providing embryo, the gestational mother. The process of reproduction has become so fragmented that the importance of parental status and the accompanying identity of the parent cannot be determined. When the conflict arises for the custody of the child, it is very difficult to provide legal relationship between the different collaborators of the reproduction. The issue has also to be analysed from the view point of the children who are born using donor sperm and eggs. There can be an emotional attachment of the donor with the child in which case the child has no idea about the identity of the biological father or mother. And when these issues can be settled in the family law, we take the help from the contract and property law to settles such disputes. There are other problems also encountered by such technologies like the status of the embryo. Does the embryo have a moral status? There is difference of opinion about whether embryos have a moral status or not. The first view is that embryo is a person position as embryo is a human subject after fertilization. This view aims at providing an opportunity for implantation to occur and bans any action before transfer that might harm the embryo such as freezing or conducting research on the embryo. The second view is that the embryos do not have any special status greater than any other extracorporeal human tissue. This view holds that embryo should not be treated as a person because it has not developed the biological structures of personhood. Thus there is divergence of opinion about the status of the embryo. Are we creating a different class of the people born with the help of ART technology? These technologies also resulted in the change of the structure of the family. Earlier to a form a family there used to be a marriage between the man and women and the sexual activity was used for procreating. The technology of ART is used not only for infertile couples but fertile couples can also benefit from such technology for parents whose child might inherit a genetic disease or providing a saviour sibling for their child who is suffering from some serious medical condition. But with these technologies there is no need for marriage as the children can be born without sex. These days the single

parents, gays and lesbians can have children even if they are not cohabiting. As these technologies provide for reproduction outside the body so it is very easy for the people to get babies. The point here is that are not these technologies increase or decrease reproductive choices and individual control over decision making. The PGD approach the children as consumer objects subject to quality control. In the same the parents act as consumers who seek the help of fertility clinics to beget children. As the technologies result in the child of your choice these technologies are devaluing people with disabilities. The genetic and reproductive technology is also increasing the commodification of women's reproductive capacity. The genetics do have a considerable impact on infertility as the genetic conditions can be further transmitted to the children and might cause health problems. Then there are other issues like people with the help of PGD the couples select embryos on before implantation on the basis of sex or to check whether the embryo is suffering from any disability. It means that when people are informed about the genetic conditions or tests are done on the parents to see whether who carries the genetic condition then genetic testing before marriage will be a new recourse for prospective couples going for marriage. Such practices are justified on the basis of therapy but are these are not used for enhancing the features of the designer baby. Is there any difference between the therapy or enhancement. Are these technologies providing a tool in the hands of the couple to design their babies who are perfect in traits like colour, hair colour, eyes etc. Are these technologies being used as a luxury or as our basic human right to reproductive autonomy? The other problem area in such converging technologies is that there is no check in the infertility clinic. The infertility clinics are mushrooming around the globe as there is no check on them. In countries where there are less restrictive laws those countries provide for crossborder breeding of children resulting in the "reproductive tourism". The infertility clinics are also involved in cut throat competition by stealing or misplacing frozen embryos as this ART technology is a multi-dollar industry operating in a completely commercialized environment. As the aim of these technologies is profit rather than health so the technologies are used to make huge sums of money and putting the health of the women in danger. The clinics for running their business with the help of these technologies seek the help of young college students for donating their eggs or sperms. Thus the young students in the lure of money are being influenced in this business of donating eggs and sperms. These clinics have also given birth to the intergenerational reproduction, post menopausal pregnancies, genetic therapies, genetic engineering of embryos, sex selection of children. The other area of concern is when these techniques are used by clinic which does not have any skilled knowledge and expertise in the field of genetics.

## **Conclusion**

The need is to keep a check on the cross border reproductive and genetic techniques and need for stringent laws to deal with new medical problems. Earlier these technologies were used by the infertile couples so that they can have children but these days the urge is that the children born of such technologies should be healthy that means children born free of any genetic abnormality. The need is to redefine the society we are becoming and the human practices that are being used to accelerate the use of genetic technologies. The need is for regulating the sphere of science in the field of genetics and reproductive technologies through extensive process of social negotiation and policy considerations and stringent laws.

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